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THE
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CONTAINING ALL THE DECISIONS OF THE

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CONNECTICUT, and PENNSYLVANIA; Court of Errors and Appeals,
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³Term of all Judges expired June 10, 1897, under new constitution.

⁴Reappointed June 10, 1897.

⁵Reappointed June 12, 1897.

⁶Reappointed June 12, 1897.

⁷Not reappointed.

⁸Appointed June 11, 1897.

⁹Not reappointed.

¹⁰Appointed June 17, 1897.

¹¹Appointed June 14, 1897.

¹²Term expired May 15, 1897.

¹³Appointed May 15, 1897.

¹⁴Deceased March 9, 1896.

¹⁵Promoted to Chief Justice-ship April 1, 1896.

¹⁶Resigned April 1, 1893.

¹⁷Retired May 18, 1895.

¹⁸Appointed May 21, 1895.

¹⁹Succeeds Chief Justice Doe.

²⁰Appointed March 24, 1891.

²¹Appointed April 15, 1893.

²²Appointed April 14, 1896.

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¹ Deceased.² Appointed March 1, 1897.³ Promoted to Chief Justiceship.⁴ Appointed March 8, 1897.⁵ Resigned March 28, 1897.⁶ Appointed March 29, 1897.⁷ Term expired April 14, 1896.⁸ Deceased.⁹ Appointed March 1, 1897.¹⁰ Promoted to Chief Justiceship.¹¹ Appointed March 8, 1897.¹² Appointed January 2, 1897.¹³ Appointed May, 1897.

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HARRINGTON et al. v. BOARD OF ALDERMEN OF CITY OF PROVIDENCE.

(Supreme Court of Rhode Island. Aug. 2, 1897.)

CONSTITUTIONAL LAW—ABATEMENT OF NUISANCE—POWER OF CITY.

1. Pub. Laws April 25, 1889, c. 777, as amended by chapter 1407 of March 1, 1895, empowering the aldermen of Providence to abate a privy vault, regardless of the manner in which it is kept, where situate upon premises abutting on a street in which there is a sewer, provides for the proper exercise of police power as to subject-matter, and is not unconstitutional.

2. Pub. Laws April 25, 1889, c. 777, as amended by chapter 1407 of March 1, 1895, authorizing the aldermen of Providence to direct an owner of land to destroy a privy vault thereon within 10 days, and, on his failure to comply therewith, authorizing a fine from \$5 to \$20 for each day of noncompliance, and after 60 days empowering the aldermen to destroy the vault, provides reasonable methods for the abatement of a nuisance, and is not unconstitutional.

3. An owner has no constitutional right to notice before the passage of an order by the aldermen of Providence that he should destroy a privy vault on his premises pursuant to Pub. Laws April 25, 1889, c. 777, as amended by chapter 1407 of March 1, 1895, as such a nuisance may be summarily abated.

4. Pub. Laws April 25, 1889, c. 777, as amended by chapter 1407 of March 1, 1895, providing for the abatement of privy vaults in the city of Providence, is valid, though the vaults are nowhere formally declared to be a nuisance, especially in view of section 3, declaring that the provisions of the act were made "in the interest of the public health of the city."

5. Pub. Laws April 25, 1889, c. 777, as amended by chapter 1407, § 3, of March 1, 1895, providing for the destruction of a privy vault pending an appeal by the owner from the order of the board directing him to fill up and destroy the vault, is constitutional, as the statute authorizing such appeal allows considerable delay, and in such matters summary action is a proper exercise of power.

Appeal from common pleas division, Providence county.

Action by board of aldermen of the city of Providence against Ruth M. Harrington and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Henry J. Spooner and Cooke & Angell, for appellants. Francis Colwell and Albert A. Baker, for appellees.

ROGERS, J. The sole question in this case before the court at this time is as to the con-

stitutionality of Pub. Laws R. I. c. 777, of April 25, 1889, as amended by chapter 1407 of March 1, 1895, and which act, as amended, is as follows:

"Section 1. The board of aldermen of the city of Providence may compel any abutting owner or occupant of land upon any street in said city in which there is a sewer to connect the drainage of his land and premises with such sewer and may direct said owner or occupant to fill up and destroy any cesspool, privy-vault, or other arrangement for the reception of drainage.

"Sec. 2. Upon the service of any order or direction or a copy thereof upon any owner or occupant of such land to connect the drainage as aforesaid or to fill up or destroy, any cesspool, privy-vault, or other arrangement for the reception of drainage, such owner or occupant shall comply with such order or direction within ten days from the time of service of such order.

"Sec. 3. In case the owner or occupant to whom such order shall be directed shall neglect or refuse to comply therewith within ten days after the service thereof upon him, such owner or occupant shall be fined not less than five nor more than twenty dollars for each subsequent twenty-four hours during which he shall neglect or refuse to comply therewith, and in case such neglect or refusal shall continue for sixty days after the service of said order, said board of aldermen may cause any cesspool, privy-vault, or other arrangement for the reception of drainage upon the land of such owner or occupant to be filled up and destroyed, and the pendency of any appeal from any of such orders or doings of said board shall not affect the power of said board after the expiration of said period of sixty days to cause the same to be forthwith filled up and destroyed, the foregoing provisions being in the interest of the public health of said city.

"Sec. 4. This act shall take effect from and after its passage and all acts and parts of acts inconsistent herewith are hereby repealed."

On August 1, 1895, the board of aldermen of the city of Providence passed the following resolution: "Resolved, that Ruth M. Harrington, wife of Wm. W., be, and she hereby is, ordered to connect the drainage of the land

and premises situated on West Clifford street in this city, bounded and described as follows: * * * with the sewer in said West Clifford street, and that the said Ruth M. Harrington be, and she hereby is, directed to fill up and destroy any and all cesspools, privy vaults, or other arrangements for the reception of drainage on said premises, the said Ruth M. Harrington being the owner, occupant of said premises, within ten days from the time of service of this order, or of a copy thereof, upon said Ruth M. Harrington." August 3, 1895, a copy of said resolution or order was duly served upon Mrs. Harrington, and, an appeal from said proceedings of the board of aldermen having been taken by Mr. and Mrs. Harrington,—for both husband and wife joined in the appeal,—and, a claim for jury trial having been made, trial was had before the common pleas division, in which, upon the admissions of the appellants, a verdict was directed by the court ratifying and confirming the said order of the board of aldermen. At the jury trial it was admitted and agreed that Mrs. Harrington was the owner of the premises described; that there was a privy vault used for the reception of human excrements upon said premises; that West Clifford street was a sewered street; that said board of aldermen passed said order August 1, 1895; that said order was duly served on Mrs. Harrington August 3, 1895, and that before the making of said order Mrs. Harrington had no notice to appear before the board of aldermen, and show cause why said order should not be made against her in the premises, nor any opportunity for a hearing. The appellants claimed that said chapter 777, as amended by chapter 1407 of the Public Laws, was unconstitutional. They also claimed that, although there was a privy vault on said premises, used for the reception of human excrements, yet it was not used for the reception of drainage in the sense in which they claimed the word was intended in the statute; and they offered to prove that on August 1, 1895, and long prior thereto, said privy vault was not kept and maintained as a nuisance, but was kept in good order and condition, and so as not to be prejudicial to the public health; and also that the drainage of said premises was on and before August 1, 1895, and ever since, connected with the sewer on West Clifford street; the broad claim of the appellants being the right to put in evidence to the jury as to the condition of that privy vault and of the premises and surroundings, in order that the jury might determine (as it was contended that it should determine) that an order of the kind aforesaid should not be passed against the said Ruth M. Harrington. The presiding justice ruled said statute constitutional as required by law, ruled out the evidence offered by the appellants, and directed the jury, upon the admissions made, to find a verdict ratifying and confirming the said order; whereupon the constitutional question was duly certified to the appellate division for determination, and the appellants petitioned for a new trial

for the alleged misrulings upon the evidence and upon ordering the verdict; but the question now before this division, as stated above, is solely upon the constitutionality of said statute, the whole travel of the case in the common pleas division having been given merely to elucidate the constitutional aspect of it.

The appellants claim that chapter 777, Pub. Laws, and chapter 1407, in amendment thereof, are unconstitutional, because no provision is made for notice to the owner or occupant of premises, and no opportunity for hearing thereon is given to the owner or occupant, before the passage of the order or direction by the board of aldermen, and because, also, by the provisions of section 3, c. 1407, the pendency of an appeal will not affect the power of the board to fill up and destroy the privy vault of such owner or occupant of the premises. This statute, "being in the interest of the public health of said city,"—to quote the concluding words of section 3 of it,—is clearly intended to be an exercise of what is called the "police power," and if it is a proper exercise of such power, both as to subject-matter and as to methods, then its constitutionality cannot be successfully impugned.

"Rights of property," says Chief Justice Shaw in *Com. v. Alger*, 7 Cush. 53, 85, "like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and limitations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. This is very different from the right of eminent domain,—the right of a government to take and appropriate private property to public use, whenever the public exigency requires it,—which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power,—the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. * * * Nor does the prohibition of such noxious use of property—a prohibition imposed because such use would be injurious to the public, although it may diminish the profit of the owner—make it an appropriation to the public use, so as to entitle the owner to compensation. * * * If a landlord could let his building for a small-pox hospital, or a slaughter house, he might obtain an increased rent. But he is restrained; not because the public have occasion to make the like use, or to make any use, of the property, or to take any benefit or profit to themselves from it; but because it would be a noxious

use, contrary to the maxim, 'Sic utere tuo ut alienum non lædas.' It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is, therefore, not within the principle of property taken under the right of eminent domain." In the words of Mr. Justice Harlan in the Slaughter House Cases, 16 Wall. 36, 62: "This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." Chief Justice Redfield, in *Thorpe v. Railroad Co.*, 27 Vt. 140, 149, 150, uses this language: "The police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state; * * * and persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state; of the perfect right in the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be, made, so far as natural persons are concerned." To quote Mr. Justice Harlan again, and this time in *Powell v. Pennsylvania*, 127 U. S. 678, 685, 8 Sup. Ct. 992, 1257: "The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has in the employment of means to that end is very large." "Police regulations," says Mr. Justice Wilde in *Baker v. City of Boston*, 12 Pick. 183, 193, "to direct the use of private property so as to prevent its proving pernicious to the citizens at large, are not void, although they may in some measure interfere with private rights without providing for compensation. * * * If by such regulations an individual receives some damage, it is considered as *damnum absque injuria*. The law presumes he is compensated by sharing in the advantages arising from such beneficial regulations." In regard to a Massachusetts statute authorizing the city council of Boston to raise the grade of certain lands in order to secure a complete drainage thereof, Mr. Justice Morton, in *Nickerson v. City of Boston*, 131 Mass. 306, 308, said: "It belongs to that class of police regulations to which private rights are held subject, and is founded upon the right of the public to protect itself from nuisances, and to preserve the general health. The authority of the legislature to pass laws of this character is too well settled to be questioned." See, also, *Com. v. Roberts*, 155 Mass. 282, 29 N. E. 522. Unwholesome trades, slaughter houses, operations offensive to the senses, the burial of the dead, drainage, the deposit of powder, and the building with combustible materials,

in thickly settled communities, are some of the numerous matters to which the police power has been applied, but the list is too long to make an attempt at enumeration practicable. See 18 Am. & Eng. Enc. Law, 748; 2 Kent, Comm. 340; *Cooley, Const. Lim.* 712 et post.

Is the subject-matter of said chapter 777, as amended by chapter 1407, Pub. Laws R. I., a proper one for the constitutional use of the police power? And by this we mean not merely the regulation of the use of privy vaults, cesspools, and other arrangements for the reception of drainage, but the absolute abatement of them under certain conditions, regardless of the manner in which they may chance to be kept. It is sufficient for us in this inquiry to consider privy vaults alone, as it is agreed on all hands that it was a privy vault only that was, as a matter of fact, obnoxious to the statute in the case at bar, and that, too, one used solely for the reception of human excrements; for a statute may be unconstitutional in part and constitutional in part, and, while the unconstitutional part may be void, the constitutional part may be valid, and may be carried into effect, the test in such cases being whether the parts are so interwoven and interdependent that they can stand only as a whole. *State v. Clark*, 15 R. I. 383, 5 Atl. 635; *In re Constitutional Amendment*, 16 R. I. 754, 758, 18 Atl. 706; *State v. Tonks*, 15 R. I. 385, 5 Atl. 636.

The receptacles known as privy vaults, for what might not inaptly be called the drainage of the human body, viz. human excrements, have in thickly settled communities been a very common matter for the exercise of the police power. It is common knowledge that the condition in which they shall be kept when allowed to exist, their construction, their locality, the time and manner of removing their contents, have, especially in cities, been subjected to sharp police regulation. Few things are more disagreeable to the senses or more injurious to health than the noisome smells too frequently arising from them. Their very presence is a menace to comfort and health, and a source of apprehension to the neighborhood. The best that can be done so long as they exist is to reduce the dangers within them to the minimum, and which, if vigilance be relaxed, soon loom up to the maximum. Wood, in his treatise on Nuisances, § 579, says that privies are regarded as *prima facie* nuisances; and the same words are used by the court in *Wahle v. Reinback*, 76 Ill. 322, 326. In *Com. v. Roberts*, 155 Mass. 281, 282, 29 N. E. 522, which involved the constitutionality of a statute providing under a penalty that certain buildings in Boston "situated on a public or private street, court, or passageway, in which there is a public sewer, and every building connecting with any sewer, shall have sufficient water-closets connected with the sewer, and shall not have a cesspool or privy, except where in the opinion of the board of health it

can be allowed to remain temporarily, and then only as said board shall approve." Mr. Justice Lathrop, in delivering the opinion of the court, said: "There can be no doubt that the statute in question is within the constitutional powers of the legislature as a police regulation. It is an act for the preservation of the public health, and relates to the disposal of one of the most dangerous forms of sewage." But it is contended on the part of the appellants that the privy vault itself, when properly used, is neither a nuisance nor injurious to health or comfort; that it only becomes so when not properly cared for, and therefore that its abuse, or improper use, alone makes it subject to police regulation and repression. The storage of gunpowder, the existence of buildings of such character and condition as to make them liable to catch fire, in thickly settled neighborhoods, have frequently been the subject of police regulation and repression, but neither would do any actual harm until carelessness, accident, or some unforeseen agency set them on fire, an event that might never happen; and yet the menace and the apprehension caused by their presence have been frequently deemed sufficient to justify their removal under the police power.

The reasonable exercise of human power must always be exerted within reasonable human limitations. It is one of the laws of human nature that there shall be, from time to time, rejections from our persons of unassimilated matter, and this higher law must be recognized in judging of the reasonableness of any human legislation in any wise pertaining to it; hence the necessity of some sort of provision for these rejections is always recognized by legislatures and courts. The crudest and most objectionable provision for this in civilized countries is presented by a great army in the field in time of war; while the most perfect and least objectionable provision for it is afforded in those towns and cities possessing the best water and sewage systems, thus making possible what are called the "modern conveniences." It is common knowledge that the city of Providence has expended vast sums of money in perfecting its water and sewer systems, thus making possible what was before impossible in the way of eliminating the menace presented and the apprehension aroused by the existence of privy vaults, and the statute in question operates merely to remove an objectionable receptacle where an opportunity exists of supplying a means of getting rid of the objectionable matter. It operates to repress privy vaults under reasonable limitations, for the land on which the privy vault to be repressed was situated must abut upon a street in which there was a sewer. Then, if there was no connection with the sewer from that land, 10 days after notice given were allowed to make the proper connections and comply with the statute. Then, if the owner or occupant neglected or refused to comply, a penalty of not less than five nor more than twenty dollars for each subsequent 24 hours during

which he should neglect or refuse to comply therewith was imposed; and, if this accumulating penalty, this milder means, failed of accomplishing the result, then the board of aldermen, as a last resort, could cause the privy vault to be filled up and destroyed. The pressure of power was applied at first very moderately, and free from harshness, gradually increasing until it might well be claimed that the fear of a money penalty would not repress the evil, and only culminating at last in the actual repression by the board when the owner or occupant had neglected or refused to act.

Is notice to the owner or occupant before the passage of the order by the board of alderman, under the statute in question, constitutionally necessary, or is it requisite that he should have what is called "his day in court," or a trial by jury, before the passage of said order, or before the privy vault can be filled up and destroyed? Senator Edmonds, in *Hart v. Mayor, etc., of Albany*, 9 Wend. 571, 609, says: "Much stress was laid by the counsel for the appellants upon the fact that the exercise of the right claimed by the respondents would result in the destruction of their property without the benefit of a trial by jury, and that, consequently, the ordinance in question was a violation of the constitution and the bill of rights. The same objection would apply to the dejection of every nuisance, yet nothing is clearer or better settled than the right to exercise this power in a summary manner, not only where the whole community is affected, but where a private individual alone is injured. It is a right necessary to the good order of society, and the reason why the law allows this private and summary method of doing one's self justice is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice."

In *King v. Davenport*, 98 Ill. 305, the question was as to the validity of an ordinance of the city of Jacksonville, it having been empowered to pass the same, to establish fire limits, and to declare the building or repairing of buildings with combustible materials within the fire limits a nuisance, and to provide against the erection of buildings, roofs, or cornices with other than fireproof material within said fire limits, and which provided that if the offender, upon reasonable notice, failed to remove such wooden building, or wooden part of such building, the city marshal, upon the written direction of the mayor, should remove or tear down such building, or such part thereof as may be necessary. The ordinance further provided that the offender should be subject to a fine of \$100 for each week he failed to remove such wooden building, or wooden part thereof, and that, if the city caused the removal, the expense of the removal might be recovered of the offender. The plaintiff's testatrix violated this ordinance by taking off an old and out of repair shingle roof from her

building, situated within the fire limits, and putting thereon, without permission, a new shingle roof. She failing to remove the same upon due notice, the roof was removed by the city marshal in conformity with the ordinance, whereupon she brought an action of trespass against the mayor and marshal of the city for the removing of the roof, and, dying since the bringing of the action, her executor was substituted as plaintiff. The defendants justified under the ordinance, and the sole question was as to the validity of the ordinance. The court, in its opinion, said, *inter alia* (page 314 et post): "There can be no doubt, it seems to us, that the ordinance in question was a police regulation, proper, and made in good faith, 'for the purpose of guarding against the calamities of fire' in a populous neighborhood, and we must regard it as an entirely reasonable regulation. There is no more frequent or admittedly proper exercise of the police power than that of the prohibition of the erection of buildings of combustible materials in the populous part of a town, and the only means of making such prohibition effectual is by summary abatement. Every moment's delay in the removal of the nuisance is constant exposure to danger. Before any judicial inquiry and hearing could be had in the matter, the whole evil sought to be guarded against might be produced. The imposition of a penalty would but punish the offender; it would not remove the source of danger. This latter is the thing which the necessity of the case requires, and immediate abatement is the only competent remedy."

City of Salem v. Eastern R. R., 98 Mass. 431, was an action to recover money expended from the city treasury by its board of health to remove a nuisance, which removal, being the digging of a canal for the abatement of a nuisance in a mill pond, was made under an ordinance of the city authorized by a statute of the state. Mr. Justice Wells, in delivering the opinion of the court, on page 442 et post, used this language: "The proceedings of the board of health are said to be defective, because taken without previous notice to the defendants, and opportunity to be heard. The evidence tended to show that the defendants were notified of the pendency of proceedings, and of the action taken by the board of health from time to time; but there was no such notice beforehand as would give the defendants an opportunity to appear and be heard upon the contemplated action of the board; and there was no hearing upon any of the questions before them. The statute does not require any previous notice. Notice must be given of general regulations prescribed by the board of health under sections 5 and 6, before parties can be held in fault for a disregard of their requirements. But, although such general regulations may seriously interfere with the enjoyment of private property, and disturb the exercise of valuable private rights, no previous notice to parties so to be affected by them

is necessary to their validity. They belong to that class of police regulations to which all individual rights of property are held subject, whether established directly by enactments of the legislative power or by its authority through boards of local administration." After citing various cases, and enlarging upon the reasons for notice not being required, viz. the necessity for summary action, the fact that delay for hearing the parties might defeat all beneficial results from an attempt to exercise the power conferred upon boards of health, etc., the learned judge concludes on this point as follows (page 444): "The necessity of the case, and the importance of the public interests at stake, justify the omission of notice to the individual. When the statute authorizing the proceedings requires no notice, their validity without notice is not to be determined by the apparent propriety of giving notice in the particular case, but by considerations affecting the whole range of cases to which the statute was intended to apply."

In *Blair v. Forehand*, 100 Mass. 136, 139, where the question was as to the validity of a statute authorizing the summary killing of unlicensed dogs, Mr. Justice Gray said: "All rights of property are held subject to such reasonable control and regulation of the mode of keeping and use as the legislature, under the police power vested in them by the constitution of the commonwealth, may think necessary for the preventing of injuries to the rights of others, and the security of the public health and welfare. In the exercise of this power the legislature may not only provide that certain kinds of property (either absolutely, or when held in such a manner or under such circumstances as to be injurious, dangerous, or noxious) may be seized and confiscated upon legal process after notice and hearing; but may also, when necessary to insure the public safety, authorize them to be summarily destroyed by the municipal authorities without previous notice to the owner,—as in the familiar cases of pulling down buildings to prevent the spreading of a conflagration or the impending fall of the buildings themselves, throwing overboard decaying or infected food, or abating other nuisances dangerous to health;" citing various authorities in support thereof.

In the celebrated *Trinity Church Case* (*Health Dept. of City of New York v. Rector, etc., of Trinity Church*, 145 N. Y. 32, 47, 39 N. E. 833) Mr. Justice Peckham gave expression to this obiter dictum: "This is not the case of a proceeding against an individual on the ground of the maintenance of a nuisance by him; nor is it the case of an assumed right to destroy an alleged nuisance without any other proof than the decision of the board itself (with or without a hearing) that the thing condemned was a nuisance; nor is it the case of the destruc-

tion of property which is in fact a nuisance, without compensation. Where property of an individual is to be condemned and abated as a nuisance, it must be that somewhere between the institution of the proceedings and the final result the owner shall be heard in the courts upon that question, or else that he shall have an opportunity, when calling upon those persons who destroyed his property to account for the same, to show that the alleged nuisance was not one in fact. No decision of a board of health, even if made on a hearing, can conclude the owner upon the question of nuisance." Mr. Justice Peckham's dictum, just quoted, is claimed by both appellants and appellees in this case as favoring their respective contentions, but, rightly understood, it would seem beyond peradventure to favor the appellees. The case of *Miller v. Horton*, 152 Mass. 540, 28 N. E. 100, affords an apt illustration of Mr. Justice Peckham's meaning. This was tort for the summary killing of a horse that had been adjudged by the commissioners on contagious diseases among domestic animals, under St. 1887, c. 252, had the contagious disease known as "glanders" or "farcy," and for the killing of which an order had been issued by them, with no provision for compensation to the owner. The defendants admitted the killing, but justified that they did it in obedience to the order. The court below ruled the act to be constitutional, found that the horse killed was not afflicted with glanders or any contagious disease, and found for the defendants, i. e. that the justification was sufficient. The whole of the supreme judicial court assumed the statute to be constitutional, a difference arising only as to whether, if the horse did not have the glanders as a matter of fact, the killing was justifiable under the order. The court stood four to three, the majority deciding that the killing was not justified, and the minority that it was justified, under the order. Holmes, J., in giving the opinion of the majority of the court, said, *inter alia*: "The language of the material part of section 13, Act 1887, is: 'In all cases of farcy or glanders, the commissioners having condemned the animal infected therewith shall cause such animal to be killed without an appraisal, but may pay the owner or any other person an equitable sum for the killing and burial thereof.' Taken literally, these words only give the commissioners jurisdiction and power to condemn a horse that really has the glanders. The question is whether they go further by implication, so that, if a horse which has not the disease is condemned by the commissioners, their order will protect the man who kills it in a subsequent suit by the owner for compensation. * * * When, as here, the horse is not only not to be paid for, but may be condemned without appeal, and killed, without giving the owner a hearing

or even notice, the grounds are very strong for believing that the statute means no more than it says, and is intended to authorize the killing of actually infected horses only. * * * Section 13 of the Act of 1887 by implication declares horses with the glanders to be nuisances, and we assume, in favor of the defendant, that it may do so constitutionally, and may authorize them to be killed without compensation to the owners. But the statute does not declare all horses to be nuisances, and the question is whether, if the owner of the horse denies that his horse falls within the class declared to be so, the legislature can make the *ex parte* decision of a board like this conclusive upon him. That question is answered by the decision in *Fisher v. McGirr*, 1 Gray, 1. It is decided there that the owner has a right to be heard; and, further, that only a trial by jury satisfies the provision of article 12 of the declaration of rights that no subject shall be deprived of his property but by the judgment of his peers or the law of the land. * * * Of course, there cannot be a trial by jury before killing an animal supposed to have a contagious disease, and we assume that the legislature may authorize its destruction in such emergencies without a hearing beforehand. But it does not follow that it can throw the loss on the owner without a hearing. If he cannot be heard beforehand, he may be heard afterwards. The statute may provide for paying him in case it should appear that his property was not what the legislature has declared to be a nuisance, and may give him his hearing in that way. If it does not do so, the statute may leave those who act under it to proceed at their peril, and the owner gets his hearing in an action against them."

There are many other cases which might be cited in reference to the nonnecessity of notice before the passage of the order, but the foregoing are sufficient to satisfy us that no such notice is required. When the appellant is sued for the penalty, she will have her day in court, and a trial by jury, if she desires; and proof will have to be adduced to show that she had an unauthorized privy vault upon her premises to obtain a recovery against her. So, if an alleged privy vault upon her premises is filled up and destroyed, under alleged authority of said chapter 777 as amended by chapter 1407, she can bring suit against the persons doing the act for the supposed trespass, and when they attempt to justify under the statute she will have her day in court, and a trial by jury, if she desires, and the defendants will have to show that the alleged privy vault was actually a privy vault, and that it was unauthorized under the statute. Of course, if the thing declared by statute to be a nuisance, or the thing regulated or repressed under an exercise of the police power, is not a nuisance in fact, or within the province of the exercise of the police power, then the court

will declare the statute unconstitutional, for the power is not to be used under the mere allegation, color, or pretense of being a proper exercise of the police power, when in truth it is not. But the legislature, as we have already seen, is to a great extent the proper judge of the necessity for the exercise of this restraining power. In addition to cases already quoted from, see *Watertown v. Mayo*, 100 Mass. 315, 319, and *Train v. Disinfecting Co.*, 144 Mass. 523, 530, 11 N. E. 929; in which latter case Devens, J., says: "But there can be no doubt of the right of the legislature to pronounce, under its police power, certain things or certain acts nuisances in themselves."

The appellant urges, as a ground for adjudging the act in question unconstitutional, that she cannot be heard upon the question whether the privy vault upon her premises is a nuisance or not, irrespective of the legislative determination thereof. We have already seen that the legislature can pronounce under its police power that certain things are nuisances per se, and privy vaults, under the conditions provided for in said chapter 777, as amended by chapter 1407, are embraced in such things. The legislature is authorized under its police power to determine and enact that places used for the illegal sale of intoxicating liquors are nuisances, and persons prosecuted thereunder can show that the place complained of is not used for the sale of intoxicating liquors, but they are not permitted to show that, although the place is used for the illegal sale of intoxicating liquors, yet that it is not a nuisance. That was determined by the legislature when it passed the act, as to the propriety of the passage of which the persons prosecuted doubtless had no notice or hearing; neither are such persons entitled to be heard whether proceedings shall be commenced against them. So the legislature has made a statute as to certain classes of privy vaults, and the appellant can have an opportunity of being heard whether her privy vault is of that class; but she will not be heard as to whether her privy vault would not have been a nuisance if the act had not been passed, because she was not heard upon the question whether the legislature should pass such a law, nor whether the board of aldermen should have initiated proceedings against her by giving her a preliminary notice or order.

The appellants contend that privy vaults have never been declared by statute nuisances per se. We do not understand that a formal declaration that a thing is a nuisance, *ipsis verbis*, is necessary to bring it within the exercise of the police power, or to constitute it a nuisance. A formal declaration that a thing is a nuisance does not necessarily make it so, as we have already seen; and not formally declaring it to be a nuisance does not technically keep it from being one, if it is treated as such in the statute. Thus we have seen that Mr. Justice Holmes, in *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100, said, "Section

13 of the act of 1887 by implication declares horses with the glanders to be nuisances," and yet reference to that section shows that such horses were not called nuisances, but only treated as such; nor is the word "nuisance" anywhere to be found in the whole act. Chapter 777, as amended by chapter 1407, distinctly declares at the end of the act that its provisions were made "in the interest of the public health of the city," and that is all-sufficient, coupled with the nature of its provisions. Neither do we see that the provision of the statute in question referring to the filling up and destroying privy vaults, etc., notwithstanding the pendency of an appeal, was in any way in contravention of the constitution. We have already referred to various authorities that summary action under the police power without being heard, without previous jury trial, and without compensation, might be constitutional. Under our system an appeal is allowed from any order of a town council, but, as the law stood in August, 1895, it was at least 65 days from the date of the passage of the order before it could be called in the appellate court for assignment even (Jud. Act, 132), and so, to avoid all question as to the effect of an appeal from an order under said chapters 777 and 1407 under the general provisions as to such appeals, it was plainly declared that such an appeal should not prevent summary proceedings under said chapters. The appeal was not affected by the abatement of the nuisance any more than trial by jury was affected by such abatement, although the prosecution of the appeal, like the trial by jury, followed the abatement. The appellants seem to draw a distinction between the privy vaults mentioned in said chapters 777 and 1407 on the one hand, and the cesspools and other arrangements for the reception of drainage on the other, that is not altogether apparent to us, but, inasmuch as such distinction is sought to be drawn, and as a privy vault is alone involved in this suit, our decision is limited to the constitutionality of the statute in question so far only as it refers to privy vaults mentioned therein. In conclusion we are of the opinion that chapter 777 of April 25, 1889, as amended by chapter 1407 of March 1, 1895, so far as it relates to privy vaults, being the only portion called in question in this case, is not in violation of the constitution.

(20 R. I. 176)

O'HARA et al. v. QUINN et al.

(Supreme Court of Rhode Island. July 7, 1897.)

RIGHTS OF CO-TENANT—PAYMENT OF TAXES.

One of several co-tenants, against whom all taxes are assessed, while he and the assessor supposed he was the sole owner of the land, is not entitled in a partition suit to any reimbursement for the payment of such assessments.

Bill by Ellen O'Hara and others against Martin Quinn and others for partition by a sale and division of the proceeds, a partition by metes and bounds being impracticable on account of the smallness of the premises and

the number of the owners. The respondent Quinn had paid the taxes on the common property, the land being taxed to him as the sole owner, and he supposing he had the title thereto.

Arthur Cushing, for complainants. McGuinness & Doran, for respondents.

PER CURIAM. The case shows that the taxes paid by the respondent Quinn were assessed upon the whole land in suit, and against him alone, both he and the assessors supposing him to be the sole owner. No portion of the taxes was assessed against his co-tenants, or against their interest in the land, and, so far as appears, no notice of the assessment was given to them. The payment, therefore, by Quinn, did not inure to the benefit of his co-tenants. So far as they are concerned, the payments were for moneys which they were under no obligation to pay. We are of the opinion, therefore, that he is not entitled to reimbursement.

(20 R. I. 180)

GUNN et ux. v. KELLIHER.

(Supreme Court of Rhode Island. July 8, 1897.)

LIMITATIONS—ACTIONS AGAINST ADMINISTRATORS.

Pub. St. c. 189, § 8 (Id. c. 205, § 9), in force at the date of the appointment of defendant as administrator, provided that no action should be brought against any administrator after three years from the grant of administration; Gen. Laws, c. 218, § 9, in force at the time plaintiff's action was brought, provides that "no executor or administrator shall be held to answer to the suit of a creditor of the deceased, * * * unless such suit is commenced within two years from the date of the first publication of the notice of the qualification of the first executor or administrator"; and Gen. Laws, c. 298, which repeals Pub. St. c. 189, § 8 (Id. c. 205, § 9), enacts (section 10) that "whenever a limitation or period of time prescribed in any of the acts repealed by this chapter, for the acquiring of any right, or the barring of any remedy, or for any other purpose, shall have begun to run, and the same or any similar limitation is prescribed in the General Laws, the time of limitation shall continue to run and shall have the like effect as if the whole period had begun and ended under the operation of the General Laws." *Held*, that such limitation of three years continued, as to plaintiff's cause of action, with the like effect as if the General Laws, instead of the Public Statutes, had been in force when such limitation began, and as if it had continued to run under the General Laws to its termination.

Assumpsit by James Gunn and wife against Daniel F. Kelliher, administrator of the estate of Peter M. Honeyman, deceased. On plaintiffs' demurrer to plea. Sustained.

Patrick J. McCarthy, for plaintiffs. Thomas F. Murphy, for defendant.

MATTESON, C. J. This is an action of assumpsit brought against the defendant as administrator of the estate in this state of Peter M. Honeyman, late of Chilton, Wis., deceased. The writ is dated May 25, 1896. The defendant pleaded the general issue, and by leave of court a special plea setting up the bar of Gen. Laws R. I. c. 218, § 9.

Gen. Laws R. I. took effect February 1, 1896, and chapter 218, § 9, provides: "No executor or administrator shall be held to answer to the suit of a creditor of the deceased, excepting suit on his bond or as is otherwise provided in this or the preceding title, unless such suit is commenced within two years from the date of the first publication of the notice of the qualification of the first executor or administrator." The plea alleges that more than two years before the commencement of this suit, to wit, on February 6, 1894, at Providence, the defendant was duly appointed administrator of the goods, chattels, and estate of the deceased in Rhode Island, and then and there accepted the trust; that afterwards, within 10 days from his acceptance of the trust, on, to wit, February 9, 10, and 12, 1894, he gave notice of his acceptance as by law required; that the plaintiffs did not begin their suit against him until more than two years from the date of the first publication of the notice of his qualification. To this plea the plaintiffs have demurred.

Pub. St. R. I. c. 189, § 8 (Id. c. 205, § 9), in force at the date of the appointment of the defendant as administrator, provided that no action should be brought against any administrator within one year after the grant of administration, nor after three years from such grant, except for certain causes, not necessary to be adverted to, provided notice of his appointment should have been given according to law, such periods to be reckoned from the time of the giving of the notice. As, therefore, the defendant was not appointed administrator, as recited in the plea, until February 6, 1894, the limitation of the statutes then in force did not begin to run against the plaintiffs' cause of action until his qualification as administrator, and the publication of the notice of his appointment on February 9, 1894. *Knowles v. Whaley*, 15 R. I. 97, 99, 23 Atl. 144. Consequently the plaintiffs' cause of action would not have been barred, by the statutes then in force, till February 9, 1897, had they continued in force, or more than a year after the General Laws took effect. In support of the plea, it is contended that this limitation was cut down by Gen. Laws R. I. c. 218, § 9, from three years to two years, and that it expired, therefore, on February 9, 1896,—more than three months prior to the bringing of this suit. We do not think that this contention is correct. Gen. Laws R. I. c. 298, § 10, enacts that "whenever a limitation or period of time prescribed in any of the acts repealed by this chapter for the acquiring of any right or the barring of any remedy or for any other purpose shall have begun to run, and the same or any similar limitation is prescribed in the General Laws, the time of limitation shall continue to run and shall have the like effect as if the whole period had begun and ended under the operation of the General Laws." Pub. St. R. I. c. 189, § 8 (Id. c. 205, § 9), was repealed by Gen. Laws, c. 198. Hence the limitation of three years prescribed by them

is expressly continued by chapter 298, with the like effect as if the three years had begun and ended under the operation of the General Laws; i. e. with the like effect as if the General Laws, instead of the Public Statutes, had been in force when the limitation began, and as if it had continued to run under the General Laws to its termination. We think, therefore, that the plea constitutes no defense to the action. Demurrer sustained, plea overruled, and case remitted to the common pleas division for further proceedings.

(30 R. I. 215)

CARR v. BROWN et al.

(Supreme Court of Rhode Island. July 26, 1897.)

CONSTITUTIONAL LAW—ADMINISTRATION OF ESTATE OF SUPPOSED DECEDENT—DUE PROCESS OF LAW.

Pub. Laws 1882-85, c. 298, providing for the administration of the estate of one who has been absent, and "not heard from, directly or indirectly, for the term of seven years," as if he were dead, violates Const. art. 1, § 10, and Const. U. S. Amend. art. 14, providing that no person shall be deprived of property without due process of law.

Action by Peter Carr against John A. Brown and others. Demurrer to answer of defendants sustained.

A. B. Crafts, for plaintiff. Lewis & Potter, for defendants.

TILLINGHAST, J. This is an action of assumpsit to recover money which came to the hands of the defendants from the plaintiff's estate, which has been administered upon during his lifetime. The defendants have filed special pleas in bar, in which they set up that more than seven years before letters of administration were taken out on plaintiff's estate he had left his home in South Kingstown, where he was a domiciled inhabitant, and that during all of said time he had not been heard from, either directly or indirectly; that notice of intention to apply for letters of administration by Bridget McGuire, a sister of the plaintiff, was given for the period of three months; that further notice by publication was afterwards ordered and given by the probate court, and that thereupon, upon proof to the satisfaction of said court that notice had been given for three months as aforesaid, and also that said additional notice had been given as ordered, it was adjudged that the petition be granted; and the defendant John A. Brown was thereupon appointed administrator on the estate of the plaintiff. The pleas further set up that said Brown thereupon proceeded to administer upon said estate in the usual way; that he settled his account with the probate court; and thereupon, after three years from the time when said administration was granted, he distributed said estate according to law. Wherefore he prays judgment, etc. To these pleas the plaintiff demurs on the grounds: (1) That the proceedings in the court of probate, recited in said pleas, were

and are null and void, as the plaintiff was then and now is living; (2) that to take and appropriate the estate of a living person, in the manner described in said pleas, would be to take private property without due process of law, and such a construction of the statute would be contrary to the constitution of this state; (3) that said court of probate acquired no jurisdiction of the plaintiff's personal property and estate.

The action of the probate court, and the proceedings in connection therewith, were had in pursuance of Pub. Laws R. I. 1882-85, c. 298, which is as follows: "Whenever it shall be proved to the satisfaction of the court of probate of any town that any person domiciled in such town at the time of his departure, has left his home and not been heard from directly or indirectly for the term of seven years, and that a notice of intention to apply for letters of administration or to prove the last will and testament of such person has been published for three months in each issue of some newspaper in the city of Providence, and also in each issue of some newspaper in the county in which he was domiciled, and been posted for three months in three or more public places in said town, and that such other notice as the court may deem best has been given to the relations and heirs, the last will and testament of such person may be proved and letters of administration may be granted on such person's estate as if he were dead. The notices shall contain a brief description of such person, his age, name and such other characteristics as shall identify him, and no distribution of his estate shall be made until three years after administration has been granted under the provisions of this section." Pub. St. R. I. c. 184, § 9, which is a continuation of the same subject, is as follows: "If such person shall afterwards return to this state, or shall constitute an agent or attorney to act in his behalf, the executor or administrator as aforesaid shall be accountable for, and shall deliver to such person or his lawful agent or attorney, all the estate of every kind which shall then be in his hands as executor or administrator as aforesaid, after deducting such sum or sums as the court of probate shall allow, in the settlement of his accounts, for any payments or disbursements which he may have legally made in his said capacity, or which such court of probate may think reasonable to allow for his personal trouble in executing the trust of executor or administrator as aforesaid." Although statutes of similar import have existed in this state for more than a century, no case of this sort has ever before arisen thereunder, so far as we are aware; and we are therefore called upon to decide the question raised without the aid of former adjudications, so far as our own state is concerned. For, although said statute was before the court in *Southwick v. Probate Court*, 18 R. I. 402, 28 Atl. 334, yet it was only in connection with the question of the sufficiency of the notice to prove the will in question, and hence the decision in that case has

no bearing upon the question as to the constitutionality of the law. It will be observed that said statute does not require the probate court to find that the person whose estate is sought to be administered is dead before proceeding to exercise jurisdiction, but only that he has been absent from his home without being heard from, directly or indirectly, for the period of seven years. This fact being made to appear, the court is given jurisdiction, after the required notice is given, to proceed as if the person were dead. The main question which is raised, then, is whether the general assembly has power to pass an act authorizing the estate of a living person to be administered upon as if he were dead. We think it is very clear, both upon reason and authority, that it does not have this power. To administer upon a person's estate while he is still living is to deprive him of property contrary to the law of the land, or, as it is ordinarily said, without due process of law; and hence is in violation of article 1, § 10, of the constitution of this state, and also of article 14 of the amendments to the constitution of the United States. What is due process of law, within the meaning of constitutional provisions like these, has been many times expounded by the supreme court of the United States, and also by the highest courts of the various states; and the result of these interpretations may be briefly summed up by saying that the words "due process of law" mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. *Pennoy v. Neff*, 95 U. S. 733. Those rules require that there shall be a court of competent jurisdiction to pass upon the subject-matter of the suit or proceeding, and that there shall be a trial or proceeding in which the rights of the parties, after notice and opportunity to be heard, shall be duly adjudicated. The words "due process of law in this place," as said in *Lavin v. Bank*, 18 Blatchf. 23, 1 Fed. 641, "cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title of property. It will be seen that the same measure of protection against legislative encroachment is extended to life, liberty, and property; and, if the latter can be taken without a forensic trial and judgment, there is no security for the others. If the legislature can take the property of A. and transfer it to B., they can take A. himself, and either shut him up in prison or put him to death. But none of these things can be done by mere legislation. There must be 'due process of law.'" The following terse exposition of this constitutional guaranty is furnished by the supreme court of New York in the case of *Taylor v. Porter*, 4 Hill, 145. Mr. Justice Bronson there says: "The words 'by the law of the land,' as here used [i. e. in the state constitution], do not mean a statute passed for the purpose of working the wrong. That

construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses, 'You shall be vested with the legislative power of the state, but no one shall be disfranchised, or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose.' In other words, 'You shall not do the wrong unless you choose to do it.'" See, also, *U. S. v. Cruikshank*, 92 U. S. 554; *Walker v. Sauvinet*, Id. 92; *Doyle, Petitioner*, 16 R. I. 538, 18 Atl. 159; *Cross v. Brown*, Index RR. 65, 33 Atl. 147; *Cooley, Const. Lim.* (6th Ed.) p. 431; 6 Am. & Eng. Enc. Law, p. 43 et seq. Tested by these rules, the statute aforesaid, under which a man's property may be taken without his knowledge or consent, and in a proceeding to which he is not a party, and of which he has no notice, must be held to be clearly violative both of his constitutional and also of his common-law right. Indeed, the whole proceeding, so far as he is concerned, is *res inter alios acta*.

In *Lavin v. Bank*, *supra*, which was a case where the original letters of administration were issued by the court of probate of Cranston, in this state, under the statute in question, and where afterwards ancillary letters of administration were taken out in New York, the court, after holding that the payment by the defendant bank to said administrator there was no defense to the suit, said: "It is also claimed that, if the New York letters are void, the payment to the administrator may be justified under the Rhode Island letters, on the principle that, though a foreign administrator cannot sue here without obtaining ancillary letters, yet a payment to him is a good payment, and discharges the debt. *Parsons v. Lyman*, 20 N. Y. 103. But it is clear that the Rhode Island letters have no greater validity than the New York letters. The Rhode Island statute undertakes to do directly what the New York statute aims to accomplish by the more indirect method of declaring a judicial decision conclusive against a person not a party to it. In Rhode Island the court does not go through the form of deciding that the person is dead, but, conceding that he is only absent, distributes his estate 'as if he were dead,' without the service of any notice or process upon him whatever. I do not see how any respectable argument can be made that this is not depriving him of his property without due process of law, or how it can be necessary, or reasonably proper, for the proper government of the persons and the property within the jurisdiction of the state." This decision is cited with approval by the supreme court of the United States in *Scott v. McNeal*, 154 U. S. 49, 14 Sup. Ct. 1108.

The general question as to whether any court has, or can have, jurisdiction to grant letters of administration on the estate of a living person has been much discussed, and, while the authorities are not entirely har-

monious, yet the great weight thereof is clearly against the existence of any such jurisdiction. The ground upon which most of the decisions rest is that, in order to confer jurisdiction upon a court to grant letters of administration upon a person's estate, that person must be in fact dead; and that, if he is not dead, there is no estate to administer upon, and hence no jurisdiction. Mr. Freeman, in discussing this question in his work on Judgments, says: "The question occasionally arises whether the grant of letters testamentary or of administration on the estate of a person in fact living, but supposed to be dead, is an act beyond the jurisdiction of the court, and therefore so utterly void that no person is protected in dealing with the executor or administrator while his letters remain unrevoked. The weight of authority is very decidedly to the effect that the decease of the supposed decedent is a prerequisite to the jurisdiction of the court, and that he is wholly unaffected by the proceedings for the settlement of his estate." In line with the doctrine here announced, it is said in *Mella v. Simmons*, 45 Wis. 334: "The proceedings of administration, settlement, and assignment of the estate of the respondent, represented to have been dead, when he was and still is alive, are absolutely null and void, for all purposes whatsoever. * * * The county court of Dodge county, or any other court, has no jurisdiction in this particular case, or in such a class of cases. There is no class of cases which embraces the administration of the estates of living persons as if they were dead. The proceedings are void ab initio and throughout. If this case falls within any class of cases, it is a class in which no court has any right to deliberate or render any judgment, and in which every conceivable act is an absolute nullity. The only jurisdiction the county court has in respect to the administration of estates is over the estates of dead persons. It would seem that the bare statement of such a proposition is enough, without citing authorities." In *Thomas v. People*, 107 Ill. 521, the supreme court of Illinois, in an able opinion by Mr. Justice Mulkey, takes the same view. The same doctrine has been either adjudged or recognized in Massachusetts in *Jochumsen v. Bank*, 3 Allen, 87; *Waters v. Stickney*, 12 Allen, 1, 13; *Day v. Floyd*, 130 Mass. 488; in Pennsylvania, in a series of cases beginning in 1824 (see *Devlin v. Com.*, 101 Pa. St. 273); in Texas, in *Withers v. Patterson*, 27 Tex. 499; in Kentucky, in *French v. Frazier*, 7 J. J. Marsh, 425; in Tennessee, in *D'Arusment v. Jones*, 4 Lea, 251; in New Hampshire, in *Morgan v. Dodge*, 44 N. H. 255; in North Carolina, in *State v. White*, 7 Ired. 116; in Alabama, in *Duncan v. Stewart*, 25 Ala. 408; in California, in *Stevenson v. Superior Court*, 62 Cal. 60; in Missouri, in *Johnson v. Beazley*, 65 Mo. 264; and in many other states. See, also, 1 Woerner,

Adm'n, § 208 et seq., where the same view is taken, and our statute commented on; and note to *Bolton v. Schriever* (N. Y. App.) 18 Lawy. Rep. Ann. 242 (s. c. 31 N. E. 1001). To this array of authorities there are to be added the decisions of the supreme court of the United States in *Griffith v. Frazier*, 8 Cranch, 9, and the recent case of *Scott v. McNeal*, supra, in which last-named case Gray, J., in an exhaustive and learned opinion, after discussing the entire subject, and reviewing all the cases, comes to the conclusion that administration cannot legally be granted on the estate of a living person, and that to deprive one of his property in a proceeding of this sort is unconstitutional. The reasoning in that case is so cogent, and the result so authoritative, especially as to the constitutional question involved in the case at bar, that further citations would seem to be unnecessary.

Opposed to all this there is practically, so far as we are aware, but the single case of *Roderigas v. Institution*, 63 N. Y. 460, where the court, by a bare majority, held that, under the provisions of the statutes of that state conferring upon surrogates jurisdiction over the subject of granting letters of administration, the inquiry of the surrogate as to the death of the person upon whose estate administration is applied for is judicial in its nature, and that the surrogate has jurisdiction to determine it upon sufficient evidence; and also that letters issued by him upon due proofs are conclusive evidence of the authority of the administrator to act until the order granting them is reversed on appeal, or the letters are revoked or vacated, so far, at least, as to protect innocent persons acting upon the faith thereof. The decision in that case has been much criticized (see articles in 21 Alb. Law J. pp. 65, 84; *D'Arusment v. Jones*, supra; 15 Am. Law Reg. 212; 1 Woerner, Adm'n, § 210), and, so far as we are aware, has never been followed outside of said state except in the case of *Scott v. McNeal*, in Washington Territory, which, as we have already seen, has since been expressly overruled by the supreme court of the United States, although it was cited with approval in *Plume v. Institution*, 46 N. J. Law, 230. In that case, however, it was not even surmised that the alleged decedent was not in fact dead. We are not unmindful of the rule that has been laid down in this state and elsewhere that the court should ponder well before declaring an act of the general assembly to be unconstitutional, and that it should resolve every doubt in favor of the validity of the act. *State v. District of Narragansett*, 16 R. I. 440, 16 Atl. 901. But if, having observed this rule, the court comes to the conclusion that the act is violative of some constitutional right, its plain and imperative duty is to declare it to be void. *Taylor v. Place*, 4 R. I. 364. The case was originally heard by the appellate division, which then consisted of three jus-

tices. Owing to the importance of the question, however, and in view of the fact before referred to that said statute has long been upon the statute book, it was thought proper to have the case resubmitted on briefs to the entire court, which has been done. And, after a full and careful consideration, we are all of the opinion that, in so far as said statute authorizes the estate of a living person to be administered upon, it is unconstitutional and void. We do not wish to be understood, in what we have said in this case, as expressing any opinion upon the validity of the statute which authorizes administration upon the estates of persons under imprisonment for crime. Demurrer sustained, and case remitted to the common pleas division for further proceedings.

(182 Pa. St. 349)

IN RE WEAVER'S ESTATE.

Appeal of PAUL.

(Supreme Court of Pennsylvania. July 15, 1897.)

CLAIMS AGAINST DECEDENT'S ESTATE.

Evidence to establish a claim for services against a decedent's estate not made during his lifetime must be other than mere loose declarations, and must clearly and distinctly establish a contract between claimant and decedent.

Appeal from orphans' court, Dauphin county.

In the matter of the estate of Rachael Weaver, deceased. From a decree confirming the report of the auditor disallowing the claim of Aaron Paul, he appeals. Affirmed.

The opinion of the court below and the report of the auditor are as follows:

Opinion of the Court.

"The questions raised by these exceptions are practically questions of fact, and, on an examination of the evidence reported by the auditor, we see no reason for changing or modifying his conclusions, nor do we think that the matter requires any extended discussion on our part. As is shown by the cases quoted by the auditor, claims for services against a decedent's estate not made during the lifetime of the decedent are looked upon by the courts with a great deal of suspicion, and in order to establish such a claim the evidence must be other than that of mere loose declarations, and must be such as to clearly and distinctly establish a contract, either express or implied, between the claimant and the decedent. We do not think the evidence in this case comes up to this standard, and the report of the auditor is therefore confirmed, and distribution ordered to be made in accordance therewith."

Report of Auditor.

"Aaron Paul claimed the sum of \$1,100 for boarding Rachael Weaver, attending to her business affairs, nursing her during sickness, and calling for doctor whenever required by her, during eleven years; also, for substantial improvements on real estate of Rachael

Weaver, consisting of fencing, etc., amounting to \$174; funeral expenses, etc., \$100; doctor's bill, \$5; and taxes, \$7.36. Rachael Weaver died February 20, 1894, intestate. Your auditor finds as a fact that for eleven years prior to death of decedent she lived with Aaron Paul, her nephew, and during that time performed the work ordinarily done around a farm by the women of the household. Your auditor finds as a fact that Aaron Paul made certain improvements upon the real estate of Rachael Weaver, which he was at that time farming, but further finds that said improvements were made in the expectation that at the death of said Rachael Weaver this real estate would be devised and bequeathed to him. Your auditor finds as a fact that Aaron Paul paid a portion of the expense incidental to the funeral dinner, but, from the evidence produced, finds that the amount claimed, to wit, \$100, is exorbitant and excessive (in fact, one witness testified that the expense could not have been more than \$10); and your auditor finds that the claimant would be fully paid with one-half of that amount, and allows the sum of \$50. Receipts were offered in evidence showing that Aaron Paul had paid a doctor's bill of \$5 for Rachael Weaver, and taxes amounting to \$7.36, and these two claims are allowed. The decisions of the Pennsylvania courts are all against the claim presented by Paul for boarding Rachael Weaver, and the claim for substantial improvements, etc., made to the real estate of decedent. 'A claim against a decedent's estate should be supported by stronger evidence than admissions to third persons.' Keyser's Appeal (Pa. Sup.) 16 Atl. 577. And 'such claims should be closely scrutinized.' Peters' Appeal, 106 Pa. St. 340. The evidence clearly shows that Rachael Weaver first went to the house of Aaron Paul's father as housekeeper, and the presumption is that she continued to act in that capacity up until her last illness; in fact, up until she became bedfast, two or three weeks prior to her death. Paul undoubtedly expected that he would be the legatee of a large portion, if not all, of the estate of the decedent, and, in making these claims, endeavors to realize his expectations. In Koecker's Estate, 47 Leg. Int. 505, the court held that: 'Claims for services against a decedent's estate not presented as a legal demand until after the death of the alleged debtor will have every intentment and presumption made against them.' 'Claims against a dead man's estate which might have been made against himself while living are always subject to just suspicion.' Mueller's Estate, 159 Pa. St. 590, 28 Atl. 491; Carpenter v. Hays, 153 Pa. St. 432, 25 Atl. 1127. And in Miller's Estate, 136 Pa. St. 239, 20 Atl. 796, it was held that: 'When one has rendered personal services to another merely upon the expectation of a legacy promised, without a contract obligation, the promisee takes his chances of receiving the legacy; and, if his expectations are disappointed, he can recover nothing.' In

accordance with the above decisions, and from the testimony produced, your auditor refuses to allow these claims for boarding and improvements, respectively."

John E. Fox and John G. Gilbert, for appellant. Meade D. Detweiler and James I. Cham-berlin, for appellees.

PER CURIAM. We quite agree with what was said by the learned president of the orphans' court in overruling appellant's exceptions and confirming the auditor's report. We find nothing in the record that would justify a reversal or modification of the decree, nor is there anything in either of the questions presented by the specifications of error that requires discussion. For reasons given in the opinion of the court below the decree is affirmed and appeal dismissed at appellant's costs.

(182 Pa. St. 176)

COMMONWEALTH ex rel. BOROUGH OF MECHANICSBURG v. COOVER et al.

(Supreme Court of Pennsylvania. July 15, 1897.)

TAX COLLECTOR'S BOND—LIABILITY OF SURETIES.

Sureties on bond for a certain year of the collector of taxes for a borough, conditioned that he "pay over * * * according to law the whole amount of taxes charged and assessed in the duplicates * * * delivered to him," are liable for money collected on the duplicate of that year, and paid the treasurer in settlement of the duplicate of the preceding year; the treasurer or borough not having had knowledge of such misappropriation.

Appeal from court of common pleas, Cumberland county; E. W. Biddle, Judge.

Action by the commonwealth of Pennsylvania, on the relation of the borough of Mechanicsburg, against W. H. Coover and others. Judgment for plaintiff, and defendants (except J. L. Knettle) appeal. Affirmed.

The following are the opinion and decree of the court below upon the reserved question:

"Gwynne v. Burnell, decided by the house of lords, and reported in 7 Clark & F. 572, is a leading case upon the legal question which is embodied in the special verdict. The ruling there was, in substance, that the condition of a tax collector's bond for a certain year was broken, and the surety became liable, whenever any money received from the taxes of that year was applied in payment of the arrears of a former year. This decision is of the highest authority, for it was adopted only after grave and protracted deliberation, and it represented the opinion of many judges. To the same effect is *Inhabitants of Colerain v. Bell*, 9 Metc. (Mass.) 499, in which it is held that where the same person is collector of taxes for two consecutive years, and pays to the town the arrears of taxes due by him on the tax list of the first year, with the moneys collected on the second year's list,—the town officials not knowing whence the money came,

—the sureties on the second bond, when sued for his default, are not entitled to set off or deduct the amount so paid by him upon the tax list of the previous year. So in *Frownfelter v. State*, 66 Md. 80, 5 Atl. 410, there is a similar determination, the court saying: 'If the commissioners or the treasurer knew that the money applied to the taxes due for previous years had been collected on the levy of 1881, certainly they would have had no right to permit such application. But, in the absence of any knowledge of the sources from which it was obtained, it is difficult to see how they could have prevented Myers from applying it to his indebtedness for any year which he might name. When the money was in his possession, there was nothing to identify it, or to distinguish it from other funds under his control or rightfully belonging to him. The obligation assumed by his sureties was that he should pay the money in discharge of the tax levied within the time required by law. If he paid it in discharge of previous taxes, it was as much a breach of his bond as if he had retained it in his own pocket. We think the law on this point is correctly stated in *Inhabitants of Colerain v. Bell*, 9 Metc. (Mass.) 499, and in *Gwynne v. Burnell*, 7 Clark & F. 572.' The exact point is also ruled in *State v. Sooy*, 39 N. J. Law. 539, where the cases on the subject are reviewed in an elaborate opinion by Depue, J.; and the doctrine is also recognized and affirmed in *Stone v. Seymour*, 15 Wend. 19, and in *State v. Smith*, 26 Mo. 226. These decisions are, in our opinion, absolutely conclusive upon the question at issue, and we find nothing in *Com. v. Stambaugh*, 164 Pa. St. 437, 80 Atl. 293, to shake their authority in this state. On the contrary, an inspection of that case shows that its determination does not conflict in any respect with the established principle upon which the above-cited cases rest. And now, October 26, 1896, the reserved question of law is resolved in favor of the plaintiff, and it is ordered that judgment be entered on the verdict upon payment of the jury fee."

J. N. Young, H. H. Mercer, H. S. Stuart, and F. E. Beltzhoover, for appellants. J. L. Shelley, J. W. Wetzel, and W. F. Sadler, for appellee.

MCCOLLUM, J. This is an action on a collector's bond, in which the principal and his sureties are defendants. The appeal from the judgment of the trial court is by the sureties. The principal acquiesces in the judgment, presumably because, as collector, he is indebted to the borough in the amount thereof. He was duly elected collector of taxes in and for said borough in February, 1893, and in February, 1894, and he gave in each year the bond required by law. The bond of 1894 is the bond in suit, and four of the sureties on it were sureties on the bond of 1893. The sureties on the bond in suit concede their lia-

bility for \$958.83 of the duplicate of 1894, but deny that they are liable for \$2,888.63 of it, which their principal paid to the borough treasurer in settlement of the balance due on the duplicate of 1893. There is no direct evidence of notice to the treasurer that the sum thus paid to him was collected on the duplicate of 1894, nor anything on the record which shows that the sureties claimed on the trial that the jury might infer such notice from the circumstances in the case. There is no presumption that the payment in settlement of the duplicate of 1893 was a misappropriation of money collected on the duplicate of 1894. The misappropriation was not discovered until the settlement of the latter was called for. Besides, there is nothing in the statutes relating to the assessment and collection of taxes which makes it the duty of the treasurer to ascertain how or from what source the money paid to him by the collector was obtained. The duties of the latter are defined by his bond, which requires that he "shall well and truly collect and pay over or account for according to law the whole amount of taxes charged and assessed in the duplicates which shall be delivered to him." While he is elected for a term of three years, he must "give a bond annually, to be approved by the court." The bond of each year is applicable to and security for the taxes of that year. It does not extend to or include the taxes of a preceding or subsequent year. If, therefore, a collector applies the money received on the duplicate of one year in satisfaction of a balance due from him on the duplicate of another year, he has not paid over according to law the money so applied. It follows that the application of the money collected on the duplicate of 1894 to the payment of the balance due on the duplicate of 1893 was a clear misappropriation of the money so collected. It was the act of the collector, and a breach of the bond in suit. It cannot operate as a release of the sureties from liability for the money so appropriated. If the application had been made with the knowledge of the borough that it was a misappropriation of money collected on the duplicate of 1894, there would be substantial ground, we think, for acquitting the sureties of liability on the bond, to the amount of the misappropriation. But it has not been shown that the treasurer or borough had such knowledge, and there are no circumstances in the case which authorize an inference of it. No act or omission of the borough affecting the transaction complained of, or affording support to the sureties' contention, was shown. The defense therefore rests exclusively on their principal's breach of the bond, and this certainly is no impairment of their liability upon it. We think the cases cited by the sureties are not applicable to the facts of the case in hand, and that the latter is clearly within the principle established by the cases referred to in the opinion of the learned court below. Judgment affirmed.

(183 Pa. St. 253)

COMMONWEALTH v. WEST END COAL CO.

(Supreme Court of Pennsylvania. May 31, 1897.)

COAL COMPANY—TAXATION.

Appraisement for taxation of the shares of a corporation engaged in coal mining at five-sixths of their par value, where the net earning for the year had been over 16 per cent., will not be disturbed merely because its lease of coal lands would soon expire, and of a suggestion, unsupported by proof, of the uncertainty of renewal.

Appeal from court of common pleas, Dauphin county.

From a settlement made by the auditor general and state treasurer for tax on capital stock of the West End Coal Company for the year 1895 it appealed to the court of common pleas, where judgment was rendered for the commonwealth, and the company again appeals. Affirmed.

M. E. Olmsted, for appellant. Henry C. McCormick, Atty. Gen., and John P. Elkin. Dep. Atty. Gen., for the Commonwealth.

FELL, J. There were no sales of the stock of the appellant company during the tax year 1895. Its treasurer appraised its shares at \$25 each, and its total capital stock at \$75,000. The facts upon which the auditor general and state treasurer base their appraisement of \$250,000 are these: The company has a paid-up capital of \$300,000, and a surplus of \$17,480. During the tax year its gross earnings were \$344,537.88, and its net earnings \$50,475.97, and after the payment of dividends it added to its sinking fund \$25,150. The only ground upon which it is possible to base an objection to the approval by the court of this appraisement is that the company owned no land, and that the lease of certain anthracite coal lands upon which it had been engaged in mining coal would expire June 30, 1897; and, according to the statement of the treasurer, it was uncertain whether the lease could be renewed or a new one made upon terms which would warrant the company in continuing its operations. This fact should, of course, be taken into consideration in appraising the capital stock, and it was considered, and full allowance for the uncertainty made. The company, for the year, earned over 16 per cent., and its shares were assessed at only five-sixths of their par value. It is true that in such a case as this an appraisement should not be based upon the earnings for any one year, and that there can be no fixed and certain standard. Large earnings in coal mining, as was said by the present chief justice in *Com. v. Edgerton Coal Co.*, 164 Pa. St. 234, 30 Atl. 125, 129, may indicate large exhaustion of the coal, and consequent impairment of the capital; and, "to arrive at the actual value, possibilities and probabilities as well as things certain are properly considered." A failure to secure a renewal of the lease-

would not necessarily, or even probably, end the business operations of the company; and the value of its capital stock did not depend entirely upon its ability to continue the lease of a particular mine. In making the appraisalment, full weight, we think, was given to the mere suggestion, unsupported by further proof, of the uncertainty of renewal. The judgment is affirmed.

(67 N. H. 222)

STEBBINS v. ROBBINS et al.

(Supreme Court of New Hampshire. Hillsborough. July 29; 1892.)

FORECLOSURE OF MORTGAGE—SATISFACTION BY MISTAKE.

In a writ of entry to foreclose a mortgage alleged to have been satisfied by the mortgagee under a material mistake of fact, the question whether the mortgagee is entitled to have his discharge canceled and his mortgage re-established and foreclosed is one that must be determined upon a full consideration of all the evidence, and it is doubtful whether such question can be tried at all in such action at law.

Writ of entry by Amos H. Stebbins against C. C. Robbins and another to foreclose a mortgage. Case discharged.

Writ of entry on a mortgage. Trial by the court. The mortgage was made April 8, 1867, by one Forbush to the plaintiff, upon a lot of land on Union street, in Peterboro Center village, to secure a note of \$600. Forbush conveyed to one Day, by warranty deed dated April 1, 1872, and recorded the next day, a strip of land 42 feet in width across the westerly end of the mortgaged premises from Union street to the river, "together with a right of way twenty feet wide running from said street to said river east of the east line of the above-described tract." Forbush occupied the rest of the mortgaged premises as his homestead until his death, in 1880. April 15, 1880, administration was granted on Forbush's estate, and the administrator subsequently sold by auction the interest of Forbush in the homestead, subject to the mortgage, upon which there was then due \$853.33. The plaintiff was the purchaser, bidding and paying \$50 for the interest of the Forbush estate in the premises subject to his mortgage. November 16, 1880, the administrator gave the plaintiff a deed of the homestead for the consideration of \$50, subject to the mortgage and to the widow's dower and homestead, "reserving a right of way twenty feet wide on the west side of said land as now used in connection with said Day's house and land." The widow released her right of dower and homestead, and the plaintiff executed the following discharge on the back of the mortgage, and it was recorded November 30, 1880, with the record of the mortgage: "I hereby discharge the within-written mortgage, for and in consideration of a deed of the within-described premises from D. M. White, administrator of the estate of Ira Forbush, and a quitclaim deed from Hannah Forbush, widow of the said Ira Forbush, re-

leasing her dower and homestead in the within-described premises, which premises I bought November 16, 1880, at public auction, subject to this mortgage and note. Peterboro, N. H., November 17, 1880. Amos H. Stebbins. Witness: D. M. White." At the time of the purchase of the equity of redemption and the discharge of his mortgage, the plaintiff had no knowledge of the grant of the right of way in the deed from Forbush to Day, and no knowledge of any claim of a right of way extending from the street to the river. At the auction the bounds between the Day lot and the homestead were pointed out, and the plaintiff knew there was a way used in connection with the Day buildings, extending from the street to the rear of the buildings about 100 feet, but no mention was made of a right of way extending to the river. Shortly after the purchase of the equity at the administrator's sale, the plaintiff sold and conveyed the Forbush homestead. His first knowledge of the claim of a right of way to the river was in 1889, when his grantee complained to him of an incumbrance on the land. The plaintiff's evidence tended to show that a right of way to the river would diminish the value of the homestead lot \$300. If the plaintiff had known that a right of way from the street to the river was granted by the deed from Forbush to Day, he would not have discharged his mortgage. This suit is brought to enforce the mortgage upon the Day lot (conveyed by Day to the defendant Robbins in 1881), upon the ground that the mortgage debt has not been paid or the mortgage discharged, the discharge having been made under a mistake of fact.

J. F. Briggs, for plaintiff. F. G. Clarke, for defendants.

ALLEN, J. In many cases the law regards a mortgage as assigned, even if it is formally discharged; and in many cases it is discharged, in law, notwithstanding a formal assignment. *Fletcher v. Chamberlin*, 61 N. H. 438, 468, and cases cited. Here was a formal discharge, and no claim of an assignment. In a writ of entry to foreclose a mortgage formally and intentionally discharged, the plaintiff contends that he is not barred by the discharge, because he executed it under a material mistake of fact. Whether equity requires that he should be relieved, and his discharge canceled or treated as invalid, is a question that should be tried upon a full consideration of all the evidence bearing upon it. There has been no such trial, and it is doubtful whether the question can be tried in this suit at law. If counsel think a bill in equity necessary, it can be filed as an amendment of the declaration, all parties interested being made parties. All material facts not being found (2 Jones, *Mortg.* §§ 870, 873, 906, 909), the case is discharged. Case discharged.

CLARK, J., did not sit; the others concurred.

(67 N. H. 183)

BLAKE et al. v. SMITH.

(Supreme Court of New Hampshire. Rockingham. July 29, 1892.)

ATTACHMENT—SERVICE OF WRIT.

Under Pub. St. c. 219, § 3, providing that, "when the goods or estate of a person are attached, a summons in the form prescribed shall be delivered to the defendant, or left at his abode," service by reading the writ to defendant is insufficient.

Exceptions from Rockingham county.

Attachment by Blake and another against Ariana Smith. Exceptions by defendant to denial of motion to dismiss. Exceptions sustained.

The writ commanded the officer to attach the goods or estate of the defendant, and to summon her. The officer attached her real estate, and returned that he summoned her "by reading to her this writ."

Drury & Peaslee, for plaintiffs. T. Leavitt, for defendant.

ALLEN, J. "All writs and other processes may be served by giving to the defendant or leaving at his abode an attested copy thereof, and writs of summons and scire facias may also be served by reading the same to the defendant. * * * When the goods or estate of a person are attached, a summons in the form prescribed shall be delivered to the defendant, or left at his abode, with the name and office of the officer serving the same indorsed by him thereon." Pub. St. c. 219, §§ 2, 3. The writ in this case is not a writ of summons or scire facias (Id. c. 218, §§ 16, 20), but is a writ of attachment (Id. § 14), upon which the defendant's property was attached. The statute is explicit that the service of such a writ shall be made, not by reading the writ, or by giving to the defendant an attested copy, but by delivering to the defendant or leaving at his abode a summons in the form prescribed, with the name and office of the officer serving the same indorsed by him thereon. The service was insufficient. Exceptions sustained.

CARPENTER, J., did not sit; the others concurred.

(67 N. H. 180)

CHAPMAN v. NEWMARKET MANUF'G CO.

(Supreme Court of New Hampshire. Rockingham. July 29, 1892.)

FLOWAGE—ASSESSMENT OF DAMAGES.

Under Gen. Laws, c. 141, §§ 15, 16, authorizing mill owners to erect dams and flow lands, and either the land owners or the mill owner to petition to have the "past, present and prospective" flowage damages assessed, there can be no assessment of such damages under a petition by the land owner when defendant, by answer, disclaims any right of flowage under the act, and merely claims a right, by prescription or otherwise, to maintain a dam at a certain height, which right is conceded by petitioner.

Exceptions from Rockingham county.

Petition for assessment of damages under the flowage act by Electa A. Chapman against the Newmarket Manufacturing Company. Verdict for plaintiff. Defendant excepts to denial of motion in arrest of judgment. Exception sustained and case discharged.

The petition alleged that the defendants for "twenty years last past have kept up and improperly maintained a dam across Lamprey river," and "have within the space of three years last past rebuilt and improperly and unlawfully enlarged said dam," thereby flowing and injuring the plaintiff's land, and praying that "her past, present, and prospective damages may be assessed according to law." The defendants claimed in their answer the right to maintain their dam a foot higher than it was August 10, 1826, and they say they "intend to maintain their said dam at said height and no higher." The plaintiff concedes the defendants' right to maintain the dam at that height, but insists that they have kept it at a greater height, and have so improperly constructed it as to raise the water higher than it would be raised by a reasonably constructed dam of the same height. Two questions were submitted to the jury: "(1) Is the dam more than one foot higher than it was August 10, 1826? (2) Is it constructed in an unreasonable and improper manner, so that it raises the water to a greater height than it would if properly constructed?" The jury were instructed that, if they should answer both or either of these questions in the affirmative, their verdict should be for the plaintiff; otherwise for the defendants. They returned a verdict for the plaintiff, assessing the damages, "past, present, and prospective," at \$150. The defendants moved that judgment be arrested, which motion was denied, and the defendants excepted.

Frink & Batchelder and S. W. Emery, for plaintiff. Wiggin & Fernald and E. G. Eastman, for defendants.

PER CURIAM.¹ It is not material in this case whether the mill act (Laws 1868, c. 20; Gen. Laws, c. 141, §§ 15-19) is an act of eminent domain, as it is held to be in this state (Manufacturing Co. v. Fernald, 47 N. H. 444), or a regulation of water power, as it is held to be by the federal court (Head v. Manufacturing Co., 113 U. S. 9, 5 Sup. Ct. 441). It authorized the defendants to flow the plaintiff's land. It also authorizes either party to bring a suit of this kind for the assessment of damages for an injury done to the land owner by the mill owner's exercise of his statutory right of flowage. It does not relate to the right of flowage which the defendants have bought and paid for, and it does not authorize a petition for the determination of the mere question whether the

¹ See footnote 36 Atl. 607.

(97 N. H. 531)

NEBONNE v. CONCORD R. R.

(Supreme Court of New Hampshire. Merrimack.
March 16, 1894.)

EVIDENCE — DECLARATIONS — WAIVER OF OBJECTION.

1. Declarations of the conductor of a train as to how a person was injured thereby, made two months after the accident, are not admissible against the railroad company.

2. Objection of defendant to declarations is not waived by its calling the person alleged to have made them, and asking him if he had done so, receiving an answer in the negative.

Action on the case by Jacob Nebonne against the Concord Railroad for injuries received by plaintiff in being run over by defendant's train. Verdict for plaintiff. Defendant moves for new trial. Motion granted.

The plaintiff, subject to exception, introduced evidence of a conversation between himself and one Wheeler, who was the conductor of the train by which the injury was caused. This conversation was held about two months after the accident, and tended to show negligence in respect to the starting of the train. Wheeler was a witness for the defendants, and testified that he had no recollection of such a conversation.

Albin & Martin, for plaintiff. Streeter, Walker & Chase, for defendants.

BLODGETT, J. The alleged statement of the conductor of the defendants' train as to the way in which the plaintiff was injured, made some two months after the injury, was incompetent, and should have been rejected. The accident had long since become a completed fact, and the statement was only the narration by an agent of a past occurrence, and not a part of the *res gestæ*. Doubtless, the declarations and admissions of a party, whenever made, may be given in evidence against him, and, "where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting a part of the *res gestæ*." (Story, Ag. § 134; Thompson v. Improvement Co., 58 N. H. 108, 111); "but an act done by an agent cannot be varied, qualified, or explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done, at a later period. 1 Tayl. Ev. 526. The reason is that the agent to do the act is not authorized to narrate what he had done, or how he had done it, and his declaration is no part of the *res gestæ*." Packet Co. v. Clough, 20 Wall. 523, 540; Insurance Co. v. Mahone, 21 Wall. 152, 157; Railroad Co. v. O'Brien, 119 U. S. 99, 103-106, 7 Sup. Ct. 118, and 58 Am. Rep. 562, note, 563-568; People v. Vernon, 95 Am. Dec. note, 73-75. More concisely stated, the declaration or admission of an agent binds his principal only when it is made "in regard to a transaction then depending et dum ferebat opus." 1 Greenl. Ev. § 113.

defendants have committed a tort by flowing the plaintiff's land. For the determination of that question the common law provides ample procedure in a common-law action, and for the mere tort of wrongful flowage the common law furnishes adequate remedies at law and in equity. This statutory proceeding provides for the assessment of damages when the mill owner exercises the flowage right given by the mill act. On this subject the pleadings in this case present no issue. On the contrary, the defendants' answer contains a disclaimer that prevents a trial of the question of damages for the exercise of the statutory right. It states explicitly what they claim and what they do not claim. It asserts nothing but a right to maintain their dam at a certain height. "The plaintiff concedes the defendants' right to maintain the dam at that height," and the answer says that the defendants "intend to maintain their dam at said height, and no higher." This is a disclaimer of a right to flow the plaintiff's land under authority given by the mill act at the commencement of this suit. If at that time the defendants had flowed the plaintiff's land more than they had a contractual, common-law right to flow it, they are liable for the tort in an action at common law. Aldworth v. City of Lynn, 153 Mass. 53, 57, 26 N. E. 229. The answer is a conclusive record that estops them from ever claiming that at the commencement of this suit they were exercising a flowage right under the mill act. That act does not empower the plaintiff to compel the defendants to buy such a perpetual right, and to pay 150 per cent. for it, as a penalty for a wrongful flowage. Town v. Faulkner, 58 N. H. 255; Hovey v. Perkins, 63 N. H. 516, 526, 3 Atl. 923.

On the record made by the pleadings, the questions submitted to the jury were irrelevant and immaterial. There was a mistrial, and no judgment on the verdict can be rendered for the plaintiff. As the case stands, the defendants are entitled to judgment notwithstanding the verdict, and no reason appears why such a judgment should not be rendered. The plaintiff can bring a bill in equity for the determination of the height at which the defendants have acquired a right to maintain their dam for flowage purposes. In such a bill, all persons interested in the question should be joined as plaintiffs or defendants. The controversy, like that in Gardner v. Webster, 64 N. H. 520, 15 Atl. 144, is one not likely to be settled by many suits at law. The ground of equity jurisdiction is stated in that case, and in Connecticut River Lumber Co. v. Olcott Falls Co., 65 N. H. 290, 390, 391, 392, 21 Atl. 1090. If the plaintiff prefers an action at law for tort, she can resort to that remedy. Case discharged.

CARPENTER, J., did not sit; the others concurred.

And this rule is of so universal acceptance that other of the numerous authorities in its support need not be cited. The defendants, by calling the conductor, and interrogating him relative to his statements, as testified to by the plaintiff's witnesses, did not waive their objection to the testimony, or make it competent. The general principle invoked by the plaintiff, that "when testimony is incompetent or not admissible when received, if, by the introduction of subsequent testimony, it is made competent, the objection is removed," is inapplicable to the facts appearing in this case. The plaintiff introduced no subsequent testimony as to the statement, and the defendants neither admitted nor proved it by any subsequent act or evidence; on the contrary, they denied that the conductor made the statement, and his testimony on that point tended only to support the denial. In view of these facts, the claim that a party who vainly objects to the admission of incompetent and highly prejudicial testimony offered by his adversary waives his objection, and makes the testimony competent, if he contradicts it, is a proposition without support in the law of evidence, and hardly requires extrinsic refutation. Verdict set aside. All concur.

(67 N. H. 593.)

LEVY v. ORDER OF THE IRON HALL.
(Supreme Court of New Hampshire. Rockingham. July 29, 1892.)

BENEFICIAL ASSOCIATIONS—ACTIONS BY MEMBERS.

A member of a benevolent order who has agreed not to institute legal proceedings for benefits till he has exhausted all remedies provided by the order must, before suit, pursue the appeals provided by the by-laws of the order, from a decision of an officer rejecting his claim in the first instance.

Assumpsit by Himan Levy against the Order of the Iron Hall. On agreed facts, judgment rendered for defendants.

The plaintiff is a member of the defendant corporation, and as such he is entitled to certain "sick benefits." Among other things, he agreed that he would not institute legal proceedings for benefits until he had exhausted all remedies therefor provided by the order. Having been sick for several weeks, he presented his claim for a sick benefit as required by the by-laws, but it was rejected by an officer of the order whose duty it was to pass upon such claims in the first instance. From his decision several appeals were provided for by the by-laws. The plaintiff did not claim an appeal, but brought this action.

W. H. Paine and C. Page, for plaintiff. H. G. Eastman and T. Leavitt, for defendants.

PER CURIAM.¹ As the plaintiff did not resort to the remedy of appeal provided by his contract, he cannot maintain this action. However unreasonable the multiplicity of appeals within the order may seem, he had a right to

make an unreasonable contract, and cannot enforce it without complying with its express conditions. Judgment for the defendants.

CHASE, J., did not sit; the others concurred.

(67 N. H. 174)

McFETRICH v. WOODROW et al.
(Supreme Court of New Hampshire. Coos. March 11, 1892.)

ACCOMMODATION NOTE—LIABILITY OF INDORSER.

An indorser before delivery of an accommodation note is liable as maker to an innocent purchaser for value from the payee.

Action on a note by James McFetrich, Jr., against H. W. Woodrow and another. On facts found, judgment ordered for plaintiff.

Assumpsit on a promissory note of the defendant Woodrow, indorsed by the defendant Jameson, dated October 27, 1886, and payable to the order of E. H. Williams four months after date. Facts found by the court. The note is an accommodation note made by Woodrow, and indorsed by Jameson, for the benefit of Williams, at his request. January 1, 1887, the plaintiff took the note of Williams in good faith, for an adequate consideration, and without notice that it was an accommodation note. When the note was exhibited to the plaintiff, Jameson's name was on it, and, at the time of its delivery to the plaintiff, Williams indorsed his name above that of Jameson. Jameson was not notified of the nonpayment of the note until June, 1889.

T. F. Johnson and Ladd & Fletcher, for plaintiff. J. H. Dudley and Ossian Ray, for defendant Jameson.

ALLEN, J. The note was not a valid contract until it was negotiated and delivered to the plaintiff for value. Jameson was not entitled to notice of nonpayment. He was liable to the plaintiff, not as indorser, but as maker. *Martin v. Boyd*, 11 N. H. 385; *Benton v. Willard*, 17 N. H. 593; *Currier v. Fellows*, 27 N. H. 366; *Phillips v. Johnson*, 64 N. H. 393, 400, 10 Atl. 819. On the facts found, it is immaterial that, for the purpose of giving the plaintiff title to the note, Williams indorsed it above the name of Jameson. Judgment for the plaintiff.

SMITH, J., did not sit; the others concurred.

(67 N. H. 531)

DAVIS v. TOWN OF RUMNEY.
(Supreme Court of New Hampshire. Grafton. March 11, 1892.)

DEFECTIVE HIGHWAY—STATEMENT OF CLAIM.

There being no controversy as to the exact spot on a highway where an accident happened, a statement representing that the accident happened "at a point indicated by a stake between two large rocks, about 847 feet southerly" from a certain point, is sufficient although the stake is actually 860 feet southerly from the named point.

¹ See footnote 36 Atl. 607.

Exceptions from Grafton county.

Suit by D. Ned Davis, as administrator, against town of Rumney, for personal injuries to plaintiff's intestate. Verdict for plaintiff. Exceptions by defendant. Overruled.

The statement of claim filed by the plaintiff represented that the deceased and his horse and carriage were thrown "over and down a bank on the westerly side of said highway at a point indicated by a stake between two large rocks, about 847 feet southerly from a point in said highway where a line running easterly on the west side of Lewis Loveland's house crosses said highway." The highway ran in a northerly and southerly direction, and Loveland's house was on the westerly side of it. The stake referred to stood on the westerly side of the road, between two large rocks, at a distance of 860 feet from a point opposite Loveland's house. There was no controversy as to where the accident happened, and no claim that the officers of the town had any difficulty in finding it. From these facts the court found that the above statement as to the place of the accident was sufficient, and the defendants excepted.

D. Barnard and Burleigh & Adams, for plaintiff. J. C. Story, S. Herbert, I. W. Drew, and Bingham & Bingham, for defendant.

PER CURIAM. The exception was overruled. *Carr v. Ashland*, 62 N. H. 665, 668; *Robin v. Bartlett*, 64 N. H. 426, 428, 13 Atl. 645. Other exceptions taken at the trial were not pressed.

CHASE, J., did not sit. The others concurred.

(67 N. H. 554)

DOOLITTLE v. TOWN OF WALPOLE.
(Supreme Court of New Hampshire. Cheshire.
March 16, 1894.)

ACTION AGAINST TOWN—ACTS OF OFFICERS.

1. An action against a town, not authorized by statute, cannot be maintained.
2. Failure of selectmen to perform the duty imposed on them to "provide a suitable lockup for the temporary detention of offenders" is not a breach of duty by the town.

Exceptions from Cheshire county.

Action on the case by Fred C. Doolittle against the town of Walpole. Demurrer was sustained to the declaration alleging that defendant erected and maintained in an unsuitable condition a lockup for keeping and detention of prisoners; that plaintiff was arrested, and for 24 hours confined therein, and by reason of its unsuitable condition was injured. Plaintiff excepts. Exceptions overruled.

D. H. Woodward, for plaintiff. J. G. Bellows, for defendant.

BLODGETT, J. "In its own courts a state cannot be made an involuntary defendant. It is not constitutionally bound to give to its school teachers, to those who support its pau-

pers, lend it money, sell it real or personal property, or make and repair its roads and buildings, to travelers injured by defects in its highways, or to any class of contractors, creditors, or claimants, a right of action, civil or criminal, against itself." *Wooster v. Plymouth*, 62 N. H. 193, 206. Towns are "only political subdivisions of the state, made for the convenient administration of the government. * * * They are component parts of the state, and, aggregately taken, are the state." *Id.*, 208. Constituting a portion of the sovereign power of the state, a municipal corporation is, therefore, not subject to a right of action against itself, unless the right is conferred by statute in the exercise of the entire control over municipalities with which the legislature is invested by the constitution (*Id.*); and, there being no express statute authorizing the plaintiff's action, nor any from which authority can be implied, the defendant town is, for the purpose of the present inquiry, no less a sovereign than the state. But, aside from this fatal objection, the plaintiff alleges no duty on the part of the defendants towards him which was unfulfilled. The injuries of which he complains arose from the misfeasance and neglect of duty of independent public officers in the performance of their statutory duty as selectmen to "provide a suitable lockup for the temporary detention of offenders" (*Pub. St. c. 204, § 23*); and the uniformly recognized doctrine is that the acts of such officers are their own official acts, and not the acts of the municipal corporation or its agents (*Edgerly v. Concord*, 62 N. H. 9, 12, 19, and authorities cited; *Wakefield v. Newport*, *Id.* 624, 625). And, even if the statute imposed the duty to provide a suitable lockup upon the town, the duty being one for the benefit of the public, and from the performance of which the town receives no corporate benefit or advantage, the plaintiff's action, in the absence of a statute giving it, could not be maintained. Authorities *supra*. Exceptions overruled.

CARPENTER, J., did not sit. The others concurred.

(87 N. H. 512)

DOLLOFF v. DOLLOFF.

(Supreme Court of New Hampshire. Belknap.
March 16, 1894.)

SUPPORT OF CHILD—LIABILITY OF FATHER AFTER DIVORCE.

Obligation of a man, or of his estate after his death (*Pub. St. c. 189, § 17*), to support his child, is not discharged by the procuring of a divorce by the mother, with alimony, and custody of the child.

Assumpsit by Martha B. Dolloff, guardian, against Harry E. Dolloff, administrator of William P. Dolloff, deceased, to recover for the support of the child of plaintiff and deceased. Judgment for plaintiff.

Facts agreed. The plaintiff procured a divorce, with \$600 alimony, and the custody of the child, over whom she has been ap-

pointed guardian. The child has since lived with the plaintiff, and been supported by her, and is still under seven years of age. The defendant is administrator of the estate of William P. Dolloff, and has not yet settled his account. It is uncertain whether the estate will be sufficient to pay for the support of the child in full, if liable.

J. L. Wilson, for plaintiff. Leach & Stevens, for defendant.

BLODGETT, J. "The estate of every person deceased shall be chargeable with * * * the support and maintenance of infant children of the deceased until they arrive at the age of seven years, if the estate is in fact solvent." Pub. St. c. 189, § 17. The plaintiff's case comes within the statute. While the divorce destroyed the relation of husband and wife, and made them as strangers to each other, it did not destroy the relation between the husband and his child. As to her, his duty and liability remained the same, except in so far as he was incapacitated or discharged by the decree, which simply took from him her custody. This did not release him from any pre-existing natural, legal, or statutory duty to support her. Guardians, or other persons invested with similar powers, are under no personal obligation to maintain their wards, whatever may be the relationship between them; and the plaintiff's acceptance of the custody and guardianship did not subject her to the maintenance of the child any more than a stranger would have been subjected to it by the acceptance of a like decree and appointment. Nor is it material that the plaintiff was awarded alimony to the amount of \$600. Alimony, in its proper signification, is not maintenance to the children, but to the wife; and when no order is made for the children's maintenance upon the allowance of alimony with custody of children, the father's obligation to support them is in no wise affected. In brief, when the father has been found, by a judicial decree like the one in this case, to be an unfit person to exercise parental control by reason of his own voluntary misconduct, the law does not allow him to convert such misconduct into a shield against his parental liability during his lifetime, and upon his decease the statute extends the liability to his solvent estate in the case of children under seven years of age. See, generally, *Buckminster v. Buckminster*, 38 Vt. 248, 252; *Stanton v. Willson's Ex'rs*, 3 Day, 37; *Gilley v. Gilley*, 79 Me. 292, 9 Atl. 623; *Cowles v. Cowles*, 3 Gilman, 435; *Plaster v. Plaster*, 47 Ill. 290; *Pretzinger v. Pretzinger*, 45 Ohio St. 452, 15 N. E. 471; *Courtright v. Courtright*, 40 Mich. 633; *Conn v. Conn*, 57 Ind. 323; *Holt v. Holt*, 42 Ark. 495; *Dow v. Dow*, 38 N. H. 188. The only question submitted being that of liability, the form of action is not considered. Judgment for the plaintiff. All concur.

(30 N. J. L. 377)

VAN AKEN v. TICE.

(Supreme Court of New Jersey. June 17, 1897.)

MORTGAGES—BONDS—JUDGMENTS—PREMATURITY—WAIVER.

1. The protection accorded to a debtor who has given a bond and mortgage for the same debt (2 Gen. St. p. 2112, § 47), extends to a subsequent bond given for the identical debt, and is not waived by giving with such bond a warrant to confess judgment. A judgment entered upon such bond before the foreclosure of the mortgage will be set aside.

2. The protection of the statute may be waived by the obligor; but the giving of a warrant to confess judgment upon any instrument securing the identical debt is not per se a waiver; it is merely an element in an issue of fact.

3. The time of the "giving" of the securities for the same debt is the test made by the statute, not the time of bringing suit or of obtaining judgment thereon, and the character thus acquired cannot be disturbed by the sole act of the creditor. Only an act imputable in law to the obligor can have that effect.

4. A creditor took a bond and warrant to confess judgment for the same debt for which he at the time held his debtor's bond and mortgage. He then tore the seals off the latter instrument for the purpose of canceling it, and caused judgment to be entered by virtue of the warrant of attorney. *Held*, that the judgment was illegal, and must be set aside.

(Syllabus by the Court.)

Judgment in favor of Alexander G. Van Aken against Josiah Tice was entered upon a bond with warrant to confess judgment, and defendant sued out a rule to show cause why the same should not be set aside. Judgment vacated.

On June 9, 1896, the defendant, Tice, executed a real-estate mortgage to Van Aken to secure the payment of two promissory notes amounting to the sum of \$1,400. A bond accompanied this mortgage. On the 23d of July, 1896, a bond with warrant of attorney to confess judgment was delivered by Tice to Van Aken. This bond was conditioned for the payment of \$1,460, which is the same debt as that secured by the mortgage, with interest added. On August 12, 1896, Van Aken, by virtue of the warrant of attorney, caused judgment to be entered in this bond. No suit had been brought to foreclose the mortgage. The defendant claims that this judgment was prematurely entered. 2 Gen. St. p. 2112, § 47.

The statutory provision is "that in all cases where a bond and mortgage has or may hereafter be given for the same debt, all proceedings to collect said debt shall be, first, to foreclose the mortgage."

Argued February term, 1897, before GUMMERE and GARRISON, JJ.

Freemann Woodbridge, for the rule. George Berdine, opposed.

GARRISON, J. (after stating the facts). This application raises a question of fact only. The law is authoritatively settled for this court by the cases of *Hellyer v. Baldwin*, 53 N. J. Law, 141, 20 Atl. 1080, and

Holmes v. Railway Co., 57 N. J. Law, 16, 29 Atl. 419.

The propositions affirmed by the former decision are:

(1) That an identical debt, by force of the statute, is not ripe for suit otherwise than by the foreclosure of the mortgage, until after the proceeds of the real-estate security have been applied in payment of such debt.

(2) That the protection of the statute may be waived by the obligor.

(3) That the giving of a warrant empowering an attorney to confess judgment for the identical debt is not such a waiver.

The bond and warrant in the case to which these doctrines were applied accompanied the mortgage, but the terms of the statute make the identity of the debt the test. This generality of application is insisted upon in the opinion delivered in the later of the cases above cited. "The statute," says Mr. Justice Van Syckel, "is comprehensive. It, in terms, applies to all cases. It is imperative that all proceedings to collect the debt shall be, first, to foreclose the mortgage securing it." As the question then before this court was a suit upon overdue coupons for interest on a debt secured by a trustee mortgage given by a railway corporation, the far-reaching effect of this language will be perceived.

The law being thus established, the obligee places his right to this judgment wholly upon the ground that he is not within the statute; in fine, that there was no mortgage at the time this judgment was entered.

The question whether an obligor might not give, as additional security, a bond and warrant, and waive his rights under the statute, is settled affirmatively as to the law, but is now before us upon the facts.

George Berdine, Esq., an intelligent counselor at law, who conducted the entire transaction from the beginning, and who took for Van Aken the bond in question, testifies for the obligee in this language:

"Deponent says of his own knowledge that the said bond and warrant of attorney was not an additional security for the bond and mortgage, but the truth to be that the said bond and mortgage was surrendered, and judgment taken for the debt, and both parties to the transaction so understood it." Tice, the obligor, does not question the former of these declarations, but joins issue upon the second, viz. that the mortgage was ever surrendered. Tice had a different notion of the transaction from either of these, but, as it does not enter into the issue, it should not be detailed. The reason why the same transaction was so differently viewed arose, doubtless, from the circumstance that the parties were dealing amicably, and that there was but one legal counsel, and he a friend of each, who advised them both, and conducted the affair for them until a rupture came, when he became distinctively the representative of the obligee. From this it came about that the attorney acted often

from a standpoint of his own, and that at times one or both of the real parties were in ignorance of his purposes, and even of his actions, and hence in no way bound by inferences to be drawn from them. I say this to avoid even the semblance of imputation of anything like unfairness or double dealing to the counsel in the case.

The issue of fact framed and presented by counsel who thus conducted the case is whether there was any mortgage security for the identical debt at the time this judgment was confessed. In support of the contention that the mortgage had been surrendered, this state of facts appears in proof, viz.: That as attorney for Van Aken, Mr. Berdine secured the bond and warrant from Tice, and accepted it for Van Aken, and that he got from Van Aken the original bond and mortgage, and as attorney for Van Aken tore the seals off the mortgage, and still had it in his possession at the time of the taking of the testimony under this rule. The entire absence of Tice from this transaction renders it difficult to see how any inference or imputation affecting him can arise out of the premises. The legal absence of Van Aken, however, is quite as noticeable, for he specifically testifies that after the giving of the second bond, and after the entry of judgment upon it by virtue of proceedings in the supreme court, he had this conversation with the counsel: "I asked Mr. Berdine if it was necessary then to have the bond and mortgage recorded, and he explained to me that the proceedings at Trenton were equivalent to record of the bond and mortgage." This is hardly the language of a mortgagee who has surrendered his security to the mortgagor. The next question and answer, however, completely dispose of the fact of a surrender:

"Q. Did you deliver the bond and mortgage to Mr. Berdine before or after this explanation that the record of a confessed judgment was equivalent to the record of the mortgage?"

"A. Afterwards."

"Q. How long afterwards?"

"A. It may have been within a few days or several weeks."

Thus, by the admission of the obligee, he is relying upon a purely constructive surrender of a mortgage inferred from a transaction from which the mortgagor was actually absent, and the mortgagee legally so, with respect to an instrument that had not been delivered to the sole party to the transaction until after the entry of the judgment claimed to be invalidated by its surrender.

Upon the plaintiff's own case, the only issue he raises must be decided against him.

I may add that there is another view of the undisputed testimony that is fatal to the plaintiff's position. The established fact is that at the time the second bond was given the mortgage for the same debt was in existence, uncanceled, and in the possession of

the mortgagee. The time of the "giving" is the test made by the statute, not the time of bringing suit or of obtaining judgment upon the bond. This character, once acquired by the instruments that have been given for the same debt, will not be disturbed by the mutilation of the real-estate mortgage, or by any other sole act of the creditor the effect of which is to avoid the statute. To accomplish this result, there must be some act of the obligor, or that is legally imputable to him. In the case in hand none such is shown.

The judgment is set aside, with costs.

(60 N. J. L. 365)

STATE (COWEN, Prosecutor) v. BOROUGH OF WILDWOOD.

STATE (SIMMERMAN, Prosecutor) v. SAME.

(Supreme Court of New Jersey. June 25, 1897.)

MUNICIPAL CONTRACT—VALIDITY—CONSTITUTIONAL LAW—ORDINANCE.

1. Section 92 of the borough act of 1897 is not applicable to a case in which the contract was awarded before the ordinance providing for it went into effect.

2. A municipal contract will not be set aside on certiorari unless the contracting parties are brought into court.

3. Section 14 of the borough act of 1878 (1 Gen. St. p. 182) requires that an ordinance passed by the borough council should be the same in substance as that submitted in writing at a previous regular meeting.

(Syllabus by the Court.)

Certiorari by the state, at the prosecution of William D. Cowen and Charles H. Simmerman, against the borough of Wildwood, to review an ordinance. Ordinance set aside.

Argued June term, 1897, before LUDLOW, COLLINS, and DIXON, JJ.

Morgan Hand, for prosecutors. D. G. Pancoast, for defendant.

DIXON, J. The motion to dismiss these writs of certiorari because they were allowed after the contract for the improvement was awarded, in supposed violation of section 92 of the borough act of 1897, should not prevail, for the reason that the contract was awarded before the ordinance which provided for the making of such a contract went into effect. To apply that section according to its terms to the case in hand would result in a mere denial of the constitutional remedy. The prosecutors are not entitled to attack the contract which the writ directs the defendant to send up, because the contractors, Messrs. Govern and Hannegan, have not been brought into court, and as to the contract the prosecution should be dismissed. The ordinance brought up was illegally adopted, having been altered in substance at the very meeting at which it was passed, in contravention of section 14 of the borough act of 1878 (1 Gen. St. p. 182), which requires that ordinances should be submitted in writing at a regular meeting of the council, and acted upon at a subsequent meeting. The

ordinance must therefore be set aside. *Ackerman v. Town of Bergen*, 33 N. J. Law, 39; *Gregory v. Jersey City*, 34 N. J. Law, 429; *People's Gas-Light Co. v. Jersey City*, 46 N. J. Law, 297. The prosecutors having failed as to the contract, no costs will be allowed.

(56 N. J. E. 41)

ROSS et al. v. AMERICAN EMPLOYERS' LIABILITY INS. CO.

(Court of Chancery of New Jersey. July 6, 1897.)

INSURANCE—EMPLOYERS' AND CARRIERS' LIABILITY—POLICIES—LIABILITY OF INSURER—INSOLVENCY—CLAIMS—ATTORNEY'S FEES.

1. Under policies issued to employers and railroad companies, insuring them against damages with which they might be "legally charged" by reason of accident to employes, or to persons or property while being transported, the liability of the insurer arose on the happening of the injury, and not at the time judgment was recovered against the insured for such injury.

2. Policies issued to employers and railroad companies insuring them against accidents to employes and to persons and property transported, provided that, if legal proceedings were taken against the insured to enforce a claim for damages, the insurance company should have the conduct and control of defending against the same, with the right to compromise and take appeals, the company assuming all costs and expenses. *Held*, that under such contract, and independent of it, the reasonable charges of attorneys in defending actions against persons injured for accidents which might result in liability of the company were proper claims against it for allowance by a receiver, and this though the services were rendered under a retainer by the company before the receiver was appointed.

Bill by P. Sanford Ross and others against the American Employers' Liability Insurance Company for appointment of a receiver. Heard on application of the receiver for instructions as to payment of dividends.

R. V. Lindabury, pro se. Carroll Robbins, for Virginia policy holders. Hamilton Wallis, for one class of policy holders. William H. Corbin, for another class. William D. Edwards and Mr. Proctor, for certain claimants.

PITNEY, V. C. This is an application upon petition by the receiver of the insolvent corporation defendant, upon notice to all the creditors, for instructions in the matter of paying a dividend, as to what creditors shall share in it. All the creditors had notice of the application, and many of them appeared by counsel. Three questions were presented:

1. The insolvent corporation issued several kinds or classes of policies of insurance. One class of insurance was by a policy called an "Employers' Liability Policy" to employers, insuring against their liability for accidents happening to employes. In this policy the undertaking is expressed in the following language: "That said company will pay to the insured all damages with which the insured may be legally charged under the common law or any statute (not exceeding the amounts hereinafter limited) for or by reason of any accidental injuries, fatal or otherwise, happen-

ing to any employé or employés of the insured," etc. Another policy issued by the company is called a "Railroad Liability Policy," and was issued to railroads, in which the covenant is: "That said company will pay to the insured, or their legal representatives, all damages with which the insured may be legally charged, or which the insured may be required to pay (not exceeding the amounts hereinafter limited, for or by reason of any liability on account of injuries inflicted upon the person or property of any person or persons whomsoever while traveling on the railroad of the insured," etc. Another class of policies was issued to owners of steam boilers, and another to owners of elevators, for injuries occurring in their operation. But no question arises under either. The first question arises under the "employers' liability" policies and the "railroad liability" policies. In these policies provision is made for the service of notice by the insured upon the insurer of claims for damages for accidents, and an opportunity given to the insurer to defend the same. Two classes of claims have been audited and adjusted by the receiver: First, those in which the accident happened, claim made, and judgment recovered against the insured before the decree of insolvency; second, those in which the accident happened before the decree of insolvency, but in which the claim was made and allowed, or judgment recovered on it, after the decree of insolvency. It is urged on behalf of the first class that by the true construction of the policy it should have priority, and be paid out of the assets of the insolvent corporation before any of the other claims are paid. The argument in support of this is as follows: That by the decree of insolvency all liability by the insolvent company as insurer from that time on ceases, and the assets of the company must be divided in accordance with the doctrine of *Vanatta v. Insurance Co.*, 31 N. J. Eq. 23; s. c., sub nom. *Mayer v. Attorney General*, 32 N. J. Eq. 815; and *Duryee v. System Co.*, 19 N. J. Law J. 18; on appeal, sub nom. *Gray v. Reynolds* (N. J. Err. & App.) 37 Atl. 461. The ground taken is that the person injured is not insured, but that the person liable for the injury is insured, and that the liability of the insurer to the insured arises only after the insured is "legally charged" (in the language of the covenant above quoted) with liability on account of the accident; or, as put by the brief of counsel: "In all these cases two things must coexist before any liability arose upon the policy of the defendant corporation: (1) There must have been an injury to some person, and (2) by reason of such injury the insured must have been legally charged with or required to pay something." Or, in other words, the happening of the accident for which the party insured was ultimately held liable did not fasten any liability on the insurer, but that such liability on the part of the insurer arose entirely out of the recovery of judgment by the

injured party against the insured party, whereby he became "legally charged." I am unable to adopt this doctrine. The vice of the argument in support of it is that it treats the liability of the insured in the matter as depending not upon the intrinsic character of the accident, but entirely upon the question of whether or not a judgment shall be rendered against it thereon; precisely as the question of liability on a policy of life, fire, or marine insurance is dependent entirely upon the actual occurrence,—the death of the party, of the fire, or the actual shipwreck. The recovery of the judgment against the insured by the injured party is not the injury against which the insurer insures him, but it is the liability for the consequences of the accident against which he is insured, and of which liability the judgment is a mere test or mode of proof. In fact, the recovery of the judgment is a mere mode by which the insured proves to the insurer that the intrinsic character of the accident was such that he was liable for the consequences of it. In this respect the judgment resembles the proof of loss to be furnished to an ordinary insurer against fire or shipwreck before action brought, or proof of death in case of life insurance. These are usually prerequisites to liability to action, but do not constitute the cause of action. And in the case of a judgment against the party insured under one of these policies for damages for the result of an accident, the liability, though legally fixed at that time, relates back to the accident itself. In contemplation of law the insured either was or was not, from the first, liable for the consequence of the accident; and the presumption is that the result of an investigation of the facts was never doubtful from the first, and always sure to result according to the actual fact. So that the recovery of the judgment cannot be held or treated in the law as a contingency which may or may not happen, but a mere judicial ascertainment of the intrinsic character of the occurrence which determined the liability of the insured. Again, another office of the judgment is to ascertain, by the only legal mode, the extent of the damages; precisely as the extent of the damages in case of a fire or shipwreck is to be ascertained by an inquiry undertaken before payment. A question something like this arose in *Duryee v. System Co.*, 19 N. J. Law J. 18, and was decided in favor of the view I have adopted; and that part of the decree advised by the learned vice chancellor in that case was affirmed on appeal. *Gray v. Reynolds*, 37 Atl. 461. This very question arose, and was carefully considered and decided, in the case of *Boston & A. R. Co. v. Mercantile Trust & Deposit Co.*, by the court of appeals of Maryland, as reported in 34 Atl. 778. That was a case precisely like this, of an insolvent company, which seems to have been engaged in precisely the same business as was the insolvent company here. The court in that case held that the insolvency of the company canceled all outstanding

policies of insurance for the future; relying upon the case of *Mayer v. Attorney General*, supra, as illustrated in *Doane v. Insurance Co.*, 43 N. J. Eq. 522, 11 Atl. 739. The contest there was between two classes of claims, precisely as it is here. The language of the policies there is not literally quoted, but it appears to have been very much, if not precisely, the same as the language in the policies in this case above quoted. The trial court excluded the second class of claims here under consideration, but the court of appeals, consisting of eight judges, unanimously reversed the decision in that respect, and held that both classes were entitled to participate equally in the assets of the insolvent corporation. I refer to the reasoning of the court on pages 783, 784, of 34 Atl. This result is the only one which can be relied upon to do anything like justice between the parties. The rule contended for by the counsel who argued so ably in favor of the first class of claimants would result in making an unfair distinction between cases in which there is no intrinsic difference. Two accidents might happen on the same day, and a judgment in one be recovered very shortly, and before insolvency, and a judgment in the other might be delayed by litigation for months and years, and until after insolvency, and yet there might be no difference in the intrinsic merits of either.

2. The next question presented and discussed was as to certain claims presented by several firms of lawyers in different states of the Union, audited and adjusted by the learned receiver, for services in defending actions against persons insured for accidents which might result in a liability covered by a policy issued by the insolvent company. One of the terms of both classes of policies is this: "If any legal proceedings are taken against the insured by any person or persons, or by the legal representatives of any person or persons, to enforce a claim or claims for damages against said insured, the company shall have the absolute conduct and control of defending against such proceedings, in the name and on behalf of the insured, and shall have the sole and exclusive control of such defense, with the right to compromise the same, and to take such appeals or other proceedings therein as it shall deem best, the company assuming all costs and expenses of such defense and proceedings. But if the company shall offer to pay the insured the full amount for which it is liable in respect to such claim or claims, then it shall not be bound to defend in such proceedings, nor be liable for any costs or expenses which may be incurred therein." Besides this provision, there are found among the conditions printed on the back of the policy certain clauses regulating the exercise of the right of defense by the insurer and also by the insured, which it is not necessary to set out at length. Suffice it to say that the learned receiver was of the opinion that these clauses, in effect, cast upon the insolvent company the duty of defend-

ing actions brought against the insured whenever such defense was at all warranted; and that in case of a failure of the insurer to make such defense the insured might make it at his own expense, and charge against the insurer, under the policy, the reasonable cost thereof. Most of the claims of lawyers audited and adjusted by the receiver were for services rendered under the retainer of the insolvent corporation before it went into the hands of the receiver, in defending such actions. The receiver, in adjusting those claims, has made abatements in several instances by reason of the fact that the damages recovered were much beyond the insurance, and hence the defense was as much for the benefit of the insured as for the benefit of the insurer. A small portion of the claims, as I understand, is for services rendered in other matters besides the mere defense of actions of the kind above referred to. I think that the circumstance that the lawyers in such cases acted upon the retainer of the insolvent company, and looked to it primarily for pay, does not vary the case, so far as the insolvent company is concerned, but that their claims should be allowed precisely as if they had been paid by the insured, and that they should be put on the same basis as the policy holders. The services were all rendered in defense of the general fund, and were for the benefit of the policy holders. The presumption is—and the learned receiver, from a very careful and elaborate examination of all their claims, is of the opinion—that they are all meritorious in that respect. At the argument the idea was enforced with great vigor that they are strictly within the limits of the terms of the trust upon which the securities which constitute the bulk of the assets of the company were deposited with the commissioner of banking and insurance of this state. The trust was that the securities were deposited "for the protection and benefit of all the policy holders." And it was argued that defending the fund against claims, the allowance of which would deplete it, was strictly within the terms of that trust. And I am not sure that the position is not well taken. Under the policies it was not only the contractual duty of the corporation to defend those claims in all cases where there was reasonable ground for such defense, but it was also their duty, independent of that contract, to so defend; and I am inclined to think that the counsel fees, within reasonable limits, must be considered as a sort of salvage necessarily expended for the benefit of the fund.

3. The third question arises in this wise: The statute of the state of Virginia requires any company like the present insolvent company doing business in that state to deposit a certain amount of securities with the treasurer thereof, for the benefit of all policy holders residing in that state, and the insolvent company under that statute deposited about \$10,000 worth of securities with the Virginia state treasurer. About \$12,500 of claims of

Virginia policy holders were presented against this fund in the Virginia courts, and they have been paid 46 per cent. of their claims thereout. The fund is not yet exhausted, and there may be something further coming to them from it. These Virginia policy holders have proven their demands here, and claim a dividend on the balance of their claims, after crediting the amount recovered from the special Virginia deposit. The question is whether they are entitled to any dividend upon their claims until the other policy holders have been paid a dividend equal to the amount the Virginia claimants have received from this special Virginia fund. The question raised is a nice one, and not without its difficulties. The actual deficiency which will arise upon the Virginia claims after the Virginia assets have been entirely exhausted is not yet determined. The receiver does not propose to make a dividend covering all the assets in his hands. In fact, he has only realized on a part of the assets. The others are still in specie, and perfectly good, and are drawing interest. For these reasons I think it best not to express any opinion at this time upon this question, but will advise a dividend of 33½ per cent. upon all the claims except those of Virginia residents, of policy holders, and claims of lawyers for services in defending suits against policy holders out of the funds received from the securities lodged with the commissioner of banking and insurance. A state of things similar to that in Virginia exists in Alabama, and is subject to the same order.

(54 N. J. E. 236)

DRAYTON v. DRAYTON.

(Court of Chancery of New Jersey. Feb. Term, 1896.)

DIVORCE—DESERTION—COLLUSION—CUSTODY OF CHILDREN.

1. Belief that a wife is guilty of adultery, though justified by gravely suspicious circumstances, is no defense to her suit for divorce a vinculo matrimonii, on the ground of his willful, continued, and obstinate desertion, where adultery is not proved.

2. The mere institution of a suit for divorce on the ground of adultery, brought by a husband after he has deserted a wife for the statutory period, is no defense to her suit for divorce on the ground of such desertion.

3. A wife sued for divorce on the ground of desertion, without demanding the custody of her children. She expected that her husband would charge her with adultery, as he had previously filed a petition for divorce on that ground, but his answer merely denied the desertion, though one averment tended to insinuate the charge of adultery, and on the trial he offered no proof, but submitted the case on the wife's testimony. She testified that there was no agreement between her and her husband respecting any of the proceedings connected with the suit; that in the surrogate's court she expected to be appointed guardian of her two youngest children; that, on advice of counsel, she decided not to have the custody of the children determined until after the divorce case was decided; and that she had not agreed that he have the custody of any of the children. *Held*, the suit was not collusive.

4. The facts that a husband and wife both

desire a divorce, and that she failed to ask for the custody of the children, hoping to cause him not to make a defense that he would otherwise make, do not prove collusion, which does not exist without an agreement or understanding of the parties.

Bill by Mrs. Drayton against her husband for divorce. Divorce granted on the petition, answer, and proofs.

Richard V. Lindabury and Herbert A. Shipman, for petitioner. Alvah A. Clark, for respondent.

McGILL, Ch. The petitioners seeks a divorce a vinculo matrimonii, because of her husband's willful, continued, and obstinate desertion of her for upward of two years prior to the filing of her petition. The proofs disclose that she and the defendant were married in October, 1879, in the city of New York, and thereafter resided in that city until the year 1886, when they removed to a dwelling which the defendant had erected in Bernards township, in Somerset county, in which county they have retained their residence hitherto. One evening in October, 1891, upon the petitioner's return from New York City, her husband, in violent temper, accused her of infidelity to her marriage vows through criminal intimacy with one B., a neighbor. Distressed by the indignity of the accusation, the next morning the petitioner went to her father's house, at Rhinebeck on the Hudson, and remained away from her husband until in November. Through the intervention of her family, he and she unwillingly became nominally reunited, and, with their four children, went to England. There they secured furnished rooms in London, and a house at Wimbledon, at which places—sometimes at one, and sometimes at the other—they lived; but the defendant, adhering to the conviction that his wife had been unfaithful to him, refused to occupy the same room with her, or to accompany her wherever she went, either in the pursuit of pleasure, of business, or in the performance of social duties, and would not remain with her when, for any reason, they happened to be left alone with each other. She testifies that his conduct made her life unhappy and miserable; that she had no intimate friends in London to whom she could confide her troubles; that she needed some one with whom she might talk, and who would secure for her legal advice, for she made up her mind that it was necessary to her happiness that she should have a legal separation from her husband; that, consequently, she telegraphed to America, to B., to come to London; that at that time her father was in France, but, as he had evinced a strong desire to avoid public scandal through her domestic infelicity, she thought he would disapprove of a separation, and refuse to aid her; that B. promptly answered her summons, and, upon reaching his hotel in London, telegraphed her, announcing his

arrival, and she immediately visited him at his hotel, and there told him of her distress, and of her desire for legal advice; that B. was acquainted with an American lawyer who was then in London, and later arranged for an interview between her and the lawyer, and at his (B.'s) hotel, in the day, at noon; that she went to the hotel at the appointed time, and there met B., with whom, because of the lawyer's delay, she was obliged to wait; that they waited in a public parlor for a time, and then B. proposed that they should have lunch, and upon her assenting, and the lunch being prepared, they went from the parlor to another room, in which they were attended by a waiter; that, while they were at lunch, her husband entered with two men, who evidently were detectives, or were acting in that capacity, and, after calling upon them to identify her and B., with them departed; that later the lawyer came, and, after conference with him, she went to the rooms which she and her husband had retained in London; that she did not see her husband again, but it was arranged between her lawyer and his lawyer that she should go to Wimbledon, where her children were, and bid them good by; that, after staying at Wimbledon two or three days with her children (her husband then being in France), she went to Paris, for the purpose of seeing her father, but, for some undisclosed reason, failed to call upon him, and returned to London, and from that place wrote to him; that thereafter, by her father's direction, she returned to Paris, and saw him, and was persuaded by him, for the sake of her children and herself, to seek a reconciliation with her husband; and that thereupon she exerted every effort to bring about such a reconciliation, and to induce her husband to permit her to return to him. The proofs abundantly satisfy me that these efforts were made in good faith, and that every overture on her part was rejected by the defendant, who steadfastly insisted that she had been unfaithful to him and her marriage vows. The precise date of the separation of the husband from his wife is not in proof, but it is clear that it was prior to the 1st of March, 1892; so that, when the petition in this suit was filed, more than two years had elapsed.

The attitude of the defendant satisfies me that his separation from his wife has been willful, continued, and obstinate. The question is, was it justifiable? The records of this court show that on the 27th of June, 1894, Mr. Drayton filed his bill for an absolute divorce from his wife, upon allegations of adultery upon her part with B., and that in October of the same year Mrs. Drayton answered that bill, denying the truth of its allegations, and that from that time hitherto the defendant has not produced his proofs and brought his cause to hearing. By his answer in the present suit, he does not reiterate his charges against his wife in defense to her action, but contents himself with a denial

that his separation from her has been willful, continued, and obstinate, averring that his wife was fully advised of his movements and his reasons therefor. After the petitioner's proofs had been closed, the defendant declared that he would not offer any evidence upon his part. It clearly appears that the defendant entertained grave suspicions, which, I think, convinced him that his wife had been disloyal to her marriage vows and duty; and when it is considered that the wife, rendered unhappy by her husband's suspicions of her adultery with B., selected that person, in preference to her father and all other kindred and friends, as her supporter in the emergency that confronted her, and summoned him by telegraph from America to England, and that he promptly obeyed that summons, and at his hotel, to which she went, counseled with her in dealing with her husband, with a view to a separation from him, it is impossible to escape the conviction that the husband's grave suspicions were not destitute of foundation, in questionable circumstances at least. But I fail to find and my attention has not been directed to any adjudication which holds that, under a statute similar to ours, a husband may with impunity be guilty of desertion of his wife merely because he believes her, even under gravely suspicious circumstances, to have been guilty of adultery.

In a Massachusetts case, strong *prima facie* evidence of a husband's adultery appears to have been held sufficient to defeat his application for divorce for the wife's desertion, but there the statute provided that the desertion was to be without fault on his part. *Clapp v. Clapp*, 97 Mass. 531. The generally accepted, and, I think, the true, doctrine, is that continued desertion, as contemplated by such a statute as ours, is justified only when it is shown by clear and satisfactory proof that the deserting party has been so offended against as to authorize, at his instance, a decree for divorce or judicial separation. *Black v. Black*, 30 N. J. Eq. 221; *Moores v. Moores*, 16 N. J. Eq. 275; *Weigand v. Weigand*, 41 N. J. Eq. 209, 3 Atl. 690; 1 Bish. Mar., Div. & Sep. §§ 1217, 1742; *Browne*, Div. & Alim. 152, 159; *Stew. Mar. & Div.* § 257. In *Grove's Appeal*, 37 Pa. St. 443, 447, Judge Strong said: "We have adopted the same principle which rules in the English ecclesiastical courts. In that country, where cohabitation is suspended by either the husband or wife, of his or her own motion, without a sufficient reason, a suit for a restitution of conjugal rights may be maintained by the injured party. Nothing amounts to a bar against such a suit except such facts as would entitle the defendant to a divorce. * * * The interests of society, the happiness of the parties, and the welfare of the families, demand such a rule. Separation is not to be tolerated for light causes." See, also, *Turton v. Turton*, 3 Hagg. Ecc. 338, 350; *Sopwith v. Sopwith*, 2 Swab. & T. 160, 164, 30 Law J. Prob. Mat. & Adm.

131. If, then, the defendant would rely upon his wife's adultery as a defense against her charge of desertion, he must prove it. There is no evidence that it was the intention of the defendant, at the time he left the petitioner, to institute a suit for divorce on the ground of her adultery. He did, in fact, commence such a suit in June, 1894, a time so remote from the commencement of the separation that more than the period prescribed by law within which desertion must continue to constitute a cause for divorce had intervened, and thereby a cause for divorce had then become available to her; and, even after the lapse of that time, his suit was not prosecuted with diligence. If his suit had been brought promptly and in good faith after the separation, the time consumed by it, during which the law does not require him to cohabit with his wife, would not be computed as part of the statutory period necessary to the desertion which will authorize a decree for divorce (1 Bish. Mar., Div. & Sep. § 1757); but its mere institution after such statutory period of desertion was complete (it matters not whether in good faith or otherwise) will not avail as a defense to a suit by the wife for divorce on the ground of desertion (Id. § 1758). It was his duty to act expeditiously, so that his wife should not remain longer than necessity required, if guilty, unconvicted, and, if innocent, under the shadow of a scandalous and disgraceful charge.

The remaining consideration which suggests itself is whether the present suit is collusive. I do not find enough in the case to warrant me in so holding. The apparent confidence with which the defendant originally made the accusations against his wife, coupled with his surprising failure, by way of defense, to efficiently reaffirm his charges in his answer, his present submission of the case upon the testimony produced by the petitioner alone, and the failure of the petitioner to demand the custody of her children, engender a strong apprehension of the existence of collusion in this suit, which has caused me to closely scrutinize the testimony. I find that, after the announcement that the defendant would not offer proofs, the counsel for the petitioner, evidently anticipating the question which the defendant's determination would arouse in my mind, recalled the petitioner to the witness stand, where, in explicit terms, she stated that her suit was not brought, and the defendant's defense on the ground of adultery was not withheld, in pursuance of any agreement or collusion between her and her husband, or between any others acting in behalf of them or either of them, and testified that it was her expectation, until her husband's answer was filed, that he would defend the suit on the ground of her adultery, and that one object of her suit was to force that issue to immediate trial, and then denied that she had been unfaithful to her marriage obligation. After the case was submitted to me, out of abundant caution against the deception of a collusive

suit, I caused the petitioner to be again and further examined as follows, upon interrogatories under commission sent to England, where she was then sojourning: "(1) Was there any arrangement, agreement, or understanding between you and your husband, or between any persons acting in behalf of you and your husband, or either of you, or in behalf of your father's family, or any member or members of it, in pursuance of which your suit was commenced or prosecuted, or in pursuance of which your husband refrained from defending against your suit on the ground of your alleged adultery? Answer: There was not. (2) Have you had any intimation of the existence of any such arrangement or agreement? If yes, state fully what that intimation was. Answer: I have not. (3) Read over with care the testimony which you gave in this cause, on the 27th of May, 1895, and state whether you are aware of any suppression or evasion, either in or by the questions put, or in or by the answers given, or by the omission of questions or answers, whereby some agreement, arrangement, or understanding of the character indicated by the first above question is not revealed to the court. If yes, state what is suppressed or evaded. Answer: I have read over my testimony, given on the 27th of May, 1895, and answer that I am not aware of any suppression or evasion, either in or by the questions put, or in or by the answers given, or by reason of the omission of questions or answers, whereby some agreement, arrangement, or understanding of the character indicated by the first above question is not revealed to the court. (4) Why do you not ask for the custody of your children, or the custody of one or more of them? Answer: A proceeding was commenced in the surrogate's court of the county of New York, on the 12th of June, 1894, wherein I am the petitioner, and in which I ask to be appointed guardian of my two youngest children, and to have such an allowance as the surrogate should determine to be a proper one for their support, made payable to me as such guardian. This proceeding has been adjourned from time to time, pending the final accounting of the trustees under my father's will, which will be had in March, 1896. My father left a fund of \$850,000 in the hands of New York trustees for the support of my children. It was for an allowance out of that fund that I applied to the surrogate of New York, but I was influenced quite as much by this: I expected that my suit would be defended on the ground of infidelity. My lawyers told me that, even if I obtained a divorce on the ground of desertion, I might not be awarded the custody of my children, as other considerations would control that question. They also told me that the question of who should have the control of the children could be raised after the divorce proceedings were ended, as well as in such proceedings. I thought it best, on this account, independent of the New York proceedings, to tender in my divorce suit

the single question of my guilt or innocence of the charges my husband was making against me, and leave the question of custody of our children to be determined afterwards. (5) Have you in any manner, directly or indirectly, assented to your husband's having and retaining the custody of your children? If so, state with full particulars what that assent was, and the facts and circumstances which led to it. Answer: I have not."

The reason why the defendant did not urge the defense of adultery is not apparent. It may be that he was satisfied that he could not prove it, or it may possibly be that, in view of the probable success of her suit, and the attainment of an absolute divorce in it, if he did not successfully defend on the ground of her adultery, to avoid the scandal which the proof of such a defense would occasion, he denied the desertion merely. It is not collusion for both husband and wife to wish their matrimonial relations dissolved. 2 Bish. Mar., Div. & Sep. § 256. And it may be that the petitioner considered that, as her husband desired a divorce, her failure to demand the custody of her children might induce him to withhold the defense which she anticipated, and avoid for both of them an acrimonious and mortifying litigation, whatever might be its result. Action upon such consideration would not be collusion. Collusion does not exist without an agreement or understanding between the parties to the suit. It is noted that in his answer, after denying the desertion charged, the defendant adds the significant language that his wife "was fully advised of his movements and his reasons therefor," which appears to me to be the covert reiteration of his charges against his wife, sufficient to mortify and insult her, without putting him to the necessity of proving his charges, and tends to show that when he answered, at least, he did not act collusively with her, for in that event it is not probable that he would have made this useless and unnecessary averment. I do not find anything in the case to justify me in refusing the decree sought. The divorce will be granted.

(54 N. J. E. 306)

DODSON et al. v. SEVERS et al.¹

(Court of Chancery of New Jersey. Feb. Term, 1896.)

**FRAUDULENT CONVEYANCES—CONSIDERATION—
PARENT AND CHILD—SERVICES.**

The fact that a deed was executed and delivered to a grandchild, who had rendered services to the grantor both before and after becoming of age, does not raise a presumption of a valid consideration for the deed, as against creditors of the grantor, where the relation of parent and child existed between grantor and grantee.

Bill by Truman M. Dodson and another, surviving partners of Weston, Dodson & Co., against James Severs and another, surviving executors of the will of James Taylor, deceased, and others. Decree for complainants.

¹ Affirmed in 33 Atl. 388.

BIRD, V. C. The testimony in this case shows that the relation of parent and child existed between the grantor and grantee. There is an utter absence of any proof that the grantee was ever emancipated. It is very manifest that the relation, which existed from the time the child was 1 year of age until she became 21, continued unbroken till her death. This being the case, the question is, was her grandfather or grantor under any obligations to the grandchild, his grantee, at the time of the execution of the deed; and if not, then was the deed, which passed the title to the grantee, valid as to the grantor's existing creditors? Not only is there nothing to show any emancipation or change of relation, but there is nothing to show any contract or understanding that the grantee was working for wages, or with the expectation of compensation of any kind. As I understand the authorities, they are very clear to the effect that, under such circumstances, no legal or equitable claim exists. In *Ridgway v. English's Ex'rs*, 22 N. J. Law, 409, the action was brought by a married daughter and her husband against the executors of her father to recover for services which were alleged to have been performed for her father in his lifetime, and after the daughter arrived at her majority. The court said: "When a daughter, after arriving of age, continues to reside in her father's family, supported by him, and performing useful services in return, the law will not, except under special circumstances, imply a promise on the part of the father to pay for such services. If she demand pay, it is incumbent on her to show affirmatively that compensation was to be made, and that it was so expected by both parties, or that the services were performed under such circumstances as that the expectation was reasonable and proper." In *Uplike v. Titus*, 13 N. J. Eq. 151, the law was thus stated: "The law implies no promise to pay for services rendered by members of a family to each other, whether by parents, children, or other relatives. The rule is well settled that a mere moral obligation constitutes no legal consideration for a contract." See, also, *Prickett v. Prickett's Adm'rs*, 20 N. J. Eq. 478. This case shows that there must be either an agreement binding between the parties, or such circumstances as would justify the court in coming to the conclusion that compensation was intended on the one side, and expected on the other, without which the services would not have been rendered. But, in effect, it has been maintained that this conveyance can be supported even as against creditors of the grantor, because, from all of the circumstances of the case, the grantor was under obligations to make such conveyance. In other words, the services having been rendered by the grantee after as well as before she became of age, and the deed having been delivered, the presumption is that it was for such good and valuable consideration as that a court of equity will not feel itself bound to disturb it. This has been the prac-

tice of the court. In *Gardner's Adm'r v. Schooley*, 25 N. J. Eq. 150, it was claimed that services had been rendered to a parent by his daughter. To compensate her, he gave her a mortgage upon his real estate. This court declared the mortgage to be void as to creditors, upon the principles stated in the authorities above cited.

All of these cases, as well as many others, were referred to approvingly in what will doubtless be considered a leading case upon the subject,—*Disbrow v. Durand*, 54 N. J. Law, 343, 24 Atl. 545. The doctrine as previously declared, whenever the question has been presented, was in this case unequivocally pronounced by the chancellor in delivering the opinion for the court of errors and appeals. He said: "Ordinarily, where services were rendered and voluntarily accepted, the law will imply a promise upon the part of the recipient to pay for them; but where the services are rendered by members of a family, living as one household, to each other, there will be no such implication from the mere rendition and acceptance of the services. In order to recover for the services, the plaintiff must affirmatively show either that an express contract for the remuneration existed, or that the circumstances under which the services were rendered were such as exhibit a reasonable and proper expectation that there would be compensation. The reason of this exception to the ordinary rule is that the household family relationship is presumed to abound in reciprocal acts of kindness and good will, which tend to the mutual comfort and convenience of the family, and are gratuitously performed; and, where that relationship appears, the ordinary implication of a promise to pay for services does not arise, because the presumption which supports such implication is nullified by the presumption that, between members of a household, services are gratuitously performed. The proof of the service, and as well of the family relation, leaves the case in equipoise, from which the plaintiff must remove it or fail." He also says: "It rests upon the idea of the mutual independence of those who are members of one immediate family, and such a family may exist though composed of remote relations, and even of persons between whom there is no tie of blood." Hence, whenever or wherever a family or domestic relation exists, whether composed of kindred or not, the presumption is one of mutuality, or of services upon the one hand, and of support upon the other, which presumption will continue until overcome by proof, express or clearly implied, of an agreement or understanding to the contrary.

The answer admits that the grantee "was a daughter of the said James Taylor [who was the grantor], and from her childhood until his death had resided with the said James Taylor as a member of his family, and was supported, maintained, and educated by him." The testimony not only fully sustains this admission, but shows very conclusively that

there was no change of relationship, nor any agreement or understanding whatever between the parties creating any other obligation. Reaching this conclusion, it seems to follow inevitably that the conveyance of Mr. Taylor to his grandchild must be decreed to have been voluntary, and consequently subject to the claims of existing creditors. The learned counsel for the defendants sought to create the impression that this case could be distinguished from the principle promulgated in the case of *Haston v. Castner*, 31 N. J. Eq. 697, with respect to voluntary conveyances; but I am entirely unable to find any foundation which has the slightest appearance of solidity upon which to base any reason for the distinction. I think the law as there expressed has been understood by law courts in New Jersey as being a completely satisfactory exposition of it, and that the members of the bar have almost universally so regarded it. The deed in question should be declared void as to the judgment of the complainants. I will so advise, with costs.

(35 Md. 130)

HARTFORD FIRE INS. CO. OF HARTFORD, CONN., v. KEATING et al.

(Court of Appeals of Maryland. June 23, 1897.)

INSURANCE — CONDITION OF POLICY — PROOFS OF LOSS — WAIVER — AUTHORITY OF AGENT — INSURABLE INTEREST.

1. The interest of a purchaser at a sale or mortgage foreclosure is not, prior to final adjudication by the court, "unconditional and sole," within the requirement of an insurance policy.

2. An insurance agent supplied with policies in blank, and authorized to issue them, and who signs and delivers them to parties desiring insurance, receiving the premiums and accounting for them to the company, is a general agent within his territory in the matter of soliciting and accepting risks and agreeing on the terms of the contract.

3. Where a general agent at the time of issuing a policy knew the facts as to the interest of insured, the company will be estopped to rely on them as a forfeiture, notwithstanding the provisions of the policy that insured's interest shall be unconditional and sole, and that "no * * * representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be indorsed hereon or added hereto."

4. Attorneys of a mortgagee have, as such, an insurable interest in the property, where it has been sold under foreclosure of the mortgage, but part of the purchase price has not been paid, and they have obtained an order of court for a resale at risk of the purchaser.

5. Where the authorized agent of an insurance company, after viewing the premises and examining into the circumstances of the fire and the value of the building, has a conversation with one of the plaintiffs, interested as mortgagees in the insurance, in which he states that the building is a total loss, and that he will send a check payable to them and the owners jointly, this is a recognition of the company's liability, inconsistent with an intention to contest plaintiffs' right of recovery, and constitutes a waiver of formal proofs of loss, if he so intended, and plaintiffs so understood it and acted accordingly.

6. Waiving the condition as to formal proof of loss is at least within the scope of the apparent authority of a special agent of the company sent by it to view the ruins, investigate the loss, and find out as much about it as he could, who,

being consulted with by the local agent, when asked when the policy would be paid, replied authoritatively, and to whom the proofs of loss, when finally made, were turned over, together with the whole matter, for such action as he should see proper in the premises.

Appeal from Baltimore city court.

Action by Thomas J. Keating and another against the Hartford Fire Insurance Company of Hartford, Conn. Judgment for plaintiffs. Defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

G. Morris Bond and E. P. Keech, Jr., for appellant. Rich & Bryan, for appellees.

PAGE, J. This is an action on a policy of insurance issued by the appellant, insuring the property of one Frank W. Draper against loss by fire. The policy was issued to Draper, and on the 2d day of October, 1894, at the request of Draper, by proper indorsement, the loss was made payable to the appellees "as their interest may appear." The property insured was a two-story frame building on a lot situate in the town of Centerville. The whole property, prior to the accrual of Draper's title, had belonged to a Mrs. Sparks, who held a policy of insurance on the house, issued by the appellant. This policy was canceled on the 10th of January, 1893,—the same day on which the policy sued on in this case was issued. In September, 1892, the appellees, as attorneys in a mortgage from Mrs. Sparks to Eliza Wilkinson, sold the lot and improvements to Draper. The sale was reported to the court, and ratified nisi on the 27th of September. Draper complied with the terms of sale by making a cash payment of \$732.55, and executing, with sureties, and delivering to the appellees, two notes, for \$597.76 and \$565.73, respectively, and thereupon entered into the possession of the property. One of the appellees then demanded of Draper that he should insure the house and transfer the policy to them, and it was in pursuance of this that the policy was issued, and the loss afterwards made payable to the appellees as attorneys. It was issued by Frank Keating, who was then the agent of the company, intrusted by it with the possession of blank policies, authorized to sign and issue them, receive the premiums and account for them, and moreover was the company's only agent in Centerville. It is admitted that when the policy was issued he was fully cognizant of the character of Draper's title, the nature of the appellees' interest in the matter, and the understanding between Draper and the appellees under and by which the insurance was applied for. Keating, besides being the agent of the company, was also a clerk in the law office of the appellees, and as such had drawn all the papers connected with the sale of the property, except the order of final ratification, and therefore knew all the facts and circumstances of the case.

In October, 1893, he ceased to be the agent of the company, and Thomas J. Keating, Jr., was appointed in his stead. A small fire having injured the property in January, 1894, the company paid in February the loss on account thereof to Draper. Shortly after this the appellees ascertained that in consequence of a neglect of Frank Keating the policy had not been transferred to them, as it was agreed should be done. Accordingly they took steps to have this effected, and on the 2d October, 1894, the indorsement was made on the policy by Thomas J. Keating, Jr., the agent, and by him on the same day forwarded to the company, who received it on the 5th of October. At that time this agent knew the exact state of Draper's title, and of the interest of the appellees, but did not notify the company further than appeared in the policy and his daily report, neither of which make mention of any incumbrance. Subsequently, Draper having made default in the payment of his notes, the appellees, on the 3d of December, obtained a final order for a resale of the property at his risk; but before a sale was had, on the 5th of January, the building was totally destroyed by fire. Upon this state of facts the appellant contends (1) that Draper's interest was "other than unconditional and sole ownership," and therefore the policy, by its terms, is void; and (2) that the appellees had no insurable interest in the property.

The policy contains the condition that, "if the interest of the insured be other than unconditional and sole ownership," it shall be void, "unless otherwise provided by agreement indorsed" thereon or added thereto. This is a part of the contract of insurance. It is binding on both parties, and must be construed by the same rule as other contracts. "The court must give to the language used its just sense, and search for the precise meaning, and one requisite to give due and fair effect to the contract, without adopting either the rule of a rigid or of an indulgent construction." *Insurance Co. v. Kelly*, 32 Md. 446. In the case just cited this court has stated the general purpose for the insertion of conditions like the one now under consideration in insurance policies. It is there said, "They were doubtless originally directed against wagering policies, and were intended to protect underwriters from paying losses to those who in fact had not sustained them, who really had nothing at hazard, and whose interest, therefore, was that the event should happen." The nature and extent of the interest of the insured are matters largely influential with underwriters in taking or rejecting risks and estimating premiums, and for that reason any condition respecting them in the contract is material, and must be construed so as to effectuate the purposes of the parties. But, while this must be done, the law assumes that the parties understood the words they have used; and therefore, unless there are potential reasons to the contrary, they are bound by the legitimate and usual meaning of the

phrases they employ. Now, it must be observed that it is not title, but interest, that is spoken of in the clause. Title and interest are entirely different things. It was undoubtedly competent for the parties to have contracted as to the title, as was done in *Wine-land v. Insurance Co.*, 53 Md. 283; but in this case they have chosen to limit the provisions of the clause to the condition of the interest, either legal or equitable. The question therefore presented to us now is, was the interest (legal or equitable) of Draper "unconditional and sole"? As to the meaning of these words when used in the present connection, there seems to be a concurrence of authority. To be "unconditional and sole," the interest must be completely vested in the assured, not contingent or conditional, nor for years or life only, nor in common, but of such a nature that the insured must sustain the entire loss if the property is destroyed; and this is so whether the title is legal or equitable. *Insurance Co. v. Dunham*, 117 Pa. St. 475, 12 Atl. 668; *Insurance Co. v. Dougherty*, 102 Pa. St. 572; *Rumsey v. Insurance Co.*, 17 Blatchf. 529, 1 Fed. 396; *Dupreau v. Insurance Co.*, 76 Mich. 615, 43 N. W. 585; *Insurance Co. v. Tyler*, 16 Wend. 396; *Oshkosh Gaslight Co. v. Germania Fire Ins. Co.*, 71 Wis. 455, 37 N. W. 819; *Insurance Co. v. Kelly*, 32 Md. 421; *Insurance Co. v. Beck*, 43 Md. 358; *Insurance Co. v. Weaver*, 70 Md. 540, 17 Atl. 401, and 18 Atl. 1034.

We have been referred to cases where it is held that when the insured is in possession under a contract of purchase, and the legal title has not passed by a conveyance, the ownership is not unconditional until the purchase money has been wholly paid. *Insurance Co. v. Curry*, 13 Bush, 312. But it may be doubted whether such cases are in line with the current of authority. But we are not concerned, however, with that question now; for at the time the policy was issued Draper was not in the position of a purchaser, but that of a bidder only for the property. His offer of purchase had not then been ratified by the court, and until it was the contract was not complete, and his interest in the property was dependent upon the subsequent action of the court. Prior to the final ratification his interest was only an inchoate right. *Lannay v. Wilson*, 30 Md. 561. The effect of final ratification, it is true, was retroactive, so that he became invested with the title from the day of the sale; but at the time the policy was issued his interest was entirely conditional, depending as it did upon the final order of the court.

The appellees, however, insist that the appellant is estopped from setting up this defense, because their agents knew all the facts both at the time the policy was issued and when the indorsement was made to the appellees. The policy was issued through Frank Keating, and, from all the evidence before us, we think he must be regarded, while so acting, as the agent of the company. The proof

shows that he was supplied with policies in blank, was authorized to issue them, signed them, and delivered them to the parties who desired insurance, received the premiums, and accounted for them to the company. Such authority constituted him a general agent of the company, within the territory assigned him, in the matter of soliciting and accepting risks and agreeing upon the terms and contract of insurance. *Insurance Co. v. Ruckman*, 127 Ill. 372, 20 N. E. 77; *Insurance Co. v. Wilkinson*, 13 Wall. 222; 2 Wood, Ins. § 409; *Cone v. Insurance Co.*, 60 N. Y. 619; *Hotchkiss v. Insurance Co.*, 5 Hun, 9. If such an agent has knowledge of the facts at the time he issues the policy, the company will be estopped from relying upon them as a cause of forfeiture. This principle is well sustained by authority. It rests upon considerations of common honesty that an insurer with full knowledge of the facts, or chargeable with such knowledge, shall not enter into a contract of insurance, receive the premiums thereon, and then be permitted to set up those facts to evade the liabilities the contract imposes on him. Nor does the clause providing that "no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be indorsed hereon or added hereto," etc., affect the question. It does not apply to the making of the contract, but to the provisions of the contract itself after it has gone into effect, so as to prevent agents from modifying the terms of the policy after it has been issued. The general doctrine is well stated in *Wood v. Insurance Co.*, 149 N. Y. 384, 44 N. E. 80. The court then said: "That the general agents of an insurance company may waive stipulations and provisions contained in the policy with respect to the conditions upon which it shall have inception and go into operation as a contract between the parties, by delivering it, with knowledge of all the facts, and receiving the premiums, has long been settled. It is so obviously just that a party to a written contract should be precluded from defeating it by asserting conditions and stipulations contained in it which would prevent its inception, and which he knew at the time he delivered it and accepted the benefits were contravened by the actual facts, that any statement upon which the rule rests is no longer necessary. The restrictions inserted in the contract upon the power of the agent to waive any condition, unless done in a particular manner, cannot be deemed to apply to those conditions which relate to the inception of the contract, when it appears that the agent has delivered it and received the premium with full knowledge of the actual situation." *Insurance Co. v. Ruckman*, 127 Ill. 364, 20 N. E. 77; *Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md. 102; *Insurance Co. v. Gusdorf*, 48 Md. 514; *Insurance Co. v. Mahone*, 21 Wall. 152; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Insurance Co. v. Gillett*, 54 Md.

218. There is no evidence in the cause that tends to prove that Frank Keating was the agent of the appellees, in any respect, touching the matter of insurance. It is clear, however, that at the time the policy was issued he was fully informed of the state of Draper's title, and that the policy was desired to cover also the interest of the appellees. It follows from what precedes that we find no error in the rejection of the appellant's fourth and fifth prayers.

The second and third prayers of the defendant raise a question as to whether the appellees had an insurable interest in the property. The contract of insurance being one of indemnity, the insured must have such an interest in the property as that its destruction will result in pecuniary loss to him. But it is not necessary that he shall have a title, provided his interest, whatever it may be, is such that it would be impaired or injured by its destruction. *Insurance Co. v. Coates*, 14 Md. 297. Nor is it requisite that the interest be personal, if the insured has an interest in the property, as agent, trustee, etc., or holds such relation to the property that its destruction will involve pecuniary loss to him or to those for whom he acts. For this reason it has been held that an administrator, where the personalty was insufficient to pay the debts, had an insurable interest in the real estate. *Clinton v. Insurance Co.*, 45 N. Y. 454. And so of a judgment creditor (*Rohrback v. Insurance Co.*, 62 N. Y. 47), and of a surety responsible for a mortgage debt (*Insurance Co. v. Thompson*, 95 U. S. 547). In the case at bar the assignment is to the appellees, "attorneys, as their interest may appear"; that is, the indemnity secured by the policy shall extend to and include such interest in the property as the appellees might hold as attorneys. When the assignment was made the sale had been reported and finally ratified. At the time of the fire, a large part of the purchase money being then unpaid, the attorneys had obtained from the court an order for a resale at the risk of Draper. It is not difficult to perceive how the attorneys, for themselves and those whom they represented, were interested in the property to the full extent of the unpaid purchase money, and how its destruction would affect them. These remarks dispose of the appellant's second and third prayers, which were properly rejected.

It is further contended that there can be no recovery because of the failure of the appellees to furnish the proofs of loss within 60 days after the fire. The policy provides this shall be done unless the time is extended in writing, and, further, that the loss shall not be payable until 60 days after the proofs of loss have been received by the company. It was argued on the part of the appellees that "the sole penalty," under the terms of the policy, of a failure to promptly file proofs of loss, is to suspend the right of action until

such proofs are filed. There are some authorities that seem to sustain this contention. The general doctrine, however (and without deciding how far it is applicable to a policy like the one in this case), maintained by the great weight of authority and by our decisions, is that conditions like this form parts of the contract of insurance, and are binding on both parties, and must be complied with. *Insurance Co. v. Evans*, 9 Md. 13; *Insurance Co. v. Doll*, 35 Md. 89; 2 Wood, Ins. § 439 et seq. But all the authorities agree that this condition may be waived, either expressly, or by acts and conduct of the insurer himself, or of his agent, having real or apparent authority, and the waiver may be inferred from such acts and conduct as are inconsistent with an intention to insist upon a strict performance. *Rokes v. Insurance Co.*, 51 Md. 512. And the reason for this rule obviously is that an insurer whose conduct is such as to induce the insured to rest under a well-founded belief that strict performance of such a condition will not be insisted on cannot in good faith afterwards set it up as a bar to a recovery. If, therefore, there was such conduct of the appellant or of its agent (with competent authority) as induced the appellees reasonably to believe that proofs of loss would not be demanded, and they did so believe, and by reason thereof they failed to make and file them with the company within the prescribed time, it would offend every principle of natural justice to permit the insurer to take advantage of it. 2 Wood, Ins. § 470 et seq., and authorities there cited, especially the case of *Ripley v. Insurance Co.*, 30 N. Y. 136; *Insurance Co. v. Kinnier*, 28 Grat. 88; *Little v. Insurance Co.*, 123 Mass. 380; *Eastern R. Co. v. Relief Fire Ins. Co.*, 105 Mass. 570. The proof shows that shortly after the fire Catanach, a special agent of the appellant, went to Centerville to view the ruins of the property and investigate all the circumstances attending the loss. While there he had a conversation with Thomas J. Keating, one of the appellees. After some general talk about the fire the latter said to him, "When you send the money for the loss of this property, I want you to send us a separate check for our interest in the matter." Catanach replied, "No; I cannot do that." Keating asked, "What will you do?" The reply was, "Send a joint check to you gentlemen, as attorneys, and to Mr. Draper." Keating then explained to him that he was afraid he would have trouble with Draper about getting him to sign a joint check. Later on, Keating, Jr., the agent, wrote to Catanach that Draper was inquiring about his loss, and he (the agent) simply tells him it is "in the hands of the company." And two days later, on the 20th of February, he again writes to Catanach, this time to say: "The attorneys for the mortgagee in the Draper matter have requested me to write and ask you to send a proof of loss, so that they could make it

out and get Draper to make oath to it. I told them that you usually attended to the making out of the proof, but that I would write you about it." On the 23d February, 1895, Catanach replies. He writes: "Inasmuch as we have notice of attachment proceedings at Baltimore in regard to this loss, it is important that great care should be exercised in the matter on this account. While I have at times made up proofs of loss, it is not customary to do so, and in all cases of litigation I decline to do so, or allow the agent to take any part in furnishing or making up proofs of loss; but, that no obstacle may be thrown in the way of the assured," he directs the agent to inform him where printed blanks can be had, etc. There was evidence tending to show that the request for "the proof of loss to be made out" was made by Palmer Keating, who did not have charge of the business, and had no knowledge of the previous conversations of Catanach with his brother Thomas, who testified that after his conversation with Catanach he did not think it was necessary to file proofs of loss, but that afterwards he had done so, because he thought it would do no harm, and Catanach had desired it to be done. In the first prayer of the appellees the jury were required to find, as one of the conditions of the right of the plaintiffs to recover, that after the fire "Catanach went to Centerville, examined into the circumstances of said fire and the value of said dwelling, and that after having done so had a conversation with Thomas J. Keating, one of the plaintiffs, in which he stated that the dwelling was a total loss, and, in answer to a request of the said plaintiff that the check for the plaintiffs' interest in said loss should be payable to the plaintiffs' order, stated that the said check could not be made payable to the plaintiffs' order, but would be made payable to the order of Frank W. Draper and the plaintiffs jointly; and further said that from such conversation the said plaintiffs believed that the defendant's agent had waived formal proofs of loss, and that the said Catanach did intend thereby to waive such proofs of loss," etc. Now, if Catanach stated to the appellees that he would send a joint check, it was a recognition of the liability of the company, and wholly inconsistent with an intention to contest the plaintiffs' right of recovery. And if the jury found the appellees so understood it, and Catanach so intended it, and the acts of the plaintiffs were thereby influenced by it, the legal conclusion of the court that the facts so put to the jury constituted a waiver was entirely warranted. In reply to the objection that there is no proof of Catanach's power or authority to waive this condition, all we have to say is that it was at least within the scope of his apparent authority. He was a special agent of the company, sent by it to view the ruins, investigate the loss, and find out as much about it as he could. Mr. Keating, the agent,

when asked about the policy and when it will be paid, consults Mr. Catanach, who replies authoritatively in his letter of 23d of February. And when finally proofs of loss are made they pass to Mr. Bond, an agent, who testifies he sent them to Catanach, and the matter was then turned over to him for such action as he should see proper in the premises. These facts, we think, clearly show that he held the actual, or at least the apparent, authority to examine into and adjust the circumstances of the loss and the liability of the company. We think the defendant's seventh, ninth, tenth, and eleventh prayers ought not to have been granted. The defendant's sixth prayer was properly rejected because there was no evidence of a change in the title or possession. *Insurance Co. v. Kelly*, supra. Of the defendant's eighth prayer it is only necessary to say that there is no condition in the policy against incumbrances. *Bowman v. Insurance Co.*, 40 Md. 620.

There were other points raised and discussed at the argument, but, inasmuch as what has been said practically disposes of all the questions in the case, we will not prolong this opinion by adverting to them. We find no error in any of the rulings of the court, and the judgment will therefore be affirmed. Judgment affirmed.

(38 Md. 1)

GUNTHER v. DRANBAUER.

(Court of Appeals of Maryland. June 22, 1897.)

VENUE—LOCAL AND TRANSITORY ACTIONS—DEMURRER TO DECLARATION—OBJECTION TO INSTRUCTION—ACCIDENT IN HIGHWAY.

1. An action for personal injury, though resulting from obstruction of highway, is transitory, no question as to right to use the highway being involved.

2. A demurrer going to the whole declaration, and not to each count, is properly overruled if any count is sustainable.

3. Objection that there was no evidence to support facts assumed by an instruction cannot be considered, exception not having been taken below. Code, art. 5, § 9.

4. An abutting owner cannot escape liability to traveler injured by a post which he set in the edge of the highway, though he put it there to protect the public from an insecure sewer which he had constructed in the street at that point.

Appeal from superior court of Baltimore city.

Action by Charles A. Dranbauer against George Gunther. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BRYAN, BOYD, and ROBERTS, JJ.

J. Fred Requardt, A. H. Robertson, and Thos. G. Hayes, for appellant. David Stewart, Redmond C. Stewart, and Rand. Barton, Jr., for appellee.

McSHERRY, C. J. This suit was instituted by the appellee against the appellant in the superior court of Baltimore city. The

declaration contains three counts. In the first it is alleged that the defendant placed or caused to be placed in a public highway of Baltimore county, at the intersection of Third and O'Donnell streets, in Canton, a block, or wooden beam, which was so placed as to obstruct the highway, and during the nighttime was left without placing any light to indicate danger, and that in consequence of such negligent and improper conduct of the defendant the plaintiff, in passing along the highway, and using due care himself, drove over the obstruction, and was thrown out of his wagon, and seriously injured. The second count charges that the defendant constructed a footwalk in front of his houses, leaving a portion of his land to be used as a roadway, and upon said roadway, where wagons passed, he placed a block, or wooden beam, so as to obstruct the roadway, whereby the plaintiff, using due care, etc., as in the first count. The third count sets forth that the defendant placed or caused to be placed at the edge of the public highway a block, or wooden beam, so as to cause a dangerous obstruction to those using the said road or highway, and placed the same in an improper and negligent manner, and left the same upon the night of a certain day, without placing any light or signal of danger thereupon; and that the plaintiff, while driving along the road in a wagon, accidentally, and without fault on his own part, drove said wagon against the said block or beam, whereby he was thrown out and injured, etc. To the whole declaration, and not to each count thereof, a demurrer was filed, and it is insisted that the demurrer should have been sustained, because, the injury having occurred in Baltimore county, and the action being a local, and not a transitory, one, the superior court of Baltimore city had no jurisdiction to try it. The court below overruled the demurrer, and in doing so committed, it seems to us, no error whatever. It is undoubtedly true that local actions must be brought in the jurisdiction where they arise, while transitory actions may be instituted wherever the defendant happens to be. The difficulty met with in practice consists not so much in a dispute over this elementary principle as in the application of it, and the chief perplexity encountered in its application springs from a failure to clearly distinguish between what are local and what transitory actions. Speaking generally, it has been said: "If the cause of action could only have arisen in a particular place, the action is local, and the suit must be brought in the county or place in which it arose. Actions for damages to real property, actions on the case for nuisances, or for the obstruction of one's right of way, are, according to all the authorities, local. On the other hand, actions for injuries to the person or to personal property, actions on contracts, and in fact all actions founded on transactions which might have taken place anywhere, are transitory." Crook, v. Pitcher,

61 Md. 513; 1 Chit. Pl. (8th Ed.) 268. But there must be a test by which it may be determined whether a particular cause of action sounding in damages is local or transitory; and an unerring one inheres in the nature of the subject of the injury as differing from the means whereby, and the mere place at which, the injury was inflicted. If the subject of the injury be real estate, or an easement, such as a right of way, whether private or public, obviously the action must be local, for the reason that the injury to that particular real estate or easement could not possibly have arisen anywhere else than where the thing injured was actually situated. But, if the subject of the injury be an individual, then an injury to that individual's person, no matter by what means occasioned or where inflicted, is essentially an injury to a subject not having a fixed, stationary, immovable location; and an action to recover damages therefor would necessarily be transitory. To borrow an apt illustration used in *Mason v. Warner*, 31 Mo. 508: "If an agistor of cattle open a pit in his field, and negligently leave it open, whereby my horse at pasture is permitted to fall into it, and is killed, the means and place of injury are local, but the subject of injury—the horse—is transitory, and capable of injury as well at one place as another. But if my horse trespass upon the agistor's field, break the close, and tread down and eat the grass, here the means of injury (the horse) is movable, transitory, but the subject of injury (the realty) is immovable, local, and therefore not capable of being injured at any other place." It is apparent that an injury to a person on a highway is not an injury to the highway. It does not follow that because an injury to a person occurs on a highway the right of such person to use the highway is indispensably at issue. An action founded on and growing out of an obstruction of a highway, and raising distinctively and specifically the plaintiff's right to use the way, is essentially a local action, because it involves an interest in the local, fixed subject itself; but an injury happening to an individual on that same highway by reason of any tort or wrongful act of another is not necessarily an injury to the bare right of user, even though an obstruction of the highway may be incidentally concerned as a mere instrumentality immediately producing the injury complained of. If the pending action involved the right of the plaintiff to use the alleged highway; if he claimed a right to use it, and the defendant obstructed the way, and by that or other means denied the existence, or interfered with the exercise of, the asserted right,—the cause of action would indisputably be local. The right of the plaintiff in or to the use of the highway would then be the subject of the injury. But there is no issue here as to the right of the plaintiff to use the highway. The suit was not brought to recover damages for an interference with the plaintiff's right of user, but to recover for a

personal injury sustained on the highway by reason of the defendant's negligence in placing and leaving either on or near to the highway an instrumentality calculated to cause, and in this instance actually causing, a personal injury. The subject of the injury is the person, and not the highway. The highway can only be injured as a highway where it is, for it has a fixed location there, and can be nowhere else; the person could have been injured there or elsewhere, for the person is transitory.

The authorities relied on in support of the demurrer are not in conflict with these views. The form in 2 Chit. Pl. (16th Ed.) 581, cannot be regarded as controlling. It is true, the form there given strongly tallies with the first count of this declaration, and it is stated that the venue is local; but precisely the same form is given in volume 2 (8th Ed.) p. 599, of the same work, and it is not stated that the venue is local. In *Greasly v. Codling*, 2 Bing. 263, it is expressly shown that "the object of the action was to establish a right of way," and of course, therefore, the action was necessarily local. But it is needless to review the cases in detail, for Mr. Poe, in his excellent work on Pleading (1st Ed., p. 29), sums up the law in these words: "The local actions are ejectment, dower, replevin, and trespass to real property. All the other actions are transitory." Let us go one step further. Even if it be conceded (though it is not) that the first and second counts declared for an obstruction of and injury to a thoroughfare in such a way as to indicate that the injury complained of could only be sued for in Baltimore county, still the third count manifestly does not involve an interference with a right of way, but proceeds upon averments imputing to the defendant negligent acts done by him outside of the right of way, whereby a personal injury was occasioned to an individual rightfully using the way. Under this count no question of impeding travel over the highway is raised, and the single inquiry presented by the third count is whether the defendant had been guilty of such negligent conduct—not in obstructing a highway, but in producing a personal injury by a wrongful act—as would give the plaintiff a cause of action. Planting a post so near the highway as to cause personal injury to another who is lawfully using the highway, though not a physical obstruction of the highway, is, if injury does ensue therefrom, an actionable wrong, differing in no respect from a similar injury caused by the same post if held in the hands of the defendant instead of being planted in the soil near the highway. Inasmuch, then, as the third count does not set forth a cause of action which is local, but does set forth one that is obviously transitory, that count is good, and as to it the suit was rightly brought in Baltimore city. Now, as the demurrer went to

the whole declaration, and not to each count, it was properly overruled if any count in the narr. were sustainable. Code, art. 5, § 15; *Avirett v. State*, 76 Md. 527, 25 Atl. 676, 987; *Wheeler v. State*, 42 Md. 563. There was, consequently, for this reason, if for none other, no error in the ruling on the demurrer.

We come next to the instructions granted and to the prayers rejected. The two instructions given at the instance of the plaintiff are free from error. Indeed, the only objection urged to the first is that there was no evidence in the case to support two facts alleged to have been assumed as true. No special exception on this ground was taken to the prayer in the court below, but it is nevertheless insisted that this objection may be successfully relied on and availed of in this court. To this contention we do not agree. Conceding that the prayer does assume as a fact that the road upon which the accident happened was a highway, and that it further assumes the post was unlighted, and granting that there was no evidence adduced to support either assumption, still, as no objection founded on the absence of evidence to sustain these postulates was made to the prayer in the court below, we are precluded from considering such an objection now. Prior to the adoption of rule 4, which is now section 9 of article 5 of the Code, an objection of this sort would have prevailed in this court, though not interposed in the court below. The act of 1862 (chapter 154) enacted that "the court of appeals shall in no case decide any point or question which does not appear by the record to have been tried and decided by the court below; but no prayer or instruction shall be deemed defective by reason of any assumption therein of any fact by said court, or because of a question of law having been thereby submitted to the jury, unless it appears from the record that such objection was taken at the trial." This statute was held not to apply to or cure an instruction founded on an assumption of facts of which there was no evidence before the jury. To assume a fact, it was said, is to state as proved that which is to be proved, while to instruct the jury upon an hypothesis of which there is no evidence is to leave them to assume or find that for which there is no foundation. *Mayor, etc., v. Trimble*, 25 Md. 34; *Dunham v. Clogg*, 30 Md. 292; *Hamilton v. Hardesty*, 32 Md. 354. But rule 4, relating to appeals, and which became effective on January 1, 1870, long after the cases just referred to arose, and considerably after the one reported in 25 Md. had been decided, specifically supplied the omission left in the act of 1862, though at the same time narrowing somewhat, in one respect, the act's previous scope and range. The act of 1862 having provided that "no prayer or instruction shall be deemed defective by reason of the assumption of any fact," etc., rule 4 declared that "no in-

struction actually given shall be deemed to be defective by reason of any assumption therein of any fact," etc. While the act of 1862 cured any prayer or instruction that but for that enactment would have been open to the objection of having assumed a fact, or of having submitted a question of law to the jury, rule 4 cured only instructions actually given, and to this extent it narrowed the scope of the statute. But in another particular the rule greatly enlarged the act, for, in addition to declaring that no instruction actually given should be deemed defective by reason of the assumption of a fact, or because of a question of law having been submitted thereby to the jury, unless an objection for such defect were taken at the trial, the rule now forming section 9 of article 5 of the Code proceeds to prescribe for a third condition left untouched by the act of 1862; and it is this: "Nor shall any question arise in the court of appeals as to the insufficiency of evidence to support any instruction actually granted, unless it appear that such question was distinctly made to and decided by the court below." Consequently, since the adoption of rule 4, if the decision of this court is desired upon the question as to whether there was an insufficiency, or, what is the same thing, an absence, of evidence to support any hypothesis of an instruction actually granted, it can only be secured by filing a proper objection in the court below raising that precise question, and procuring a ruling thereon; and this objection, and the ruling thereon, must appear in the record by exceptions signed by the trial judge. *Albert v. State*, 68 Md. 834, 7 Atl. 697. It is apparent, therefore, that though the cases in 25, 80, and 82 Md. were rightly decided under the statute as it then stood, providing for but two contingencies, viz. the assumption of a fact and the submission of a question of law to the jury, those cases are not applicable to rule 4, or section 9 of article 5 of the Code, providing for three contingencies, viz. the assumption of a fact, the submission of a question of law to the jury, and the insufficiency of evidence to support an instruction actually granted. No exception having been taken in the court below to the granting of the first instruction on the ground that there was no evidence to support the facts alleged to be assumed by it, we are not at liberty to consider such an objection, made for the first time in this court.

The second instruction, defining the measure of damages, is not open to criticism.

The appellant's third and fifth prayers were rejected; his first, second, and fourth were conceded. The third and fifth are precisely alike, except as respects one hypothesis of fact, which the third contains, but the fifth does not. This hypothesis is unsupported by any evidence in the record. With-

out transcribing these prayers here, it is sufficient to say that both are founded upon wholly untenable theories. The record shows that the defendant, who owned several houses on O'Donnell street, constructed along that street an open gutter for drainage, and then built a sewer to carry the water from the gutter under the street. This sewer was covered with iron bars or grating. At the end of this covering there is a perpendicular drop of three inches from the level of the street paving to the iron grating covering the sewer. The iron bars were not sufficiently strong to permit heavy vehicles to pass over or along them, and, with a view to protect the covering from being crushed by wagons, a post two feet six inches in height was planted on the outside of the sewer, or some feet out in the roadbed. The third and fifth prayers, which we are now considering, deny to the plaintiff a right to recover if the jury should find that to make the sewer so built by the defendant in the street secure, and to prevent it from being dangerous to the public, the planting of the post in the bed of the road or highway was a reasonable and proper way to protect the public from accident. This obviously presented no defense. The construction of a sewer in or across a public thoroughfare in such an insecure way as to be dangerous to the persons who might use the road was in itself a wrong, for which, if an injury happened on account of it, an action would lie. The planting of a post in the same highway, alongside of the sewer, was likewise a wrong which would furnish a cause of action if injury resulted therefrom. The proposition of the prayers is that, though the improper construction of the sewer did amount to an actionable wrong, the defendant would not be liable in this suit if, to avoid the consequences which that wrong might produce, he committed another wrong by erecting the post; and that he would not be liable though the latter wrong inflicted the injury for which the suit was brought. Having been guilty of a tort by negligently building the sewer, the prayers assert that the defendant had the legal right to guard against injuries that might arise from that wrong by perpetrating another wrong which actually caused the injury. Thus the first wrong necessitated the second, and, as the second was resorted to for the purpose of preventing damage by the first, the second, though immediately occasioning the damage, furnished no cause of action at all. A succession of wrongful acts only emphasizes the liability of the wrongdoer. Certainly, it cannot lessen or extinguish his accountability. If one wrongful act makes him liable, two wrongful acts cannot exculpate him. As we find no errors in the rulings complained of, the judgment appealed from must be affirmed. Judgment affirmed, with costs above and below.

(36 Md. 219)

HADDEN et al. v. LINVILLE.

(Court of Appeals of Maryland. June 23, 1897.)

GARNISHMENT — EVIDENCE — CORPORATIONS — POWERS OF PRESIDENT.

1. Where a garnishee testified that on a certain day he had goods belonging to the debtor, a corporation, it is competent for him on cross-examination to narrate the statements of the debtor's president to him, made after said day, and before garnishment, to the effect that such goods had been transferred to another, as such evidence is neither hearsay nor immaterial.

2. A statement of a garnishee that "he thought" there was a bill of sale by the debtor to the goods sought to be attached, is not sufficient proof of a written instrument to sustain an objection to oral proof of a transfer.

3. A president and general manager of a corporation governed by a by-law giving him entire charge of the affairs of the business, subject to the approval of the board of directors, has not the power, without the assent of the board of directors, when the corporation becomes insolvent, to transfer all the assets within his control to satisfy debts to one of its creditors, as against another creditor attaching a part of the goods sought to be transferred.

Appeal from superior court of Baltimore city.

Attachment by Harold F. Hadden and another, trading as Hadden & Co., against the Natchaug Silk Company and Charles H. Linville, garnishee. From a judgment in favor of the garnishee, plaintiffs appeal. Reversed.

Argued before McSHERRY, O. J., and BRYAN, FOWLER, PAGE, and BOYD, JJ.

Nicholas P. Bond, Edward Duffy, and Henry B. Twombly, for appellants. William Reynolds and Paul M. Burnett, for appellee.

PAGE, J. In this case an attachment was issued out of the superior court of Baltimore city, at the instance of the appellants, against the Natchaug Silk Company, a Connecticut corporation. It was laid in the hands of Charles H. Linville, garnishee, who has pleaded nonassumpsit on behalf of the defendant, and nulla bona as to himself. At the trial, the plaintiffs, having first offered other evidence to establish their claim, introduced the garnishee himself, and proved by him that he has been the agent of the silk company in Baltimore, and as such had in his possession on the 25th of April, 1895, certain of its goods; that up to the 27th of December, 1895, when the attachment was laid in his hands, he still retained the possession of the goods, or the proceeds of the sale thereof, and that he yet holds them, exactly as he had before. On cross-examination he testified that on the 26th of April, 1895, Mr. Chaffee, the president and general manager of the silk company, told witness that "to recompense or make good a claim" which the bank had against the company, the goods in his hands had been transferred to Mr. Dooley (who was the receiver of the bank), and also asked witness if he would "continue to represent the bank or Mr. Dooley in the sale of the goods." This he consented to do, and thereupon received from Solomon

Lucas, then present, as the attorney for Dooley, an authority in writing to so act. Subsequently witness received letters from Dooley about the goods, a copy of one of which, recognizing Linville as his agent, is exhibited in the record. Under this authority the witness, after the 26th of April, held the goods as agent of Dooley. To the admission of the evidence thus given on cross-examination the plaintiffs objected on the ground that the conversation between Chaffee and the witness was hearsay, immaterial, and particularly because it was not shown that Lucas had any authority at that time to represent Dooley. As to the last objection, we think it clear that Dooley, by his letter of 12th July, recognized the authority of Lucas, and ratified his act. The witness having testified that on the 25th of April he had in his possession goods of the silk company, and that he still held "these same goods," it was entirely proper to interrogate him on cross-examination how and for whom he held them after that date. Such facts were germane to and connected with the main issue, which was to whom the goods belonged at the time the attachment was laid in the garnishee's hands. *Griffith v. Diffenderfer*, 50 Md. 479. There were present on that occasion referred to by witness the president and general manager of the silk company, the representative of the receiver of the bank, and the person who had actual possession of the goods as agent of the silk company. The general manager directs the agent that the goods had been transferred, and inquires if he will continue to hold them as agent of the receiver. The agent consents to do so, and receives the authority to so hold them from the attorney of Dooley. Now, if it be assumed there had already been a contract for the sale of the goods by the proper authority, or if Chaffee had power to transfer them, the effect of all this was to make a delivery of the property to the receiver, and to constitute Linville his agent for the custody and sale of the goods. *Thompson v. Railroad Co.*, 28 Md. 396. The witness was then asked by the plaintiffs whether there was any written assignment, and replied he "thought there was a bill of sale, but whether on that day or prior thereto he was not sure, and he did not think that he had ever seen that bill of sale." The plaintiffs then further objected to so much of the testimony of the witness as purported to prove a transfer, on the ground the transfer was made by written instruments. Respecting this, it is sufficient to say that it had not appeared the transfer had been effected by written instruments. The witness only said "he thought" there was a bill of sale, but had never seen it. Such evidence is hearsay, and not sufficient to support the objection made by the plaintiffs. From what has been said it follows we find no error in the rulings of the court set out in the first and second exceptions.

At the conclusion of the evidence, the court, at the instance of the garnishee, in-

¹ For opinion on reargument, see 33 Atl. 900.

structed the jury there was no evidence before them from which they could find that there were in the hands of the garnishee, at the time of the laying of the attachment or since, any of the goods, chattels, or credits of the defendant. The propriety of this ruling is the question presented by the third and only other exception. It must be borne in mind that the goods attached, it is conceded, were, on the 25th of April, 1895, the property of the silk company; also the fact that up to and at the time the writ was laid, —that is, to the 27th December following, —the garnishee still retained the possession of them. The only issue, therefore, between the parties, seems to be, did the goods, or the proceeds of the sale of them, for any reason, at any time between those dates, cease to be the property of the silk company? In presenting this question, many points were raised, and exhaustively and ably argued. In our view, however, it will not be necessary for us to consider more than a single phase of the case. At the outset we may remark there is no evidence in the record tending to prove the transfer to the bank or its receiver except that contained in the testimony of the garnishee. There is some evidence that some time in 1890 and 1894 certain papers, called by the witness "bills of sale," were made, but there is no proof whatever that the specific articles mentioned in them included any of the goods that were attached in this case. The first of these so-called "bills of sale" is dated January 1, 1890. It is only a bill of goods alleged therein to have been sold by the silk company to O. H. Risley, cashier of the First National Bank, with the word "Paid" at the end, and signed "Barrows," a bookkeeper of the silk company. The two others are like the first, except there are appended the words "the goods represented by this bill are pledged to the Nat. Bank of Willimantic as security for loans made by said bank to the Natchaug Silk Company." They are signed by J. D. Chaffee, president, and Charles Fenton, treasurer. Of these instruments, the treasurer, Fenton, testifies that no record was made of them in the books of the silk company, or anywhere else. They were never brought up at any meeting of the company. None of the directors knew of them, "as far as he knew"; and none of the goods mentioned in them, or either of them, were ever delivered to the bank, or set apart for it, but were sold from time to time, and used in filling orders, "the same as any other stock." Without pausing to inquire how far such instruments, under all these circumstances, could operate to transfer such a title to goods, either in Connecticut or Maryland, as to defeat the claims of an attaching creditor in the latter state, it can be safely stated there is nothing in them on the face of the papers themselves, or connected with them by proof, that in any manner affects the goods in the hands of this garnishee. It must be as-

sumed, therefore, as we have already said, the whole case turns upon the effect of Linville's statement; and if, upon the case made by his evidence, the transfer to the bank or its receiver was not successfully effected, the title is still in the silk company, and the attachment of the plaintiffs must be maintained, although it may appear the receiver of the silk company was appointed before the alleged transfer, it being conceded that the right of a creditor to attach goods in Maryland is not impaired by the previous appointment of a receiver in the state of Connecticut. Now, Linville's testimony is that, on the 28th April, Chaffee came to his office in Baltimore; that he (Linville) had been the agent in that city of the silk company for five years, and prior to that time had known Chaffee "only as having been president, manager, and everything else connected with the company." Chaffee told him "that to recompense or to make good a claim which the bank had against the company these goods had been transferred to Mr. Dooley, and these belonged to him, and he asked witness if he would continue to represent the bank or Mr. Dooley in the sale of the goods." Linville consented, received from Lucas, the attorney of Dooley, the authority to so act, and did so act up to the date of the attachment. This proceeding on the part of Chaffee was unknown to and without the authority of the directors of his company, and was never ratified by them. Dooley subsequently, at a meeting of the directors in the company's office in Willimantic, stated that "Mr. Chaffee had been to New York, Chicago, St. Louis, and Baltimore, in an effort to secure the bank of goods of the Natchaug Silk Company, that were held in these offices, and that it was very necessary that the board * * * should ratify what had been done." This request was not, however, acceded to. "In fact," says a witness, "they refused to ratify what had been done." It thus appearing that Chaffee's act in making the transfer was without the prior specific authority of his company, and was not subsequently ratified by the board of directors, it remains to inquire whether Chaffee, as president or general manager, *virtute officii*, or by usage or otherwise, possessed the power and authority thus to bind the company. To properly meet this question, a brief statement of other facts in the case is required. The Natchaug Silk Company, organized originally as a joint-stock association, was incorporated by the legislature of Connecticut in 1869. Its business was the manufacturing and dealing in silk, leather, wool, or other substances composed wholly or in part of those materials, and to do such other things as are incident to that business. Chaffee was its president and general manager from the beginning. In the course of its business it became a large borrower of the First National Bank of Willimantic. The record shows that its indebtedness on this account

as far back as 1893 amounted to more than \$300,000, and it remained at not less than \$285,000. It was enabled to secure this large credit with the bank by reason of the fact that the silk company's financial agent, Risley, was also the cashier of the bank. It was this credit only that for several years enabled it to maintain itself as a going concern. In fact, it had not been solvent since 1890. Risley died on the 12th of April, 1895, and on the 22d of the month the bank went into the hands of the receiver; and by reason of these facts the principal, if not the only, source of credit of the silk company was entirely cut off. To Chaffee, as well as to all who knew the situation, it became evident that the silk company's affairs must also pass, at no distant period, into the hands of a receiver. Under these circumstances Chaffee determined to make an effort to secure the bank by transferring to it the goods of his company held in the office of its agents in New York, Chicago, St. Louis, and Baltimore. Probably it was to make his action more effective that shortly after Risley's death he forwarded goods of large value to New York, assigning as a reason therefor that, as he could get no more money from the bank, he would make arrangements elsewhere. Almost all the debts of the silk company were to become due on the 22d of April, or within a few days thereafter. Chaffee seems to have kept his purpose strictly to himself. As he was about to start on his mission, he told Barrows, the bookkeeper, "if he needed any counsel in the matter, to consult Perkins." On 22d April he proceeded to New York, and transferred all the company's goods, including those he had sent there the week before, to the bank, on account of his company's indebtedness to the latter. Thence he went to Chicago and Baltimore, and at each place made a transfer of all the goods held there; thus placing all the property of the company outside the state of Connecticut (so far as the record discloses) in the hands of the bank. It is obvious such transfers were not made in the usual course of business, but solely for the purpose of devoting all the assets within his control (a receiver having been appointed for the company in Connecticut on the 26th April) to the discharge of the antecedent claim of the bank; thus constituting, of his own will, the bank a preference creditor of his insolvent company. The twelfth by-law of the company provides for the election of a general manager, "who shall have entire charge of the business and affairs of said company, subject to the order and approval of the board of directors." This by-law, by a reasonable construction, confers full power to do all things and make all contracts that are needed in transacting the ordinary business of the corporation within the legitimate scope, objects, and purposes of its organization; but not such authority as that he may deal at his own pleas-

ure with the assets, outside the regular course of business. Nor does it appear from anything contained in the record that Chaffee had ever arrogated to himself such extensive authority. Prior to the transaction in question, he had never undertaken to dispose of the property of the company otherwise than in the regular course of business. This case is clearly distinguishable from one where the managing officer has disposed of the property for the purpose of procuring credit for his company. There are cases when that is held to have been a proper exercise of his authority. *Fay v. Noble*, 12 Cush. 1; *Lewis v. Manufacturing Co.*, 56 Conn. 36, 12 Atl. 637. But with that question we are not now called upon to deal. In this case the transfer was for the purpose of securing or paying an antecedent debt. Chaffee's authority under the by-law—and under that he was permitted to exercise in the management of the affairs of the company—was conferred upon him for the purpose of enabling him to properly and successfully conduct the business, to keep the company a going concern, with capacity to earn a profit for its stockholders; not that he might, after the company became insolvent, and was about to go into the hands of a receiver, parcel out its assets, or any portion of them, among such of the creditors as his caprice or interest might lead him to select. An authority like this has never been accorded, as far as we are informed, to any officer charged with the conduct of the affairs of a corporation, whether he be called president, general manager, or by any other name, unless there had been conferred upon him a prior express authority by the directors or stockholders of the company. Ordinarily, it is true, an authority to do a particular act may be inferred by persons dealing with the corporation from the fact that the officer who is acting for it has habitually assumed and exercised the power in the face of the public. *Olcott v. Railroad Co.*, 40 Barb. 179; 4 Thomp. Corp. § 4626; *Ceeder v. Lumber Co.*, 86 Mich. 541, 49 N. W. 575. But under no theory of implied power can either a president or general manager transfer the assets of an insolvent corporation about to go into the hands of a receiver for an antecedent debt. The case of *Hoyt v. Thompson*, 5 N. Y. 320, is instructive on this point. There the Morris Canal & Banking Company, an insolvent corporation of New Jersey, being indebted to the state of Michigan, its president and cashier, without the authority of the directors, to secure the payment of the canal company's debt, assigned to the state of Michigan a debt and mortgage due to the canal company by a railroad company. There was no proof that the state had any knowledge of the assignments here made without the authority of the directors, and such want of proof, if there were nothing else in the case, might probably authorize a presumption they were executed in

pursuance of the authority of the directors, and that the president and cashier of the canal company were acting within the general scope of their powers; but that principle could not apply in that case, for, said Page, J.: "If the assignments had been made to the state of Michigan for a new consideration, paid at the time, or if the state had relinquished any security held by it, so as to entitle it to the character of a bona fide purchaser for a valuable consideration, and the agents * * * of the state * * * had no notice of the want of authority of the officers of the canal company making the assignment, * * * the company would be estopped from denying that the president and cashier had competent authority to execute and deliver the assignments. * * * But, inasmuch as the state of Michigan received the assignments as collateral security merely for an antecedent debt, the Morris Canal & Banking Company, or its representatives, are not estopped from denying the authority of its president and cashier to execute and deliver the assignments." It has always been held that, unless there is prior express authority, or subsequent ratification, or unless some principle of estoppel intervenes, the president or managing agent, has only the authority to bind the company while acting within the scope of his duties, and in the ordinary routine of business. 4 Thomp. Corp. § 4849 et seq., and authorities there cited. This is a general principle, for which many cases could be cited. It has been often applied,—as, for instance, where managing officers have undertaken to consent to the appointment of a receiver (*Walters v. Trust Co.*, 50 Fed. 318), or to release claims (*Bank v. Dunn*, 6 Pet. 60), or alien property (*Luse v. Railway Co.*, 6 Or. 125; *Bliss v. Irrigation Co.* [Cal.] 4 Pac. 507; *Waltham County Bank v. Farmers' Loan & Trust Co.*, 14 Wis. 825; *Hyde v. Larkin*, 35 Mo. App. 365; *First Nat. Bank of Springfield v. Asheville Furniture & Lumber Co.*, 116 N. C. 828, 21 S. E. 948; *England v. Dearborn*, 141 Mass. 590, 6 N. E. 837). There is nothing in conflict with what we have said in *Hadden v. Dooley*, 20 O. C. A. 494, 74 Fed. 429. In that case Judge Shipman said "the decisions of the state of Connecticut apparently recognize that a president and unlimited general manager of one of its manufacturing corporations is vested with such power" (that is, to sell the property of the corporation in part payment of its debts), and that such transfer is valid; but adds that this, being a question of law, "may be controlled by the facts which may subsequently appear as to any limitation of Chaffee's actual powers of which the bank had knowledge." The court did not decide as to the power of Chaffee. As to that, the question was of a character which cannot be determined on affidavits. Nor does he decide what the power of a general manager is in Connecticut, but only what it "apparently

is," and that it is subject to modification by other facts than those before him in that case. We are of opinion, for these reasons, that Chaffee had no power, under the circumstances disclosed by the evidence contained in the record, to make an effective transfer of the goods, and that the plaintiffs were entitled to maintain their attachment. Finding error in the granting of the defendant's prayer, the judgment must be reversed. Judgment reversed, with costs, and cause remanded for new trial.

(36 Md. 306)

HAMBLETON et al. v. RHIND (four cases).
(Court of Appeals of Maryland. June 23, 1897.)

ASSOCIATIONS—FUND RESERVED FOR EXPENSES—WHO ENTITLED TO.

Defendant employed L. as agent to promote the sale of certain state bonds, agreeing to pay him one-third of any commission he might obtain. L. formed, with plaintiffs and others, a syndicate to purchase the bonds at par flat; it being agreed that two-thirds of six months' interest accrued should be set aside for syndicate expenses. L. concealed his agency, and represented that he had no interest in the fund so reserved except as a member of the syndicate. Held that, the whole fund thus set aside belonging to the syndicate, on the failure of some of the members of the syndicate to claim an interest in such fund, defendant did not become entitled to what would have been theirs had they claimed it.

Appeals from circuit court of Baltimore city.

Bill of interpleader by the Baltimore Trust & Guarantee Company against T. Edward Hambleton and others. By the interpleader decree, T. Edward Hambleton and others, trading as Hambleton & Co., and other defendants, were made plaintiffs, and Colden Rhind defendant. From a decree awarding defendant a certain portion of the fund in dispute, plaintiffs appeal. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BRYAN, PAGE, BOYD, and FOWLER, JJ.

Wm. A. Fisher, W. Cabell Bruce, and D. K. Este Fisher, for appellants. Rich. M. Venable and Edwin G. Baetjer, for appellee.

McSHERRY, C. J. There are four appeals in this record, and these cases, with six others that await the determination of those now pending, were in this court on a former appeal; the decision being reported in 84 Md. 456, 36 Atl. 597. One of the questions involved is common to the 10 cases,—these four and the six still remaining in the court below,—but the other question is confined to three of the appeals now before us. We will first dispose of the question arising in all the cases, and in another opinion we will deal with the remaining subject of controversy. On the former appeals the precise point at issue was the ownership of a fund in court. The fund had been brought into court under a bill of interpleader. On the one hand, the fund was claimed by the appellee, Colden Rhind, and, on the other, by the appellants, who, with

others, were members of a syndicate which had been formed to purchase and float a large block of the 4½ per cent. state bonds of South Carolina. The fund litigated over arose in this way: The syndicate selected the Baltimore Trust & Guarantee Company to be its agent in negotiating with the officials of South Carolina respecting the purchase of the bonds. By one of the provisions contained in each of the several subscription agreements, signed by every member of the syndicate, it was stipulated that two-thirds of the 2¼ per cent. interest to mature on said bonds between January 1 and July 1, 1893, should be paid by the trust company to R. A. Lancaster & Co. "for syndicate expenses." Lancaster, himself a member of the syndicate, and also the agent of Rhind in promoting the undertaking, represented to the other members of the syndicate that he would be entitled to only about \$500 of this sum so set apart for "syndicate expenses," and he intimated—if he did not assert—that the rest of the money was payable to parties in South Carolina, though he solemnly and repeatedly declared that he did not know, and did not wish to know, who would receive it. At the time he made these statements he was fully aware of their utter falsity, for he then had in his possession a secret written agreement, signed by Rhind and himself, in which they stipulated to divide the sum so appropriated to syndicate expenses between themselves in the proportion of two-thirds to Rhind and one-third to Lancaster. When the fund out of which the syndicate expenses were payable was received by the trust company, Lancaster served his drafts thereon to the amount of \$25,250 in favor of Golden Rhind, and the latter, in performance of the secret agreement just alluded to, at once indorsed them in blank without recourse, and delivered them back to Lancaster, who procured the money thereon for his own use. When this fraudulent conduct was discovered, many of the members of the syndicate insisted that the trust company should pay no more of the fund upon Lancaster's drafts until the amount thus surreptitiously secured by Lancaster should be made up to the syndicate out of the residue of the fund devoted to syndicate expenses, so as to place these members of the syndicate more nearly upon an equality with their co-partner Lancaster. Lancaster, however, drew three more drafts, aggregating \$48,500, on the same fund, in favor of Rhind. In this state of the conflicting claims to the fund, the bill of interpleader was filed by the trust company. The trust company, though a member of the syndicate, disclaimed in its bill of complaint any interest in the fund of \$48,500 still remaining in its hands as the residue of the amount specifically appropriated to syndicate expenses, and by the interpleader decree the members of the syndicate who claimed the fund were made plaintiffs and Rhind was made defendant. By the same decree the bill was dismissed as to Lancaster, because he disavowed any

title to the fund, having been previously paid by the proceeds of the drafts for \$25,250; and it was adjudged as to some other of the defendants, who had failed to answer the bill, that they were not entitled to any part of the fund. The contest then proceeded between the remaining members of the syndicate and Rhind, and ultimately resulted in a decree which awarded the whole fund to the latter. An appeal was then taken to this court, and on January 5, 1897, the decree appealed from was wholly reversed. In that controversy Rhind based his claim to the fund on two grounds: First, that he was entitled to the entire \$48,500 under the three drafts drawn by Lancaster on the trust company in his (Rhind's) favor; and, secondly, because, though under the syndicate subscriptions, signed by the various members of the syndicate, the fund was made payable to Lancaster, it was well understood and known by the members of the syndicate that the money was really payable to Rhind under his original contracts with the governor of South Carolina. We decided, when these questions were presented on the former appeals, that under the contracts entered into between the trust company, acting as the agent of the syndicate, and the state authorities of South Carolina, "one of the things which the members of the syndicate contracted to get, and one of the things that was to be their common property, * * * was this six months' interest. * * *" In other words, one of the things which was to be the common property of the syndicate was this very six months' interest, out of which the syndicate expenses were specifically payable. "The trust company," we went on to say, "was authorized to disburse in discharge of syndicate expenses from this common or partnership fund for the benefit of the whole syndicate two-thirds. * * *" In giving our reasons for the conclusion that the fund out of which the syndicate expenses were to be paid belonged to and was the property of the syndicate, and not of Rhind, we proceeded to state that: "There being no reservation of this July coupon, and no exception of it from the sale, but, on the contrary, the clearest manifestation of an intention that it should accompany and go with the bonds to which it was attached, when the bonds were sold to the syndicate the July coupon or interest was also sold, and the syndicate (the purchaser), through the trust company, acquired title to the July interest. Under the individual subscriptions, antecedently made; the proceeds of the July coupon thus acquired by the syndicate were impressed with a trust, and the Trust & Guarantee Company was authorized to disburse the fund for account of syndicate expenses, and in a particularly designated way. Whatever the antecedent arrangements between Golden Rhind and the authorities of South Carolina may have been, they were obviously superseded by the contracts of January 19th and March 7th, and no title to this interest

passed to Rhind. Whatever claim he has or can assert to any part of this interest, whether the claim be preferred as commissions or as syndicate expenses, must now be made through the syndicate, and must be derived from and founded on the second clause of the individual subscription contracts which were the basis of the final transaction and of the actual purchases of January 19 and March 7, 1893." It is perfectly obvious, therefore, that one of the propositions distinctly and flatly determined in the former appeals was that the whole fund then in controversy—and the whole fund then in controversy included the identical part now in dispute—was a common or partnership fund, and was the property of the syndicate, and not the property of Rhind. We further held that, as Rhind and Lancaster had entered into a fraudulent scheme to secure to Lancaster, one of the members of the syndicate, an advantage over the other members, he (Rhind) was answerable for the fraud and misrepresentations of his agent as well as for the fraud and want of frank dealing of which he and Lancaster, as promoters of the syndicate, had been guilty; and that the fund payable to Rhind under the drafts, and amounting to \$48,500, was liable to make good the injury done to the other members, to the extent of the secret and fraudulent profit secured to Lancaster. As the secret and fraudulent profit which Rhind had agreed to pay Lancaster was \$26,250, or one-third of the whole \$78,750 which constituted two-thirds of the July coupon on the total amount of bonds purchased, we further held that Rhind must pay to the syndicate, out of whatever interest he had in the fund in court, the sum he participated in turning over, as an unlawful profit, to his confederate, Lancaster, under the pretext of applying it to syndicate expenses. But, as Rhind held by assignments from some members of the syndicate transfers of their undivided interests in this reclaimed fund, it was stated in the opinion that he would be entitled to those assigned interests. As between Rhind and the syndicate, Rhind was entitled to no part of the \$26,250 wrested from him; but Rhind, as assignee of some members of the syndicate, became the owner of the portions which the assigning members would have taken upon a distribution of the fund, but for those assignments. These conclusions, reached after full arguments and upon mature reflection, irresistibly led to an entire and total reversal of the decree appealed from, and the causes were remanded to the lower court for the passage of a new decree conforming to the opinion of this court. When the record reached the circuit court of Baltimore city, it was contended by Rhind that the shares of those members of the syndicate who had failed to answer the bill of interpleader, and who the decree of the lower court had, in consequence, adjudged to have no interest in the fund, belonged to him; while the members of the syndicate who had made the contests

and secured a reversal of the final decree insisted that these lapsed or abandoned shares, as they are called, belonged to the syndicate, and were divisible between themselves and Rhind upon the basis upon which the \$26,250 fund was divisible,—Rhind being entitled only in virtue of the assignments heretofore alluded to. In one view of the case there are five of these lapsed or abandoned shares, aggregating \$6,838.36; in another view there are but four such shares, amounting to \$6,341.72. Whether there are four or five lapsed or abandoned shares is the question we shall deal with in the next case. To whom do the funds representing the lapsed or abandoned shares actually belong, whatever their number may be, is the inquiry now involved. The court below signed a decree on April 3d wherein, by section 4 of paragraph 5, it awarded the whole of the lapsed or abandoned shares to Rhind, and wherein, by section 3 of paragraph 5, it rejected the claim of Heald & Co. to participate in said fund wrested from Rhind by the former decree of this court passed January 5, 1897. From the decree of April 3d the pending appeals were taken.

The lapsed or abandoned shares—that is, the shares which would have belonged to the trust company and certain members who failed to answer the bill of interpleader—were not separate and distinct funds belonging distributively to these particular members of the syndicate; but they were parts of a common fund, the whole of which was the property of the syndicate, held for ultimate distribution among such of the members as should, in due season, make claim thereto. These so-called lapsed shares did not belong to Rhind, nor were they owned by Lancaster. They, together with the other shares, made up a common or partnership fund, which was divisible into as many properly apportioned parts as there might be rightful claimants. If the lapsed shares were fractions of an entire fund, the whole of which, undivided unto parts, belonged to the syndicate in common, then the failure of some of the members to claim the portions that would have gone to them had they made claim thereto obviously did not divert those portions from or deplete them out of the syndicate, and most certainly did not transfer them to Rhind, but left them just where this court's decree declared them to be; that is, in the syndicate. The whole \$26,250, being, by reason of the fraudulent conduct of Lancaster and Rhind, syndicate assets, and not the separate apportioned assets of any particular member, and being in no sense the property of Rhind except in so far as he became the assignee of some of the members, Rhind could not possibly acquire a title to them by the mere failure of some of the members to demand what would have been theirs had they reasonably claimed it. The controversy, when it originated, did not present the case of an interpleader between two parties where the funds belong to one or the other of them, and where one only asserts in the

proceedings a claim and the other forbears to do so, but permits a decree to go against himself by default. The fallacy of the appellee's argument consists in assuming that this is such a case. The contest was between an individual and a quasi co-partnership. The individual was declared not to be entitled to the fund, but the syndicate or co-partnership was decreed to be the owner thereof. The mere fact that some of the members of that partnership did not claim any part of its assets did not disentitle the partnership to the fund, or deprive the other members of the right to appropriate what would, upon a distribution of the syndicate's assets, have gone to the defaulting members had they demanded it. The failure of some members of the syndicate to claim an interest in the fund did not, and manifestly could not, deprive the syndicate of that fund, or of any part of that fund. The lapsed or abandoned shares were no more segregated from the total fund than were the shares of the contesting members. There had been no apportionment when the bill of interpleader was filed, nor did the decree finally passed on that bill make any division. The decree of this court filed January 5, 1897, did not divide the fund into shares, but declared the entire fund—that is, the \$26,250—to be the property of the syndicate; and while the opinion stated that the members of the syndicate would be entitled to the fund in a named ratio, that rule of apportionment by no means excluded a participation by the contesting members in the lapsed or abandoned shares. The prior contestation was over the whole fund,—Rhind, on the one hand, claiming all of it, and the members of the syndicate claiming it, on the other hand, as the property of the syndicate; and that issue was finally concluded by a decree which determined that Rhind owned none of the fund in virtue of either of the two grounds upon which he founded his title to the whole. That same decree further conclusively settled the fact that the syndicate owned the entire \$26,250, though Rhind, under certain assignments, and therefore through the syndicate, was conceded a portion of it. In a word, when reduced to its last analysis, the claim now made by Rhind is to part of a fund the whole of which we heretofore decided belonged to some one else, and therefore that no part of it belonged to him in his own right. The ground upon which he asserts title to the fraction that he now claims is the identical ground that he relied on to support his disallowed claim to the whole fund. If that ground was untenable as to the whole fund, it must be equally so as to every part of it. We are unable to see how there can be any logical escape from the conclusion that Rhind is not entitled, in his own right, to a part of a fund, after we have deliberately determined that he had no interest whatever in the fund at all. If the whole includes all its parts, and the whole has been adjudged to belong to the syndicate, then there has been a flat decision

that Rhind is not entitled to any of the fund except by virtue of the assignments he holds. This being so, it follows, of course, that section 4 of paragraph 5 of the decree appealed from is erroneous, and must be reversed. So much of the decree as has been appealed from, to wit, section 4 of paragraph 5, is reversed, with costs above and below, and the cause is hereby remanded for a new decree in this particular conforming to this opinion.

(36 Md. 320)

HEALD et al. v. RHIND (four cases).

(Court of Appeals of Maryland. June 23, 1897.)

INTERPLEADER—ABANDONMENT OF CLAIM—WHEAT CONSTITUTES.

On the filing of a bill of interpleader against R. and the members of a certain syndicate, the decree directing defendants to interplead adjudged that H. & Co., members of the syndicate, having failed to answer, were entitled to no interest in the fund in dispute; but they answered before the final decree, which declared R. entitled to such fund. H. & Co. did not appeal, but on appeal by other members of the syndicate such decree was reversed, and the syndicate was declared entitled to such fund. *Held*, that the portion claimed by H. & Co. did not form a lapsed or abandoned share, and they were entitled to participate in the fund.

Appeals from circuit court of Baltimore City.

Bill of interpleader by the Baltimore Trust & Guarantee Company against Heald & Co., and others. By the interpleader decree Heald & Co. and others were made plaintiffs and Colden Rhind defendant. From that part of the decree declaring that Heald & Co. were not entitled to participate in the fund in dispute, and awarding the share claimed by them to defendant, they appeal. Reversed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, PAGE, BOYD, and FOWLER, JJ.

Wm. A. Fisher, W. Cabell Bruce, and D. K. Este Fisher, for appellants. Rich. M. Venable and Edwin G. Baltjer, for appellee.

McSHERRY, C. J. Having decided in the preceding case (38 Atl. 40) that Colden Rhind is not entitled in his own right to any portion of the shares that have been called "lapsed" or "abandoned," and having further held that he is only entitled to such part thereof as may be covered by the assignments which he holds from some members of the syndicate, the question now to be disposed of is whether Heald & Co. may participate in the fund in court, or whether the portion claimed by them forms one of the lapsed or abandoned shares. Heald & Co. were members of the syndicate. They were made parties to the bill of interpleader, but failed to answer until after the decree directing the parties to interplead had been passed. That decree was signed on June 13, 1894, and the answer of Heald & Co. was filed on the 4th of October following. By paragraph E, section 2, of the decree of interpleader, it was adjudged that Heald & Co. and

several others, having failed to answer, were entitled to no interest in the fund. The final decree which declared that Rhind was the owner of the entire fund was passed on May 5, 1896. Heald & Co. did not appeal. It is now insisted by Thom & Redwood and by Alexander Brown & Sons that Heald & Co., having been adjudged by the decree of interpleader to have no interest, and having taken no appeal from the final decree awarding the fund to Rhind, are precluded from now asserting any claim to the fund; and that the share of that fund which would have gone to the firm of Heald & Co. had they made their claim in due season forms the fifth lapsed or abandoned share; the other four shares being those of the Bank of Charleston, R. M. Marshall & Bro., Parsons, Leach & Co., and the Baltimore Trust & Guarantee Company. The court below decreed by section 3 of paragraph V that Heald & Co. were not entitled to participate in the fund, and neither Thom & Redwood nor Alexander Brown & Sons were entitled to a dividend of the share which Heald & Co. claimed. By the same paragraph and section the decree awarded to Rhind the amount demanded by Heald & Co. It is perfectly clear that the decree of interpleader was not a final decree. *Barth v. Rosenfeld*, 36 Md. 604; *Owings v. Rhodes*, 65 Md. 408, 9 Atl. 903; *Miller, Eq. § 724*. As stated by Mr. Miller in his admirable and very reliable work on Equity, just published: "A decree passed upon the filing of a bill of interpleader * * * is interlocutory, settling the rights of no party, and is at all times prior to a final decree subject to revision and alteration. * * *" Section 724. And in the note to the same section it is said, on the authority of *Owings v. Rhodes*, supra, that from the nature of the procedure there must be a preliminary decree so that the co-defendants may have an opportunity to properly present their conflicting claims. The court could not undertake to determine the validity of the claims in controversy before all evidence in support of those claims had been adduced. This interlocutory decree declaring that Heald & Co. had no interest in the fund merely because they had failed to answer did not preclude them from asserting a claim at any time before a final decree was passed. After the interlocutory decree was signed, but long before the case reached a final decree, Heald & Co. went into the case without apparent objection, filed an answer, and set up a claim to an interest in the fund. The final decree of May 5, 1896, adjudged that Rhind alone owned the whole fund in dispute; but that decree, having been declared on appeal to be radically erroneous, was wholly and entirely reversed. It thereupon ceased to have any efficacy whatever. Whether Heald & Co. appealed from the decree of May, 1896, or not, is, therefore, immaterial. The final decree, having been completely annulled, could not possibly have any vitality afterwards, and consequently could not interpose any obstacle or hindrance to the assertion by Heald & Co.

of a claim to participate in the distribution of the fund.

We said on the former appeals, reported in 84 Md. 456, 36 Atl. 597, that the fund for the possession of which the parties were then litigating belonged to the syndicate, and we stated, substantially, that the syndicate was quoad the transactions out of which the fund arose, at least a quasi partnership, subject to many of the principles applicable to that relation. It of necessity follows from this postulate that until the signing of a final decree making a division and distribution of the common fund belonging to the syndicate, each member of the partnership who made claim to participate in the fund had an undivided interest in the entire fund. Heald & Co. were, before a final decree was reached, among those who made claim to the fund. By the decree of this court passed in January, 1897, each member of the syndicate who had not then abandoned a claim to the fund was accorded an undivided interest in the whole fund, whether each member had appealed from the decree below or not, for the fund was an undivided entirety. When the record went back from this court to the circuit court of Baltimore city, it contained the claim of Heald & Co., and it seems to us it would be exceedingly rigorous to hold that, because no prior leave to file an answer had been obtained by them, their answer and claim actually filed must be treated as not in the case at all merely because of the intervention of the decree of interpleader, which settled and determined nothing finally. Heald & Co. confessedly did make claim to a part of the fund, and in this respect their situation is different from that of the trust company, which explicitly disclaimed any interest therein; and their position is also unlike that of the Bank of Charleston, R. M. Marshall & Bro., and Parsons, Leach & Co., who have never yet asserted any claim whatever. As neither the decree of interpleader nor the reversed final decree could effectually debar Heald & Co., we think they are entitled to participate in the fund to the extent claimed by them. In announcing this conclusion it may not be amiss, with a view of avoiding further litigation, to say that the reasons we have given for letting in the claim of Heald & Co. do not apply to the trust company, to Marshall & Bro., to the Bank of Charleston, or to Parsons, Leach & Co., because, as respects the trust company, its disclaimer disentitles it to any share of the funds, and because as to the other parties named they have never heretofore set up any claim whatever to the fund; and now that we have decided that the unclaimed or lapsed shares belong to the other members of the syndicate in the proportions set forth in paragraph 3 of the decree below, it is too late for a new claim to be interposed. As there was error in rejecting the claim of Heald & Co. and in awarding the sums demanded by them to Rhind, the decree in this particular must be reversed, and this cause must be remanded, to the end that a new de-

decree allowing the claim of Heald & Co. may be passed. So much of the decree below as disallows the claim of Heald & Co. and as awards the sum claimed by them to Rhind is reversed, with costs above and below, and the cause is remanded for a new decree conforming to this opinion.

(39 Conn. 521)

BARTHOLOMEW et al. v. DERBY RUBBER CO. et al.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

CORPORATIONS—LEASE OF PLANT—RIGHT OF MINORITY STOCKHOLDERS—FRAUD.

1. It is competent for the directors and majority of stockholders of a joint-stock manufacturing corporation against the will of the minority of the stockholders to lease its entire plant for 10 years, where the lessee is to carry on the business for which the corporation was organized.

2. Fraud not charged in the pleadings will not be inferred from the facts.

Case reserved from superior court, New Haven county; Silas A. Robinson, Judge.

Suit by Dana Bartholomew and others, certain minority stockholders of a joint-stock manufacturing company, to compel the surrender and cancellation of a lease of its entire plant, brought against the Derby Rubber Company and others to the superior court in New Haven county, and reserved by that court, upon demurrer of the respondents, for the consideration and advice of this court. Judgment sustaining demurrer advised.

This is a complaint praying that a certain contract entered into between the Derby Rubber Company and the other defendants be set aside. The plaintiffs complain and say:

"(1) That they are now, and for the past three years have been, stockholders in the said Derby Rubber Company, and owning the following number of shares, viz.: Dana Bartholomew, 125 shares, and the said Page 225 shares.

"(2) The plaintiffs bring this suit not only in their own behalf, but in behalf of all other stockholders in the said defendant corporation who choose to come in and take the benefit of this action, excepting such stockholders as may be defendants herein.

"(3) The defendant corporation was organized under the joint-stock laws of this state on or about February —, 1889, and has ever since been located in said Shelton.

"(4) The purpose and object for which said Derby Rubber Company was organized was to reclaim rubber,—to work over old rubber and manufacture rubber stock from the same; buy, sell, manufacture, and deal in rubber, rubber goods of all kinds, and the stock and materials of which the same are composed; buy, sell, manufacture, and deal in any substitute for rubber, and goods composed in whole or in part of such substitute; to own any real or personal property necessary and convenient for the transaction of said busi-

ness; and generally to do all things incidental to said business.

"(5) The capital stock of said corporation is divided into two thousand (2,000) shares of the par value of twenty-five dollars (\$25) per share.

"(6) The stockholders of said corporation on the 2d day of August, 1895, were as follows:
* * *

"(7) After its organization the said corporation purchased a tract of land situated in said Shelton, and erected thereon a suitable mill, and equipped the same with such machinery, tools, and fixtures as were convenient and necessary to successfully carry on the business for which it was created. And said corporation is now the owner of said land, mill, and certain machinery therein, but a more particular description of which is to the plaintiffs unknown.

"(8) Said corporation continued to carry on its business with profit on said premises until on or about the 12th day of June, 1891, when it leased its real estate, including its factory and machinery situated therein, to the Rubber Reclaiming Company, a joint-stock corporation located in the city of New York, and thereupon said Derby Rubber Company suspended the further prosecution of the business for which it was created, and the said Rubber Reclaiming Company continued to occupy said premises, and carry on business thereon, until on or about the 5th day of May, 1895.

"(9) On or about the 1st day of May, 1895, the lease between the said Derby Rubber Company and the said Rubber Reclaiming Company was canceled and set aside by mutual consent of all the stockholders of said rubber company and both parties to said lease, and said Derby Rubber Company was thereupon restored to all of its property, real and personal, which had heretofore been leased to and held by said Rubber Reclaiming Company.

"(10) At the annual meeting of said Derby Rubber Company, held on the — day of January, 1895, the following named persons were elected directors of said corporation to hold office for one year and until their successors should be appointed in their stead, viz.: Royal M. Bassett, Theodore S. Bassett, Theodore W. Bassett, Henry F. Wanning, Henry Atwater.

"(11) On the 15th day of January, 1895, at a meeting of said directors, the following persons were duly elected officers of said Derby Rubber Company for one year, viz.: Henry Atwater, president; Theodore S. Bassett, treasurer; Theodore W. Bassett, secretary,—and all of said parties accepted said offices and entered upon the discharge of their duties.

"(12) That on the 8th day of May, 1895, the directors of the said Derby Rubber Company voted to lease all the property, real and personal, described in Exhibit D, hereafter referred to, then owned by said company, situated in the town of Huntington, in said state, to Max Loewenthal, of New York City. A copy of said vote is hereby annexed, and

made a part of this complaint and paragraph, and made plaintiffs' Exhibit A.

"(13) On the 10th day of May, 1895, Theodore W. Bassett, the secretary of the Derby Rubber Company, signed and sent to all the stockholders of said corporation the following call for a special stockholders' meeting. A copy of said call is hereby made a part of this paragraph, and is marked 'Plaintiffs' Exhibit B.'

"(13½) Said notice was sent under and pursuant to the by-laws of said Derby Rubber Company. The by-law relating to the calling of special stockholders' meetings is as follows: 'Special meetings of the stockholders of said corporation may be held at any time upon notice hereinbefore specified, and the secretary or president shall give such notice upon the request in writing of stockholders holding two hundred (200) shares of the capital stock of said corporation calling for such special meeting, and shall specify therein the object and purpose of said meeting.'

"(14) That pursuant to the call and notice aforesaid a special stockholders' meeting of said Derby Rubber Company was held at the time and place named in said call, at which a vote was passed, by the terms of which the action of the directors of said company in leasing and agreeing to sell the property described in Exhibit D to said Max Loewenthal was confirmed, ratified, and approved. A copy of said vote is hereby annexed, and made a part of this complaint and paragraph, and is made plaintiffs' Exhibit C.

"(15) Said lease and agreement to sell were duly recorded upon the land records of the town of Shelton on the 14th day of May, 1895.

"(16) Acting under and pursuant to the authority conferred by the votes aforesaid, Henry Atwater, the president of said company, did on the 9th day of May, 1895, execute in the name of said Derby Rubber Company a certain written lease and agreement, by the terms of which the said Derby Rubber Company leased its property, real and personal, described in Exhibit D, to the said Max Loewenthal. A copy of said lease and agreement is hereby annexed, and made a part of this complaint and paragraph, and is made plaintiffs' Exhibit D.

"(17) The said Derby Rubber Company and the said directors and stockholders thereof intended, by the action taken by them, to abandon the business for which said company was created for and during the time mentioned in said lease, and to place its factory, tools, and machinery from and out of its possession and control, so that during the term of said lease the business for which said corporation was organized could not be carried on by said corporation in the premises described in said lease.

"(18) Neither the stockholders nor directors who voted to make said lease and agreement expected thereby to wind up the af-

fairs of said company so long as the property described in said lease should be in the possession of the said Max Loewenthal, nor did they expect to distribute among the stockholders of said company any of its assets described in said lease and contract, except the rent that would be payable under the terms of said lease.

"(19) The stockholders and directors who voted in favor of said lease and agreement did expect thereby that if the said Max Loewenthal purchased said property under said agreement, that thereupon said corporation should be dissolved, and that all of the property described in said lease should thereupon be sold and conveyed to the said Max Loewenthal at the price which should be fixed and determined upon, pursuant to the conditions named in said lease and agreement.

"(20) On the said 10th day of May, 1895, the capital stock of said corporation was fully paid up. The value of its property described in Exhibit D was from twenty-five thousand to forty thousand dollars (\$25,000 to \$40,000), and it had personal property not included in said lease to the value of eight to fifteen thousand dollars (\$8,000 to \$15,000), the larger portion of which personal property was at the date of said lease uncertain in amount, and contingent on the settlement of the accounts between said rubber company and said Rubber Reclaiming Company mentioned in paragraph 8, of which amount — dollars has since been received, and has been divided among the stockholders.

"(21) On the 10th day of May, 1895, said corporation was entirely solvent, and its indebtedness did not exceed one hundred dollars (\$100).

"(22) On said date the said Derby Rubber Company could not have carried on the business for which it was organized successfully and with profit to its stockholders without additional capital, and on said date the directors and stockholders of said rubber company who voted in favor of said lease and contract Exhibit D were unwilling to invest further capital in said business, and, no other person offering to furnish the additional capital needed to carry on said business with profit to said corporation, it was the judgment of said directors and stockholders who voted to make such lease and contract that such contract and leasing was the most profitable use to which the plant of said company could then be put.

"(23) The plaintiffs did not attend said stockholders' meeting of May 15th, nor did they have any knowledge or notice of the action which was in fact taken at said meeting, or of the action taken at said directors' meeting of May 9, 1895, except such as was contained in said notice, Exhibit A. Within a month after said meeting, and upon learning of the action taken therein, the plaintiffs consulted counsel in reference to their legal rights as stockholders, and on the 20th day

of July, 1895, said counsel notified the said Derby Rubber Company that he had been retained to bring suit to have said lease set aside. The plaintiffs did not consent to the execution of said lease, nor did they approve of the same, unless such consent and approval can be inferred from their neglect to attend said stockholders' meeting, and oppose the making of said lease and agreement, and unless such consent can be further inferred from their silence from May 15, 1894, to July 29, 1894.

"(24) That it is the desire and the wish of the plaintiffs and other stockholders of said Derby Rubber Company owning eight hundred and forty-four (844) shares of its original stock that said company shall conduct the business for which it was organized, and for that purpose to use and control the property owned by it, and which is not in the possession of the United States Rubber Reclaiming Works; and that they are prevented from so doing from the facts above stated.

"(25) On the 1st day of June, 1895, said Max Loewenthal took possession of the property described in said Exhibit D, and by himself or his lawful assigns has ever since retained possession of said premises, and has performed on his part all the conditions, provisions, and stipulations contained in said Exhibit D. And at the date hereof, by assignment of said Exhibit D, the premises described therein are in the possession of said Max Loewenthal, Nathan Kauffman, and Theodore S. Bassett, partners in business under the firm name of the United States Rubber Reclaiming Works.

"(26) That on the 9th day of August, 1895, the directors and the majority of the stockholders were the same as those who had voted in favor of making said lease, and on said date they believed that said lease and agreement should continue in full force and effect as made, and for that reason they would not have voted to cancel or set aside the same had the plaintiffs or any other minority stockholders requested them so to do, but they would have refused to comply so to do for the reason stated. And because of that fact the plaintiffs did not request them to take any steps to have said lease and agreement set aside and declared null and void.

"The plaintiffs claim: (1) An order citing in such shareholders of said Derby Rubber Company as omit to join with the plaintiffs and the defendants therein, and that the lease and agreement, Exhibit D, be declared null and void. (2) That the said Max Loewenthal, Nathan Kauffman, Theodore S. Bassett, and such other person or persons who may constitute the co-partnership of the United States Rubber Reclaiming Works, be required to surrender said lease and the possession of the property now held by them and owned by the said Derby Rubber Company. Such other or further orders in the premises as may be necessary to fully protect the rights of the plain-

tiffs, and to carry into effect such orders as the court may see fit to pass in the premises."

"Exhibit A.

"May 9th, 1895. A meeting of the directors of the Derby Rubber Company was held at the office of said company at Derby, 4 o'clock in the afternoon of said day, pursuant to notice given May 7th, 1895. R. M. Bassett, H. F. Wanning, Henry Atwater, T. S. Bassett, and T. W. Bassett, being a full board of directors, present. The minutes of the last directors' meeting were read, and approved. Mr. R. M. Bassett reported that, as agent appointed by the directors of this company, with power to cancel the lease with the Rubber Reclaiming Company, he has carried out the instructions delegated to him by the board of directors of the Derby Rubber Co., and presents for record the agreement executed at meeting of the stockholders of the Rubber Reclaiming Company between this company and the lessees, whereby the several leases are canceled, and a copy of the agreement is entered on contract book of this company, on page No. 51-52, etc. On motion it was voted: 'Whereas, a lease of the plant and works of the Derby Rubber Company with Max Loewenthal has been presented to the board of directors of this company for action upon the same: Therefore, be it resolved, that the company accept and carry out the said lease in accordance therewith, and that the president of this company, Mr. Henry Atwater, be, and he is hereby, appointed special agent, with full power and authority to execute lease of the Derby Rubber Company plant to Max Loewenthal, of New York, in accordance therewith, and that the said lease be recorded on the contract book of this company.' No other business, the meeting adjourned. Attest: Theo. W. Bassett, Secretary."

"Plaintiffs' Exhibit B.

"Derby, Conn., May 10th, 1895. Special Stockholders' Meeting of the Derby Rubber Company. Call. Dear Sir: Notice is hereby given that a special stockholders' meeting of the Derby Rubber Company will be holden at the office of the Rubber Reclaiming Works Company, in the town of Huntington, on Wednesday, May 15th, 1895, at 3:30 p. m., for the purpose of confirming the action of the directors in the execution of lease on the plant of the Derby Rubber Company, and to do any business pertaining thereto and proper to be done at said meeting. Theodore W. Bassett, Secretary."

"Exhibit C.

"Special Stockholders' Meeting. May 15, 1895. Pursuant to the foregoing notice a meeting of the stockholders of the Derby Rubber Company was held at the former office of said company in the town of Huntington on the 16th day of May, 1895, at 3:30 o'clock in the afternoon. The following stockholders were present or by proxy: H. A. Haugh; R. M.

Bassett; T. S. Bassett; Henry Atwater; W. F. Askam; Carrie B. Woodman; Caroline W. Bassett; R. W. Blake, by T. S. Bassett, proxy; H. F. Wanning, by R. M. Bassett, proxy. The following resolution was then offered: 'Whereas, the lease heretofore existing between this company and the Rubber Reclaiming Company has been canceled and terminated by the mutual consent of both parties; and whereas, the Derby Rubber Co. has not sufficient cash capital to engage in the business of reclaiming old rubber on its own account; and whereas, Mr. Max Loewenthal, of the city of New York, is desirous of engaging in said business, and of leasing the plant of this company for said purpose; and whereas, at a meeting of the board of directors of this corporation held on May 9th, 1895, at which all of the directors, together with Geo. O. Schneller and Max Loewenthal, were present, a lease of the plant of the Derby Rubber Co. to the said Loewenthal was presented, and approved of by said board of directors, and Henry Atwater was appointed an agent of this company, with full power and authority to execute said lease on behalf of the Derby Rubber Co.; and whereas, afterwards, on the 10th day of May, 1895, said lease with the said Loewenthal was duly executed by Henry Atwater on behalf of the Derby Rubber Co. and said Loewenthal for himself: Therefore, be it resolved, that said lease of the plant of this corporation with the said Max Loewenthal, executed on the 10th day of May, 1895, by Henry Atwater in behalf of this corporation, is hereby approved, ratified, and confirmed in all respects, and is hereby declared to be binding upon this corporation, and the action of the board of directors in making such lease is hereby approved and ratified.'

"Exhibit D.

"This indenture, made the 10th day of May, one thousand eight hundred and ninety-five, by and between the Derby Rubber Co., a corporation organized under the laws of the state of Connecticut, party of the first part, and Max Loewenthal, party of the second part, witnesseth:

"First. That the said party of the first part hath letten, and by these presents does grant, demise, and lease, unto Max Loewenthal, the party of the second part, the following described premises: (1) All that certain piece or parcel of land situated, lying, and being in the borough of Shelton, town of Huntington, and state of Connecticut, on the easterly side of the Ousatonic Water Co.'s main canal, bounded northerly by land of the Star Pin Company, easterly by the Housatonic river, southerly by land of the Derby Gas Company, and westerly by a line thirty feet easterly from and parallel with the westerly face of the easterly wall of said main canal, said lot being seventy-five feet wide, and extending from said line thirty feet from said wall to the river, the land between said westerly line and said canal being reserved by said water company

as and for a way for the use of the owners and occupiers of land along said canal, the said way to remain forever open and unincumbered for such a road and way, and for the use of a steam-railroad track thereon, substantially as now existing, subject only to the necessary use to conduct water from said canal to the above-described land for power, in a properly constructed flume, under the direction of the engineer of said water company; said land having all the rights and being subject to all the obligations in and concerning the party wall between the land above described and the land of the Derby Gas Company, fully described and set forth in an agreement between the Derby Gas Co. and the Derby Rubber Company, dated June 24th, 1889, and recorded on the same day in Volume 26 of Huntington Land Records, pages 299 to 302, to which reference is hereby made for a more particular description; and subject also to covenant running with the land for an annual rent of four square feet of permanent water, at the rate of two hundred and fifty dollars for each square foot, contained in the aforesaid agreement between the Derby Gas Company and the Derby Rubber Company, dated and recorded as aforesaid, said water rent being a lien on the land. (2) Also all that certain other piece or parcel of land lying and being in said town of Shelton between the canal of the Ousatonic Water Company and the Housatonic river, and next northerly of the manufacturing establishment of Wilcox & Howe, and bounded, butted, and described as follows, viz.: 'Commencing at a point thirty feet northeasterly of the canal of the Ousatonic Water Company, which said point is at the northwesterly corner of land deeded by said water company to William Howe; thence northwesterly, parallel with the southerly face of the northerly wall of said canal, and thirty feet distant therefrom, and northeasterly of said face, seventy-five feet; thence northeasterly, parallel with and seventy-five feet distant from the northerly and main portion of said William Howe's northwesterly line, to the Housatonic river, about one hundred and seventy-six feet; thence southeasterly, parallel with said canal and said first line, eighty-two feet, to the northeasterly line of William Howe's land at this point; thence southwesterly about forty feet along said William Howe's land, to an angle in the same; thence northwesterly along said Howe's land seven feet; thence southwesterly along said William Howe's land and the northwesterly line one hundred and thirty-six feet, to the point of departure.' Said described land is abutted southeasterly and northwesterly by land now or formerly of said Ousatonic Water Co., northeasterly by the Housatonic river, and southwesterly by land now or formerly of William Howe. Also the equal and undivided half of the flood gates and aqueduct or flume conducting water from the canal of said water company across said strip of land thirty feet wide between the

above-described land and said canal; and also the equal and undivided right in said aqueduct or raceway conducting water across the land above described in continuation of the aqueduct crossing said thirty-foot strip of land, and running for one hundred and thirty-six feet along the dividing line between the land before described and said land of William Howe, excepting therefrom any water wheel or wheels or other devices, the property of said William Howe or his lessees in said agreement, if any there be; and also all right acquired by the party of the first part in and to said strip of land thirty feet wide lying between the land herein described and said canal; and also all rights which the said party of the first part has or ought to have to take water from said canal for power on the land hereinbefore described; and also all rights existing in favor of said party of the first part, as assignee by various mesne assignments of a certain contract between said Ousatonic Water Company and the Spring Horseshoe Company, dated March 5, 1881, and recorded in Huntington Land Records, vol. 20, pages 338 to 347, the raceway extending from the canal of the Ousatonic Water Company to the tract of land herein described; thence along the southerly line of said tract of land to the Housatonic river; and also the use of the water in said raceway is subject to the terms and conditions of a certain contract entered into by and between the Ousatonic Water Company and the Spring Horseshoe Company, bearing date March 5, 1881, and recorded in Huntington Land Records, Volume 20, pages 338 to 343. (3) Together with the buildings erected on the tracts of land hereinbefore described, and used by the party of the first part in connection with the business heretofore carried on by it. And (4) the entire plant of the rubber business of the said party of the first part, including the machinery, tools, implements, chattels, personal property, and effects contained in the buildings or on said premises, with the appurtenances, for the term beginning at the date hereof, and expiring on the first day of June, one thousand eight hundred and ninety-six, at the yearly rent or sum of two thousand five hundred dollars, to be paid in equal quarterly payments, commencing on the first day of September, 1895, one thousand eight hundred and ninety-five, and continuing thereafter on the first days of December, March, and June during the continuance of this lease, or of any renewal thereof: provided, that the period beginning with the date hereof and expiring June 1st, 1895, no rent shall be paid, unless the party of the second part shall during that period operate the plant, in which case he shall pay the sum of one hundred eight $\frac{22}{100}$ dollars as rent.

"Second. In consideration of the premises and of the mutual covenants herein contained the party of the first part stipulates, covenants, and agrees: (1) That it is the owner in fee simple of said premises hereby leased,

and of the goods, chattels, and effects now contained in or upon the premises. (2) That there are no liens or incumbrances (same as above recited) of any kind or character upon the aforesaid premises, or upon the goods, chattels, or effects owned by the party of the first part, and hereby leased. (3) That in case the building or buildings erected on the premises hereby leased shall be partially damaged or entirely destroyed by fire, the same shall be repaired or rebuilt as speedily as possible, at the expense of the party of the first part; that the premises and buildings hereby leased and the personal property therein contained shall be insured by the party of the first part, at the expense of the party of the second part. (4) That it will pay and discharge, when the same shall become due and payable, all taxes and assessments upon the realty hereby leased. (5) That the said party of the second part shall, at the expiration of the term of this lease, or of any renewal thereof, have the option of purchasing from the party of the first part the premises hereby leased, and the personal property, machinery, fixtures, tools, and chattels now contained in or upon said premises, at price to be determined upon by appraisement, each of the parties hereto to select an appraiser, and in case of disagreement the two appraisers so chosen to select a third; the decision of a majority of said appraisers to be conclusive and final. That the said party of the second part, his executors, administrators, or assigns, shall have the option of remaining in the use and occupation of said premises and property for another year after June 1st, 1896, upon the same rent, terms, and conditions, provided that by March 15, 1896, he or they shall, in writing, notify the party of the first part. Such notice shall ipso facto constitute a renewal of this lease. Furthermore, the party of the second part, his executors, administrators, or assigns, may have nine additional such extensions of use and occupation, of one year each, upon the same rent, terms, and conditions, by giving such notice seventy days before the first of June of the year in which the term would expire but for said notice. Each such notice shall have the same force and effect as a mutual written contract renewing and extending this agreement. In addition to the above, the party of the first part, as further assurance, agrees, on receiving such notice, to execute, acknowledge, and deliver to the party of the second part, his executors, administrators, or assigns, a formal written instrument of renewal or extension. (6) That the said party of the second part, on paying the yearly rent, as hereinbefore provided, and performing the covenants herein contained and assumed by him, shall and may peaceably and quietly have, hold, and enjoy the said demised premises for the term aforesaid.

"Third. The said party of the second part hereby covenants and agrees: (1) To

pay the yearly rent as hereinbefore provided. (2) To pay and discharge during the continuance of this lease, or of any renewal thereof, all personal taxes which may be imposed or assessed upon the personal property hereby leased, all insurance premiums thereon, and all charges levied or imposed for the use of water in connection with the business to be carried on by him on said premises: provided, that he shall not be chargeable with such charges for the use of such water till June 1st, 1895. (3) To accept the lease of the premises hereinbefore described, subject to the terms and conditions and to the covenants and provisions hereinbefore mentioned. (4) At the expiration of said term to quit and surrender the premises in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted. It is mutually understood and agreed that the covenants and agreements contained in the foregoing lease shall be binding upon and shall inure to the benefit of the respective parties hereunto, and their successors, executors, administrators, and assigns.

"In witness whereof the said party of the first part, by its president and agent, Henry Atwater, specifically authorized thereto by the board of directors of said corporation, hath caused this indenture to be subscribed with its corporate name, and the corporate seal thereof to be hereto affixed to duplicates, on the day, month, and year first above written. And the said party of the second part also on said day hath hereunto set his hand and seal.

"Sealed and delivered in presence of

"Wm. D. Bishop.

"M. Kennelly.

"The Derby Rubber Company,

"By Henry Atwater,

"President and Agent Specially
Authorized. [L. S.]

"A. B. Atwood.

"Edward F. C. Clegg.

"Max Loewenthal. [L. S.]"

Amendment to Complaint.

"By consent of court, the plaintiffs hereby amend their complaint as follows:

"(1) Paragraph 8 of the amended complaint is amended by adding thereto the following: 'Said lease to said the Rubber Reclaiming Company also contains an optional contract of purchase of said property by said Rubber Reclaiming Company, and a copy of said lease and contract of said Derby Rubber Company to said Rubber Reclaiming Company is hereto attached, and made part of this paragraph and complaint, and marked "Exhibit E."'

"(2) Add the following section: '(8½) The plaintiff Bartholomew became a stockholder in said Derby Rubber Company August 15th, 1891.'

"Plaintiffs' Exhibit E.

"This indenture, made the 12th day of June, A. D. one thousand eight hundred and ninety-

one, by and between the Derby Rubber Company, a corporation duly organized under the laws of the state of Connecticut, party of the first part, and the Rubber Reclaiming Company, a corporation duly organized under the laws of the state of New Jersey, party of the second part, witnesseth:

"First. That the said party of the first part hath letten, and by these premises does grant, demise, and lease, unto the Rubber Reclaiming Company, the party of the second part, the following described premises: (1) All that certain piece or parcel of land situated, lying, and being in the borough of Shelton, town of Huntington, and state of Connecticut, on the westerly side of the Ousatonic Water Company's main canal, bounded northerly by land of the Star Pin Company, easterly by the Housatonic river, southerly by land of the Derby Gas Company, and westerly by a line thirty feet easterly from and parallel with the westerly face of the easterly wall of said main canal, said lot being seventy-five feet wide, and extending from said line thirty feet from said wall to the river, the land between the westerly line and said canal being reserved by said water company as and for a way for the use of the owners and occupiers of land along said canal, the said way to remain forever open and unincumbered for such a road and way, and for the use of a steam-railroad track thereon, substantially as now existing, subject only to the necessary use to conduct water from said canal to the above-described land for power in a properly constructed flume, under the direction of the engineer of said water company; said land having all the rights and being subject to all the obligations in and concerning the party wall between the land above described and the land of the Derby Gas Company, fully described and set forth in an agreement between the Derby Gas Company and the Derby Rubber Company, dated June 24, 1889, and recorded on the same day in Volume 26 of Huntington Land Records, pages 299 to 302, to which reference is hereby made for a more particular description, and subject also to a covenant running with the land for an annual rent of four square feet of permanent water, at the rate of two hundred and fifty dollars for each square foot, contained in the aforesaid agreement between the Derby Gas Company and the Derby Rubber Company, dated and recorded as aforesaid, said water rent being a lien on the land. (2) Also all that certain other piece or parcel of land situated, lying, and being in said town of Shelton, between the canal of the Ousatonic Water Company and the Housatonic river, and next northerly of the manufacturing establishment of Wilcox and Howe, and bounded, butted, and described as follows, viz.: 'Commencing at a point thirty feet northeasterly of the canal of the Ousatonic Water Company, which said point is at the northwesterly corner of land deeded by said water company to William Howe; thence northwesterly, parallel with the southerly face of the northerly wall of said

canal, and thirty feet distant therefrom, and northeasterly of said face, seventy-five feet; thence northeasterly, parallel with and seventy-five feet distant from the northerly and main portion of said William Howe's northwesterly line, to the Housatonic river, about one hundred and seventy-six feet; thence southeasterly, parallel with said canal and said first line, eighty-two feet, to the northeasterly line of William Howe's land at this point; thence southwesterly, about forty feet, along said William Howe's land, to an angle in the same; thence northwesterly, along said Howe's land and the northwesterly line, one hundred and thirty-six feet, to the point of departure.' Said described land is abutted southwesterly and northwesterly by land now or formerly of said Ousatonic Water Company, northeasterly by the Housatonic river, and southeasterly by land now or formerly of William Howe. Also the equal and undivided half of the head races and aqueduct or flume conducting water from the canal of said water company across said strip of land thirty feet wide between the above-described land and said canal; and also the equal and undivided right in said aqueduct or raceway conducting water across the land above described in continuation of the aqueduct, crossing said thirty-foot strip of land, and running for one hundred and thirty-six feet along the dividing line between the land above described and said land of William Howe, excepting therefrom any water wheel or wheels or other devices, the property of said William Howe or his lessees in said aqueduct, if any there be; and also all rights of way and all rights acquired by the party of the first part in and to said strip of land thirty feet wide, lying between the land herein described and said canal; and also all rights which the said party of the first part has or ought to have to take water from said canal for power on the land hereinbefore described; and also all rights existing in favor of said party of the first part as assignee by various mesne assignments of a certain contract between said Ousatonic Water Company and the Spring Horseshoe Company, dated March 5th, 1881, and recorded in Huntington Land Records, Volume 20, pages 338 to 347, the raceway extending from the canal of the Ousatonic Water Company to the tract of land herein described; thence along the southerly line of said tract of land to the Housatonic river; and also the use of water in said raceway is subject to the terms and conditions of a certain contract entered into by and between the Ousatonic Water Company and the Spring Horseshoe Company, bearing date March 5th, 1881, and recorded in Huntington Land Records, Volume 20, pages 338 to 343. (3) Together with the buildings erected on the tracts of land hereinbefore described and used by the party of the first part in connection with the business heretofore carried on by it. And (4) the entire plant and good will of the rubber business of the said party of the first part, including the machinery, tools, implements, chattels, personal property, and ef-

fects contained in the buildings on said premises, and more particularly enumerated and described in the schedule hereto annexed and made part hereof, marked 'Schedule A,' with the appurtenances, for the term of ten years from the first day of June, A. D. one thousand eight hundred and ninety-one, at the yearly rent or sum of six thousand and forty-eight dollars (\$6,048), to be paid in equal quarterly payments, commencing on the first day of August, eighteen hundred and ninety-one, and continuing thereafter on the first days of February, June, August, and November in each and every year during the continuance of this lease, or any renewal thereof.

"Second. In consideration of the premises and of the mutual covenants herein contained, the party of the first part stipulates, covenants, and agrees: (1) That it is the owner in fee simple of said premises hereby leased, and of the goods, chattels, and effects enumerated in Schedule A. (2) That there are no liens or incumbrances (save as above recited) of any kind or character upon the aforesaid premises, or upon the goods, chattels, and effects owned by the party of the first part, and hereby leased. (3) That in case the building or buildings erected on the premises hereby leased shall be partially damaged or entirely destroyed by fire, the same shall be repaired or rebuilt as speedily as possible at the expense of the said party of the first part. That the premises and buildings hereby leased and the personal property therein contained shall be insured by the party of the first part, at the expense of the party of the second part. (4) That it will pay and discharge, when the same shall become due and payable, all taxes and assessments upon the realty hereby leased. (5) That the said party of the second part shall at the expiration of the term of this lease, or of any renewal thereof, have the option of purchasing from the party of the first part the premises hereby leased, and the personal property, machinery, fixtures, tools, and chattels mentioned and described in said Schedule A, at a price to be determined upon by appraisement, each of the parties hereto to select an appraiser, and in case of disagreement the two appraisers so chosen to select a third; the decision of a majority of said appraisers to be conclusive and final. (6) That the said party of the second part, on paying the yearly rent as hereinbefore provided, and performing the covenants herein contained and assumed by it, shall and may peaceably and quietly have, hold, and enjoy the said demised premises for the term aforesaid.

"Third. The said party of the second part hereby covenants and agrees: (1) To pay the yearly rent as hereinbefore provided. (2) To pay and discharge during the continuance of this lease, or of any renewal thereof, all personal taxes which may be imposed or assessed upon the personal property herein leased, all insurance premiums thereon, and

all charges levied or imposed for the use of water in connection with the business to be carried on by it on said premises. (3) To accept the lease of the premises hereinbefore described, subject to the terms and conditions and to the covenants and provisions hereinbefore mentioned. (4) At the expiration of the said term to quit and surrender the premises hereby leased in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

"It is mutually understood and agreed that the covenants and agreements contained in the foregoing lease shall be binding upon and shall inure to the benefit of the respective parties hereto, and their successors and assigns. In witness whereof the said party of the first part, by its president and agent, Robert N. Bassett, specially authorized thereto by the board of directors of said corporation, hath caused this indenture to be subscribed with its corporate name, and the corporate seal thereof to be hereto affixed to duplicates, on the day, month, and year first above written. And the said party of the second part also on said day hath by its president and agent, N. Chapman Mitchell, specially authorized thereto by the board of directors of the said corporation, the Rubber Reclaiming Company, caused this said indenture to be subscribed with its corporate name, and the corporate seal thereof to be affixed to said duplicates.

"Sealed and delivered in the presence of

"Witnesses:

"Wm. C. Atwater.

"James B. Atwater.

"The Derby Rubber Co.,

"By Robert N. Bassett,

"President and Agent Specially Authorized. [Seal.]

"The Rubber Reclaiming Co.

"N. Chapman Mitchell,

"President. [Seal.]"

"Demurrer of Max Loewenthal and the United States Rubber Reclaiming Works to the Complaint.

"The defendants Max Loewenthal and the United States Rubber Reclaiming Works demur to the amended complaint and the amendment thereto, and for reasons of demurrer assign the following, viz.:

"(1) Because upon the facts therein stated said lease and contract to sell, Exhibit D, was within the powers of the Derby Rubber Company, and was duly authorized and executed and delivered in the name and behalf of said company.

"(2) Because upon the facts therein stated said lease and contract, Exhibit D, was authorized by a majority of the stockholders and by the directors, and executed in good faith for the best interests of said Derby Rubber Company, and that no stockholder opposed said lease and contract at the meeting of the stockholders duly called for the

purpose of ratifying said lease and contract.

"(3) Because it does not appear from said complaint that these defendants had any knowledge of any opposition to said lease and contract, Exhibit D, on the part of any stockholder in said rubber company, until long after the execution and delivery of said Exhibit D, and possession taken thereunder, and long after the holding of said stockholders' meeting mentioned in paragraph 14 of said amended complaint, viz. until the bringing of this suit.

"(4) Because the plaintiffs are estopped from claiming that said lease and contract, Exhibit D, should be canceled and set aside because they did not attend said stockholders' meeting called to take action on the same, as described in said amended complaint, nor make any objection to the same which was brought to the knowledge of any stockholder in said Derby Rubber Company either prior to or at said stockholders' meeting.

"(5) Because upon the facts stated in said complaint the plaintiffs, and each of them, are estopped from now objecting to said lease and contract, Exhibit D, and from maintaining suit to cause the same to be set aside.

"(6) Because it is not alleged in said amended complaint that these defendants did not act in the most entire good faith in making and entering into said contract and lease, Exhibit D, but it does appear that all parties to said lease and contract acted in entire good faith.

"(7) Because said lease and contract, Exhibit D, was within the power of the said corporation, and these defendants had the right to presume that said lease and contract was properly authorized.

"(8) Because said complaint contains no allegation of damage caused or threatened by these defendants to the plaintiffs, or either of them, or to the said rubber company.

"(9) Because it appears from said complaint that said lease and contract, Exhibit D, was highly advantageous to said rubber company and the plaintiffs.

"(10) Because it sufficiently appears from said amended complaint that said lease and contract, Exhibit D, was made by the directors and stockholders with a view to winding up the affairs of said rubber company, and distributing its assets among its stockholders.

"(11) Because it appears from said amended complaint and the amendment thereto that for many years said rubber company had, without opposition on the part of any of its stockholders, leased its plant by a lease and contract of sale substantially the same as Exhibit D, viz. Exhibit E, and that it had become impracticable for said rubber company to make any other profitable use of its plant than by leasing as in Exhibit D; and that said company had abandoned its business on the 12th day of June, 1891; and that the plaintiffs never requested any different

conduct of its affairs until long after the making and delivery of Exhibit D, and possession thereunder.

"(12) Because said complaint does not state any cause of action against these defendants.

"(13) These defendants further demur specially to paragraph 24 of said complaint, because it is no allegation of damage that the majority of the stock of said rubber company does not manage the affairs of said company as said owners of a minority of its stock desire and wish.

"(14) And these defendants demur specially to paragraph 26 of said amended complaint, because upon the facts stated in said complaint the directors and stockholders of said rubber company had no right to cancel or set aside said lease and contract, Exhibit D, without the consent of these defendants."

"Demurrer to Prayer for Relief.

"These defendants demur to each paragraph of the prayer for relief:

"(1) Because on the facts stated the plaintiffs are not entitled to the relief therein sought.

"(2) Because upon the facts alleged in said amended complaint and amendment thereto the plaintiffs, and each of them, are not entitled to any relief."

V. Munger, for petitioners. Edwin B. Gager and Williams S. Downs, for respondents Max Loewenthal and the United States Rubber Reclaiming Works.

ANDREWS, C. J. (after stating the facts). The plaintiffs are a minority of the stockholders of the Derby Rubber Company. They ask that a certain contract called a lease between the said company and the other defendants be set aside and declared to be void. The record shows that this contract was made by the directors of the company; that it was, before delivery, submitted to a meeting of the stockholders, duly called for that purpose, and that by a unanimous vote of the stockholders present at that meeting—being a majority of all—it was affirmed and ratified. The plaintiffs, although duly notified of said meeting, and the purposes for which it was to be held, voluntarily remained away. If the contract was really *ultra vires* of the corporation, the plaintiffs may claim that it should be set aside. The contract contains an option to the lessees to become the purchasers of the property at a price to be fixed by a sort of arbitration. The complaint avers that it is the intention of the directors and the majority stockholders, in case the option is used, to divide the money received among all the stockholders, and wind up the corporation. As a conditional contract to sell the property, this agreement is not questioned, nor could it well be questioned. It is competent for any business corporation to sell its property, pay its debts, divide its assets, and wind up its affairs. Especially is this so if the corporation is in an embarrassed

condition. It is as a lease for 10 years without a sale that the contract is said to be *ultra vires*. We speak of the contract hereafter as a lease. The sole question then is, was the vote ratifying the lease, and so the lease itself, *ultra vires* and void? We are inclined to think the lease was not void. The lessees is to continue the same business which the corporation was organized to carry on. The lease, therefore, is not a change in the business, but only a change in the management of the business. The financial condition of the corporation is now depressed, and its business cannot be made profitable under its own management for want of capital. Additional capital is not available. But neither the directors nor the majority stockholders have so far lost confidence in the concern as to be willing peremptorily to wind up its affairs. The lease was entered into as the best, perhaps the only, means of carrying the corporation over this period of depression, and in the meantime obtaining some income for the stockholders. If a sale takes place, it is certain that the property will be worth more in operation than if left idle. Such leases have repeatedly been sustained by the courts of equity. The case of Featherstonhaugh v. Clay Co., L. R. 1 Eq. 818, was like the one in hand in this: Minority stockholders asked to have a lease of the entire property of the corporation set aside. That company was incorporated for "the working, preparation, and sale of porcelain clay," with power to combine "mining operations" with the original business. After a period of unsuccessful working, a majority of the stockholders voted to and did lease the whole of the works and buildings of the company for the period of 21 years. It was held that this was a valid lease, not beyond the power of the company to make. The vice chancellor, Sir William Page Wood, in giving the opinion, said: "It appears to me that I should be controlling improperly the effect of this deed if I did not allow this company to do that act which, through the medium of their directors, they have done." "Have the company, by this act, which they intend to carry into effect, either on the one hand abandoned their purposes, or on the other hand exceeded their purposes? Have they done either the one or the other? It appears to me they have not abandoned the purposes of the company. They have granted a lease for twenty-one years, and so far they have agreed to take a rent for their property, instead of working it themselves, and taking a profit. At the end of the twenty-one years they are to have the whole of the property back, and as it appeared to them (that is the true way to put it, for they are the sole judges on that part of the case) they would have it back in a more profitable condition. They have not exceeded their power, because nobody can contend that parting with their property for a certain time is exceeding their powers beyond this: that during all that time they are not carrying on the business. But as to this view I apprehend that it is perfectly competent for a meeting

(i. e. of the stockholders) to say: 'China clay is in a very depressed state; the market is very bad; and we agree it is better not to work it for two or three years.' That would be entirely within their functions, and they would not be said in that respect to have abandoned their work, or to have exceeded the functions allowed them." The bill was dismissed, with costs. In *Simpson v. Hotel Co.*, 8 H. L. Cas. 712, a company was established for the erection, finishing, and maintenance of an hotel, and the doing of all such things as are incidental or otherwise conducive to the attainment of that object. The directors of the company let for a stipulated period of five years, to the head of a government department, for the business of his office, a large part of the hotel. There was evidence that this use would be advantageous to the company in its intended business. This too was a bill by minority stockholders asking that the lease might be declared invalid. It was held that the arrangement was valid. In the house of lords the lord chancellor (Lord Campbell) said: "From the large rent immediately to be received by the company for the occupation of the one hundred and sixty-nine rooms by the India board, from the monopoly to be enjoyed by the company in supplying so many persons with refreshments, and from the fashionable reputation to be conferred on the hotel from this association, the opinion expressed by the majority of the stockholders that the arrangement is beneficial to them is likely to be verified. This anticipation would not be sufficient if the original undertaking had been abandoned, or if there was any extension of the original undertaking; but, as there is neither abandonment nor extension of the original undertaking, and the arrangement may assist instead of obstructing the prosecuting the original undertaking, I must advise your lordships to affirm the decree appealed against." In *Seminary v. Cramer*, 98 N. Y. 121, a company incorporated as an academy or seminary of learning was held not to have exceeded its powers by leasing one of its buildings during the vacations for a boarding house. See, also, *Lafond v. Deems*, 81 N. Y. 507. In *Brown v. Winnisimmet Co.*, 11 Allen, 326, a company chartered as a ferry company let one of its vessels not needed in its ferry business to be used in another business. This was held not to be ultra vires contract. *Hotel Co. v. Dickinson*, 6 Gray, 586; *French v. Inhabitants*, 3 Allen, 9; *Lyndeborough Glass Co. v. Massachusetts Glass Co.*, 111 Mass. 315; *Manufacturing Co. v. Clark*, 32 Mo. 306; *Watts' Appeal*, 78 Pa. St. 370; *Dupee v. Power Co.*, 114 Mass. 87.

We have considered this case on the assumption that the action of the directors and the majority stockholders was done in good faith, and in the honest belief that they served the best interests of all concerned. If fraud had been charged, a very different case would have been presented. Counsel for the plaintiffs says, in his brief, that the lease was fraudu-

lent on its face. But fraud is not charged in the complaint. Fraud is never to be presumed. While fraud may in some cases be inferred from the facts, it is never to be inferred unless it is charged, and then only where the facts and circumstances indicate clearly that fraud has been committed. The superior court is advised that the complaint is insufficient, and to sustain the demurrer. The other judges concurred.

(99 Conn. 484)

McNAMARA et al. v. McDONALD.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

GIFTS—CONVERSION—MEMORANDUM ON SUSTAINING DEMURRER—TRUST—HARMLESS ERROR—COMMON COUNTS.

1. Delivery by a depositor in a savings bank, to M., of an order on the bank to transfer the deposit on its books to plaintiffs, subject only to the right of M. to draw from it so much, if any, as should be necessary for his proper support, followed by notice to the bank, will, on acceptance of the gift by plaintiffs, invest them immediately, and before any actual transfer on the books of the bank, with the equitable title to the deposit, subject only to drafts thereon for the proper support of M.

2. Where a deposit in bank is given to plaintiffs, subject to drafts thereon for the proper support of M., and M. fraudulently draws on it for other purposes, gives the money to a confederate, and then dies, the confederate is liable to account to plaintiffs, and is liable for a conversion if he fails to return it to them on demand.

3. Omission of the court to file memorandum, in compliance with Pub. Acts 1895, c. 155, p. 523, stating on which of the grounds of demurrer specified its decision was based, is not ground for appeal; the remedy being, where necessary, by application for appropriate process to enforce the duty.

4. An order by a depositor in a savings bank directing it to transfer the deposit on its books to M., to be drawn by him during life, after his death the remainder to be divided among plaintiffs, delivered with the bank book to M., but not delivered to the bank or brought to its knowledge before the death of the depositor, is revoked by that event.

5. An order by a depositor in a savings bank directing it to transfer the deposit on its books to M., to be drawn by him during life, after his death the remainder to be divided among plaintiffs, delivered with the bank book to M., while ineffectual as an order, for want of delivery or notice to the bank before the death of the depositor, might, if it were shown that M. accepted it and the bank book in plaintiffs' behalf as well as his, be effectual to define the terms on which he received the book, and to constitute a declaration of trust, by virtue of which the depositor's administrator might be bound to cause a transfer to be made on the books of the bank, in conformity with its directions; but even then, by the provisions of the order, M. would have power to draw out all the deposits at his pleasure, during life, plaintiffs being entitled merely to anything he might choose to leave untouched; and M. being the administrator, and having, as such, drawn out the deposit, the beneficial title to it, when withdrawn, if the legal title was held on such trust, became absolute in him, the trust being thus substantially fulfilled.

6. Error in sustaining a demurrer to a count of a complaint is harmless, the evidence offered under the other count showing that the complaint could not be supported by proof.

7. Under the practice act, the form known as

the "common counts" can be used only as an entire complaint for the commencement of an action. It cannot follow a special count. Practice Book, p. 12, rule 2, § 1.

Appeal from superior court, New Haven county; John M. Thayer, Judge.

Action by Susan McNamara and others against Michael McDonald for money claimed to have been given to plaintiffs, and to have been converted by defendant to his own use. Judgment of nonsuit, and plaintiffs appeal. Prior to the trial, Shumway, J., sustained a demurrer to the first count of the complaint. Affirmed.

The complaint contained two counts. The first alleged that Ann McDonald, being the owner of a deposit of \$954.05 in the Connecticut Savings Bank, by a written order, duly delivered, directed said bank to transfer said deposit on its books to the plaintiffs, to be divided equally among them, subject to the right of Bryan McDonald to draw from the same so much, if any, as should be found necessary for his proper support, and thereupon notified said bank that she had given said money to the plaintiffs, and delivered her deposit book to said Bryan, to hold during his life, and to be delivered to the plaintiffs at his death; that the plaintiffs accepted the gift, and agreed to its terms; that said Bryan thereby became a trustee of the plaintiffs to hold said book, and deliver it over to them when the purpose for which he held it was accomplished, and, if said purpose was not accomplished during his lifetime, then said book became the absolute property of the plaintiffs upon his death; that afterwards she died, and a year later he died; that during his life he did not need any of the money for his support, and did not draw out any for his use, but was induced by the defendant, his brother, for the purpose of defrauding the plaintiffs, to draw out, and did draw out, \$800, and turned it over to the defendant, who received it with full knowledge of the plaintiffs' rights, and without consideration, and has converted it to his own use, and refused to return it to them on their demand. This count was adjudged insufficient, on demurrer. The second count was in the form known as the "common counts," for \$954.05, under which the following bill of particulars was filed: "To eight hundred dollars cash, the property of the plaintiffs, drawn from the Connecticut Savings Bank by the defendant, through the aid of one Bryan McDonald, brother of defendant, who then had in his possession a bank book of said bank belonging to the plaintiffs, and which said sum of money the defendant then well knew was the property of the plaintiffs, and that neither he nor said Bryan McDonald had the right to draw or keep the same, and which said sum of eight hundred dollars the defendant has always neglected and refused to return to the plaintiffs, though often requested and demanded, and especially on the — day of November, 1895. \$800.00, to interest on same." A trial was had on this

count, and, when the plaintiffs rested, a nonsuit was granted, on motion of the defendant. The plaintiffs afterwards moved to set the nonsuit aside, which was refused.

Charles S. Hamilton, for appellants. William B. Stoddard and John J. Clerkin, for appellee.

BALDWIN, J. The plaintiffs stated a sufficient cause of action in their first count. According to that, a depositor in a savings bank executed and delivered a written order, properly addressed to it, and of which it afterwards had due notice, for the transfer of the deposit on its books to the plaintiffs, subject to the right of one Bryan McDonald to draw from it so much, if any, as should be found necessary for his proper support, and delivered the deposit book to him to be delivered to the plaintiffs at his death. The plaintiffs accepted the gift. He needed nothing and drew nothing for his support during his life, but did draw out \$800, in order to defraud the plaintiffs, and gave it to the defendant, a party to the fraud; and, after his death, the defendant refused to return the money to the plaintiffs on their demand, but has converted it to his own use. The delivery of such an order, with the deposit book, to one of the donees, who was to take a beneficial interest for his life, followed by due notice to the bank, upon the acceptance of the gift by the other donees, would invest them immediately, and before any actual transfer upon the books of the bank, with the equitable title to the deposit, subject only to such drafts as might be made upon it for the proper support of the party having a life interest. If he fraudulently drew upon it for other purposes, gave the money to a confederate, and then died, the latter would be liable to account to the plaintiffs, and guilty of a conversion if he failed to return it to them on demand. The demurrer to this count should therefore have been overruled.

It is also assigned for error that, although several grounds of demurrer were specified, no memorandum was filed by the court to state upon which its decision was based. This omission was in violation of Pub. Acts 1895, c. 155, p. 523; but so trivial a defect of procedure, due probably to mere inadvertence, can constitute no cause of appeal. *Atwater v. News Co.*, 67 Conn. 504, 527, 34 Atl. 865. Application might have been made to this court, if necessary, to enforce the statutory duty by the issue of appropriate process, in the exercise of its general appellate and superintending powers. *Sikes v. Ranson*, 6 Johns. 279; *Ex parte Crane*, 5 Pet. 189.

The parties went to trial upon a second count, which charged the defendant, Michael McDonald, with having drawn \$800 of the plaintiffs' money from the same bank, well knowing whose it was, through the aid of Bryan McDonald, who then had in his possession the plaintiffs' bank book. The bank book and order, which were, at the time of the trial, in

the defendant's possession, were produced at the plaintiffs' request, and they laid them in, in evidence, together with a receipt given to the bank for the \$800. The bank book was the original one, in favor of Ann McDonald, by her maiden name of McCuen; but over her name the bank had entered, "Michael McDonald, Executor of Bryan McDonald, Administrator." The order read as follows:

"To the Connecticut Savings Bank: Please transfer all the balance due me on Deposit Book No. 28,356, being nine hundred dollars, with a year's interest, nearly, to Brian McDonald, to be drawn by him during life. After his death, the remainder to be divided equally among Susan McNamara, Kate McGuinness, Ann McKeon, Ellen McKeon, and Mary Callan.

her
"Ann X McCuen.
mark.

"In the presence of William S. Pardee.

"New Haven, July 17th, 1894."

The receipt was signed by "Bryan McDonald, Administrator," and proof was also introduced that he had been appointed, a few months previously, administrator of the estate of Ann McDonald, who was his wife, and had filed a probate certificate of that fact with the bank. Evidence was offered that the order, upon its execution, was delivered, with the bank book, to Bryan McDonald, but none that he did or said anything indicating that he received them in any way in the plaintiffs' behalf, or that the bank ever knew that any order had been drawn, or was informed that the plaintiffs had or claimed any interest in the deposit, or to show that Bryan McDonald ever had any communication with them in respect to it. Under these circumstances, the nonsuit was properly granted. The order, not having been delivered to the bank or brought to its knowledge before Mrs. McDonald's death, was revoked by that event. So far as the evidence disclosed, the bank book, though delivered to her husband, was not accepted or held by him in behalf of the plaintiffs, nor did they even know that it had been put in his possession. Their claim rested upon an inchoate gift, which never became of effect, either in law or equity. If they had been able to show that Bryan McDonald accepted the bank book and the accompanying order in their behalf as well as his own, the order, while inoperative, as such, for want of delivery or notice to the bank in her lifetime, might have been effectual to define the terms upon which he received the book, and to constitute a declaration of trust, by virtue of which her administrator might be bound to cause a transfer to be made upon the books of the bank, in conformity with its directions. Even in that case, however, the only trust with which the administrator would have been chargeable in favor of the plaintiffs, would have been to cause the transfer to be made on the books of the bank, in the manner indicated by the order, and thus to clothe himself individually with power to draw out any

and all of the deposit at his pleasure, from time to time, during his life, for his own use. Such was the legal effect of the form of transfer directed by Mrs. McDonald. She imposed no limitations whatever on his right to resort to the fund, except that it must be exercised by himself, and would not survive him. The plaintiffs were to be entitled merely to what, if anything, he might choose to leave untouched.

It was not claimed by the appellants in their argument before this court that Mrs. McDonald ever had any other deposit in the Connecticut Savings Bank, or ever gave any other order upon it than that produced upon the trial in the superior court, and, as to all the facts relevant to these, they were then fully heard. In view of the evidence on which they relied, it is plain that there could have been no recovery under the first count had the demurrer been overruled. The order did not purport to limit Bryan McDonald's right to draw from the deposit to such amount as might be found necessary for his proper support. Notice to the bank of the gift to the plaintiffs, and of the order by which it was to be accomplished, was never given. Bryan McDonald did not draw the \$800 in his individual capacity, by virtue of the order, but as the administrator of his wife's estate. If it was part of that estate, the plaintiffs had no concern with it. If it had appeared that, in equity, it was not a part, because the legal title was held upon a trust sufficiently constituted and declared, the beneficial title to it, when withdrawn, would have become absolute in Bryan McDonald. For thus the trust would be substantially fulfilled. The second count, as originally drawn, claimed the full amount left on deposit at the decease of Mrs. McDonald, but the bill of particulars limited the plaintiffs' recovery to the \$800, which was actually withdrawn. Their rights in remainder were therefore not in issue.

The real case made out by the plaintiffs at the trial was essentially different from the case alleged. A meaning was attributed to a written document which it cannot bear, and a cause of action made out by pleading as facts what had no existence. It may be assumed that the framing of such a fictitious complaint was due to misstatements made to counsel; nor is it necessary to suppose them made with knowledge of their falsity. It is decisive of the case that the complaint was one which could not be supported by proof. The plaintiffs, therefore, were not injuriously affected by the erroneous ruling on the demurrer. The law was against them, and they could not have held a verdict under either count. To avoid any seeming sanction of the duplication of counts in the complaint, it is proper to observe that the second was made to fulfill an office for which it was not adapted or designed. Under the practice act, the form known as the "common counts" can be used only as an entire complaint for the commencement of an action. It can never follow a special count..

Practice Book, p. 12, rule 2, § 1; *Breweries' Corp. v. Baker*, 68 Conn. 327, 342, 36 Atl. 785. There is no error. The other judges concurred.

(80 Conn. 492)

SMITH v. BROCKETT.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

REPLEVIN—PLEADING AND PROOF—FRAUDULENT TRANSFER—EVIDENCE—RECORD OF JUDICIAL PROCEEDINGS IN ANOTHER STATE—DECLARATIONS OF CONSPIRATOR—DISCREDITING WITNESS.

1. Gen. St. §§ 905, 1880, excepting the action of replevin from the leading provisions of the practice act, and providing that defendant may plead "the general issue, with or without notice, as may be necessary," authorize defendant under the general issue, with notice that he will prove that he took the goods as sheriff on an attachment against H., in favor of C., and that they were and still are the property of H., to prove that plaintiff got title through a fraudulent conspiracy to cheat the creditors of H., who as to them remained the real owner.

2. Plaintiff in replevin for a stock of goods which he bought in Boston of H., an insolvent, and shipped to D. & R., a firm of auctioneers in New York, and which was attached in transit as the property of H., having testified that he learned through said firm that the goods were for sale, and went with one of them, his brother-in-law, to Boston, to examine them, may on cross-examination be asked whether he knew that D. & R. were in the business of buying bankrupts' stocks, for the purpose of cheating their creditors, as, if he did, it would affect his direct testimony, and tend to show that, if the sale was fraudulent, he participated in the fraud.

3. A witness cannot be discredited by showing that he is an insolvent debtor.

4. Error in refusing to allow a question on cross-examination is cured by the witness subsequently giving in rebuttal the testimony sought to be elicited.

5. The sale by a tradesman of his entire stock of goods to a stranger from another state, followed by their shipment thither, consigned to auctioneers, being a transaction out of the common course of business, it is proper in replevin by the nominal purchaser, against one who has attached the goods as the property of the seller, an insolvent, to allow a witness for plaintiff, who was one of the consignees, and active in promoting the purchase, to be asked on cross-examination if he had negotiated similar transactions with other tradesmen, about the time, at the same place, and had been employed by plaintiff for such purpose, as these facts, if shown, would tend to discredit his statement that the sale was made to plaintiff, as well as show the conspiracy to defraud the creditors of the seller, claimed by the defense.

6. A copy of the record of an examination in the court of insolvency of another state is properly excluded where the exemplification lacks the certificate from the judge of the court, required by Rev. St. U. S. § 905.

7. Declaration by one as to past transactions, though made before a court, are not admissible against another, though at the time of such transaction they were conspirators to defraud his creditors.

8. It being sufficient, under Pub. St. Mass. 1882, p. 880, c. 157, §§ 6, 7, to minute all proceedings on a voluntary petition in insolvency on the docket of the court of insolvency, down to the point of actual assignment of the insolvent estate, and such entries being the record of judicial proceedings, a certified copy of them is admissible, as proof that such proceedings have been had.

9. The record of a court of insolvency of Massachusetts showing that "Lewis Harris," of Boston,

who filed petition in insolvency, included C., H. & Co. in the schedule of creditors, tends to identify him with "Louis Harris," of Boston, who sold his stock of goods to plaintiff, which defendant attached for C., H. & Co., as creditors of Louis Harris.

Appeal from superior court, New Haven county; John M. Thayer, Judge.

Replevin by Heyman A. Smith against Luzerne A. Brockett for a stock of boots and shoes. Judgment for plaintiff, and defendant appeals. Reversed.

The finding stated the following facts: Upon the 21st day of February, 1895, the goods replevied were the property of Lewis Harris, of Boston, Mass., who was then engaged in the retail shoe business in East Boston, and constituted his entire stock in trade. On that day he sold and delivered them to the plaintiff, for \$1,450, which the latter then paid to him. Within a few days the goods were by the plaintiff shipped by rail to Doblin & Rosenthal, auctioneers, at 225 East Forty-Second street, New York, and, while in transit through New Haven, were attached by the defendant as a deputy sheriff, upon a lawful writ of attachment in favor of the Clark-Hutchinson Company, of Boston, against said Harris, as the property of said Harris. The defendant claimed upon the trial that Harris, at the time of said sale, was insolvent; that, under the statutes and common law of Massachusetts, said sale was out of the ordinary course of business, and was prima facie fraudulent and void against said attaching creditor; and that the transaction between Smith and Harris was one of a series of fraudulent transactions of Coughlin, Doblin & Rosenthal, and Smith, and in furtherance of a general plan between them to cheat and defraud the creditors of Harris out of their claims against him, by securing to themselves all of his property. To prove the insolvency of Harris, the defendant offered in evidence certain papers certified by the register of the Suffolk (Massachusetts) court of insolvency to be a true copy of papers appertaining to said court, and on file and of record in the office of said court, to wit, schedule of creditors and property filed June 12, 1895, in the case of Lewis Harris, of Boston, in said county of Suffolk, an insolvent debtor, and copy of the docket entries in said case, the first docket entry being, "June 11, 1895, (1) pet'n by debtor;" and also another paper, certified by the same official to be a copy of a paper appertaining to said court, on file, etc., "to wit, the examination of Lewis Harris, of Boston, in said county of Suffolk, insolvent debtor," taken February 7, 1896. Upon the first of said papers was the certificate of the judge of said court of insolvency that the person certifying as the registrar of said court was such officer, the proper certifying officer of the court, and had, by law, custody of the seal of said court, its books, records, documents, and papers. No such certificate was attached to the second of said papers. To the admission of these papers in

evidence, counsel for the plaintiff objected, as each was offered, on the ground that they were not properly authenticated, and did not purport to be a copy of the insolvency proceedings, and did not show that said Harris was ever adjudicated an insolvent, and did not show upon what, if any, proceedings he was adjudicated an insolvent, and that it did not appear that the Harris therein named was the one who sold these goods to the plaintiff. The court sustained the objection as to each of the papers. The plaintiff testified that he learned that the stock of goods was for sale through Doblin & Rosenthal, the former of whom was his brother-in-law, and that he went to Boston with Doblin to examine the stock before purchasing. Upon cross-examination the defendant's counsel asked him the following question: "Did you know that your agents, Doblin & Rosenthal, were in the business of buying bankrupts' stocks, for the purpose of cheating their creditors?" To this question the plaintiff's counsel objected, and the objection was sustained. Doblin was called as a witness for the plaintiff, and testified in chief that he and his partner heard that Harris' stock of goods was for sale, through one Coughlin, of Boston; that his partner, Rosenthal, went to Boston to see it, and wrote the witness that he thought the plaintiff (who is a shoe dealer in New York) could use the stock; that the witness thereupon told the plaintiff about it; and that they went on to Boston, and examined the stock; and that the plaintiff bought it. Upon cross-examination of this witness, the defendant's counsel asked him the following question: "Have you recently been examined in insolvency in New York?" The plaintiff's counsel objected to the question as not proper cross-examination, and the objection was sustained. This question was asked of this witness (he having first been asked and testified that himself, Rosenthal, and the plaintiff went to Harris' store together) on cross-examination: "Did you make any inquiry of Mr. Harris, or was any made in your hearing, as to the amount of the indebtedness of Mr. Harris?" The question was objected to as not cross-examination, and the objection was sustained. The witness was again called on rebuttal, and then testified that inquiry was made in his presence of Mr. Harris as to his property and indebtedness, and that Harris replied that he owned the building in which his stock was, and the building across the streets, and that he had no indebtedness. This witness, when called in chief, was asked on cross-examination the following questions: "Did you have a transaction of this sort [meaning the purchase of an entire stock of goods] with a Mr. Weil, a Walker street dry-goods firm?" "Is this the only stock of goods in East Boston that your firm bought at that time?" "Did your firm buy any other stocks in East Boston?" "Were you Smith's agents for the purpose of purchasing any other stocks in Boston?" To each of these questions, when put, the plaintiff's

counsel objected, because they were not proper cross-examination, and each objection was sustained. The defendant offered in evidence declarations of Rosenthal and Harris (who were not called as witnesses), claiming them both as declarations of conspirators with the plaintiff, and to prove a conspiracy; but the court excluded them, being of opinion that no prima facie proof of any conspiracy had been shown. To all evidence offered by the defendant for the purpose of proving fraud, or conspiracy, or the insolvency of Harris, the plaintiff, in addition to the grounds of objection stated heretofore, made the general objection that it was inadmissible under the pleadings. These were a complaint in the statutory form, and the general issue, with notice that the defendant would offer evidence to prove that he had taken the goods as a deputy sheriff, on an attachment against Harris in favor of the Clark-Hutchinson Company, and that they then were, and still are, the property of Harris.

Charles H. Fowler, for appellant. David Strouse, for appellee.

BALDWIN, J. The leading provisions of the practice act do not apply to actions of replevin, and the statute authorizes a plea of "the general issue, with or without notice, as may be necessary." Gen. St. §§ 905, 1330. Under such a plea, any evidence which goes to meet the plaintiff's allegations that the goods in question were his property, of which he was entitled to the immediate possession, and that the defendant has wrongfully detained them from him, is relevant and admissible, subject to the statutory rule as to notice contained in Revision 1875, p. 424, tit. 19, c. 7, § 10. It was therefore competent for the defendant in this action to offer proof that the plaintiff's title was the fruit of a fraudulent conspiracy to cheat the creditors of Harris, who, as to them, remained the real owner, and upon an attachment against whom the goods were rightfully detained. The issue remains the same, whatever notice may be filed, and the notice is always liberally construed in favor of the pleader. *Curtis v. Gill*, 34 Conn. 56; *Merrill v. Everett*, 38 Conn. 40.

The plaintiff, after buying the goods from Harris, had shipped them from Boston to Doblin & Rosenthal, a firm of auctioneers in New York City, and they were attached while in transit through this state. He testified in his own behalf that he learned that they were for sale through this same firm, and went on to Boston with one of them, who was his brother-in-law, to examine them before purchasing. Upon cross-examination he was asked, "Did you know that your agents, Doblin & Rosenthal, were in the business of buying bankrupts' stocks, for the purpose of cheating their creditors?" In excluding this question there was error. If an affirmative answer had been given, it would have set his direct testimony in a new light. If Doblin & Rosenthal were

in the business of buying from bankrupts who sold to defraud their creditors, and the plaintiff knew it, his purchase, upon information received from them, with their aid and in their company, would, especially in view of his relationship to one of the firm, have tended to show that, if this sale was fraudulent, he participated in the fraud.

The question put to Doblin on cross-examination, as to certain insolvency proceedings in New York, was properly excluded. A witness cannot be thus discredited, by showing that he is an insolvent debtor. The question asked him in respect to inquiries as to Harris' indebtedness should have been admitted; but, as the testimony which it sought to elicit was subsequently fully given in rebuttal, no injury was done to the defendant by the ruling.

In excluding the other questions put to this witness there was error. The sale by a tradesman of his entire stock of goods to a stranger from another state, followed by their shipment thither for a sale by auction, was a transaction out of the common course of business. *Walbrun v. Babbitt*, 16 Wall. 577. Doblin was one of the consignees, and had been active in promoting the purchase. If he had negotiated similar transactions with other tradesmen, at the same place, and about the same time, and had been employed by the plaintiff for such purposes, these facts would have had some tendency to discredit his statement that the sale was made to Smith, as well as to show the conspiracy claimed by the defense.

The copy of the record of Harris' examination in the court of insolvency for Suffolk county, Mass., was properly excluded, because the exemplification lacked the certificate from the judge of the court required by Rev. St. U. S. § 905. Had due latitude been allowed upon the cross-examination of the plaintiff's witnesses, it is possible that enough might have been brought out to constitute, in the opinion of the trial court, such evidence of a fraudulent conspiracy as to justify the admission of declarations of any of those who were claimed to have been parties to it. But even in that case this examination in insolvency, having been taken a year after the sale to Smith, could not have been received. Declarations of one conspirator are admissible against another only when made in the course of the conspiracy. *Knower v. Clothing Co.*, 57 Conn. 202, 222, 17 Atl. 580. The other copies were properly authenticated, and the records and judicial proceedings which were their subject were thereby entitled to have such faith and credit given to them in our courts as they have by law or usage in the courts of Massachusetts. Rev. St. U. S. § 905. The statutes of that state provide as follows: "The proceedings in courts of insolvency shall be deemed matters of record, and the assignment and certificate of discharge shall be recorded in full. The other proceedings need not be recorded at large, but shall be carefully filed, kept, and numbered in the office of the regis-

ter. Copies of all parts of the records, * * * duly certified by the register, shall in all cases be admissible as prima facie evidence of the facts therein stated. * * * The register shall keep a docket with an alphabetical index of all cases in court, in which he shall enter short memorandums, with the numbers of all proceedings and papers filed." Pub. St. Mass. 1882, p. 880, c. 157, §§ 6, 7. The assignment, which is to be recorded at length, is one made by the judge of the court, conveying the debtor's estate to such assignee as may be appointed at or after the first meeting of the creditors. Id. §§ 40, 44. Voluntary insolvency proceedings are commenced by a petition addressed to the judge, upon which a warrant may issue directing the sheriff to take possession of the debtor's property.

The copy of the docket entries offered in evidence began as follows:

No. 3,142.	Lewis Harris.	Boston.
1895.	(1)	(2) \$25 Deposit Costa.
June 11.	Pet'n by Debtor. Warrant re'd July 26th, 1895, 10 a. m., Po. & Trav.	
	(3)	(4)
	" 12. Schedule: of Creditors, of Property	
July 26.	First meeting, warrant re'd.	
	1st publ'n June 18th, 1895	
	(5)	
	Claims proved: Joseph Caro, Barnard	
	(6)	(7)
	Ginsberg, Albert W. Hixon and Co.	
	-8-	-9-
	Louis Nelson, Austin Stone and Co.	
	-10-	-11-
	W. H. Grainger; List of Debtors.	
	John H. Blanchard, assignee.	
	-12-	
	Acceptance, Assignment recorded	
	Vol. XI., page 265.	

This transcript also included copies at length of a "schedule of property in the case of Lewis Harris, insolvent debtor, case No. 3,142," which stated that he had no property, and of a "schedule of creditors" in the same case, among whom appeared "Clark, Hutchinson & Co., \$355.88," and others, whose claims in all amounted to over \$2,700. Each schedule was signed by Harris, sworn to by him on June 8, 1895, and filed in the court of insolvency on June 12th.

Every state has the right to determine for itself how fully the judicial proceedings in its courts shall be recorded. Massachusetts has deemed it sufficient, in her courts of insolvency, simply to minute all the proceedings, upon a voluntary petition, on the docket, down to the point of the actual assignment of the insolvent estate. This does not affect their judicial character or evidential weight. *Read v. Sutton*, 2 Cush. 115, 123. The docket entries are entries of judicial proceedings, and a certified transcript of them constitutes the proper proof that such proceedings have been had. Those now in question were proper evidence that Lewis Harris, of Boston, filed a petition in voluntary insolvency on June 11, 1895, and on the next day schedules of his estate and of his creditors. The abbreviations used were such as can be readily understood, and are to be read as if the proper words had been written out in full. *Erwin v. English*, 61 Conn. 502, 507, 23 Atl. 753. The sale to the plaintiff took place in February, 1895, nearly three

months earlier. For reasons already stated, therefore, no mere declarations as to past transactions made by him before the court of insolvency, in or after June, 1895, would be admissible against the plaintiff, even if both had been engaged in a previous conspiracy to defraud his creditors. Hearsay does not change its nature by being communicated to a court of justice. But that he occupied in that month the status of an insolvent debtor, under the laws of his state, and before its courts, was a fact which bore directly upon the defense set up. If, at the time of the sale in controversy, he intended a fraud upon his creditors, one way to effect his purpose would be to conceal or dispose of the proceeds, and then take an early opportunity to get rid of his obligations, by applying for a discharge in insolvency. His petition in insolvency was a step in that direction. It is unimportant whether the statements which it contained, or those of the schedules by which it was supported, were true or not, or whether, under the statute of the United States and the laws of Massachusetts, they were to be accepted in our courts as *prima facie* true. They were a part of the record of the cause. They were statements of a kind which it was necessary to make in order to support the jurisdiction of the court to proceed to grant a discharge; and the fact that Clark, Hutchinson & Co. were included in the schedule of creditors, without regard to the question whether they were in fact among his creditors or not, tended to identify "Lewis Harris," of Boston, the insolvent debtor, with "Louis Harris," of Boston, the plaintiff's vendor. This transcript should therefore have been received in evidence.

There is no ground for the remaining reasons of appeal, and the rulings complained of are so obviously correct that no discussion of them is required. There is error, and a new trial is ordered. The other judges concurred.

(69 Vt. 309)

BORLEY v. McDONALD.

(Supreme Court of Vermont. Franklin.
Jan. Term, 1897.)

CONTRACT OF EMPLOYMENT—BREACH—LIQUIDATED DAMAGES.

1. Provision in an agreement of employment that the employé will not for a year after conclusion of his services, directly or indirectly, solicit any insurance that shall at that time be held by the employer from any party, is violated by his entering into a partnership engaged in a business in competition with the employer's, and by his partners during the year soliciting and obtaining insurance from parties insured with the employer, and known by the partners to be so insured.

2. Such provision being clear and explicit, evidence that the employer understood that the employé has a right to represent any insurance company, and to solicit any insurance not held by the employer when the employé left his employment, and to solicit any additional insurance of parties holding insurance with the employer, is not admissible.

3. Provision in a contract of employment by an insurance agent that if the employé shall, within

a year from termination of his employment, solicit any insurance that shall at that time be held by the employer from any party, he shall forfeit and pay to the employer \$500, as liquidated damages, will be sustained as a provision for liquidated damages.

Exceptions from Franklin county court; Ross, Chief Judge.

Assumpsit by Isaac S. Borley against James McDonald. Heard on report of referee and exceptions thereto. Exceptions overruled, and judgment for plaintiff for \$500, as liquidated damages, with interest from date of writ. Defendant excepts. Affirmed.

Wilson & Hall, for plaintiff. Farrington & Post, for defendant.

TYLER, J. It appears by the referee's report that the plaintiff had a large, well-established, and profitable fire, life, and accident insurance business in St. Albans, representing 28 or more companies; that in the spring of 1888 the defendant entered his employment as a clerk in his insurance office; and that on October 28, 1889, while he was so employed, the parties entered into the following written contract with each other: "In consideration of the agreement of the said McDonald hereinafter contained, said Borley agrees to employ him, the said McDonald, in his insurance business for the term of one year from the 21st day of October, 1889, unless this contract is sooner determined by its terms or by agreement, at and for the sum of not less than fifty dollars per month, payable at the end of each and every month. And the said McDonald agrees for himself, his heirs and assigns, that, in consideration of said salary of not less than fifty dollars a month, he will devote his time and energies to the insurance business of said Borley, eight hours each day, in such part of said insurance business as said Borley shall direct; and that, in case of the determination of this agreement by its terms, by limitation, or for any cause, he will not, in the town of St. Albans, directly or indirectly, for the period of one year from the conclusion of service under the contract, solicit any insurance that shall at that time be held by said Borley from any party or parties whatsoever; and that he will not do any act or thing in advantage of the said Borley by reason of information gained in his services; and, in case said McDonald shall violate this provision of this agreement, he hereby agrees for himself, his heirs, executors, administrators, and assigns, to forfeit and pay to said Borley the sum of five hundred dollars as liquidated damages, to be recovered in an action of assumpsit; this contract to control as to the amount of damages. It is further stipulated and agreed that, in case either party shall be dissatisfied with the other, this contract may be determined, so far as service and compensation are concerned, by giving notice to the other

party, in writing." The defendant had no previous knowledge of the insurance business, but, for some time before he left the plaintiff's service, he had been the general manager of the business; and had access to and knowledge of the insurance registers and other books kept by the plaintiff. He remained in the plaintiff's employment under the contract from its date until August 28, 1890, when, for reasons not stated, the plaintiff discharged him. September 25, 1890, the defendant, A. D. Tenney, and S. S. Watson formed a partnership for the purpose of carrying on a like insurance business, as equal partners. They bought an established business in St. Albans, and have ever since prosecuted it, under the firm name of Tenney & Watson, their business being in active competition with the plaintiff's. The plaintiff considered that the defendant's entering into this partnership was in violation of the contract, and that he had otherwise broken it, and in January, 1891, brought a bill in equity against him, and procured an injunction, by which the defendant was enjoined from directly or indirectly prosecuting insurance business, in violation of the written contract. Subsequently proceedings were instituted against the defendant for an alleged violation of the injunction. The matter was referred to a master, who reported the facts to the court, whereupon the court of chancery, at the September term, 1891, for the county of Franklin, considered and adjudged that the defendant had violated the injunction, and was guilty of a contempt, and imposed upon him the payment of a fine of \$50 and costs.

It is unnecessary to decide the question, which has been discussed by counsel, whether the decree of the chancellor in the proceedings against the defendant for violating the injunction is conclusive of a breach by him of the written contract, for the referee has found such breach as a fact from the evidence. The fact of the defendant's entering into a partnership which was engaged in a business in competition with the plaintiff's, with the fact that the defendant's partners did at different times during the year solicit and obtain insurance business from parties in the town of St. Albans who were insured in the plaintiff's companies, and known by the defendant's partners to be so insured, was a violation of the contract. In such case the act of each partner was the act of the partnership. Evidence that the plaintiff understood at the time of making the contract that the defendant had a right to represent any insurance company, and to solicit any insurance that was not held by the plaintiff at the time the defendant left the plaintiff's employment, and to solicit any additional insurance of parties that held insurance with the plaintiff, was inadmissible. The contract is clear and explicit upon this subject. The referee also found a breach of the contract by the defendant in his soliciting and obtaining insurance of C. L. Moren.

The next question is whether the plaintiff shall recover the actual damages found by the master, or the sum of \$500, named in the contract as liquidated damages. It was clearly error for the referee to find from extrinsic evidence that, when the parties entered into the contract, they both understood that, for a breach of it, only actual damages would be recoverable. The contract was the best evidence of their understanding. In *Barry v. Harris*, 49 Vt. 392, the defendant sold the orator a freight business over certain routes, and gave a writing promising the orator that he would pay him \$500 if the defendant re-engaged in that business. It was held that the damages were stipulated, upon the ground of the practical impossibility of ascertaining the damages consequent upon a breach of the contract, the reasonableness of the sum named, and the purpose of the contract. The court said: "Contracts whereby a party agrees not to exercise his vocation for a limited time or in a particular place, under an obligation to pay a stipulated amount, have often, perhaps generally, been held to be contracts conditioned for the payment of liquidated damages, rather than penalties. The difficulty of ascertaining the actual damages in such cases has doubtless led to this construction. They have been regarded in many cases as alternative contracts, giving the party the right to pay the sum named if he wishes to do the thing prohibited." It further said that, when it is clear that the parties have agreed for themselves upon a definite sum as the measure of the damages, courts will not undertake to make new contracts for them. A similar case is *Cushing v. Drew*, 97 Mass. 445. It was held in *Stevens v. Pillsbury*, 57 Vt. 205, that "it has rarely been held that in a contract by which a party has agreed to refrain from exercising a particular trade or profession within a named locality, and agreed upon the sum to be paid if he breaks his agreement, that the sum thus agreed upon has been held other than liquidated damages"; citing several authorities. One of the principal reasons given for this holding was the difficulty of measuring the damages. The same rule is given in *Chase v. Allen*, 13 Gray, 42, and in *Hall v. Crowley*, 5 Allen, 304. In 13 Am. & Eng. Enc. Law, 854, numerous cases are considered, and the rule stated that "it is now well settled that a sum, if it be at all reasonable, stipulated to be paid as 'liquidated damages' for the breach of a covenant, will be regarded as such, and not as a penalty, where, from the nature of the covenant, the damages arising from its breach are entirely uncertain, and cannot be ascertained upon an issue of fact." Where an agreement is for the performance or nonperformance of only one act, and there is no adequate means of ascertaining the precise damage which may result from a violation, the parties may, if they please, by a separate clause of the contract, fix upon the amount of compensation payable by the defaulting party in case of a breach; and a stipulation inserted for such purpose

will be treated as one for "liquidated damages," unless the intent be clear that it was designed to be only a penalty. It is true that, where the terms "liquidated damages" and "penalty" are employed in the contract, they will not always be conclusive; but the intention of the parties will be ascertained from the circumstances in which it was made, its real purpose, and the difficulty in ascertaining the damages when it is broken. In this case, upon leaving the plaintiff's service, the defendant entered into a competing business, and broke his contract. It is practically impossible to ascertain the damages, and as was held in *Barry v. Harris*, considering the form of the contract and its evident purpose, and the reasonableness of the sum named, a case is clearly made of liquidated damages. Judgment affirmed.

(69 Vt. 369)

LAMOILLE COUNTY SAVINGS BANK & TRUST CO. v. BUCK et al.

(Supreme Court of Vermont. Lamoille. Jan. Term, 1897.)

APPEAL—TAXATION OF COSTS.

An appeal taken from the taxation of costs only will not lie.

Appeal from chancery court; Start, Chancellor.

Action by the Lamoille County Savings Bank & Trust Company against Murray Buck and others. From an order disallowing certain items of costs, defendant Hunt appeals. Dismissed.

P. K. Gleed, for petitioner. B. A. Hunt, pro se.

TAFT, J. It appears from the record in this cause that no appeal was taken from the final decree. It is only from such a decree that one can be had. V. S. § 981; *Nelson v. Brown*, 59 Vt. 600, 10 Atl. 721. The cause, therefore, is not properly in this court, and should be remanded to the court of chancery. The appeal was taken from the taxation of costs only, and will not lie. *Mott v. Harrington*, 15 Vt. 185. The court rarely, if ever, reverses a decree on the question of costs alone. *Hastings v. Perry*, 20 Vt. 272; *Sanborn v. Kittredge*, Id. 632; *Sanders v. Wilson*, 34 Vt. 318; *Railroad Co. v. Blxby*, 57 Vt. 548; *Flannery v. Flannery*, 58 Vt. 576, 5 Atl. 507. Appeal dismissed and cause remanded.

(69 Vt. 338)

McMULLIN v. ERWIN.

(Supreme Court of Vermont. Orleans. Jan. Term, 1897.)

PLEADING—GENERAL ISSUE—NOTICE—FALSE IMPRISONMENT—TORT OF OFFICER—LIABILITY OF PRINCIPAL.

1. Where a plea was the general issue with notice, it was not error to refuse to dismiss the notice because containing no matter of defense not provable under the general issue, as such objection related to its sufficiency as a defense.

2. In trespass for false imprisonment, evidence tending to show that defendant thought the original suit had been properly brought was immaterial.

3. The note on which the original suit was founded, and the proceedings in such suit, were admissible under the general issue, on the question of exemplary damages.

4. A remark by defendant's counsel in reply to a statement by plaintiff's counsel, respecting matters of fact not in evidence, was not a ground of exception.

5. Defendant, having a note for collection, as an attorney at law, caused a *capias* writ to issue, and sent it to an officer to serve and return. Certain alterations were made in the writ, of which defendant had no knowledge until after plaintiff's arrest thereon. Held, that defendant was not liable for such tort of such officer, though he prosecuted such suit to judgment after having knowledge of such alterations.

Exceptions from Orleans county court; Ross, Chief Judge.

Action by N. McMullin against J. W. Erwin for damages for false imprisonment. The plea was the general issue with notice. There were verdict and judgment for defendant, and plaintiff excepts. Affirmed.

The plaintiff moved to dismiss the notice because it contained no matter of defense not provable under the general issue, and did contain immaterial and prejudicial statements of fact. The motion was overruled, and the plaintiff excepted. The plaintiff offered to show that at the justice trial on the original action his counsel notified the defendant that the arrest was illegal, and that, if he proceeded with the suit, he would be sued for false imprisonment; and that the defendant then replied that the suit had been well brought, and was all right. This evidence was excluded, and the plaintiff excepted. The plaintiff also excepted to the admission of the original note, and the records of the proceedings before the justice in the suit thereon. In argument to the jury, the plaintiff's counsel stated that the defendant knew that the affidavit, writ, and arrest were illegal, and that no reputable lawyer would do as he had done. Of this there was no evidence. In reply to this statement, counsel for the defendant said that it was the practice among lawyers to make affidavits for the arrest of parties living in Canada, to lodge them with the justices, and take out writs, placing them in the hands of officers to be served when the parties came across the line; that he had done it, and he had no doubt plaintiff's counsel had done the same. Of this there was no evidence. The court held that the reply, being called out by the statement of plaintiff's counsel, unsupported by testimony, was not improper. The plaintiff excepted.

A. D. Bates, for plaintiff. John Young and C. A. Prouty, for defendant.

TYLER, J. Action for false imprisonment. Plea, general issue and notice. The plaintiff in the court below waived the counts in case, and claimed to recover only in trespass. The

defendant is an attorney, and as such, on March 14, 1892, having received a note against the plaintiff for collection, made a capias writ against him, and on March 15th made his affidavit that the plaintiff was about to abscond or remove from this state, and filed it with a justice of the peace. The justice then signed and issued the writ, which was made returnable May 2, 1892, and was sent by the defendant by mail to a deputy sheriff to serve and return. The plaintiff was not in this state March 14th nor 15th, and, no service of the writ having been made in its life, the date was afterwards changed to May 14th, and the return day to June 16th. The plaintiff's evidence tended to show that he was arrested on the writ with the dates thus changed on May 25th, and gave bail for his appearance. The officer testified that the dates were changed by the defendant, but he was unable to say whether before or after the arrest. The defendant's evidence tended to show that he did not change the dates, nor direct them to be changed; that he gave no direction to the officer to serve the writ after the alterations had been made; that he had no knowledge of any alterations until after the service and return, and that he thought that the officer returned the writ to him either on the day or the day after the service, and then told him that his (the officer's) daughter had changed the dates. The question as to the defendant's liability seems to have depended mainly upon whether he changed or directed the dates to be changed after the writ was issued, and, if not, whether he ordered the arrest after the changes were made. These were questions of fact, and were decided by the jury. Some exceptions were taken to the rulings and the charge, which we will consider.

There is no practice by which the notice could have been dismissed. The question was as to the sufficiency of the matters therein alleged as a defense. To the argument that the statements in the notice were calculated to mislead the jury, it is sufficient to say that it does not appear that the jury read it, or heard it read. There was no error in the refusal of the court to dismiss the notice.

The alleged admission of the defendant at the trial in the justice's court was immaterial to the plaintiff. At most it tended to show that the defendant then thought the suit had been properly brought, and that he acted in good faith in the matter.

It was proper to admit the original note in evidence under the general issue upon the question of exemplary damages. It showed a cause of action upon which the suit was founded.

It was clearly admissible to show what the proceedings were before the justice, and no objection seems to have been made that this was shown by the files instead of by the record.

The remark of defendant's counsel to which the plaintiff objected seems to have

been made in reply to a statement of plaintiff's counsel, and not as a matter of evidence, and was not a ground of exception.

The exception upon which the plaintiff most relies is to the refusal of the court to hold the defendant liable as matter of law upon his own testimony. It appears that he made a lawful capias writ, and sent it to an officer to serve and return, and that he had no knowledge of alterations in the writ until after the plaintiff had been arrested, and given bail, and the writ had been returned to the defendant. There is no evidence of a common design between the defendant and the officer to do an unlawful act. The defendant's purpose was lawful,—to collect a debt by legal process. The law is settled by the authorities cited on the defendant's brief that, as the defendant did not aid, advise, nor command the commission of the tort, nor have knowledge of it until after it had been committed, he was not liable. But the plaintiff insists that, as the defendant proceeded with the suit to judgment after he knew of the alteration of the writ, he thereby became liable, on the ground that he approved of the tort, and derived benefit from it. It was held in *Hunter v. Burtis*, 10 Wend. 358, that where an illegal arrest had been made the attorney who appeared to advocate the cause was not responsible unless he officiously interposed in directing the arrest. See *Kirkwood v. Miller*, 73 Am. Dec. 142, notes, where the general rule is stated that an attorney is not liable for a trespass committed by an officer in overstepping the bounds of his process, or acting in a manner which the writ, if legal, would not justify. The court below certifies that no claim was made during the trial and argument that the arrest was made for the benefit of the defendant, and that the court's attention was in no way called to it. Therefore no question is before us in respect to benefits derived by the defendant. He was acting as attorney, and not for his own benefit, and the deputy sheriff was not his servant and agent, but a public officer. We find no error in the trial. Judgment affirmed.

(63 Vt. 344)

OAKMAN v. WALKER et al.

(Supreme Court of Vermont. Rutland. Jan. Term, 1897.)

DEEDS—CONSIDERATION—CONDITIONS—DECLARATIONS—BURDEN OF PROOF—MORTGAGES—REDEMPTION—LIMITATIONS—MORTGAGEE—LIABILITY.

1. Those who claim under a deed may prove the declaration of the grantor that it did not pay one-half his debt to the grantee (a daughter), for the purpose of showing full consideration, and the character of the transaction.

2. An orator seeking to enforce his equitable right to property has the burden of proving payments made towards satisfying the conditions of a deed under which he claims.

3. The declarations of orator's grantor that he had not made the payments upon which the deed to him was conditioned, and the fact of his poverty, are admissible against orator, seeking to

enforce his equitable rights, to prove that the conditions of the deed to his grantor had not been complied with.

4. The fact of the making of a subsequent deed is admissible to prove that the conditions of the prior deed have not been complied with, when taken in connection with the fact that the prior grantee made no claim to the premises, while the subsequent grantee, to the knowledge of the prior grantee, held possession from the time of the deed to her until her death.

5. A grantee takes possession of property subject to the right of redemption of a prior grantee whose grantor's deed was treated as an equitable mortgage, and was conditioned upon the payment of a note which was due and unpaid at the time of the second conveyance.

6. One seeking to redeem against an equitable mortgagee in possession must pay the mortgage debt, though the statute of limitations has run thereon.

7. A deed to orator's grantor was considered an equitable mortgage, and provided that the grantee should keep the premises in repair, and under its conditions the grantor remained in possession until his subsequent grantee took possession. *Held* that, on a bill to redeem, the subsequent grantee should not be charged with the depreciation in value of the property due to want of repairs before she took possession.

Appeal in chancery, Rutland county; Rowell, Chancellor.

Bill by William P. Oakman against Charles H. Walker and others. From a judgment for defendants, allowing them to redeem in installments, orator appeals. Reversed pro forma.

The note referred to in the opinion was payable in annual installments of \$100, beginning with July 9, 1871.

Butler & Maloney, for appellant. Fred S. Platt and Henry L. Clark, for appellees.

ROSS, C. J. By the terms of the warranty deed from James Oakman, Sr., to James Oakman, Jr., dated July 9, 1870, the property was not to vest in the grantee until he performed the two conditions therein named,—allowed the grantor to retain possession of the premises during the grantor's natural life, and paid his note then given to the grantor for \$900. Under this deed, standing alone, it was incumbent on the grantee and those claiming under him to show a performance of these conditions, in order to have the title vest in the grantee. Under it the grantee was never in possession and control of the premises. So far as found by the master, the grantee never paid anything on the note, nor did he, at the time of the making of the deed, or before, advance to the grantor anything on the faith of the deed. What the master has found in regard to the grantee having paid \$125 for the grantor on the Beman mortgage is immaterial, inasmuch as he has not found that it was treated as a part of the consideration for, nor in any way connected with the giving of, the deed. Hence the deed of July 9, 1870, is to be considered in the light of a deed under which the title was to vest in the grantee upon his performance of these two conditions. Immediately following the conditions is the provision: "When these condi-

tions are fully complied with, then this deed is to be in full force and virtue in law, and otherwise null and void." Under this provision, to raise an equity, it would seem that the grantee should, in part at least, have performed the conditions. The condition in regard to the life estate was a reservation in favor of the grantor, and required no action by the grantee. But the condition in regard to the payment of his note for \$900 required action by him to raise an equity in his favor. No payment of any kind is found to have been made by him on this note. April 6, 1882, after the note for \$900 was wholly overdue and unpaid, James Oakman, Sr., conveyed the premises to Margaret Alvord by a deed of warranty, on full consideration as found by the master. The record of this deed was constructive notice of it to James Oakman, Jr. He also resided on the premises with Margaret Alvord, and was partly supported by her, the last three years of her life. He made no claim to the premises while Margaret Alvord was in possession and control of them under her deed from April, 1882, to the time of her death, in October, 1893. The declaration made by James Oakman, Sr., while making this deed to Margaret, that it did not pay half his debt to her, was admissible, because it characterized the transaction, and showed that the deed was being made for full consideration. It showed that, notwithstanding their relations were those of parent and child, there also existed between them the relation of debtor and creditor; otherwise the father could not have been in debt to her. On these facts, against Margaret Alvord and the defendants, who claim under her, it is difficult, and apparently impossible, to raise an equity in the premises in favor of James Oakman, Jr., or the orator, who claims under him. The court of chancery treated the conveyance of July 9, 1870, as creating an equitable interest in the premises in favor of James Oakman, Jr. On this basis wholly the case has been presented to this court. The orator's bill is drawn to enforce such equitable right. He claims that James Oakman, Jr., fully performed, and offers to pay whatever may be found due under the conditions of the deed if they were not fully performed by him. Considering the case on this basis, it is incumbent on the orator to establish that James Oakman, Jr., in whole or in part fulfilled the conditions imposed upon him by the deed of July 9, 1870. He did not interfere with the life estate reserved to James Oakman, Sr. If the orator claims that James Oakman, Jr., made any payments on his note for \$900, it is for him to establish such payments. Claiming through James Oakman, Jr., against the right of the defendants, who claim under James Oakman, Sr., the former's declaration to the attorney of the latter, in 1877 or 1878, that he had paid nothing on his note of \$900, was admissible. It was a declaration against James Oakman, Jr.'s interest, and therefore against the interest of the orator. In con-

nection with this declaration, the continuous poverty of James Oakman, Jr., and the fact that James Oakman, Sr., conveyed the premises by deed of warranty to Margaret Alvord, who was then in possession of the premises, in April, 1882, and that she continued in possession until her decease, in 1893, and James Oakman, Jr., made no claim to the premises, the master has found that James Oakman, Jr., never paid anything on his note for \$900. It was for the orator to establish a payment. His right, derived under James Oakman, Jr., depended, in a measure, upon such payment being established. But if, as the master seems to have regarded it, the burden was on the defendants to negative such payment, all these facts and circumstances could properly be shown, and considered by him. Without considering or deciding whether the conveyance of April 6, 1882, standing alone, could have been shown and considered by the master on this question, it was clearly admissible in connection with the facts that Margaret thereafter continued in possession and control of the premises to the knowledge of James Oakman, Jr., and that he made no claim to the premises until after her decease, in 1893. This brings us to the main contention on this point. Treating the deed of July 9, 1870, as creating an equitable mortgage of the premises in favor of James Oakman, Jr., and that he had not paid the mortgage debt on April 6, 1882, when the mortgagee, James Oakman, Sr., conveyed the premises to Margaret Alvord by a deed containing the usual covenants of warranty, did this deed—nothing being shown to the contrary—convey the mortgage debt due from James Oakman, Jr., to the grantor? The decisions on this question are apparently in conflict. But the conflict is only apparent. In many of the states, especially the code states, the fee of the premises mortgaged never becomes vested in the mortgagee. The mortgage is treated as creating a lien, only, in his favor, to secure the payment of the mortgage debt. His only rights created by the mortgage are to have no waste committed by the mortgagor, and, if payment of the mortgage debt is not made when it is due, to have the real estate mortgaged sold, and the sum realized applied, or so much of it as is necessary, to the extinguishment of the mortgage debt. The title to the premises does not vest in the mortgagee upon the passing of the law day, nor does it vest absolutely in him by foreclosure of the mortgage. The mortgagee has no right to the premises created by the mortgage except such as are collateral and incidental to the debt secured thereby. The mortgage is considered as a chattel or personal property interest. The only end or result of such a mortgage being security for the payment of the debt, it follows that the mortgagee, by a conveyance alone of the mortgaged premises, does not impliedly nor necessarily convey any right to any portion of the mortgage debt, and that, for such conveyance to create any interest in

the grantee other than that of trustee for the mortgagee, a conveyance of the mortgage debt, or some portion of it, must be shown. Hence when, under the law of the jurisdiction, the mortgagee has only these rights, his conveyance of the premises mortgaged does not impliedly convey the mortgage debt. But in this and several of the other states, upon the passing of the law day without performance or payment by the mortgagor, the fee of the mortgaged premises becomes vested in the mortgagee, and there remains in the mortgagor only the equitable right of redemption, which is fully extinguished by a foreclosure. After the law day has passed, the mortgagor, if he remains in possession, is treated as tenant at will. After the law day has passed, a conveyance of the mortgaged premises by a quitclaim deed by the mortgagee conveys what rights he has under the mortgage, supported by whatever of the mortgage debt is then due and unpaid. If made to the mortgagor, it operates as a discharge of the mortgage; if to a third person, it may be, and impliedly is,—if nothing more is shown,—a conveyance of all his rights supported by the mortgage debt; or, where only a portion of the mortgaged premises is conveyed, it may have been intended only to bar him from arresting his debt against the portion conveyed. When the mortgagee conveys, after the law day has passed, the mortgaged premises, by a deed containing the usual covenants of warranty, these covenants imply a conveyance of all his rights, supported and fed by whatever rights he then holds or may thereafter acquire. Hence, nothing being shown to the contrary, and it being shown that, if the deed of July 9, 1870, be considered an equitable mortgage, the debt therein described and included in the note of the grantee for \$900 being overdue and still existing in favor of James Oakman, Sr., his conveyance of April 6, 1882, operated impliedly to convey to Margaret Alvord the fee of the premises, supported by the mortgage debt then owned by him, as against the rights of James Oakman, Jr., to redeem. Such is, in substance, the holding of this court in *Collamer v. Langdon*, 29 Vt. 32. The same is also held in *Welsh v. Phillips*, 54 Ala. 309; *Hunt v. Hunt*, 14 Pick. 374, 25 Am. Dec. 400, and note; *Murdock v. Chapman*, 9 Gray, 158; *Ruggles v. Burton*, 13 Gray, 507; *Kilborn v. Robbins*, 8 Allen, 472; *Lawrence v. Stratton*, 6 Cush. 163. As embracing the two apparently conflicting classes of decisions, see *Wilson v. Troup*, 14 Am. Dec. 458, and note; 3 Pom. Eq. Jur. §§ 1209-1213, and notes; Washb. Real Prop. c. 16, pars. 8-18.

The facts surrounding this case impress upon it a peculiar character; so peculiar that it is doubtful, if the deed of July 9, 1870, created an equitable interest in the premises in James Oakman, Jr., whether the defendants are to account for the rents and profits of the premises for the time Margaret Alvord and they have been in possession. We have no

occasion to determine the question. The defendants' solicitor says that they are willing to account for such rents and profits in reduction of the amount due on James Oakman, Jr.'s, note for \$900.

The solicitor for the orator has made a point in regard to the statute of limitations having run on this debt, or some part of it. It might be so if this were an action at law. But in equity, against an equitable mortgage, a party cannot claim the right to redeem and invoke the statute of limitations at the same time. They are inconsistent positions. The right to redeem against a mortgagee in possession exists for 15 years after possession taken. If the mortgagor demands this equitable right, he must also do equity, and pay the debt due under the mortgage, after application of the rents and profits. By such application equity treats the mortgage debt as still subsisting. *Smith v. Railroad Co.*, 56 Vt. 82.

The orator contends that the defendants should be charged with depreciation in the value of the property through a failure to keep it in proper repair. His grantor, James Oakman, Jr., by the deed of July 9, 1870, stipulated to keep the premises in repair. The only neglect hinted at in the facts reported was while he was under this duty. No such neglect is shown since Margaret Alvord came into possession under the deed of April 6, 1882. There is no basis for this contention. Decree reversed pro forma, and cause remanded to have an account of the rents and profits received by Margaret Alvord and the defendants applied in reduction of the sum due on the \$900 note, and a proper decree entered that the orator pay the balance found due on the note by the time fixed by the court, or be foreclosed of his rights to redeem.

(69 Vt. 332)

IN RE SMITH'S ESTATE.

(Supreme Court of Vermont. Chittenden.
Jan. Term, 1897.)

NOTE—CONSIDERATION—SUBSCRIPTION TO CHARITABLE INSTITUTION—GIFT.

1. Mutual promises are no consideration for a note, where, when the maker gives it, the payee agrees, in consideration of receiving the amount thereof, to pay the maker annually for life a sum equal to 6 per cent. thereof, but no payments are made by either party.

2. There must be a consideration to support a promise to pay money, though the promisee is a charitable institution; and a promise to devote it to the only object for which it is authorized to take gifts is no consideration.

3. A promissory note without consideration cannot be the subject of gift from the maker to payee, though at delivery it is agreed by the parties that it be treated as a cash payment.

Start, J., dissenting.

Exceptions from Chittenden county court; Tyler, Judge.

Appeal from a decree of the probate court accepting the report of commissioners disallowing the claim of the Montpelier Seminary on a note given December 24, 1884, against

the estate of Eliza Smith, who died between December 24, 1893, and December 24, 1894. Pleas, the general issue and statute of limitations. Judgment pro forma for claimant. Defendant excepts. Reversed.

Frank C. Partridge and Dillingham, Huse & Howland, for claimant. T. E. Wales and O. P. Ray, for defendant.

TAFIT, J. The claim which is sought to be recovered in this cause is evidenced by a promissory note for \$1,000, given by the testatrix to the claimant, payable one day after date, with interest annually. At the time of its execution and delivery the claimant gave the testatrix an agreement, reciting that, in consideration of having received from her that sum, it agreed to pay her annually during life \$60, the same being 6 per cent. interest upon the amount named in the note. At the time of the delivery of the note to the claimant it was agreed by parol between the parties that the note should be treated as a cash payment. No money was ever paid by either party to the other, although interest was regularly indorsed annually upon the note. It was also agreed by parol that the testatrix should indorse upon the agreement or annuity contract the sums to be paid to her annually, as they became due. But the referee does not find that the testatrix ever made any indorsement on the contract, or did anything towards carrying out the parol agreement between her and the claimant. The contract has been lost. The giving of the note and the annuity contract was, in effect, but one transaction. They were executed at the same time, and related to the same subject-matter. It was evident that no money was to be paid by any one until the testatrix had in fact paid the \$1,000 to the claimant. The transaction was simply a promise of the testatrix to give the claimant at some future time the sum of \$1,000. A promise for the payment of money is void unless made upon a legal consideration. As instances of such want of consideration, we have many cases in this state, viz.: *Holley v. Adams*, 16 Vt. 206; *Carpenter v. Dodge*, 20 Vt. 595; *Smith v. Kilttridge*, 21 Vt. 238; *Frost v. Frost's Estate*, 33 Vt. 639; *Rogers v. Rogers*, 55 Vt. 73. The question before us is, was there a consideration for the note in suit? It has been held in some cases, like agreements to marry, to submit matters to arbitration, etc., that mutual promises are sufficient to uphold the contract. And it was held in *Bank v. Sabin*, 48 Vt. 239, and in *Lamson v. Lamson*, 52 Vt. 595, that mutual and concurrent promises afford a sufficient legal consideration for the promise of each party. The inquiry is, was the agreement to pay the testatrix the interest on the \$1,000 a sufficient consideration for the promise of the testatrix? The transaction between the parties was in the form of a contract—sometimes called "bilateral"—consisting of mutual promises to do some future

act. In such contracts, if the consideration for a promise is another promise, the whole agreement may be contingent, to come into effect only at the will of one of the parties. And it is well settled both in England and with us that such an agreement, so long as nothing is done by the promisee, is not binding on the promisor. This contract, it is evident, was not to take effect until the testatrix paid the money specified in the note. Then the promise of the claimant would become of force. It could have no force and no life until the money was paid. Until that time, it had nothing to operate upon; and there was nothing in the promise of the claimant that can be held to be a consideration for the promise of the testatrix. If the \$1,000 was never paid, there was no liability whatever upon the claimant to pay the interest. We do not put this upon the ground that the consideration was inadequate, but that there was a total want of consideration to support the obligation. The note was delivered as a gift. The testatrix intended it as a gift. The fact that she agreed that it should be treated as a cash payment is immaterial, for it was not a cash payment, and no agreement of the parties could make it so. The agreement did not make the note money, nor create any consideration for it. The referee states in express terms, "No value was received for Mrs. Smith's promise." This we construe as a finding of no value, unless the claimant's promise created one. We hold the promise to pay interest constituted no consideration for the note.

It is further insisted by the claimant that the note can be supported as a subscription to a charitable institution. There is no difference in respect to the necessity for a consideration to support a promise made in behalf of a charitable institution and a promise for any other purpose. All simple contracts must be based upon a sufficient legal consideration.

It is claimed that there was an implied promise on the part of the trustees of the seminary to see to and make an application of the money under the obligation imposed upon and assumed by them as trustees, to enable the claimant to prosecute its duties of public instruction for which it was incorporated, and that this implied promise was the consideration of the testatrix's promise contained in the note. The claimant is an educational institution, having capacity to take gifts for its general purposes. Nothing else being shown, it will be presumed that it can take gifts only for the purpose of public instruction, and that, unless limited by the terms of the gift, it would have been the duty of the trustees to use the gift of Mrs. Smith—had it been executed by the payment of money—for the only purpose for which the seminary could take, hold, and use property. Any implied promise, therefore, would be no more nor less than a promise to do their duty, and constitute no consideration for a contract. Doing or promising to do what one is already

legally bound to do is not a sufficient consideration to uphold a contract, whether the previous obligation arises by contract or by law independently of it. *Cobb v. Cowdery*, 40 Vt. 25. No implied promise, therefore, can be raised to support the promise made by the testatrix. There are authorities in some of our sister jurisdictions indicating the doctrine above alluded to, that an implied promise on the part of the corporation or its trustees to expend the money is a sufficient consideration for the promise, and sufficient to support the contract. The doctrine is incidentally referred to in *Troy Academy v. Nelson*, 24 Vt. 189. But that doctrine is not consistent with the principle that where nothing whatever is said upon the subject, and no limitation annexed to the gift, and the corporation takes the fund with power to expend it only for the purposes of the corporation, the trustees are doing only what their duty requires them to do, and therefore it cannot constitute a sufficient consideration for a promise. In the cases in which this latter rule has been discussed, with scarcely an exception, there was an ample consideration shown in each case, without resorting to an implied promise on the part of the corporation, or its trustees. The question of want of consideration in cases of subscription to aid educational and other public enterprises in this state has arisen in *University of Vermont v. Buell*, 2 Vt. 48, *State Treasurer v. Cross*, 9 Vt. 289, and *Troy Academy v. Nelson*, 24 Vt. 189. Each of these cases can well be sustained on the ground that a legal consideration may consist in loss, damage, or inconvenience sustained by the party to whom the promise was made. The erection of the state house and the university building, in two of these cases, and the labor, expense, and disbursement in obtaining a subscription of \$20,000 to pay the debts of the institution in the other, constituted sufficient considerations for the promises respectively made. We hold that there was no consideration for the note in question; that the testatrix received no benefit from it, nor was the claimant subjected to any loss, damage, or inconvenience; and that a promissory note without consideration cannot be the subject of a valid gift from the maker to the donee. The pro forma judgment reversed, and judgment for the defendant, and ordered certified to the probate court.

START, J., dissents.

(69 Vt. 375)

PARKHURST v. KRELLINGER.

(Supreme Court of Vermont. Washington. Jan. Term, 1897.)

SUPPORT OF DAUGHTER—IMPLIED CONTRACT—EVIDENCE OF AGE.

1. Recovery may be had of defendant for boarding and nursing his unmarried daughter, though she was of age and defendant made no express promise; he having told plaintiff to take her to

plaintiff's house, give her a good home, and take good care of her; and she being at the time sick, and in need of shelter, food, lodging, and care, and unable to provide them, and she having, while at home, been in danger of her life, and having been driven therefrom by her mother.

2. Defendant, in support of his claim that his daughter was over 18 years old, may show that before the controversy with plaintiff the daughter had a birthday party, and on the birthday cake were figures indicating such age.

Exceptions from Washington county court; Munson, Judge.

General assumpsit by Helen Parkhurst against Joseph Krellinger. Plea, the general issue. Verdict and judgment for defendant. Plaintiff excepts. Reversed.

It appeared that the board and nursing furnished defendant's daughter were necessities, and the plaintiff's evidence tended to show that the daughter was a nonemancipated minor. But the plaintiff claimed that, since the daughter was still a member of the defendant's household, the defendant would be liable on an implied contract, by reason of his relationship, and the fact that the daughter would be a public charge without his support, even though the daughter were over 18 years of age. But the court held otherwise, and charged the jury upon this point as quoted in the opinion.

John W. Gordon, for plaintiff. R. A. Hoar, for defendant.

START, J. This action is brought to recover for boarding and nursing Nellie Krellinger, an unmarried daughter of the defendant. It appeared that Nellie had been ill for some weeks before going to the plaintiff's house, during which time she had been at her father's home; that for some time previous to her illness, but for how long it did not appear, Nellie had been away at work, and while so away was taken sick and returned to her father's house; that during her illness she had no means for her support, and was unable to support herself by work; and that her father was possessed of sufficient means to provide for her. It appeared that Nellie's mother was a person of violent temper, and was frequently intoxicated. The plaintiff's evidence tended to show that the mother at this time had a strong dislike for Nellie; that, on the occasion of Nellie's leaving her father's home before going to the plaintiff's house, she had beaten her so that she was insensible, and driven her from home; that the defendant was unable to control his wife's conduct towards Nellie; and that it would have endangered Nellie's life to have remained at home with her mother. It appeared that Sarah Parkhurst, a daughter of the plaintiff, had been at the defendant's, taking care of Nellie, and had refused to remain any longer, and that Nellie left the defendant's house with the plaintiff and her daughter, and went to the house of one McCarty, and from there, soon after, went to the plaintiff's house. The plaintiff's evidence tended to show that she boarded and nursed Nellie upon the credit of the defendant;

that defendant was present when Nellie left home, and made no objection to her going; that he told the plaintiff while Nellie was at McCarty's to take Nellie up to her house, and give her a good home and take good care of her, and he would see that she had her pay for it. The evidence further tended to show that soon after Nellie went to the plaintiff's house the defendant came there, and that the plaintiff then asked him if he was willing Nellie should stay there, and he said he was, telling her to keep her, and he would see that she had her pay. The court instructed the jury, among other things, as follows: "Now, if you find from the evidence that Nellie Krellinger was over eighteen years of age at the time these services were rendered, then the plaintiff is not entitled to recover upon the ground of an implied promise; but she can still recover upon the ground of an express promise, if you find from the evidence that the express promise was made." The plaintiff excepted to the instruction that, if they found that Nellie was over 18 years of age, the plaintiff could not recover upon an implied promise. We think the instruction excepted to was error. The evidence tended to show facts and circumstances from which the jury should have been at liberty to have found a contract in fact. They must have understood from the instruction that they were not at liberty to find such contract unless they found that the defendant promised in express words. To entitle the plaintiff to recover, it was not necessary that the jury should find that the defendant said that he would pay, or that he said he would see that the plaintiff was paid. If the defendant told the plaintiff to take his daughter to her house, give her a good home, and take good care of her, such facts, taken in connection with other facts and circumstances which the evidence tended to show,—such as the fact that the daughter was sick, needed shelter, food, lodging, and care, and was unable to provide them; that while she was at home her life was in danger; that while sick she had been driven from home by her mother; that the defendant was her father, and able and willing to provide for her,—would justify a finding that the defendant expected to pay for the service, and the plaintiff expected to receive payment from him. Such mutual expectation, under the circumstances disclosed by the evidence, would constitute a contract in fact, and entitle the plaintiff to recover. Chit. Cont. 17, 18; Gordon v. Potter, 17 Vt. 348; Goetschins v. Hunt (Sup.) 5 N. Y. Supp. 307; Patton v. Hasinger, 69 Pa. St. 311; Wood v. Gill, 1 N. J. Law, 449; Ives v. Hulet, 12 Vt. 314; Swain v. Tyler, 26 Vt. 9; Rowell v. Town of Ver-shire, 62 Vt. 405, 19 Atl. 990.

The defendant claimed that his daughter was over 18 years of age, and upon this issue was allowed to show that she had a birthday party, on which occasion there was a birthday cake, with figures thereon indicating her age. The party was before the controversy arose,

and at a time when the defendant could have no motive in representing the age of his daughter to be different from what it was in fact; and we think the evidence must be regarded as in the nature of an act of the defendant that rendered his claim more probable, and was admissible. Judgment reversed and cause remanded.

(30 VL 364)

BROWN v. TOWN OF MT. HOLLY.

(Supreme Court of Vermont. Rutland. Jan. Term, 1897.)

DEFECTIVE HIGHWAY—EVIDENCE—COMPLAINTS.

1. In an action for damages caused by a defect in a highway, where there was evidence that such defect was so far latent that it could not reasonably have been anticipated and guarded against, and that the accident complained of had occurred without fault on the part of the town, the jury should have been required to determine whether the town officers ought, as prudent men, to have anticipated that such defect was likely to occur, and guarded against it, and, if not negligent in such respect, whether they ought to have seasonably discovered and remedied it.

2. In an action for personal injury, testimony as to plaintiff's complaints of pain suffered by him at the time such complaints were made was properly received, though such complaints were not made to a physician or nurse.

Exceptions from Rutland county court; Rowell, Judge.

Action by James Brown against the town of Mt. Holly for damages for injury through a defect in a highway. The plea was the general issue. There were verdict and judgment for plaintiff, and defendant excepts. Reversed.

The accident occurred on Tuesday. The defendant requested the court to charge "that if the culvert was suitably built, and remained apparently safe and secure, and there was no apparent change in its condition before the accident, and the accident was occasioned by the parting of the stones covering the culvert, then the defect would be latent, and the town not liable, and that this would be true although the hole was there a few hours before the accident, or even the Sunday night before, unless the jury should find that by due diligence the town ought to have known of the defect; that the town is chargeable only with the care and prudence of an ordinarily prudent man." The court refused to charge as requested, but charged that the town's liability was not to be measured by ordinary care and prudence; that the statute imposed upon it the duty of keeping the culvert in good and sufficient repair, and if it had neglected that duty, and the culvert was insufficient and out of repair, it was liable, if the plaintiff's case was otherwise made out, whether it knew of the defect or not, and whether it was, or not, negligent in not knowing it. To this refusal and charge the defendant excepted.

W. W. Stickney, J. G. Sargent, and H. W. Parker, for plaintiff. W. H. Lord and G. E. Lawrence, for defendant.

START, J. The plaintiff's evidence tended to show that, while riding over a culvert which the defendant was bound to maintain and keep in repair, his horse stepped into a hole that had been there about 48 hours, caused by the spreading of the stone slabs covering the culvert, and the dirt covering the same working through. The defendant's evidence tended to show that there was no hole in the culvert until the plaintiff's horse broke through it on the occasion of the accident; that the culvert was properly and securely built, with sides covered with large flagstones, which at the time of the accident were covered with gravel and dirt to the depth of about 18 inches; that said culvert was, to all appearances, in perfect condition; that the defect could only have been discovered by crowding into the culvert; that the defendant's road commissioner had from time to time inspected the road where the culvert was, and discovered no fault in the same. This evidence tends to show that the defect causing the injury complained of was so far latent, sudden, and unforeseen that its occurrence could not reasonably have been anticipated and guarded against, and that the accident occurred without fault on the part of the town. The evidence fairly presented for the consideration of the jury the question whether the town officers charged with the duty of keeping the culvert in repair ought, as careful and prudent men, to have anticipated that such a defect would be likely to occur, and guarded against its occurrence, and, if not negligent in this respect, whether by the exercise of due care and prudence they could or ought to have seasonably discovered the defect, and remedied it. And these questions should have been submitted to the jury. When a defect in the highway is latent, and when a sudden and unforeseen defect occurs without fault on the part of the town, the town is not chargeable for the damage resulting from such defect unless it has been in default in respect to getting seasonable knowledge of the defect, or unless, having such knowledge, it was reasonably practicable to have repaired the defect, or put up a warning or barrier, before the happening of the accident. In such cases the questions of whether the defect occurred without the fault of the town, and whether the town was wanting in care and prudence in not seasonably discovering and repairing the defect, are for the jury. *Campbell v. Fair Haven*, 54 Vt. 336; *Ozier v. Hinesburgh*, 44 Vt. 220; *Willard v. Newbury*, 22 Vt. 458; *Kelsey v. Glover*, 15 Vt. 708. In *Mullen v. Rutland*, 55 Vt. 77, the defendant's surveyor built a barricade to prevent travelers from driving upon a bridge that was being repaired; and the court held that if the town performed its full duty, and built a barricade at nightfall sufficient in height, in strength, and in the right place, and had no knowledge or reason to suppose or suspect that some unforeseen casualty would happen to it, the

town would not be liable. In *Prindle v. Fletcher*, 39 Vt. 255, the plaintiff was traveling upon a highway, when the ground gave way under his horse, through some latent defect, which was not known and was not discoverable; and the court, in holding that the defendant was not liable, in the course of the opinion said: "It was not the design of the statute to require impossibilities of the town, and to make it the absolute insurer against all accidents and injuries caused by defects in highways. But it was designed to hold the town to insure against accidents and injuries caused by defects existing through any fault of the town."

The plaintiff was permitted to show by his sons the complaints he made of pain he was suffering at the time he made the complaints. This testimony was properly received. It is not necessary that such complaints be made to a physician or nurse, in order to render them admissible. *Knight v. Smythe*, 57 Vt. 529; *State v. Howard*, 32 Vt. 380; *Kent v. Lincoln*, Id. 591; *Drew v. Sutton*, 55 Vt. 586; *State v. Fournier*, 68 Vt. 262, 35 Atl. 178. Judgment reversed and cause remanded.

(66 Vt. 285)

SHERMAN v. ESTEY ORGAN CO.

(Supreme Court of Vermont. Windham. Jan. Term, 1897.)

CHattel Mortgages—Oath—Law of the Case.

1. A decision of the supreme court on a point in the case will, on the case again coming to that court, be adhered to, the facts relevant to the point remaining the same.

2. Under Pub. St. N. H. c. 140, § 12, declaring a chattel mortgage invalid against all except the mortgagor, unless sworn to and recorded in the manner herein prescribed; and section 6, requiring to be recorded the following oath to be taken by the parties to the mortgage: "We severally swear that the foregoing mortgage is made for the purpose of securing the debt specified in the condition thereof, and for no other purpose whatever [and that said debt was not created for the purpose of enabling the mortgagor to execute said mortgage], but is a just debt honestly due and owing from the mortgagor to the mortgagee,"—omission of the words indicated by brackets renders the mortgage invalid against a purchaser from the mortgagor of the mortgaged property.

Exceptions from Windham county; Start, Judge.

Trover by Sidney H. Sherman against the Estey Organ Company for wood and lumber. Judgment for plaintiff. Defendant excepts. Reversed.

The plaintiff claimed title to the wood and lumber by virtue of a chattel mortgage and a foreclosure sale to himself thereunder, subsequent to which sale the defendant converted the same to its own use, claiming title thereto by virtue of conveyances, from other parties, of the land upon which said wood and lumber grew, and a bill of sale of the same from the plaintiff's mortgagor.

Clarke C. Flitts and L. M. Read, for plaintiff. K. Haskins and Waterman, Martin & Hitt, for defendant.

ROSS, C. J. When this case was before this court, as found in 67 Vt. 550, 32 Atl. 483, it was held that the chattel mortgage from Waite to the plaintiff, if it was executed for the purpose and under the circumstances which the plaintiff's testimony tended to establish, was, so far as regards the facts which that testimony tended to establish, valid. The decision of this court upon a point in a case will not be departed from when the case comes again before the court, so long as the facts relevant to the point decided remain unchanged. *Ross v. Bank*, 1 Aiken, 43; *Dana v. Nelson*, Id. 252; *Herrick v. Belknap*, 27 Vt. 673; *Stacy v. Railroad Co.*, 32 Vt. 551; *Barker v. Belknap*, 39 Vt. 163; *Childs v. Insurance Co.*, 56 Vt. 609; *Railroad Co. v. Hunt*, 59 Vt. 294, 7 Atl. 277. No new facts relevant to whether the true relations of the plaintiff and of Waite to their note given to Herrick, upon which the plaintiff had written "Surety" after his signature, could be shown by evidence allunde the note, have been brought into the case since the decision. That decision is conclusive upon this point. The trial court properly admitted such evidence.

Upon the former trial a verdict was ordered for the defendant at the close of the plaintiff's testimony. The exceptions then before the court show that only section 9 of chapter 140 of the Public Statutes of New Hampshire was admitted in evidence. This chapter relates to mortgages of personal property, and points out the manner in which they must be executed and recorded to be effectual against attaching creditors and purchasers. Section 9, in substance, provides, that if the mortgage is executed to secure the mortgagee for a liability other than a debt due to him from the mortgagor, the form of the oath given in section 6 of the chapter shall be so varied as truly to describe such liability. On this trial the whole of chapter 140 of the Public Statutes of New Hampshire was in evidence. The exceptions then did not include the form of the oath required by section 6 of that chapter. Hence the point whether the oath affixed to the mortgage given by Waite to the plaintiff complied, in substance, with the form of the oath prescribed by section 6 of chapter 140 of the Public Statutes of New Hampshire was not raised by these exceptions, nor was it considered by this court in the decision then made. The personal property mortgaged was located in New Hampshire, and the mortgage, to be valid, must be executed in accordance with the laws of that state. The mortgage from Waite to the plaintiff of the property in contention was executed in Windham county, and has upon it the form of oath prescribed by V. S. § 2253, reading: "We severally swear that the foregoing mortgage is made for the purpose of securing the debt specified in the conditions thereof, and for no other purpose, and that the same is a just debt, due and owing from the mortgagor to the mortgagee." The oath prescribed by section 6 of chapter 140 of the Public Statutes of New Hampshire,

and required to be taken by the parties to such mortgage, and recorded, reads: "We severally swear that the foregoing mortgage is made for the purpose of securing the debt specified in the condition thereof, and for no other purpose whatever, and that said debt was not created for the purpose of enabling the mortgagor to execute said mortgage, but is a just debt, honestly due and owing from the mortgagor to the mortgagee." The mortgage and note were admitted in evidence against the exception of the defendant. The defendant also excepted to the refusal of the court to comply with its request to charge that the mortgage was void under the laws of New Hampshire, because the oath taken by the mortgagor and mortgagee, shown by the mortgage recorded, did not contain the clause, "and that said debt was not created for the purpose of enabling the mortgagor to execute said mortgage." Hence the contention is whether the omission of this clause from the oath taken and recorded rendered the mortgage upon which the plaintiff relies to establish his title to the personal property, in contention, void under the laws of New Hampshire. Section 12 of chapter 140 of the Public Statutes of New Hampshire reads: "No such mortgage shall be valid against any person except the mortgagor, his heirs, executors or administrators, unless possession is delivered or the mortgage is sworn to and recorded in the manner herein prescribed." The decisions of the supreme court of New Hampshire, given in evidence, show that such mortgages, to be valid under the laws of New Hampshire, must be executed and recorded in substantial compliance with every provision of the statute. If the mortgage is given to secure the mortgagee for a debt due him from the mortgagor, the condition and oath must describe it as a debt. If to secure a liability, they must so describe it; and that a liability is not covered by the term "debt." If the whole sum secured is described as a debt, when a part of it is merely an indemnity, unless separately described, the mortgage is void against creditors; but, if they are separately described, the mortgage will be invalid only as to the part misdescribed. *Belknap v. Wendell*, 31 N. H. 92. If the proper oath is taken, and the magistrate administering it neglects to sign the certificate, such mortgage is invalid against attaching creditors, although the mortgage, with the unsigned certificate, is recorded. *Hill v. Gilman*, 39 N. H. 88. In this case it is held that the provisions of the statute in regard to the execution and record of such mortgages, "must, in general, be strictly complied with." *Parker v. Morrison*, 46 N. H. 280, holds that such mortgages cannot be given to a stranger to secure a debt due to another, and that the oath must verify the truth, validity, and justice of the debt, or of the liability, or of the agreement, or it will not be invalid except between the parties. See, also, *Kennard v. Gray*, 58 N. H. 51; *Sumner v. Dalton*, Id. 295. These decisions hold that all the provisions of the statute in regard to

the execution and record of such mortgages must be fully complied with to render them valid against any one except the parties thereto. The clause omitted from the oath taken by mortgagor and mortgagee and recorded, in the case at bar, is not supplied by any other clause of the oath. It relates to the creation of the debt, and not to its justness between the parties. The mortgage might be given to secure the debt specified in its condition, and for no other purpose, and that debt might be a just debt, honestly due and owing from the mortgagor to the mortgagee, and still the debt might have been created for the purpose of enabling the mortgagor to execute the mortgage. The omitted clause therefore contains a matter made essential by the statute, to the validity of the mortgage between these parties, which is not supplied by any other clause of the oath taken and recorded. The court should have complied with the request of the defendant in relation thereto. This view renders a consideration of the other questions discussed immaterial. Judgment reversed, and cause remanded.

(69 Vt. 450)

IN RE BRAINARD.

(Supreme Court of Vermont, Franklin. July 27, 1897.)

INSOLVENCY—PETITION.

A creditor whose claim is secured within the meaning of the insolvent law cannot maintain a petition to have his debtor adjudged insolvent.

Exceptions from Franklin county; Ross, Chief Judge.

Petition by Royce A. Smith to have A. O. Brainard adjudged insolvent. On appeal to the county court the petition was dismissed, and the petitioner excepted. In the supreme court the respondent moved to dismiss the exceptions. Judgment affirmed.

F. W. McGettrick, for petitioner. Ballard & Burleson, for respondent.

TYLER, J. Appeal to the county court from an order of the court of insolvency for the district of Franklin adjudging the petitioner insolvent. It appeared that at some time before the petition in insolvency was filed the petitioner had executed and placed on record a mortgage deed of certain real estate purporting to secure the petitioner for the debt described in the petition; that a petition to foreclose the mortgage had been brought before these proceedings were commenced, and was still pending; that the petitioner had filed an affidavit of defense alleging that the mortgage had never been delivered to nor accepted by the petitioner, and that the petitioner insisted that the mortgage did not constitute security for the debt. The county court did not pass upon the question of the debtor's insolvency, but decided that it had not jurisdiction of the case upon the ground that the petitioner's debt was secured within the meaning of the insolvent

law, and therefore one upon which the debtor could not be adjudged insolvent. The petitioner's counsel concedes that, if the county court had taken jurisdiction, and considered and passed upon the question of the debtor's insolvency, its adjudication would have been final, under V. S. § 2156; but he insists that he was entitled to the judgment of the court upon that question, and that the court erred in dismissing the petition without such an adjudication. Section 2156, V. S., is, in substance, the same as the last paragraph of section 1870, R. L., as amended by section 4 of No. 125, Laws 1884. It provides that upon an adjudication of insolvency in the insolvency court either party may appeal to the county court, and that the adjudication of that court (evidently upon the question of the debtor's insolvency) shall be conclusive. But the judgment of the county court dismissing the petition was not based upon that section. The court refused to act for want of jurisdiction. Upon the finding that the petitioner was a secured creditor he had no standing in court, and there was no error in dismissing the petition. It was held in *Re Montgomery Spool & Bobbin Co.*, 68 Vt. 29, 83 Atl. 766, that a judgment of the county court dismissing a petition upon the ground that the petitioning creditor had no standing in court was final, as well as upon the question of the debtor's insolvency. Judgment affirmed, and cause remanded.

(69 Vt. 468)

SHATTUCK v. WROUGHT-IRON RANGE CO.

(Supreme Court of Vermont. Caledonia. July 27, 1897.)

SETTING ASIDE VERDICT—TREATING JURY.

Under V. S. § 1232, providing for the setting aside of a verdict where the successful party has treated the jury, it is proper to set aside a verdict in favor of a defendant company, whose representative, after the trial, procured the jury to be treated to cigars, though defendant neither directed nor ratified such treating.

Exceptions from Caledonia county; Taft, Judge.

Assumpsit by W. O. Shattuck against the Wrought-Iron Range Company. Defendant brings exceptions from order setting aside verdict in its favor. Affirmed.

The court found that C. A. Day, soon after the return of the verdict, procured the jury to be treated to cigars; that Day had been a witness for the defendant upon the trial, and its superintendent for the territory in which the sale was made, and attended the trial as the representative of the defendant. There was no evidence that the defendant directed or ratified the act of Day in treating the jury.

W. P. Stafford, for plaintiff. Bates, May & Simonds, for defendant.

TYLER, J. The finding of the county court that Day represented the defendant is conclusive, and brings the case within the provisions of V. S. § 1232, as construed in *Baker v. Jacobs*, 64 Vt. 197, 23 Atl. 588. The court properly set the verdict aside. Judgment affirmed, and new trial granted.

(69 Vt. 330)

WILLETT v. VILLAGE OF ST. ALBANS.

(Supreme Court of Vermont. Franklin. Jan. Term, 1897.)

MUNICIPAL CORPORATIONS—DEFECTIVE SEWERS—EVIDENCE—EXEMPLARY DAMAGES—TRIAL—OBJECTIONS TO EVIDENCE.

1. A village empowered to maintain and construct sewers is liable for injury resulting from noxious vapors coming upon the premises of abutting owners through its negligence in the exercise of such power.

2. The admission of evidence against a specific objection which is untenable was not error, though the evidence may have been inadmissible on other grounds.

3. In a suit against a village to recover damages for illness caused by the escape of gas from its sewers, the testimony of a physician that during the three years last past he had attended patients living near plaintiff's home, whose illness he attributed to gas escaping from the locality complained of, was not admissible.

4. A village authorized to construct and maintain sewers is not liable for consequential damages arising from defects in the original design of construction adopted.

5. A municipal corporation, whose trustees are empowered to construct and maintain sewers, is not liable in exemplary damages for the neglect or refusal of the trustees to repair a defective sewer.

Exceptions from Franklin county court; Munson, Judge.

Action by Frederick Willett against the village of St. Albans. Plaintiff recovered judgment, and defendant excepts. Reversed.

The defendant's charter empowered the trustees to make and maintain sewers as the public health and convenience might require, and for that purpose to take the land of individuals under proceedings similar to those provided by statute in case of the taking of land for highways. The substance of Dr. Belden's testimony was that he had had several patients within the three years last past living within 100 feet of the place complained of, and had one at the time of testifying, whose sickness he attributed to malarial influences contracted from the sewer.

Dee & George, for plaintiff. Hogan & Royce, for defendant.

ROSS, C. J. This action is to recover for damages sustained by the negligence of the defendant in the construction and maintenance of its sewer. On the trial the defendant took several exceptions, which it now insists upon, based upon the ground that the plaintiff was not entitled to recover, because none of the sewer and none of the sewage complained of came upon the plaintiff's premises. The defendant's charter in regard

to constructing and maintaining sewers, in legal effect, is the same as the charter of the village of Rutland, which was before this court in *Winn v. Rutland*, 52 Vt. 481, in which it was held that the defendant was liable for negligence in constructing and maintaining its sewers to the damage of the plaintiff. In that case the defect complained of was on the plaintiff's premises, and the court say the use which the defendant put it to amounted to a taking of the plaintiff's land within the purview of the constitutional requirement that compensation shall be made. The defendant relies upon this decision to support its contention that the plaintiff is not entitled to recover, because neither the sewer nor any of the sewage come upon the plaintiff's premises, except in the condition of noxious and unhealthy vapors. The other cases cited by it in support of this point relate to taking of land for streets, highways, and railways. In *Winn v. Rutland* it is not decided that the plaintiff would have been remediless, if the defective sewer had not been on his premises, if it caused him damage. The maxim, "*Sic utere tuo ut alienum non lædas*," applies in such cases. No person or corporation can so use its own property or rights as to injure the property or rights of another. If it creates a nuisance on its own property, or in the exercise of its rights, upon common or public property, it becomes liable to adjoining proprietors who suffer special damage. *Gifford v. Hulett*, 62 Vt. 342, 19 Atl. 230; *Abbott v. Mills*, 3 Vt. 521; *Camp v. Village of Barre*, 66 Vt. 563, 29 Atl. 1022; *Sargent v. George*, 56 Vt. 627; *Curtis v. Winslow*, 38 Vt. 690; *Wesson v. Iron Co.*, 13 Allen, 95. The opinion in the last case fully and clearly distinguishes between two kinds of nuisances called public, and holds that a party specially damaged by the maintenance of either may recover against the party guilty of maintaining it upon his own premises. These exceptions are not sustained.

The plaintiff filed several specifications of his claims for damages. The first is for loss and damage on account of decrease in the value of plaintiff's property, and incapacity to sell the same, caused by the defendant's defective sewer. Considerable testimony was received in reference to this item, but at the close of the testimony the plaintiff withdrew this claim, and the court told the jury not to consider the evidence relating to it. The defendant seasonably objected and excepted to all testimony tending to show damage to the plaintiff under each and every item of his specifications, without showing damage to his land, or a taking thereof. The plaintiff concedes that no recovery could be had under this item. The defendant contends that, inasmuch as the evidence was received against its exception, the court, under our decisions, could not cure the error in receiving it by instructing the jury to disregard it. We do not decide whether this

would have been true if its exception to this item had been placed upon the ground now claimed,—that no recovery could be had under it. The defendant's exception to this testimony was placed upon a specified ground, and not the one now urged against it. The trial court's attention was not called to the objection now urged, and it made no decision in regard to it in admitting the testimony. Its present objection to this testimony cannot avail the defendant. The specified ground of objection made to its introduction was not tenable, as shown under the first point considered. It was not injured by the plaintiff's and court's withdrawal of this item from the consideration of the jury. The defendant also took several special exceptions to this class of testimony in regard to whether some of the witnesses were qualified to give an opinion, and in the manner in which they were allowed to give their opinion or estimation of the amount of damage occasioned to the plaintiff's property by the defendant's negligent maintenance of its sewer. We have not considered these special objections with much care, as the testimony was withdrawn from the consideration of the jury. The defendant concedes that the court was to determine whether the witnesses had sufficient knowledge of the subject-matter under consideration to give an opinion in regard to the nature of the plaintiff's property, and in regard to the damage done thereto by the defendant's negligence complained of. The trial court observes the witness, and can determine better than can be shown by what the witness says, and is placed on record, in regard to the competency of the witness in this respect. Much more latitude is allowed, under our practice and decisions, to the witness in giving his opinion in regard to the value of and damage done to property than is allowed in many of the other states. We have observed no substantial error in these respects.

The testimony of Dr. H. G. Belden, received against the defendant's exception, which related to patients which he had attended living in other houses, whose sickness he attributed to the escape of sewer gas from the locality complained of by the plaintiff, was improperly received. Every such case of sickness, although occurring in houses near the house of the plaintiff, was not relevant to the sickness of the plaintiff's wife, neither in time nor circumstances. It brought into the case a new issue not embraced in the issues on trial. The defendant was not called upon, by the issues on trial, to inquire into, and to be prepared to show the cause of, such sicknesses. Besides, such outside issues tend to confuse the jury, prolong the trial, and surprise and prejudice the defendant.

If the plaintiff had been allowed to recover for injury to the health of his wife, other than for what he expended in nursing and doctoring her, and in loss of her services and society, it would have been error. We do not find that

he was allowed so to recover. The charge confines his recovery on this item to his expenses for medicines and tonics for the wife if it was shown her sickness was caused by the defendant's negligence. This was unobjectionable.

The defendant requested the court to charge the jury: "That if the jury are satisfied by a fair balance of testimony that the damage suffered by the plaintiff, if any there was, was due in whole or in part to the defective plan or method of construction of the so-called 'Moran Sewer,' laid in the bed of the brook, then for such damage so resulting the plaintiff is not entitled to recover." The doctrine of this request is recognized in *Winn v. Rutland*, 52 Vt. 481. It is there said: "In acting under the charter power, the village authorities must necessarily deliberate and adjudge upon a system or plan of the work; when to perform it, and where to locate it. So far no liability to private action is incurred for errors in judgment or want of forecast. * * * Having devised a plan, it may be carried into execution with due care, without risk of private action. The charter makes the construction of the work lawful, and, if the work be done in a proper manner, the charter power is a complete bar to a claim of consequential damages to persons or property." Mr. Dillon recognizes the same doctrine in volume 2, § 1046, of his work on Municipal Corporations. He says: "The corporation is not liable to a civil action for wholly failing to provide drainage or sewerage; nor, probably, for any defect or want of efficiency in the plan of sewerage or drainage adopted; nor, according to the prevailing view, for the insufficient size or want of capacity of gutters or sewers for the purpose intended." This, he says, is because in these respects the municipality acts judicially or quasi judicially. To the same effect are *Child v. City of Boston*, 4 Allen, 41; *Johnston v. District of Columbia*, 118 U. S. 19, 6 Sup. Ct. 923; *Mills v. City of Brooklyn*, 32 N. Y. 489. The defendant's evidence tended to show that the condition of the sewer and sewage complained of was not due to the negligence of the defendant, but to the defectiveness of the original design and plan of construction of the receiving sewer. Hence there was evidence to which this request was applicable. The court did not comply with it, nor make any charge upon the subject. For this refusal the defendant excepted. On the authorities cited this refusal was error.

The defendant also excepted to the charge of the court on the subject of exemplary damages. The court told the jury that if they found that the plaintiff was entitled to recover some actual damage, then, although the plaintiff would not claim it as a matter of right, they might, in their discretion, award him exemplary damages if they found the defendant's negligence causing the actual damage was so gross as to amount to a wanton and willful disregard of the rights of the plaintiff. To the allowance of this class of damages in this case the defendant excepted. It does not

complain of the language of the charge, if this class of damages were allowable under the circumstances of the case. The negligence complained of, and which the plaintiff's testimony tended to establish, was that the trustees of the defendant did not cause to be properly connected the sewers receiving east and west with the sewer in Stevens brook running north, and in allowing the latter to become broken in and filled up so that sewage accumulated in the brook near the dwelling occupied by the plaintiff, and that the trustees did not, although notified by the plaintiff several times, remedy these defects, but allowed them to remain for a considerable length of time, and that in the meantime the accumulated sewage became and was offensive, disagreeable, noxious, and unhealthful; that the gas escaping therefrom entered the plaintiff's dwelling, and caused him damages in several particulars. Exemplary or punitive damages have been allowed in this state in actions of tort, under the conditions named in the charge, from an early period, against personal defendants. No case has been brought to our attention, and we know of none, in which in this state such damages have been allowed against a corporation. Hence we are not controlled by previous decisions on this subject. It is very generally held that exemplary damages may be allowed against corporations, and possibly against strictly municipal corporations. In examining this subject, quite a large number of cases have been considered. Most of them have been against railroad corporations. I have not seen one against a strictly municipal corporation like the defendant. The limitations on which this class of damages are recoverable against railroad corporations are variously stated by the different courts. One searches in vain for any uniform rule governing the allowance of this class of damages against railroad corporations. In most of the cases against railroad corporations the plaintiff has been a passenger or employé to whom it sustained a contract relation; a very different relation from that which a municipal corporation bears to its citizens. The most satisfactory and logical opinion, on this question against a railroad corporation, which has fallen under our notice, is that of Judge Gray in *Railway Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261. In it a large number of decisions, both English and American, are reviewed. It is there held that, inasmuch as this class of damages are not allowed as compensation for damages sustained by the person wronged, and only as a punishment against the offender because of his malicious, wanton, or reckless conduct, when the offender is the agent or servant of another, the principal can be made liable for this class of damages only when he has either directed, participated in, or subsequently approved the misconduct of his servant or agent; nor does it make any difference that the servant or agent was acting within the scope of his employment or agency, unless the scope of the employment or agency includ-

ed the exercise of malice, wantonness, or recklessness, or the commission of the offense for which such damages are allowed. We think this is the logical and reasonable deduction and conclusion to be drawn from the conditions on which this class of damages are allowed. On this decision, a party asking for the rendition of such damages must either bring his suit against the servant or agent guilty of the wrongful conduct, or, if he brings his action against the principal, establish that the principal was also guilty of the wrong by directing, participating in, or subsequently approving of the wrong. On this basis the exemplary or punitive damages are made to fall upon the offender. They are a punishment to him, and a warning to others not to offend, and secure the only purpose for avoiding them. They are never suffered to fall on a party innocent of the offense for which they are the punishment. With this limitation, this class of damages have a reasonable basis to rest upon. Without it, they are made to fall upon the innocent, in many cases, while the guilty party bears none of the punishment. With this limitation, such damages cannot be allowed against a municipal corporation unless such corporation in some legal way either authorizes or subsequently approves of the wrongful act or neglect. The trustees of such a corporation can only act by majority vote. They are the business managers of the corporation. But, after once elected, the voters and taxpayers, on whom such damages must fall if awarded, cannot, during their term of office, discharge them, and usually cannot control their action within the scope of their office. In the case at bar the most which the plaintiff's testimony tended to show was that the trustees of the defendant neglected to act in the premises. If the action of the trustees can ever render the defendant municipal corporation liable for this class of damages, their neglect or refusal to act in this case had no such tendency. This exception is sustained. Judgment reversed, and cause remanded for a new trial.

(9 Vt. 428)

STATE v. SHEDRICK.

(Supreme Court of Vermont. Windsor. Jan. Term, 1897.)

ADULTERY—"MAIDEN"—DEFINITION.

The word "maiden" in an indictment of a man for adultery did not mean a virgin necessarily, but merely a young unmarried woman.

Exceptions from Windsor county court; Munson, Judge.

James Shedrick was adjudged guilty of adultery in default of further plea after his plea of former acquittal was overruled, and he excepts. Reversed pro forma.

James G. Harvey, State's Atty. W. B. O. Stickney, for respondent.

ROSS, C. J. The contention is whether the defendant's acquittal of the charge of

rape on the facts found by the court is a bar to the charge of adultery, made in the present indictment. Each charge is by indictment, found by the grand jury, at the same term of the court, alleged to have been committed on the same day, upon the same female. In the indictment for rape, on which the respondent was acquitted, she is described as a female child under the age of 14 years, the age of legal consent; and in the indictment for adultery she is described as a "maiden," not the wife of the respondent. Both crimes are charged to have been committed on July 20, 1893. The plea in bar was traversed, and the trial had by the court. The identity of the respondent in the two indictments, and of the girl upon whom the crimes are charged to have been committed, is found by the court. It is also found that the evidence of the state, on the trial for rape, tended to show that that crime was committed upon the girl when only 12 years old, before the 20th day of July, 1893; that the girl testified to the commission of the offense; and that it was the first time any one had had sexual intercourse with her. By the verdict, the respondent was not found guilty of having committed this offense. The indictments were found at the December term of the court for 1896.

To have an acquittal or conviction of one charge bar another, both must arise out of the same transaction. The respondent's counsel concedes this. The county court do not find that these charges arose out of the same transaction. But the respondent's counsel contends that the description of the girl in the indictment for adultery, that she was then a "maiden," means that she was then a virgin; and therefore the transaction must have been the same to which she testified on the trial upon the indictment for rape. But this is not the usual and ordinary meaning of the word "maiden." Webster's and Worcester's Unabridged Dictionaries give, as the first definition of "mald" and "maiden," "an unmarried woman." They also give "virgin" as another definition. The full first definition of the word, as contained in the Century Dictionary, is "a young unmarried woman; a girl. Specifically, a girl of marriageable age, but applied usually with 'little' or some other qualifying term to a female child of any age above infancy." Richardson's English Dictionary gives these meanings to the word: "A female child; a female who has preserved her chastity; a virgin; a female servant." From these definitions by the foremost lexicographers, it results that the common, ordinary meaning of the word "maiden" is a young unmarried woman or female. We think the state, in its proof, is not bound to go beyond this meaning of the word "maiden" to answer the description of the girl with whom the crime is charged to have been committed in the present indictment. With this meaning of the descriptive word "maiden," the acquittal

of the charge of rape only bars the state from prosecuting the respondent for adultery arising out of that same transaction, but not from prosecuting him for the commission of adultery with her at another time. There was therefore no error in the proceedings in the county court, and the respondent takes nothing by his exceptions. But, agreeably to the stipulation, judgment and sentence reversed pro forma, and the cause remanded, that the respondent may have leave to withdraw his plea in bar, and to plead "Not guilty," and be tried thereon.

The respondent not being in court, TAFT, J., did not sit.

(60 VT. 425)

BERTOLI v. SMITH et al.

(Supreme Court of Vermont. Washington.
July 27, 1897.)

**SALES—ACTION FOR PRICE—DEFENSES—EVIDENCE—
WITNESSES—IMPEACHMENT—UNDISCLOSED
AGENT—RIGHTS OF PRINCIPAL.**

1. In an action for the price of goods sold by plaintiff's agent, it was not error to permit plaintiff to testify that, when he called on defendants for payment, they told him they had paid the agent, and "that he understood from this that they had paid him in money," and thereupon brought suit against the agent; the fact being that they credited the agent on account with such goods.

2. Where an agent sold goods without disclosing his principal, and the principal understood from the buyers' statements that they had paid the agent therefor, the bringing of suit by the principal against the agent was no defense to a subsequent action by the principal against the buyers.

3. Witnesses called to impeach another witness can be asked, as showing hostility to him, only as to whether they have had a quarrel with him, and hence it was within the discretion of the court to refuse an offer to show, on cross-examination of impeaching witnesses, that they had had some trouble with the assailed witness "about claims which they severally had against him."

4. It was not permissible to show that the assailed witness was indebted to a bank of which an impeaching witness was cashier.

5. One who purchases from an agent that has neither possession of the goods, nor muniments of title, cannot defend an action by the undisclosed principal for the price by showing that he credited the goods on a claim against the agent, supposing that he was the owner.

Exceptions from Washington county court.

Action in assumpsit by H. J. Bertoli against E. L. Smith & Co. to recover the price of certain tablets sold and delivered by plaintiff to defendants. There was a judgment entered on a verdict in favor of plaintiff, and defendants except. Affirmed.

The defendants requested the court to instruct the jury that if the agent was authorized to sell the tablets, and sold them in his own name, without disclosing his principal, and the defendants had no knowledge of the truth, and there was nothing to excite their suspicion, they were entitled to set off any claim they had against the agent, as if the suit had been brought in his name. The instruction was refused, and the jury were told that the agent would have no right to sell to the defendants, and take pay by credit from the de-

fendants upon their account against him. To the refusal and the charge the defendants excepted.

Fred W. Laird, for plaintiff. John W. Gordon, for defendants.

MUNSON, J. The tablets for which the plaintiff seeks to recover were sold to the defendants by one W. A. Rice, who received credit for them on an account which the defendants had against him. The plaintiff's evidence tended to show that he was the owner of the tablets, and had specially authorized Rice to make the sale. The defendants' evidence tended to show that the plaintiff's ownership was not disclosed, and that they bought with an understanding that Rice was the owner. The plaintiff testified that, when he called upon the defendants for payment, they told him they had paid Rice, and that he understood from this that they had paid him in money, and thereupon brought a suit against Rice. The testimony as to his understanding was objected to, but was properly received. It was permissible for the plaintiff to explain how he came to sue Rice, and, as a part of that explanation, to state what he understood from the statement that Rice had been paid. The bringing of the suit against Rice upon such information and understanding cannot be urged in defense of this suit. Action taken without a knowledge of the facts does not amount to an election. 7 Enc. Pl. & Prac. 366. See *White v. White*, 68 Vt. 161, 34 Atl. 425.

The plaintiff produced witnesses who testified that Rice's reputation for truth was below par. The defendants proposed to show, as affecting the credibility of the witnesses, that they had had some trouble with Rice about claims which they severally had against him, and this offer was excluded. An impeaching witness may be asked whether he has had a quarrel with the witness whom he discredits. *Long v. Lamkin*, 9 Cush. 361. But, in showing the hostility of a witness, a party is not entitled to inquire into the cause or the particulars of the difficulty. *Allen v. State*, 73 Am. Dec. 775, note; *State v. Glynn*, 51 Vt. 577. It was within the discretion of the court to restrict the evidence to the simple fact of trouble, and, as this offer embraced more, it was not error to exclude it. Nor were the defendants entitled to show that Rice was indebted to the bank of which one of these witnesses was cashier.

The defendants were not entitled to the charge requested, and the charge as given was correct as applied to the case presented. The person making this sale did not have the property in his possession. The defendants' own testimony showed that the tablets were in the shop of the plaintiff at the time of the sale, and that they went there to examine them before making the purchase. It is clear that one who purchases from an agent who has neither the possession of the goods, nor the muniments of title, cannot defend against

the undisclosed principal by showing that he credited the goods on a claim against the agent, supposing that he was the owner. *Mechem, Ag.; Bernshouse v. Abbott*, 45 N. J. Law, 531. It will be found that our own cases which recognize this defense were cases where the property was in the possession of the seller. In *Lapham v. Green*, 9 Vt. 407, where it is said that, when the suit is not brought in the name of the person ostensibly contracting, it will be open to whatever defense could obtain if it were so brought, the goods were in the possession of the persons who made the sale. In *Cross v. Haskins*, 13 Vt. 536, where the court disallowed the plaintiffs' claim for goods disposed of by one who was in fact their agent in a transaction which was manifestly for the seller's own benefit, it would seem that the articles were sold from a shop which was in charge of the seller, and the case is so treated in the headnotes. The defendant cites *Squires v. Barber*, 37 Vt. 558, as showing what must appear to deprive a purchaser of this defense. It did not appear in that case whether the seller had the possession or not, but there was enough to charge the purchaser with notice even if the seller had possession; and the case was disposed of without referring to the question of possession. There is nothing in the opinion to justify a claim that the notice held sufficient in that case is necessary in all cases. When the seller is without possession or other evidence of title, nothing further is needed to put the purchaser on inquiry. Judgment affirmed.

(69 Vt. 414)

SOWLES v. CARR.

(Supreme Court of Vermont. Franklin. Jan. Term, 1897.)

EJECTMENT—POSSESSION—SURRENDER—BURDEN OF PROOF—APPEAL—WEIGHT OF EVIDENCE.

1. In ejectment to recover the possession and rent of premises leased to defendant, plaintiff must prove that defendant was in possession when the suit was brought.

2. Where defendant was in possession, it is presumed that the relation of lessor and lessee has continued; and, if defendant relies on a surrender, he must prove it.

3. A motion to set aside a verdict as against the weight of evidence is addressed to the discretion of the trial court, and its decision thereon is not revisable.

Exceptions from Franklin county court; Munson, Judge.

Ejectment by Susan B. Sowles against Anthony Carr to recover the possession and rent of premises leased to defendant. Plea, not guilty and disclaimer. Trial by jury at the September term, 1895. There was verdict and judgment for defendant, and plaintiff excepts. Reversed.

E. A. Sowles, for plaintiff. C. G. Austin, for defendant.

ROWELL, J. The plaintiff could not recover without showing that the defendant

was in possession when suit was brought, which was in June, 1894. It appeared that on February 1, 1893, the defendant took a perpetual lease of the demanded premises, and then went into possession thereunder, and remained in possession and actual occupancy until the fall of 1893; but he claimed, and the testimony on his part tended to show, that, between that time and the commencement of the suit, he surrendered possession to the plaintiff, with her consent, and that she accepted and received possession at his hands, which she denied. The court correctly charged that the defendant could not rid himself of possession by abandoning the premises without acceptance of possession by the plaintiff, and that the burden was on the plaintiff to show that the defendant was in possession when the suit was brought; but it erroneously charged that this covered the point that there had been no surrender of possession, and that the burden was on the plaintiff to show that there had not been, for it contravened the rule in respect of the presumption of the continuance of existing conditions. Mr. Wharton says that, when a party establishes a judicial relation not in itself so limited in time as to have terminated at the period of litigation, it is not necessary for him to prove the continuance of the relation, but that the burden is on the other party to prove that it has terminated. 2 Whart. Ev. § 1284. There are many cases illustrative of this rule. Thus, I prove that a debt was due to me a year ago. The burden is on the debtor to show that it is paid or otherwise discharged. *Farr v. Payne*, 40 Vt. 615. Where the defendants relied on the statute of limitations, the plaintiff proved that they resided out of the state when the cause of action accrued. Held, that it must be presumed that they continued thus to reside, and that the burden was on them to show that they did not. *Rixford v. Miller*, 49 Vt. 319. The fact that a man was a professional gambler 20 months ago is presumptive evidence that he is such now. *McMahon v. Harrison*, 6 N. Y. 443. So, when possession is admitted or proved, whether of real or personal property, we may infer as a presumption of fact, for the purpose of determining where the burden of proof lies, that the possession is continuous. 2 Whart. Ev. § 1286. Thus, A. was in actual possession of land in March, claiming title. It will be presumed that he was in such possession in May following, when ejectment was brought against him, unless he shows that he had abandoned possession. *Chilson v. Buttolph*, 12 Vt. 231. So, if the seisin of a party is proved, the presumption is that it continues, and the burden is in him who alleges disseisin; and that burden does not shift, but remains upon him, even after he has given prima facie evidence of a disseisin. *Brown v. King*, 5 Metc. (Mass.) 173. So, occupancy under a disseisor will, in the absence of evidence to the contrary, be presumed to continue under his heirs. *Currier v. Gale*, 9 Allen, 522. And see cases collected in a note on this subject to *Huss v.*

Hochhausen (N. Y. App.) 12 Lawy. Rep. Ann. 620 (s. c. 27 N. E. 784).

The plaintiff excepted to the refusal of the court to charge as requested concerning the right of the defendant to surrender. But we think those requests were sufficiently complied with when the court told the jury that there could be no surrender without the consent and acceptance of the plaintiff. With such consent and acceptance, there certainly could be a surrender of possession that would defeat this action.

The testimony of Mr. Austin was admissible, as it was in rebuttal of material testimony given by Mr. Sowles.

The motion to set aside the verdict, as against the weight of evidence, was addressed to the discretion of the trial court, and therefore its decision overruling it is not revisable here. *Newton v. Brown*, 49 Vt. 16; *Stearn v. Clifford*, 62 Vt. 92, 18 Atl. 1045.

Reversed and remanded.

(69 Vt. 417)

PRIEST v. FOSTER et al.

(Supreme Court of Vermont. Rutland. Jan. Term, 1897.)

LEASE — AGREEMENT TO RETURN IN GOOD CONDITION — DESTRUCTION BY FIRE — RES JUDICATA — ELECTION OF REMEDIES.

1. Judgment for defendants in an action on the case against lessees for the value of leased property burned through their alleged negligence, cannot be interposed against an action to recover, on the ground that defendants contracted to return the property in as good condition as when received, as an adjudication thereon, though the referee in the first case made a finding relative thereto; the court having in such action, on plaintiff's asking to file an amendment setting forth such agreement, refused leave, holding that it was for a different cause of action than that set forth in the original declaration.

2. An action on the case against lessees for leased property burned through their alleged negligence, which results in their favor, is not a bar to action on agreement of the lessees to return the property in as good condition as when received; the remedies being consistent.

3. Lessees, having agreed to return leased property in as good condition as when received, are liable in damages for failure to do so, though it is destroyed by fire.

Exceptions from Rutland county court; Rowell, Judge.

Special assumpsit by John R. Priest, administrator, against Foster & Jaquith, to recover for property leased to defendants, and which they agreed to return in as good condition as when received, but failed to do, it having been burned. Plea, the general issue, with notice. Judgment for plaintiff. Defendants except. Affirmed.

Butler & Maloney, for plaintiff. W. W. Stickney and J. G. Sargent, for defendants.

START, J. The plaintiff obtained judgment in the court below for damages that had accrued to him by reason of the defendants' breach of a contract to repair, keep in repair, and return in as good condition

as when they took it, a certain mill and machinery therein. While the defendants were in the occupancy of the mill under this contract, it was destroyed by fire. Thereupon the plaintiff brought a suit against the defendants, declaring in case, and thereby charged that, while the defendants were in the occupancy of the mill, it became their duty to manage and use the mill and premises in a careful and prudent manner, so that the same might not be injured and destroyed; that the defendants, not regarding their duty, were careless and negligent in the management of the property, by putting upon the premises a boiler and smoke-stack, and running and operating the same, and neglecting to keep the property insured for the benefit of the plaintiff, and by wholly neglecting to care for the property so that it might not be destroyed; and that, by reason of the carelessness and negligence aforesaid, the property was wholly destroyed. To this declaration the defendants pleaded not guilty, and the cause was heard by a referee, who failed to find that the fire was caused by the negligence of the defendants, or that the defendants agreed to keep the property insured for the benefit of the plaintiff, and so reported, but did find that by the terms of the contract under which the defendants went into possession of the mill and machinery they were to take the property as it was, and leave it as good as they found it. After the report had been filed in court, the plaintiff asked leave to file an amended declaration, setting forth, among other things, the defendants' agreement to leave the property as good as they found it, and that they had not done so. The court held that the proposed amendment was for a different cause of action from that set forth in the original declaration, denied the plaintiff's motion, and rendered judgment on the report for the defendants. The defendants claim that the judgment in the first suit is conclusive as to the terms of the contract under which they took possession of the property, and that its terms were not open to dispute in the present suit. The terms of the original contract were not put in issue by the pleadings in the former suit; and the court refused to allow an amendment that would put the defendants' liability under the contract in issue, because the same was for a different cause of action from that declared upon in the original declaration, and thereby held that the defendants' liability under their contract to return the property could not be litigated in that action. This holding is conclusive upon the question of whether the defendants' liability under the contract was in issue or determined; and the plaintiff is not concluded by the finding of the referee upon an issue not made by the pleadings, which was not, and could not be, litigated in that action. In order to estop a party from proving a fact because the fact has been found against him in a

former suit, it must clearly appear that the precise question was adjudicated in such suit; and, if the record relied upon leave this in doubt, there is no estoppel. *Aiken v. Peck*, 22 Vt. 255; *Tarbell v. Tarbell*, 57 Vt. 492; *Gray v. Pingry*, 17 Vt. 419; *Gilbert v. Thompson*, 9 Cush. 348; *Russell v. Place*, 94 U. S. 606.

The more important inquiry is whether the plaintiff, by attempting to charge the defendants with the loss of the property in action of tort, on the ground that the damage was caused by the defendants' negligence, and falling in such action, is precluded from resorting to the present action to recover the damage he has sustained by reason of a breach of the defendants' contract to repair, keep in repair, and return the property in as good condition as when they took it. To constitute the defense of waiver by election of remedies, the remedies must be inconsistent; as where one action is founded on an affirmation, and the other upon a disaffirmance, of a contract. Where two remedies are consistent, so that resort to one is not a disaffirmance of the other, either or both may be prosecuted until satisfaction is obtained. There are numerous authorities in support of this holding. Thus, in *Bank v. Taylor*, 68 Vt. 574, 29 Atl. 1012, the defendant, by false and fraudulent representations in respect to his farm being free from incumbrance, induced the plaintiff to surrender to him certain trade paper, and take in lieu thereof his note, secured by mortgage upon his farm. It was held that the plaintiff had two causes of action,—one in contract upon the note, and the other in tort for the false representations; that the plaintiff might prosecute either or both of these causes of action to a recovery; that both proceeded on the theory of affirming the contract; and that one did not allege what the other denied. In *Johnson v. Worden*, 47 Vt. 457, it is held that a conditional vendor of personal property does not lose his lien upon the property by proving the sum due upon the contract of sale against the vendee's estate in insolvency; and that, after such proof, he may maintain an action against the vendee for its conversion. In the opinion it is said: "When he proved the debt for the oxen, he was pursuing that one of his remedies, and could do so without losing the other, until his right to his pay for the oxen should be fully satisfied. Not having been paid in that way, he had the right to pursue the other remedy." In *Root v. Lord*, 23 Vt. 568, the holding is to the same effect. In *Powell v. Railroad Co.*, 16 Or. 33, 16 Pac. 863, it is held that an election to sue on a contract to purchase real property will not preclude the plaintiff from suing for damages for waste committed on the same property by the defendant while a lessee thereof, if the plaintiff had no cause of action, and failed in the first suit because the defendant had not elected to purchase the property. In *Connihan v. Thompson*, 111 Mass. 270, it is held that a purchaser of land is not estopped

from maintaining a bill in equity for specific performance of the contract to sell, by reason of his having sued the seller at law for the breach of the contract. In the course of the opinion it is said: "The defense of waiver by election arises where the remedies are inconsistent; as where one action is founded on an affirmation, and the other upon the disaffirmance of a voidable contract, or sale of property." Where the remedies are consistent and concurrent, the party may prosecute as many remedies as he has. *Bowen v. Mandeville*, 95 N. Y. 237. The rule requiring a choice of remedies is applicable only when the remedies available are inconsistent. *Black v. Miller*, 75 Mich. 323, 42 N. W. 837. Election exists when a party has two alternative and inconsistent rights, and is determined by a manifestation of choice; but the fact that a party wrongly supposed he had two such rights, and attempted to choose the one to which he was not entitled, is not enough to prevent his exercising the other, if entitled to it. *Snow v. Alley*, 156 Mass. 193, 30 N. E. 691. In the case last cited the plaintiff had brought an action to recover the value of certain bonds, on the ground that he could repudiate the contract because of the defendant's bad faith, but recovered for only a part of them; and it was held that the alleged breach of the defendant's promise was left untouched, and was the proper subject of an independent action. A recovery in an action for the hire of personal property is no bar to another action seeking to obtain damages for injuries done to the property while in the hands of the bailee. *Shaw v. Beers*, 25 Ala. 449. It was held in *Morgan v. Skidmore*, 55 Barb. 263, and affirmed in court of appeals, that an action of tort can be maintained against a person for deceit in making false representations as to the solvency of a mercantile firm of which he was a member, although a judgment had been obtained against the firm, including himself, for the price of the goods, sold on credit to the firm by the plaintiff in consequence of such misrepresentations. An unsuccessful attempt to claim a right, or pursue a remedy, to which a party is not entitled, will not deprive him of the benefit of that to which he is entitled. In *re Van Norman*, 41 Minn. 494, 43 N. W. 334. A party who imagines he has two or more remedies, or who misconceives his right, is not to be deprived of all remedy because he first tries the wrong one. *Bunch v. Grave*, 111 Ind. 351, 12 N. E. 514. So where a party, in ignorance of his rights, resorts to a supposed remedy, and fails, he is not concluded from resorting to the remedy he in fact had. *Butler v. Hildreth*, 5 Metc. (Mass.) 52; *Dash v. Van Kleeck*, 7 Johns. 477. In some cases it is said that a party is estopped by an election of remedies, where both actions must be supported by the same evidence. Thus, in *Marsh v. Pier*, 4 Rawle, 273, it is held that judgment estoppel arises when the evidence in support of the present and former actions

must be the same, though the actions are grounded on different writs; and in *Smith v. Whiting*, 11 Mass. 445, it is held that a second action cannot be maintained upon evidence once offered and rejected in the trial of a like action between the same parties. The issues made by the pleadings in the two cases are dissimilar, and are supported by entirely different evidence. In the former case, the issue was whether the loss complained of was caused by the defendants' negligence, and was supported by evidence of the defendants' acts and omissions. In the latter case, the issue was whether the defendants agreed to keep the property in good repair, and return it in as good condition as it was when they took it, and whether there was a breach of this agreement, and was supported by evidence tending to show the contract under which the defendants took the property, and their failure to return it. If the loss of the property had been caused by the defendants' negligence, the plaintiff would have had two remedies,—one in tort, counting on the defendants' negligence; and the other on the defendants' contract to keep the property in good repair, and return it in as good condition as it was when they took it. The plaintiff, by his action in tort, in which he failed to show that the loss was caused by the defendants' negligence, has established the fact that he had only one remedy, and that in resorting to the former action he misconceived his rights; but he is not precluded from pursuing the remedy he in fact had because he misconceived his rights, and resorted to a supposed remedy, which he did not have. The remedy he in fact had and the one he supposed he had, and would have had, if his evidence had been sufficient, are entirely consistent; and by resorting to his supposed remedy in the first instance he did not disaffirm the defendants' contract, or in any way affect the alleged breach of the defendants' promise. The jury having found, from evidence that was legally admissible, that the defendants agreed to repair and keep in repair the property, and return it in as good condition as it was when they took it, the plaintiff was entitled to recover the damage sustained by him by reason of the defendants' failure to do so, notwithstanding the property was destroyed by fire. A few authorities may be cited in support of this holding. In *Hoy v. Holt*, 91 Pa. St. 88, it is held that where, in a lease, there is an express and unconditional agreement to repair and keep in repair, the tenant is bound to do so, though the premises be destroyed by fire or other accident. In *Phillips v. Stevens*, 16 Mass. 237, it is held that, where a lessee covenants to keep the demised premises in repair, and at the termination of the lease to surrender them in as good condition as they were at the date of the lease, if the buildings are destroyed by fire during the term, without the fault of the tenant, he will be bound to rebuild them. Chitty, in his work on Contracts (page 359), lays down the same rule.

In *Polack v. Ploche*, 35 Cal. 416, and in *Linn v. Ross*, 10 Ohio, 412, the holdings are to the same effect. Judgment affirmed.

(39 Vt. 411)

STATE v. STEVENS.

(Supreme Court of Vermont. Orleans. Jan. Term, 1897.)

FISHING—"SET LINE"—CONSTRUCTION OF STATUTE.

1. Determination of the meaning of a word in a statute is for the trial judge, who may take any means to inform himself.

2. A common fishing line fastened to an object on the bank, and extending into the water, with one hook thereon, is not a "set line," within V. S. § 4592, prohibiting the use for fishing, or the furnishing thereof for that purpose, of "a pound net, seine, gill net, set net, fyke, set line, fishing otter or trawl."

Exceptions from Orleans county court; Ross, Chief Judge.

E. G. Stevens was convicted of fishing with a set line, in violation of V. S. § 4592, and excepts. Exceptions sustained.

On the trial respondent offered to show, as matter of fact, by witnesses and by dictionary definitions, that the lines used were not "set lines," and excepted to the ruling of the court excluding the evidence. At the close of the testimony, he moved for a verdict in his favor, and excepted to the denial of his motion. He also excepted to the charge that the lines described by the state's evidence were set lines.

O. S. Annis, State's Atty. B. F. D. Carpenter and E. A. Cook, for respondent.

TAFT, J. The respondent was indicted under V. S. § 4592, which provides that if a person use, or furnish for use, for fishing, a set line in the waters of this state, he shall be fined. The respondent is charged with using for fishing a set line in Willoughby Lake, in Westmore, in May, 1896. The facts shown upon trial in reference to the acts of the respondent were not disputed. He was fishing in the lake, and had five lines extending into the waters, with one hook upon each, the lines being fastened to some object upon the bank of the lake. The case turns upon the construction and meaning of the term "set line," as used in the statute. The question presented is, was the court correct in holding that the lines in question were set lines? The construction of a statute, involving the meaning of words used therein is not a question of fact, but one of law. What was meant by the term "set line," as used in the statute, was a question for the court. There is no statutory definition of it. If a word in a statute is of common import, the court may understand it without further knowledge; but if the word is not of common use, or has a technical meaning, the judge may refer to persons who have knowledge upon the subject, or consult documents or books of reference containing information thereon. If the terms are words of art and science, their

meaning may be found by consulting experts in such art and science. In fact, the trial judge may take such means as he deems advisable to inform himself upon the subject, and enable him to give in his instructions to the jury the proper construction and definition of the words used in the statute. Did the court err in holding the lines were set lines? Writers upon the subject of fishing state that a "set line" is "a line with baited hooks fastened to it, set or anchored for taking fish" (Stand. Dict. 1638); and "a line to which a number of baited hooks are attached, and which, supported by a buoy, is extended on the surface of the water" (4 Enc. Dict. 4216); and, further, "fishing lines may be classed as band lines and set lines, long lines, or trawls. These three names are applied to long lines having attached to them, at regular intervals, lines armed with hooks. At either end is an anchor to hold the trawl in place, furnished also with a line and buoy to indicate its position" (3 Johns. Univ. Cyc. 390). In describing "fisheries" in 9 Enc. Brit. 256, an instance is given of a set line about 8 miles long, with 4,680 hooks attached. The statute not only forbids the use for fishing of pound nets, seines, gill nets, set nets, fykes, set lines, and fishing otters or trawls, but prohibits the furnishing of them for that purpose. Hence, if a man has one of these things, he cannot loan it to a neighbor for such use. Each of these articles is a specific thing. The name designates what it is. It is fairly inferable from this language that the term "set line" denotes a fishing line of a certain kind or species, its character not depending upon the manner of its use, and not a common fishing line with one hook attached, which becomes a "set line" if tied to some object on the shore. The language of V. S. § 4583, countenances this construction of the statute, for by that section a penalty is imposed upon certain fishing, except fishing through the ice with not more than 15 "tended lines." This would indicate that a line with a single hook fastened to any object upon the banks or upon the ice, such a line as the respondent was using, is what is meant as a tended line, and not a set line. The ruling should have been that the lines were not set lines. Exceptions sustained, judgment and sentence reversed, and cause remanded.

(9 Vt. 408)

STATE v. SHATTUCK.

(Supreme Court of Vermont. Windsor. July 17, 1897.)

STATUTES—EXCEPTIONS—BURDEN OF PROOF—CONFLICT OF LAWS—PRESUMPTIONS—MARRIAGE—EVASION OF LAWS OF DOMICILE.

1. A restriction on remarriage by the guilty party to a divorce is exceptional, and accordingly, if one claims that a case falls within it, the burden is on him to show such to be the fact.

2. The presumption is that the common law of a sister state is like the common law of Vermont.

3. If the marriage of parties under no disability by international law is valid where performed, it

is valid everywhere, though they were away from the state of their domicile to evade a law prohibiting remarriage of the guilty party to a divorce, since such law has no extraterritorial force.

Exceptions from Windsor county court; Munson, Judge.

Addie Shattuck was convicted of adultery, and alleges exceptions. Overruled.

J. G. Harvey, State's Atty., and W. W. Stickney, for the State. W. B. C. Stickney, for respondent.

ROWELL, J. The charge is that the prisoner, an unmarried woman, committed adultery with Coburn, a married man. It appeared that Coburn's first wife, who is still living, obtained a divorce from him in this state in December, 1895; that on June 13, 1896, he and Grace Holsington, both of whom were then domiciled in Windsor, in this state, went to Claremont, N. H., and were there married by a clergyman authorized by the law of that state to solemnize marriages; and that immediately after the marriage they returned to Windsor, where they have lived ever since, and where they first cohabited as husband and wife, never having cohabited as such in New Hampshire. The only evidence of the law of New Hampshire respecting marriages was chapter 174 of the Public Statutes of that state, entitled "Marriages." That chapter imposes no restraint upon remarriage by the guilty party to a decree of divorce. The court charged the jury that if it found that the marriage ceremony was performed by the clergyman, and that he was authorized to perform it, as his testimony tended to show, and also found that the said Grace cohabited with Coburn under the belief that the marriage was legal, as her testimony tended to show, the marriage was valid, and Coburn was a person with whom the crime of adultery could have been committed. To this the prisoner excepted, and also for that the court did not charge that there was no evidence in the case to show that Coburn, being disqualified by the laws of this state to contract a lawful marriage, was, notwithstanding such disqualification, competent by the laws of New Hampshire to contract a lawful marriage, and that without such testimony the fact of his marriage to said Grace was not made out. This last exception is not sustainable. As we have said, the chapter of the New Hampshire statutes put in evidence is not restrictive in this behalf; and if it be said that some other part of the statutes may be, the answer is that, as such restrictions upon marriage are exceptional, the burden was on the prisoner to show the restriction, if any there is. *Hutchins v. Kimmell*, 31 Mich. 126, 132. And, as no such restriction exists in the common law of this state, the presumption is that the common law of New Hampshire is like ours in this regard. *Ward v. Morrison*, 25 Vt. 593, 601. The marriage in question must, therefore, be taken to be valid by the law of New Hampshire. But,

had it been celebrated in this state, it would be void here, for our statute provides that it shall not be lawful for a divorced libelee to marry a person other than the libellant for three years from the time the divorce is granted, unless the libellant dies; and imposes a penalty on a person who violates that provision, or lives in this state under a marriage relation forbidden by it; and we have recently held that a marriage celebrated in this state in violation thereof, between parties domiciled here, was void here. *Ovitt v. Smith*, 68 Vt. 35, 33 Atl. 769. The prisoner claims that this marriage is void here notwithstanding it was celebrated in New Hampshire, and is valid there, for that, when a marriage is absolutely prohibited in a state or country as being contrary to public policy, and leading to social evils, the domiciled inhabitants of that state or country cannot be permitted, by passing the frontier, and entering another state, in which the marriage is not prohibited, to celebrate a marriage forbidden in their own state, and immediately return to their own state, to insist on their marriage being recognized as lawful. It is the common law of Christendom that as to form and ceremony a marriage good where celebrated is good everywhere. But as to capacity to marry the authorities are not agreed, some holding that, as in other contracts, it depends upon the law of domicile, and some that it depends upon the law of the place where the marriage is solemnized, as do form and ceremony, and that a marriage good where celebrated is good everywhere, unless odious by the common consent of nations, or positively prohibited by the public laws of a country from motives of policy. It is undoubtedly true that states may control this matter by statute, as Massachusetts does, where it is enacted that when persons resident in that state, in order to evade its marriage laws, and with an intention of returning to reside there, go into another state or country, and are married, and afterwards return and reside in Massachusetts, the marriage shall be deemed void. We have no such express provision. The language of our statute is general, and it is a fundamental rule that no statute, whether relating to marriage or otherwise, if in the ordinary general form of words, will be given effect outside of the state or country enacting it. To bind even citizens abroad, it must include them, either in express terms or by necessary implication. Hence, if a statute, silent as to marriages abroad, as ours is, prohibits classes of persons from marrying generally, or from intermarrying, or declares void all marriages not celebrated according to prescribed forms, it has no effect upon marriages, even of domiciled inhabitants, entered into out of the state. Those marriages are to be judged of by the courts of such state, just as though the statute did not exist. If they are valid by the international law of marriage and the local law of the place where celebrated, they are valid by the law of such state,

and the statute has nothing to do with the question if such international law is a part of the law of the state, as it is here, for a written law not construed to be extraterritorial does not change the unwritten law as to extraterritorial marriages; and therefore parties who are under no disability by international law may choose their place of marriage, and, if the marriage is valid there, it will be valid everywhere, though they were purposely away from home, and the same transaction in the state of their domicile would not have made them married. There is, therefore, no foundation for an argument based simply on the idea of an evasion of the law of domicile.

This doctrine is entirely applicable to statutes prohibiting marriage after divorce. Such statutes are not extraterritorial, unless made so by express words or necessary implication, as has been frequently held in this country, though there are cases the other way, among which is the recent and well-considered case of *Pennegar v. State*, 87 Tenn. 244, 10 S. W. 305, where the cases adopting the same view will be found. But the weight of American authority, as well as reason and analogy, sustain the proposition stated. This whole subject is very fully and satisfactorily discussed by Mr. Bishop in chapter 39 of the first volume of his work on Marriage, Divorce, and Separation; and, as we adopt his views, an extended discussion here is not necessary. The subject is also fully discussed in *Com. v. Lane*, 113 Mass. 458, and *Ross v. Ross*, 129 Mass. 243. In the latter case it is said that, the relation of husband and wife being based upon the contract of the parties, and recognized by all Christian nations, the validity of the contract, if not polygamous nor incestuous according to the general opinion of Christendom, is governed, even as regards the capacity of the parties, by the law of the place of marriage; that this status, once legally created, should be recognized everywhere as fully as if created by the law of the domicile; and that, therefore, such a marriage, if valid by the law of the place where contracted, even if contracted between persons domiciled in Massachusetts, and incompetent to marry there, is valid there to all intents and effects, civil and criminal, except so far as the legislature has clearly declared that such a marriage out of the commonwealth shall be deemed invalid. The same doctrine is held in *Van Voorhis v. Brintnall*, 86 N. Y. 18, where it is said that, in the absence of express words to that effect, it is not to be inferred that the legislature intended its enactments to contravene the *jus gentium* under which the question of the validity of the marriage contract is referred to the *lex loci contractus*, and which is made binding by the consent of all nations, and professedly and directly operates upon all; and that, while every country can regulate the status of its own citizens, until the will of the state finds clear and unmistakable expression to the contrary, that law must control. Judge Marshall says in *U. S. v. Fisher*, 2 Oranch, 389, that

"where rights are infringed, where fundamental principles are overturned, where the general system of the law is departed from, the legislative intent must be expressed with irresistible clearness," to induce a court of justice to suppose a design to effect such objects." *Brook v. Brook*, 9 H. L. Cas. 193, sustains the prisoner's contention. There a man and his deceased wife's sister, both of whom were lawfully domiciled British subjects, went temporarily to Denmark, and were there married, where their marriage was valid; but it was held void in England, because an English statute prohibited such marriages. The law lords delivered separate opinions, and the only ground upon which they agreed was that, as the statute made such marriages between English subjects domiciled in England void because declared by the act to be contrary to the law of God, it must be construed to include such marriages though solemnized abroad. Judge Gray says, in *Com. v. Lane*, above cited, that the judgment in that case proceeds upon the ground that an act of parliament is not merely an ordinance of man, but a conclusive declaration of the law of God, and that the result is that the law of God, as declared by act of parliament, and expounded by the house of lords, varies according to time, place, length of life of parties, pecuniary interests of third persons, petitions to human tribunals, and technical rules of statutory construction and judicial procedure. Mr. Bishop criticises the case very sharply, and says it is of the highest importance that it be sufficiently understood in this country to avoid any accident of its being followed by our courts. He discusses it very fully, admitting that it was difficult for him to write soberly about it, as the decision was announced in apparent oblivion of the course that justice had taken for ages in England, and ignored alike acts of parliament and judicial decisions. To follow it, he says, would lead us into confusion not to be endured where marriage, good order, and Christian decency are respected. The French law is much like the English in this regard, though more exacting. By the Code Napoleon, a marriage contracted in a foreign country between French people, or between a French person and an alien, is valid if it has been celebrated in the manner followed in such country, provided it has been preceded by the publication required by the Code, and provided the French person has not violated the provisions of the Code concerning the qualifications and conditions required to contract marriage. *Cachard's French Civ. Code*, art. 170. This accords with the further provision of the Code that laws relating to the status and capacity of persons apply to Frenchmen even resident in a foreign country. *Id.* art. 8. On this principle the civilians generally, we think, hold that as to capacity to marry the law of the domicile governs. But the other view, as suggested by Judge Story, is founded upon a more liberal basis of international policy that deems it far better to support as valid marriages celebrated in another state or country when in conformity with the

laws thereof, although some minor inconveniences may arise therefrom, than to shake general confidence in such marriages, to subject the innocent issue to constant doubts as to their legitimacy, and to leave the parties themselves at liberty to cut adrift from their solemn obligations whenever they happen to become dissatisfied with their lot. Story, *Conf. Laws*, pl. 124. Judgment that there is no error in the proceedings of the county court, and that the prisoner take nothing by her exceptions.

The respondent not being in court, TAFT, J., did not sit.

(69 VL 888)

IN RE WELLS' ESTATE.

Appeal of WARD.

(Supreme Court of Vermont. Chittenden. July 17, 1897.)

RES JUDICATA—WILL—CONSTRUCTION—PERPETUITIES.

1. The decree of the probate court having the estate of testator and parties interested before it, and having jurisdiction and the duty to determine the rights of petitioner in the estate, which gives to her a life estate in the property, but in terms makes no disposition of the fee, not having been appealed from, is a bar to a petition by her bringing no new facts before the court, but asking that a conditional devise over be declared void, and the estate vested in her absolutely.

2. A daughter to whom testator gives a life estate in his property with remainder to heirs of her body, with provision that, if she leave no heirs of her body, then the property shall go to a church, has no interest in the question whether the contingent executory devise to the church is void; but this, in case she leaves no such heirs, will be a question between testator's heirs and the church.

3. Testator, who, with his wife, was well advanced in years, and had but one child, grown to womanhood and married, gave, after termination of life estate to his wife, a life estate to his daughter, with remainder to the heirs of her body, with provision that if she die "leaving no heirs of her body, or should I at any future time fail to have heirs of my body," then the property shall go to a church; and further provision that the church is not to have any interest in the property till after death of his wife and daughter, and not then unless his daughter dies, leaving no heirs of her body. *Held*, that by the words, "or should I at any future time fail to have heirs of my body," testator meant only his daughter, and such as might descend through her, and did not contemplate another line of heirs of his body; so that the devise over to the church did not contravene the law against perpetuities.

Exceptions from Chittenden county court; Rowell, Judge.

Petition of Lucia R. Ward to the probate court to have the estate of Oliver Wells, deceased, finally decreed to her, was dismissed, and she appealed to the county court, which also dismissed the petition. Appellant excepts. Affirmed.

S. C. Shurtleff and J. J. Monahan, for plaintiff. L. F. Wilbur and Charles T. Barney, for defendant.

ROSS, C. J. On February 15, 1895, the appellant, Lucia R. Ward, preferred her peti-

tion to the probate court for the district of Chittenden, setting forth that she is the daughter and heir at law of Oliver Wells, deceased, and legatee under his will, and that she is advised and believes that the Congregational Church of Underhill has no interest in the estate under the provisions of the will; that the limitation or devise over to it is too remote and void; and that upon the death of Rebecca Wells all the estate vested in her absolutely. She prays that a decree may be made accordingly. The court appointed a time for hearing the petition, and gave due notice thereof. On the day appointed, the Congregational Church appeared and filed a motion to dismiss the petition, assigning, among other reasons, that the petitioner was concluded by a previous adjudication of the court, and that the will was not void, as to the Congregational Church, for remoteness. Upon appearance and hearing the probate court dismissed the petition. From this decree the petitioner appealed to the county court. In the latter court the Congregational Church pleaded the general issue and seven special pleas in bar, all of which set up as conclusive upon the appellant, and in bar of her application, a decree of the probate court made December 19, 1890, on the settlement and distribution of the estate of the testator. The appellant joined issue on the general issue, and replied precludi non to the special pleas, because she says that the property mentioned in her petition, consisting of both real estate and personal estate, has never been finally decreed to her, nor to the church, nor to any person or corporation whatsoever, by the probate court, which alone has jurisdiction to make such decree, and that title to the property is uncertain. The replication was traversed, and the trial was by the court. On the trial the court found that the decree of the probate court of December 19, 1890, and the portions of the will of Oliver Wells material to the issue, are correctly set forth in the third and fourth special pleas; that by that decree the appellant was given the use of the residue of the estate during her natural life, and that the fee of the residue was not thereby decreed to any one, nor has it been since then. On these findings the county court rendered judgment dismissing the petition of the appellant against her objection and exception. The material facts set forth in the pleas found to be true are that Oliver Wells deceased testate in 1887; that his will was duly probated; that by his will he gave the use of all his estate—First, to his wife, Rebecca Wells, during her natural life; secondly, at her decease, to his only daughter, the appellant, and the reversion to the heirs of her body, "and, should my beloved daughter, Lucia R. Ward, die, leaving no heirs of her body, or shall I at any future time fail to have heirs of my body," then the real and personal property, constituting his estate, is given in fee simple

to the Congregational Church at Underhill Flats. This gift to the church has a condition in regard to its use by the church, and then the will proceeds: "The said church is not to have any interest in the aforesaid real estate and personal property until after the decease of my beloved wife, Rebecca Wells, and my beloved daughter, Lucia R. Ward; and is not then to have any interest in it unless my said daughter dies leaving no heirs of her body." The pleas further set forth that after probating the will, and after the executor had rendered his final account, and had it settled, and after finding both what estate was left and that Rebecca Wells had deceased, on due notice and appearance of all parties interested, on December 19, 1890, the probate court, "pursuant to the last will and testament of the deceased and the laws of this state," did decree to Lucia R. Ward, the petitioner, the use of the residue of the estate during her natural life. This decree was not appealed from by any of the parties, and is now in full force.

The first contention is whether it precludes the petitioner from the relief sought through her petition. December 19, 1890, the probate court had the subject-matter—the estate of Oliver Wells—and the parties interested therein before it. It had full jurisdiction to determine, and it was its duty to determine correctly, the rights of the petitioner in and to the estate, and to make a decree thereof. If the devise to the Congregational Church is now void under the law against perpetuities, it was so then. If the petitioner is now entitled to have the estate decreed to her in fee, she was so entitled then. Hence the identical subject-matter brought before the probate court by this petition, and all facts relevant thereto, were then before it for determination and decree. By its decree she was given only a life estate in the property under adjudication. If she was then entitled to have the property decreed to her in fee, she was, by the decree, deprived of that right. A decree of the estate to her then or now in fee would operate to vacate and set aside the decree then made. A decree of the estate to her now in fee would collaterally attack and vacate the decree then made. It would cut the bond then placed around the property of the estate by which she could only enjoy its use during her life, and give her title, dominion, and absolute control of the property. By that decree she was deprived of the enjoyment of the fee, dominion, and absolute control of the property. Being deprived of a right in the property which she now claims, she could have appealed from the decree, and had it corrected, if erroneous. The decrees of the probate court made in matters and against parties within the sphere of its jurisdiction, not appealed from, are conclusive upon those to whom the right of appeal is given. *Collard v. Crane*, Brayt. 18; *Judge of Probate v. Fillmore*, 1 D. Chip. 420; *Giddings v. Smith*, 15 Vt. 344;

Lawrence v. Englesby, 24 Vt. 42. Nor can such decrees be attacked or impeached collaterally in the probate court, or in any other court. Rix v. Smith, 8 Vt. 365; Lawrence v. Englesby, 24 Vt. 42; Driggs v. Abbott, 27 Vt. 580; Abbott v. Colburn, 28 Vt. 663; Richardson v. Merrill, 32 Vt. 27; Robinson v. Swift, Id. 283; Probate Court v. Vanduzer, 13 Vt. 135. The petition brought before the probate court no facts which were not before it when it made the decree of December 19, 1890. The same parties were then before the court which the petition brought before it. It has always been held that the decisions of this court on the same facts and between the same parties are conclusive when the case comes a second time before the court. Ross v. Bank, 1 Aik. 43; Dana v. Nelson, Id. 252; Herrick v. Belknap, 27 Vt. 673; Stacy v. Railroad Co., 32 Vt. 551; Barker v. Belknap, 39 Vt. 168; Childs v. Insurance Co., 56 Vt. 609; Railroad Co. v. Hunt, 59 Vt. 294, 7 Atl. 277. This doctrine is applicable to the decrees of the probate court made within its jurisdiction. Nor is the result changed by the finding of the county court that no final decree in regard to the fee of the property had been made by the probate court. By the terms of the will the time had not arrived when the probate court could determine in whom the fee of the property vested absolutely. That time will not arrive until the death of the petitioner. If then there exist heirs of her body, the fee will be ascertained to be vested in such heirs. Although no persons now exist who would constitute heirs of the petitioner's body, the possibility of such heirs coming into existence is not precluded until the death of the petitioner. If no such heirs then exist, it will be for the probate court to determine whether the conditional executory devise to the Congregational Church is void under the rule against perpetuities, and, if so, to decree the property in fee to the heirs of the testator, and, if not void, to decree it to the Congregational Church under the provisions of the will. This is the scope of the decree of the probate court of December 19, 1890, and it is correct. The terms of the devise to the petitioner create what, at common law, would be an estate in fee tail (Giddings v. Smith, 15 Vt. 344), which, under V. S. § 2201, and which before the statute, gave the petitioner a life estate only in the premises. Giddings v. Smith was three times argued, carefully and fully considered, and has ever since been followed. Village of Brattleboro v. Mead, 43 Vt. 556; Thompson v. Carl, 51 Vt. 406; Doty v. Chaplin, 54 Vt. 361; In re Kelso's Estate, 69 Vt. 272, 37 Atl. 747. Hence the decree of December 19, 1890, was correct so far as concerns the petitioner. She has no interest in the question whether the contingent executory devise to the Congregational Church is void or not. That question will never arise if she dies leaving heirs of her body. If she leaves no such heirs at her decease, it will be a question between the heirs

of the testator and the Congregational Church.

But, if there is any doubt in regard to the finality and correctness of that decree, the construction placed upon the will by the decree of December 19, 1890, gives effect to the intention of the testator. His intention is to be ascertained from a careful consideration of all the provisions of his will read in the light of existing circumstances. By the will, the testator has provided, in very explicit terms, that, after the termination of the life estate therein given to his widow, a life estate shall be created in the property "to my only and beloved daughter," with remainder "to the heirs of her body." He then proceeds to say, "And should my beloved daughter, Lucia R. Ward, die, leaving no heirs of her body, or should I at any future time fail to have heirs of my body, then it is a part of my will and testament" that the property in contention shall be the property of the Congregational Church, to be used for the purposes specified. If the words, "or should I at any future time fail to have heirs of my body," had been omitted, it is not seriously contended that the devise over to the Congregational Church would have been void for remoteness. The language used in the first clause, "die leaving no heirs of her body," import that the time when, if ever, the estate is to pass to the church is at the decease of the petitioner. If then she had an heir or heirs in the descending line, child or grandchild, living, such heir or heirs take the property, and the church takes nothing. If at that time she left no such heir, the Congregational Church takes the property. In such case it is conceded that the devise over would not be defeated by reason of remoteness. But it is contended that the addition of the words, "or should I at any future time fail to have heirs of my body," creates such remoteness under the decision of Village of Brattleboro v. Mead, 43 Vt. 556, as to defeat the devise to the Congregational Church. In that case, and generally, it is held that the intention of the testator in regard to the remotest time when the devise over shall take effect determines whether such remotest time is within the rule against perpetuities; and that his intention in this respect is to be ascertained from all the language of his will on the subject, read and construed in the light of existing, surrounding circumstances, independently of whether it will bring that time within or without the time limited by the rule against perpetuities. These circumstances existed when the testator made his will. The testator and his wife were well advanced in years. He had only one child, grown to womanhood and married. He expected his wife might outlive him, for he made provision for such a condition. Under these circumstances, it is hardly reasonable to construe the language, "or should I at any future time fail to have heirs of my body," as

relating to any other such heirs than those who might thereafter exist in the line of his only married daughter. In creating the life estate to that daughter, the remainder is "to the heirs of her body." He makes no devise to the heirs of his body in any other descending line. By his will he evidently intended to die testate in respect to all his property. But he devises a life estate to the daughter, and makes it take effect subsequently to the life estate which he has therein devised to his wife. It may have occurred to him that his daughter might die leaving no heir of her body, in his lifetime, or in the lifetime of her mother; or, if she died leaving a child, the child might die during his life, or during the life of the grandmother; and he added these words to provide for such a contingency, but not thereby intending to defeat the conditional devise to the Congregational Church on the, to him, impossible supposition that another line of heirs of his body than through his only married daughter might come into existence, and need to be provided for. He did not attempt to provide for any such heirs. However the two clauses of the will already quoted might be construed, if they were all the will contained on this subject, we think the other provision of the will on this subject confines the testator's intention and meaning, in using the words in regard to the heirs of his body, to that we have given them. He evidently feared that if the petitioner should die childless during the continuance of the life estate of his wife, the devise over might cut short her life estate; for in a subsequent sentence he is careful to say, "The said church is not to have any interest in the aforesaid real estate and personal property until after the decease of my beloved wife, Rebecca Wells, and my beloved daughter, Lucia R. Ward, and is not then to have any interest in it unless my said daughter dies, leaving no heirs of her body." Here again he fixes the time when the devise to the church shall take effect as of the time when his daughter shall die, leaving no heirs of her body, if that shall ever happen; but in no event until the two life estates are terminated. Here he says nothing in regard to the failure of the heirs of his body, although he is endeavoring definitely to fix the time when the contingent remainder shall vest in the church, if ever. Neither does he speak of any other line of heirs coming to an end except that which shall descend through the petitioner. This must be the construction to be placed upon this will. The will became operative and spoke as of the time of the testator's death. At that time the heirs of his body were determined. His only daughter, the petitioner, was such sole heir. No other such heirs could come into existence, certainly, except through her. When, therefore, the testator, in his will, speaks of the

heirs of his body, he designates the petitioner, and—if any others—such heirs as descend through her. When, in his will, he says, "Or shall I at any future time fail to have heirs of my body," he means his only daughter, or at most such, and only such, as may descend from her. Hence when, in his will, he says, "And should my beloved daughter, Lucia R. Ward, die, leaving no heirs of her body, or shall I at any future time fail to have heirs of my body," he speaks of only one line of heirs descending from his body; and when he says that, if this line of heirs does not exist at the death of this daughter, then the Congregational Church shall take the property in fee, he fixes a time for the church to take that is within the time limited by the rule against perpetuities. On the happening of the condition named, the devise over to the Congregational Church will be ascertained to be operative and to have taken effect. Hence, considering all the provisions of the will, read in the light of existing circumstances, the remotest time at which the testator intended the contingent remainder devised to the church should vest and be determined to have vested, if it ever did, was at the termination of the life estate devised to the petitioner, if she outlived her mother, and came into it; but, if the mother survived her, then upon the termination of the mother's life estate, dependent upon whether at such time there was then living one or more heirs of the body of the petitioner, and therefore heirs of the body of the testator. If such heir or heirs were then living, would determine that the remainder or fee of the property had vested in them; otherwise in the Congregational Church. Judgment affirmed, and ordered certified to the probate court.

(88 Vt. 456)

JEFFERS v. HAZEN.

(Supreme Court of Vermont. Essex. June 24, 1897.)

REFERENCE—DISCHARGE OF RULE.

A party had a right to have a rule of reference discharged, the referee not having made his report at the term when by the rule he was required so to do.

Exceptions from Essex county court; Start, Judge.

Action by M. G. Jeffers against L. D. Hazen. Rule of reference was discharged, and defendant excepts. Affirmed.

Harry Blodgett and W. P. Stafford, for plaintiff. Bates & May, for defendant.

TAFT, J. This cause was referred at the March term, 1892, and continued from term to term until September term, 1895, when an order was entered that the plaintiff should procure a report at the next term, or become non-

suit. Hearings were had between that term and the March term, 1896, but, without fault of either party, were not closed, and the case was continued at the March and September terms, 1896. At the March term, 1897, no report having been made, the plaintiff was permitted to revoke the order of reference, the court ruling, as a matter of law, that he had a right to do so. Whether this ruling is erroneous is the only question in the case before us.

The county court may, by an agreement of parties, appoint a referee in any case pending therein. V. S. § 1437. After a reference has been agreed upon and become a rule of court, a party cannot revoke the reference, and discharge the rule, until the time for making the report has expired. But when such time has elapsed, and no report made, a party is not compelled to submit to a new reference, and may discharge the rule, if he so desires. At the time this reference was agreed upon, no time was specified in the statute when the report should be made, but it was always treated, and the rule issued, as though the report must be made at the next term of court. The cases in our Reports involving this question are in accord with that rule. In *Rice v. Clark*, 8 Vt. 104, it was held: "The court have no power without consent of parties to enlarge a rule of reference." In that case no report had been made by the referee, and it was held that it required the consent of both parties to enlarge the rule. In *Baxter v. Thompson*, 25 Vt. 505, a report had been made, and a motion to discharge the rule was denied, and judgment entered on the report. In *Lazell v. Houghton*, 32 Vt. 579, the referees continued the hearing before them past the term when they were required to make a report; but the party appeared before them, and the cause was fully heard, and the referees reported that the rule of reference was enlarged; but, the defendant objecting to the acceptance of the report, the court said: "Although the acquiescence of the defendant in the proceedings before the referees would not entitle this objection to favor, as coming from him, yet we regard the objection as being well founded, and our judgment must be controlled by its legal effect." In fact, they put the proceedings before the referees after the first term of court upon the ground that they were merely arbitrators, and derived their power from the consent of the parties, and that any rule in such a case, while it might be good between them, could not be enforced by judgment. In *Knapp v. Fisher*, 40 Vt. 94, the referees were appointed at the December term, 1874, of the county court, and filed their report at the succeeding term. The attempt to revoke the reference was made during the term, and before the report was filed; but the report was filed, and afterwards, and before the term closed, it was held that the reference could not be revoked, and judgment was rendered upon the report. In the case at bar, the referee not having made his report at the term when by the rule he was required so to do, the party had the right

to have the rule discharged. The action of the court below was correct. Since the rule in this cause was issued by an amendment of the statute taking effect in August, 1895, referees are required to make their reports to the next term of court, "after hearing before them is closed." What effect this statute may have upon a case like the one at bar we do not consider, as the case before us should be governed by the law as existing at the time the reference was made. From the record before us, it does not expressly appear what the terms of the rule were, but we infer that it was issued in accord with the law and practice as they then were. Judgment affirmed, and cause remanded.

(69 Vt. 440)

BROWN v. WEST et al.

(Supreme Court of Vermont. Windsor. Jan. Term, 1897.)

AGENCY—SALESMAN—SCOPE OF AUTHORITY.

Jobbers were under an express contract with certain manufacturers not to sell goods at less than list prices. Their traveling salesman, A., was instructed to sell the goods only at list prices, and to make collections and receipt bills. A retailer, who knew of the contract, bought goods from A., who subsequently settled with him, and allowed him discounts as agreed on at the time of sale, though the goods were sold and bills rendered at list prices. *Held*, that the retailer was bound to inquire as to A.'s authority to make discounts. Taft, J., dissenting.

Exceptions from Windsor county court; Rowell, Judge.

Assumpsit by Allen J. Brown against West, Stone & Co. Plea, general issue, with declaration in offset. Heard on the report of a referee. The referee found that, if plaintiff was entitled to the discounts, he should have judgment for a sum stated; otherwise, judgment should be for defendants. There was judgment for plaintiff, and defendants except. Reversed.

Frank A. Walker, for plaintiff. W. W. Stickney and J. G. Sargent, for defendants.

TYLER, J. In July, August, and September, 1892, the plaintiff was a retail merchant in Ludlow, in this state, and the defendants were wholesale grocers in Springfield, Mass. They had in their employment one Andrews, as a traveling salesman, who was under instructions from them to sell certain "limited goods," so called, according to price lists which they furnished him, and at no other prices, and to make collections and receipt bills in their name as rendered from their office. The defendants were under an express contract with the manufacturers of these goods not to sell them for less than the fixed prices. During this time Andrews sold the plaintiff several bills of goods, including some that were "limited," and subsequently settled with the plaintiff, and allowed him discounts as agreed upon at the time of sale. Only the last three consignments were in controversy here. The plaintiff had no express knowledge of the defendants' instructions to Andrews. He knew that Andrews sold him

these goods at list prices; that the orders therefor were sent to the defendants at list prices; and that the defendants rendered him bills at those prices; but he supposed that the defendants knew and assented to the deductions, and that they adopted this method to evade their contract with the manufacturers. The salesman clearly had no authority from his principal to sell the limited goods for less than the fixed prices; but the plaintiff contends that the defendants held Andrews out to the public as their general agent, and as having competent authority to make the sales, and that they are bound by his acts. This would be the rule applicable to the case if the plaintiff did not know and had no reason to believe that the salesman's authority was limited. It was said in *Griggs v. Selden*, 58 Vt. 561, 5 Atl. 504: "In determining the liability of the principal, the question is not what authority was intended to be given the agent, but what authority was a third person dealing with him justified from the acts of the principal in believing was given him." No principle is better settled in the law, nor is there any founded on more obvious justice, than that if a person dealing with an agent knows that he is acting under a circumscribed and limited authority, and that his act is outside of and transcends the authority conferred, the principal is not bound; and it is immaterial whether the agent is a general or special one, because a principal may limit the authority of the one as well as that of the other. See *Walsh v. Insurance Co.*, 73 N. Y. 10.

The plaintiff must have known of the defendants' contract with the manufacturers, for the referee finds that he supposed that the defendants' practice of rendering him bills in accordance with the price lists, and the agent making discounts on payment thereof, were understood methods of evading the defendants' contract with the manufacturers not to sell below fixed prices. He knew that the defendants rendered him bills for the goods ordered by him through the salesman at the list prices, and that the salesman collected the bills of him at less than those prices. These facts were sufficient to have put the plaintiff on inquiry as to the extent of the agent's authority to make discounts. He should have inquired of the defendants whether the salesman was acting under their authority in making the deductions, rather than have assumed that they were conniving to defraud the manufacturers. Judgment reversed, and judgment for defendants.

TAFT, J. (dissenting). The salesman's authority was limited. The plaintiff dealt with him at his peril. I would affirm the judgment.

(69 Vt. 432)

MORTON v. THOMPSON.

(Supreme Court of Vermont. Franklin. Jan. Term, 1897.)

EASEMENTS—GRANT—DEFEASANCE—SERVIENT ESTATE—EXCLUSIVE USE OF WAY—TRANSMISSION OF COVENANTS—CLAIM OF TITLE—EQUITY—AMENDMENTS.

1. A landowner conveyed a part by warranty deed reciting that the grantor, "for himself, his

heirs and assigns, doth covenant and agree that the space between the tavern house and the land herein conveyed shall be kept open for the passage of teams to the west end of the land herein conveyed, until said [grantor] shall, by deed, convey to said [grantee] a convenient passage for teams to the rear of said land herein conveyed, from some known public street." Held, that the covenant amounted to a grant, and created an easement in the grantor's land that attached and was appurtenant to the grantee's land, and inured to the benefit of subsequent grantees.

2. An occupant of the granted premises was entitled to the easement, though not in privity with the original grantee, since it went with the land.

3. The grantee was entitled to the whole space between the tavern house and the land conveyed for the purpose, not only of passing "to the west end of the land," but upon that end.

4. The covenant was a grant with a defeasance, and the words "his heirs and assigns" must be carried forward, and read in after the grantor's name in the defeasance clause, to effectuate the intention that the way thereby granted should remain until another was substituted in accordance therewith by some one interested in the servient estate.

5. The grantee was not entitled to a way devoted exclusively to his use, and hence could not refuse to accept a tendered deed for another way, on the ground that it was to be used in common with others.

6. Possession under a claim of title is an estate sufficient for the transmission of covenants that run with the land when that possession goes by deed from one to another, and is of such a character that it will ripen into title in the requisite time.

7. In a bill to enjoin the obstruction of a way, where defendant, during the hearing before a master, has tendered the orator a deed of another sufficient way, which he is authorized to convey in lieu of the one he was obstructing, he may be allowed to amend his cross bill to show such tender.

Bill by Henry G. Morton against John J. Thompson. Heard on pleadings, master's report, exceptions thereto by both parties, and orator's motion to recommit, at chambers, December 30, 1896. The chancellor pro forma overruled the motion and exceptions, and dismissed the bill, with costs. The orator appeals. Reversed.

Hogan & Royce, for orator. Wilson & Hall, for defendant.

ROWELL, J. This is a bill to enjoin the obstruction of a way over land that the defendant occupies and claims to own, to adjoining land that the orator occupies and claims to own. On January 11, 1853, Samuel H. Barlow, the then owner of all the land, on the south side of which was a tavern known as the "American House," by his warranty deed of that date, conveyed to the president, directors, and company of the Franklin County Bank the land occupied by the orator. In and by said deed, he covenanted, among other things, as follows: "And the said Barlow, for himself, his heirs and assigns, doth covenant and agree that the space between the tavern house and the land herein conveyed shall be kept open for the passage of teams to the west end of the land herein conveyed, until said Barlow shall, by deed, convey to said bank a convenient passage for teams to the

rear of said land herein conveyed, from some known public street." The orator claims to have derived title to the bank property by several meane conveyances, and the defendant claims to have derived title in like manner to the rest of the original hotel property. Each party, in argument, disputes the title of the other; but the orator's title is admitted, as it is well alleged in the bill, and not denied or put in issue by the answer. Chancery Rule 20. The defendant's title is not admitted nor found by the master. While there is probably no doubt that he has title, it is difficult to make it out from the abstract before us. There are, however, some things about it that are certain enough. The master finds, and the cross bill asserts, that Hiram Pierce owned the American House property in November, 1866; and the exhibits show that he continued to own it for several years thereafter. The original bill alleges that the defendant claims title to that property under a deed thereof from Stroud and wife, dated January 27, 1893, and that all the title he has thereto he derives through Samuel H. Barlow and his heirs, representatives, and assigns; and it appears that Mrs. Stroud was in that chain of title. Take this in connection with the finding that the owners and occupants of the hotel property have used it for an hotel from the time Barlow occupied it, down to the present time, and it sufficiently appears that the defendant's deed is the last link in a chain of deeds down which the possession, at least, passed from Pierce to the successive grantors, including the defendant, and that all were in claiming under and according to their deeds.

There is no doubt that, by grant, the owner of land may create out of it any incorporeal hereditament with which, in its nature, it is capable of being affected. In this way, land may be charged with rents, commons, ways, the privilege of light, air, water, and the like. Moreover, with the exception, perhaps, of rent, such incorporeal hereditaments may, as in the case of common appurtenant, be attached to other land, so that the right to enjoy them will vest successively in every one to whom such other land shall come by assignment. Nor need the instrument by which an incorporeal hereditament of this kind is created or enlarged be a formal grant; for, although it be in the guise of a covenant, yet, if it be properly executed, and express an intention to grant, the effect of a grant will be given to it, and rights will pass thereunder by assignment, when nothing would have passed by the assignment of a mere covenant. *Holms v. Seller*, 3 Lev. 305; *Greene v. Creighton*, 7 R. I. 1; *Bronson v. Coffin*, 108 Mass. 175, 180; 1 Smith, Lead. Cas. *143.

Although the language quoted from Barlow's deed sounds in covenant, yet it manifests an intent to grant, and therefore it is held to amount to a grant, and to create an easement in the defendant's land that attaches and is appurtenant to the orator's land, and inures to his benefit, especially as it is

admitted that he is in privity of estate with the original grantee of said land. *Gunson v. Healy*, 100 Pa. St. 42. But we do not regard it essential that he should be in such privity, for there is a distinction between things that run only with the estate in the land and things that are attached to the land itself. "Note," says Lord Coke, "a diversity between a use or warranty, and the like things annexed to the estate of the land in privity, and commons, advowsons, and other hereditaments annexed to the possession of the land." *Chudleigh's Case*, 1 Coke, 122b. In the latter class of cases, of which easements are a conspicuous example, when the right is once acquired, whether by prescription, grant, or covenant, it attaches to the land for the benefit of which it was acquired, and sticks so fast to it that it goes with it, regardless of privity, into all hands, even those of a disseisor. "So, a disseisor, abator, intruder, or the lord of escheat, etc., shall have them as things annexed to the land." *Chudleigh's Case*, 1 Coke, 122b; *Norcross v. James*, 140 Mass. 188, 2 N. E. 946; *Brewer v. Marshall*, 18 N. J. Eq., at page 344; *Nevill's Case*, Plowd. 377, 380.

But the defendant says he has not infringed the orator's right of way, as the master finds that notwithstanding the structure complained of, a part of which is on the rear of the "space" that Barlow covenanted to "keep open," there is still "room left for a convenient right of way for the passage of teams from Main street to the west end of the orator's premises, for all reasonable purposes required by the owners of the bank property." On the west end of the orator's lot, in the rear of his building, there is an open space, eight feet wide, upon which, according to Barlow's deed, no building can be erected that shall exceed eight feet in height. The orator claimed before the master that he has not only a right of way for the passage of teams to the west end of his premises, but also for the passage of modern two-horse coal teams and other two-horse teams, to and upon said eight-foot strip. The master finds that, before the erection of said structure, such teams could be driven over the space between the buildings, to and upon said eight-foot strip, but that since its erection, and because of it, they cannot be. The language of the covenant is that "the space between the tavern house and the land herein conveyed shall be kept open for the passage of teams to the west end of the land herein conveyed, until," etc. This language covers the whole space, and when we consider, as we must, the subject-matter of the covenant and the circumstances in which it was made, the words "to the west end of the land herein conveyed" cannot well be limited to mean that teams might pass over said space to, but not upon, that end, for it is fair to suppose that the parties intended a way as beneficial to the property conveyed as it reasonably could be, as that end of it was not otherwise accessible; and it is obvious that to drive upon that end might often be extremely convenient in dis-

charging heavy articles into the basement and other parts of the rear of the building. It is considered, therefore, that the defendant has infringed the orator's right of way by the structure complained of.

But the defendant says, if this is so, that, still, he has a right, under the Barlow deed, to terminate and extinguish that right of way, by providing the orator another way from some known public street, which he claimed to have done before he began said structure; and he filed a cross bill to compel the orator to accept the deed tendered of such other way. The orator claims that the right reserved by Barlow to provide another was merely a personal right or privilege reserved to himself, and not to his heirs or assigns, and that, as he did not see fit to exercise the right, it died with him, and did not pass to his heirs or assigns, as it could not run with the land, and, even if it did run with the land, that the defendant is not in position to exercise it, as he has not shown title to the hotel property. But this covenant is a grant with a defeasance, and the grant and the defeasance are parts of the same thing, and must go together, as such, we think, was the intention of the grantor. He covenants for himself, his heirs and assigns. It is a rule that every word must be given effect if it can be, and none be rejected. The words "heirs and assigns" can have no effect if the right to defeat the grant is confined to the grantor himself, for without those words the covenant would be just as effective as a grant as it is with them, and just as binding upon his heirs and assigns. Why should he be covenanting that his heirs and assigns, and especially his heirs, should keep the space open, if he understood that he alone could do the thing that would close it? But, if he intended that they also should have the right to do that thing if he did not, then his covenanting for them is accounted for. It is considered that the words "his heirs and assigns" must be carried forward and read in after the grantor's name in the defeasance clause, in order to effectuate his intention, which appears to have been that the benefit should go with the burden, which is highly equitable in this case. The real essence of the covenant is that the way thereby granted shall remain until another is substituted in accordance therewith by some one interested in the servient estate. A case somewhat analogous is *Duke of Northumberland v. Errington*, 5 Term. R. 522. There, in an indenture of lease of coal mines, two lessees covenanted "jointly and severally in manner following." Then followed a string of covenants as to working the mines, and then a covenant that the moneys appearing to be due should be accounted for and paid by the lessees, their executors, etc., not saying "and each of them"; and it was held that the general words extended to all the subsequent covenants on the part of the lessees throughout the deed, as there was nothing in the nature of the subject to restrain them to the former part of the lease. It was said that it would not have answered the lessor's pur-

pose that each of the lessees should be bound separately by the covenants that related to the working of the mines, unless each was also answerable for the products of the mines. If this covenant is viewed as annexed to the estate of the land in privity, yet has the defendant a title that enables him to avail himself of its benefit; for possession under a claim of title is an estate sufficient for the transmission of covenants that run with the land when that possession goes by deed from one to another, and is of such a character that it would ripen into title in the requisite time. *Beddoe v. Wadsworth*, 21 Wend. 120; *Slater v. Rawson*, 6 Metc. (Mass.) 439; *Rawle, Cov.* (4th Ed.) 372; 2 Am. Law Reg. (N. S.) 208 et seq.

Before the defendant began the structure complained of, he tendered to the orator a deed of another right of way, which the orator objected to for divers reasons, but not because the defendant had no right to tender it, and refused to accept, and which the master finds does not convey a convenient and sufficient right of way. The cross bill was based on the tender of this deed. During the hearing before the master, and after the completion of said structure, the defendant tendered to the orator another deed, enlarging the right of way in the first deed, and to take the place of that deed, if the master should find the right of way thereby conveyed insufficient, and the right of way conveyed by the second deed sufficient, which last the master does. But the orator says that finding is unwarranted, for that the way thereby conveyed is too narrow, and is to be used in common with others. The orator is not entitled to a way devoted exclusively to his use and the use of his successors in title; and, as to the sufficiency of the way, that is a question of fact for the master.

In the view we have taken of the case, it is unnecessary to consider any other of the orator's exceptions to the report. The cross bill has never been amended by setting up said last-mentioned deed, and therefore the orator claims that the defendant cannot avail himself of it. But, inasmuch as we hold that the defendant has the right to defeat the grant in Barlow's deed, the exercise of that right ought not to be temporarily defeated because of the lack indicated, but an amendment should be allowed to remedy the objection. But the defendant was in fault in obstructing the orator's way before he provided another sufficient way. Therefore the original bill was well brought, and the orator should have his costs. But on amending the cross bill as indicated, and filing said last-mentioned deed with the clerk for the orator, a decree should be entered that the orator accept and receive said deed in discharge and release of the right of way conveyed by Barlow's deed, and execute the defendant a proper deed of such discharge and release; and then the original bill should be dismissed, with costs to the orator therein. But, in default of such amendment and filing, the cross bill should be dismissed, with costs to the defendant therein, and a decree be entered for the orator in the

original bill, according to the prayer thereof, without damages, but with costs. Reversed and remanded, with mandate.

(69 Vt. 448)

HUGHES v. KELLEY.

(Supreme Court of Vermont. Rutland. July 17, 1897.)

TAXATION—EXEMPTIONS—TAX BILL—SUFFICIENCY
—TAX SALE—TRESPASS.

1. A tax bill is void where the taxpayer was not allowed his claimed deductions for debts owing, though he truthfully answered all the interrogatories in his inventory, but the listers refused to make such deductions because he had personal property in New York, where he was domiciled, which he did not include in his inventory, but which was taxed in New York, as such property was exempt from taxation, under V. S. § 362, subd. 4, whether such taxpayer was a resident or a nonresident.

2. Under V. S. § 3017, authorizing the selectmen to include all taxes in one tax bill, and making it their duty to certify on each bill what taxes are included therein, and the rate per cent. of each, a tax bill is sufficiently specific which gives the amount of the taxpayer's list, and on which is certified the rate per cent. of each tax included therein.

3. A collector of taxes, who, by means of a distress and sale under a tax warrant, collected interest on such tax, which he had no right to do, did not thereby become a trespasser, where he did not proceed to sell for such purpose after having sold enough to pay the tax and costs, but sold en masse, and the taxpayer bid it off at but little more than enough to pay the tax without interest and costs.

4. Nor did he become a trespasser by misapplying in payment of interest a part of the balance realized, as that was not a wrongful act done to the property, but only to a portion of the fund realized therefrom.

Exceptions from Rutland county court; Rowell, Judge.

Trespass and trover by W. H. Hughes against A. A. Kelley. Plea, the general issue, and notice of justification under tax warrants. From a judgment pro forma on the report of a referee, overruling exceptions thereto, and for plaintiff to recover the amount specified in the report, defendant excepts. Reversed.

Joel C. Baker, for plaintiff. Fayette Potter and G. E. Lawrence, for defendant.

ROWELL, J. This is trespass and trover for 160 squares of roofing slate. The defendant justifies as collector of taxes of the town of Pawlet under tax bills and warrants for the years 1890 and 1891, respectively. The plaintiff claims that his list for each of those years was void, for that he was not allowed his claimed deductions for debts owing. As to his list for 1891, his claim is well founded, for he truthfully and properly answered all the interrogatories in his inventory of that year that were necessary to be answered in order to entitle him to such deduction. The listers refused to make such deduction, because he had personal property in New York, where he was domiciled, which he did not put into his inventory, but which was taxed in New

York. This property was not taxable here, for nonresident taxpayers and resident taxpayers stand alike in respect of such property (*Sprague v. Fletcher*, 69 Vt. 69, 37 Atl. 239), and our statute exempts from taxation personal estate owned by inhabitants of this state situate and taxed in another state. V. S. § 362, subd. 4. But as to his list for 1890, his claim is not well founded, for he did not answer any of the interrogatories in his inventory of that year necessary to be answered in order to entitle him to such deductions. So his list for that year is valid. But he claims that the tax bill of that year is invalid, for that the taxes therein assessed are blended, and not kept separate, and placed in different columns. Conceding, without deciding, that the tax bill should show to the taxpayer the nature and amount of each tax that is assessed against him, that he may pay or tender the amount of such as he considers legal, and refuse to pay such as he considers illegal, yet it is a rule of law as well as of logic that that is sufficiently certain that can be made certain; and in this case the nature and amount of the plaintiff's taxes can be made certain from the tax bill itself. The selectmen are authorized to include all taxes in one tax bill, and it is their duty to certify on each tax bill made out by them what taxes are included therein, and the rate per cent. of each tax so included. V. S. § 3017. The tax bill in question gives the amount of the plaintiff's list, and the selectmen certified thereon that it includes a town tax of 30 per cent. and a highway tax of 15 per cent., voted by the town on the grand list of 1890; making in all a tax of 45 per cent. From this data the plaintiff could readily acquire all the information that the rate bill would have given him had the taxes not been blended. This objection, therefore, is not well founded.

The warrant annexed to this tax bill is in the statutory form, and therefore sufficient. The defendant collected \$12.88 interest on this tax, which he had no right to do, for the tax did not draw interest. *Shaw v. Peckett*, 26 Vt. 482. But he did not thereby become a trespasser to any extent, as he did not proceed to sell for that purpose after having sold enough to pay the tax and the costs, but sold en masse, and the plaintiff bid it off at only \$19.08 more than enough to pay the tax without interest and the costs. The statute provides that if a tax, with costs and charges, is not paid within four days after distress is made, the collector may sell the property at public auction, after posting notice thereof; and, after deducting the tax and his charges, shall, on demand, return the balance realized from the sale to the person whose property was distrained, with an account of the tax and his charges. But the statute does not prescribe the manner in which the collector shall set up the property to be bid upon. From the necessity of the case much must be left to his discretion in

this respect. He is bound to act in good faith, and with due regard to the rights of the parties in interest. It does not appear that the defendant in this case acted otherwise. He could not know in advance how much the slate would bring, and it may have been the best way to put it up in one lot, instead of in parcels, or enough by the square to bring the money required. *Bergin v. Hayward*, 102 Mass. 414, 426; *Perkins v. Spaulding*, 2 Mich. 157. Nor did he become a trespasser by misapplying in payment of interest a part of the balance realized, as that was not a wrongful act done to the property itself, but only to a portion of the fund realized therefrom. *Wilson v. Seavey*, 38 Vt. 221, 230. The plaintiff, by his agent, bid off at \$140 the slate sold on the warrant annexed to the tax bill for 1891, and that amount he is entitled to recover, to which we add interest by way of damages from March 5, 1892, the day of sale. Judgment reversed, and judgment for the plaintiff accordingly.

(39 Vt. 396)

TOWN OF PAWLET v. KELLEY et al.
(Supreme Court of Vermont. Rutland. July 2, 1897.)

TAX COLLECTOR—DEFALCATION—ELECTION OF REMEDIES—INSOLVENCY—SURETIES—DISCHARGE—ELIGIBILITY TO OFFICE—INVALID TAX LEVY—CORRECTION OF LIST—PAYMENT—APPLICATION.

1. By presenting its claim against the insolvent estate of a defaulting tax collector, and obtaining a dividend thereon, a town does not waive its right to pursue the sureties on his official bond, since the two remedies are not inconsistent.

2. A tax collector is within V. S. § 2139, providing that a debt created by the defalcation of "a public officer" shall not be discharged under proceedings in insolvency.

3. Where the debt is one covered by the bond, the sureties on a tax collector's bond are within V. S. § 2140, providing that a debtor's discharge in insolvency shall not release a person liable for the same debt as "surety or otherwise for or with the debtor."

4. Under V. S. § 3058, which forbids the re-election of a constable who fails on or before March 1st in each year "to pay over all moneys collected by him to the treasury to which they belong," the mere fact that certain taxes remain uncollected is no prohibition on his re-election.

5. The fact that a tax levy was invalid is no defense to the nonpayment of moneys in fact collected by the tax collector.

6. Corrections by selectmen of errors in footings and in other respects, in tax bills, and the addition of some taxes which had been omitted by the listers, do not render a list void as a basis of taxation.

7. A tax collector, during the year 1893, paid to the town treasurer by mistake, to apply on taxes of 1892, a sum in excess of the amount due. The collector was in default as to collections in 1891 and 1893. *Held*, that the excess would be applied on the deficit of 1893, it appearing that the money was the proceeds of taxes for that year.

Exceptions from Rutland county court; Tyler, Judge.

Debt on collector's bond by the town of Pawlet against A. A. Kelley and others. Heard on the report of a referee, exceptions thereto by both parties, and plaintiff's motion to recommit, at the March term, 1897. The court

pro forma overruled plaintiff's motion and exceptions, and allowed the application of the overpayment to the taxes of 1893, according to the direction of the collector, and sustained defendants' exception, and rendered judgment pro forma for defendants, all as matter of law. Plaintiff excepts. Reversed.

Fayette Potter and G. E. Lawrence, for plaintiff. Butler & Moloney, for defendants.

TAFT, J. The plaintiff town presented its claim against the insolvent estate of Kelley, the defaulting tax collector, and obtained a dividend thereon. The defendant Blakely, one of the sureties, who is defending this suit, insists that the town has thus chosen one of two inconsistent remedies, and for that reason it cannot now pursue him, as he was thereby discharged; citing *Hartland v. Hackett*, 57 Vt. 92, and *White v. White*, 68 Vt. 162, 34 Atl. 425. There is no question concerning the rule. If a creditor has two remedies, inconsistent with each other, he has his election which to pursue, and, if he adopts one, he is barred from pursuing the other. He cannot affirm a contract, and at the same time rescind it for fraud or other reasons. If he has the right to enforce his contract by action of contract, or, upon a rescission of the contract, to maintain an action of tort for fraud, if he obtains judgment in contract he waives the fraud. *Palmer v. Preston*, 45 Vt. 154. The court in *Hartland v. Hackett*, supra, may have erred in holding the remedies inconsistent, or it may have placed its decision upon the ground that the imprisonment of the debtor was a quasi satisfaction of the debt. There is nothing inconsistent in a creditor's pursuing the principal and the surety at the same time, both actions being based upon an affirmation of the contract. He may pursue both until he obtains satisfaction of his debt. This point is not well taken. In connection with it, it is further urged that the discharge of Kelley was a discharge of the surety, Blakely. The debt presented by the plaintiff against the insolvent estate of Kelley was one created by the defalcation of the latter as a public officer,—a tax collector,—and from this debt Kelley was not discharged. V. S. § 2139. If he was, the defendant Blakely was not. Id. § 2140.

It is objected that the defendant Blakely cannot be holden, for that Kelley was ineligible to re-election in 1893 and 1894, under V. S. § 3058, which forbids the re-election of a constable who refuses or neglects, on or before the 1st day of March in each year, "to pay over all moneys collected by him to the treasury to which they belong, and settle his accounts with the treasurers." It does not appear that, at the time of the settlements in 1893 and 1894, there were any moneys in Kelley's hands not paid over, and he settled his account each year with the treasurer. The referee reports that certain amounts of the taxes were uncollected, or not paid over; it does not appear which. If they were uncollected, there was no prohibition

upon his re-election. If the election was in violation of the statute, whether it would bar a recovery in this action we do not pass upon, as it is unnecessary.

It is no defense herein that the selectmen included the unpaid highway taxes of 1891 and 1892 in the tax bill for 1893. If the taxpayer paid Kelley the amount of the tax, the money became the money of the town, and the surety liable if the collector did not pay it over. If the tax levy was invalid, it was no defense to the nonpayment of the moneys in fact collected. *Tunbridge v. Smith*, 48 Vt. 648.

It is objected that the selectmen changed the tax bills from time to time, and that the sureties should not be held liable for the mistakes of and changes by the plaintiff's officials. The changes made, as shown by the report, were corrections of errors in footings, and in other respects, and adding some taxes which had been omitted by the listers. Accidental errors and defects made in good faith do not render a list void as a basis of taxation. *Spear v. Braintree*, 24 Vt. 414.

The surety was not harmed by the withdrawal of the uncollected taxes in the hands of the collector in the spring of 1895. It prevented any increase in the amount of defalcation. The objection under this point is based upon assumed facts,—viz. that the collector was ineligible, a void tax, and no proper assessment,—and is not tenable; and for the same reason point 7 in the brief of the defendant, assuming there was no proper assessment, was not well taken.

Kelley, during the year 1893, paid the plaintiff's treasurer, by mistake, to apply on taxes of 1892, the sum of \$529.27 in excess of the sum due. The error was not discovered until the hearing in this case before the referee, when the collector requested its application upon the rate bills of 1893 and 1894, and the plaintiff upon delinquent taxes for 1891, for which the defendant was not liable. The current of decisions in this state is that, when neither party makes an application of a payment, the law will make such an application as it deems just and equitable. *Pierce v. Knight*, 81 Vt. 701. It is apparent that the money so applied by mistake upon the taxes of 1892 was the proceeds of the taxes for the year 1893, and it is just and equitable that that sum should be applied upon the deficit of that year. This exception of the plaintiff is not sustained.

It fairly appears from the report of the referee that the taxes were legally assessed, the warrants duly issued, and that Kelley collected and withheld the amount shown by the referee's report; and it will be presumed that the plaintiff paid the state and the school tax to the proper authorities. There is nothing included in the report of the referee save money collected by Kelley, and not paid over; and, by the judgment, the defendant is not made liable for anything for the reason of noncollection of taxes, and nothing appears in the case which made it the duty of the town

treasurer to notify the surety of any misapplication of the funds of the town, or that he had paid any funds to the town without making an application thereof.

This disposes of all questions made by the defendant. The pro forma judgment is reversed, and judgment rendered for the plaintiff, for the amount shown due by the report, with interest since the bringing of the suit. The exceptions of both parties being overruled, neither is allowed costs in this court.

(90 Me. 235)

INHABITANTS OF WINTHROP v. INHABITANTS OF READFIELD.

(Supreme Judicial Court of Maine. April 27, 1897.)

TOWN LINES—COMMISSIONERS—QUALIFICATION—WAIVER—REVIEW OF FINDINGS.

1. The power of commissioners appointed under Rev. St. c. 3, § 67, to ascertain and determine the location of a line in dispute between adjoining towns, is analogous to that of referees under an unrestricted rule of reference, who are judges of the law as well as of the facts involved, and whose conclusion, as shown by their direct and unconditional award, in the absence of any improper motive, will not be inquired into.

2. All findings of such commissioners upon questions of fact and conclusions upon matters of law involved are final.

3. Although the power of the court has not been exhausted when the commissioners have been appointed, but continues until their report is offered and passed upon, the court has no power to review the conclusions of the commissioners upon questions of law or fact involved, but only to inquire into the conduct and motives of the commissioners, when anything improper in that respect is alleged, and as to whether the proceedings have been in accordance with the statute, and their report legally correct as to form.

4. It is not necessary that such commissioners should be sworn. It is neither required by the statute providing for their appointment, nor by any general rule or statute.

5. But, even if it were otherwise, the objection comes too late. If the commissioners were not sworn, it must be presumed that the party now objecting had knowledge of that fact, unless the contrary is shown. A party who has knowledge of a purely technical objection will not be allowed to take the chance of a decision in his favor, and be given the opportunity of first raising the objection after the decision, if it should be against him.

6. That one of the commissioners had previously been employed by one of the towns to run the line as a surveyor does not disqualify him from acting as one of the commissioners appointed under this statute.

(Official.)

Exceptions from supreme judicial court, Kennebec county.

Proceeding by the inhabitants of Winthrop against the inhabitants of Readfield to determine the location of a town line. The court overruled defendant's objections to the commissioners' report, and ordered it accepted, and defendant excepts. Exceptions overruled.

L. T. Carleton, for plaintiff. E. O. & F. E. Beane, for defendant.

WISWELL, J. Various objections were made at nisi prius, by counsel for the town

of Readfield, to the acceptance of the report of commissioners appointed by the court under Rev. St. c. 3, § 67, to ascertain and determine the location of a line in dispute between these towns. The court overruled the objections, and ordered the report accepted and confirmed, to which ruling and order exceptions were taken by the town of Readfield.

It becomes important to clearly understand exactly what power and discretion the court has in regard to the acceptance of a report of such commissioners.

It was formerly held in this state that, in proceedings under the statute referred to, the court had no further duty nor power than to appoint the commissioners; that the report need not be accepted, and that its acceptance was not authorized; that the report itself, if in accordance with law, was final and conclusive. *Monmouth v. Leeds*, 76 Me. 28.

But later, when the same proceeding came before the court upon a question of costs, this court, in an opinion by the chief justice, took occasion to express quite a different view upon this question, and referred to the fact that the earlier statutes expressly required that the report of the commissioners should be passed upon by the court, and that this provision had been omitted in the different revisions of the statutes with no legislative change, and simply for the sake of brevity. In that case it is said: "We do not see why the court should not so far control the proceeding that it may, as in cases before referees, prevent a report being final until satisfied of its freedom from fraud, and of its legal correctness." *Monmouth v. Leeds*, 79 Me. 171, 8 Atl. 828.

But it was not meant, by the expression "satisfied * * * of its legal correctness," that the court might review the conclusion of the commissioners upon any legal question that might arise. All findings of the commissioners upon questions of fact and conclusions upon matters of law involved are final. The only power and discretion of the court in this respect is to ascertain and determine if the report is legally correct in form, and if all the proceedings have been in compliance with the statute. The power of such commissioners is analogous to that of referees under an unrestricted rule of reference, who are judges of the law as well as of the facts involved, and whose conclusion, as shown by their direct and unconditional award, in the absence of any improper motive, will not be inquired into. So, in a matter of this kind, although the power of the court has not been exhausted when the commissioners have been appointed, but continues until their report is offered and passed upon, the court has not the power to review the conclusions of the commissioners upon questions of law or fact involved, but only to inquire into the

conduct and motives of the commissioners, if anything improper in that respect is alleged, and as to whether the proceedings have been in accordance with the statute, and their report legally correct as to form.

This view disposes of many of the objections made to the acceptance of the report. The one most relied upon is as to the construction by the commissioners of an act of the legislature of Massachusetts, passed in 1810, whereby that portion of the line in controversy was established. But the construction of this act was one of the matters necessarily committed to the commissioners; and although we have examined the act, and think that the construction placed thereon by the commissioners was correct, the result would be the same if we should differ with them as to the meaning of this act, their determination being conclusive.

Several of the other objections are involved in the one just considered. It is certainly true that the territorial limits of towns must be established by legislative action. Without it, no portion of the territory of one municipality can be set off to another. The act of the Massachusetts legislature of 1810 established the line in controversy between these adjoining towns; but as to what is meant by that act, and as to where upon the face of the earth the line thus established is, must be determined by some tribunal with jurisdiction in the premises. As we have already seen, the statute provides for the appointment of a tribunal in matters of this kind, whose conclusions upon all questions properly arising are final.

Other objections made go more to the correctness and legality of the proceedings. It is said that the commissioners were not sworn, and their report does not show that they were. We do not think it necessary that the commissioners should have been sworn. The statute providing for their appointment does not require it, and we know of no general rule or requirement which makes it necessary. *Lewis v. Foster*, 65 Me. 555. But, even if it were otherwise, the objection comes too late. If the commissioners were not sworn, it must be presumed that the party now objecting had knowledge of that fact, unless the contrary is shown. A party who has knowledge of a purely technical objection will not be allowed to take the chance of a decision in his favor, and be given the opportunity of first raising the objection after the decision, if it should be against him. *Raymond v. County Com'rs*, 63 Me. 110.

Objection is also made that one of the commissioners had been previously employed by the town of Winthrop, as a surveyor, to run the line in dispute, and that, in company with the selectmen of Winthrop, he had run this line, which employment, it is said, was unknown to the town of Readfield at the time of the appointment of the commissioners. We think there is nothing in

this objection; that the fact that one of the commissioners had previously been employed by one of the towns to run the line as a surveyor in no way disqualified him from acting as one of the commissioners appointed under this statute.

Exceptions overruled.

(99 Me. 261)

ROWE v. FRIEND et al.

(Supreme Judicial Court of Maine. April 27, 1897.)

TAXES—ASSESSMENT—COLLECTION—ARREST FOR NONPAYMENT—LIABILITY OF ASSESSORS.

1. The defendants, as assessors of the town of Etna, completed their assessment of the tax for the year 1895, including the town's proportion of the state tax for the same year, and committed the same to the tax collector, two days before the state treasurer issued his warrant, as provided by Rev. St. c. 6, § 36, and as required by the act of the legislature making the assessment of a state tax for the year 1895.

The state tax for the year 1895 was laid by the legislature, the only competent authority, by an act approved March 26, 1895. The proportion of the whole tax that was to be paid by each city, town, and plantation in the state was fixed by that act. The amount apportioned thereby to the town of Etna was \$340.14, the precise amount included by the assessors, as the town's proportion of the state tax, in their assessment and commitment.

In an action against the assessors for the arrest of the plaintiff by the tax collector for the nonpayment of his tax, *held*, that the assessors' authority to assess and commit this tax did not depend upon the state treasurer's warrant; the issuance of that warrant was a ministerial act, and such warrant was not the only nor the best evidence of the amount of the state tax that was to be assessed upon the polls and estates in the town of Etna; and that if the assessors saw fit to complete the assessment, including the state tax for the current year, and commit the same to the collector before the issuance of the state treasurer's warrant, the taxpayer, at least, can find no fault.

2. The tax on the plaintiff's real estate in the record of assessment was assessed at \$2.33, while in the lists committed to the collector it was stated to be \$3.33. The latter amount is the correct assessment upon the real estate, at the valuation placed thereon by the assessors.

Held, that this clerical error does not even make the assessment void, much less render the assessors liable for the plaintiff's arrest by the tax collector.

3. If the arrest of the plaintiff was unlawful because he offered to show the collector sufficient goods and chattels to pay the tax, still the defendants are not liable. The collector is not the servant of the assessors, and they are not responsible for his illegal act, if any be shown.

(Official.)

Report from supreme judicial court, Penobscot county.

Action by John W. Rowe against Joseph E. Friend and others. Submitted on report. Judgment for defendants.

G. W. Howe, for plaintiff. O. A. Bailey, for defendants.

WISWELL, J. The plaintiff, having been arrested and committed to jail by the tax collector of the town of Etna for the nonpayment of his tax in that town for the year

1895, and claiming that his arrest was illegal, brings this action therefor against the defendants, who were the assessors of the town, and, as such, assessed the tax, and issued the warrant to the collector by virtue of which the plaintiff was arrested.

No question is raised as to the plaintiff's residence in Etna, and his consequent liability to taxation in that town; and the records introduced show the due election and qualification of the defendants as assessors. But it is claimed in behalf of the plaintiff that there were certain errors and mistakes in the assessment and commitment of the tax, and that the assessment and commitment were wholly unauthorized and void, because, although it included the town's proportional part of the state tax, the assessment was completed and committed to the collector on the 13th day of April, while the state treasurer's warrant was not issued until two days later.

Rev. St. c. 6, § 36, provides that, "when a state tax is ordered by the legislature, the treasurer of state shall forthwith send his warrants directed to municipal officers of each town or other place, requiring them to assess upon the polls and estates of each, its proportion of such tax for the current year." And one of the sections of the act of the legislature, making the assessment of a state tax for the year 1895, contains similar provisions, requiring the state treasurer to issue his warrant during the month of April of that year.

By Rev. St. c. 6, § 39: "Assessors of towns * * * are not responsible for the assessment of any tax, which they are by law required to assess; but the liability shall rest solely with the corporations for whose benefit the tax was assessed, and the assessors shall be responsible only for their own personal faithfulness and integrity."

It is not denied that the assessors of Etna were required to assess the tax committed to the collector on the 13th of April, 1895. The only question is whether they were authorized to complete the assessment, including the town's proportion of the state tax for the current year, and commit the same to the collector before the state treasurer had issued his warrant, in accordance with the provisions of the general statute and of the special act above referred to.

We have no doubt that this question must be answered in the affirmative. The state tax for the year 1895 was laid by the legislature, the only competent authority, by an act approved March 26, 1895. Priv. & Sp. Laws 1895, c. 301. The proportion of the whole tax that was to be paid by each city, town, and plantation in the state was fixed by that act. The amount apportioned thereby to the town of Etna was \$340.14, the precise amount included by the assessors, as the town's proportion of the state tax, in their assessment and commitment.

We think that the assessors' authority to as-

sess and commit this tax did not depend upon the state treasurer's warrant. The issuance of that warrant was a ministerial act, and such warrant was not the only nor the best evidence of the amount of the state tax that was to be assessed upon the polls and estates in the town of Etna. If the assessors saw fit to complete the assessment, including the state tax for the current year, and commit the same to the collector before the issuance of the state treasurer's warrant, the taxpayer, at least,—and this is the only question considered,—can find no fault.

This was the decision of the court in *Alvord v. Collin*, 20 Pick. 418, under statutes similar in purpose and effect. In that case it was said by the court: "The legislature, the only power competent to such an act, made a regular grant of a state tax for the year 1819, and duly made an apportionment of it among the several towns in the commonwealth. Of this the evidence is unexceptionable. This authorized the assessors of Washington to assess the amount imposed upon that town. This authority did not depend upon the treasurer's warrant, and cannot be defeated or annulled by any act or omission of any ministerial or other officer of the government. An assessment in pursuance of the grant and apportionment of a state tax would be valid, although made by the assessors, without any warrant from the treasurer. Such warrant may be competent authority for the assessors to act upon, but is not the only nor the highest evidence of the grant. The treasurer's authority to issue this precept depends upon the grant of the legislature, and the warrant is obligatory only so far as it is in pursuance with the legislative act. The treasurer's warrant is a mandate to the assessors, binding upon them, for the disobedience to which they are subjected to the penalty prescribed by statute. Although they could not be compelled to act without this mandate, yet if they chose to act without it, and did act in conformity with the statute, they would be justified, and all others would be bound by their proceedings."

The assessors, then, being required by law to assess this tax, and being authorized to commit it when they did, they are only liable for their own personal faithfulness and integrity. No evidence has been introduced showing any want of personal faithfulness or integrity upon the part of the assessors.

The plaintiff also complains of certain errors and mistakes in the assessment and commitment. For instance, the tax on the plaintiff's real estate in the record of the assessment is assessed at \$2.83, while in the lists committed to the collector it is stated to be \$3.33, making the plaintiff's whole tax, as committed to the collector, \$1 more than it appears to be in the assessors' records. The latter amount is the correct assessment upon the real estate at the valuation placed thereon by the assessors. This clerical error does not even make the assessment void, much less

render the assessors liable for the plaintiff's arrest by the tax collector, by reason of Rev. St. c. 6, § 142, which provides that no error, mistake, or omission by the assessors, collector, or treasurer shall render the assessment void, and which gives a right of action against the town in favor of any one who has sustained damages by reason of such mistakes.

It is said in the brief of the plaintiff's counsel that the statement of the whole tax in the record of the assessment and in the commitment is \$10 greater than the aggregate of the several items thereof. If this were so, it would not invalidate the tax, by reason of the statute referred to; but an examination of the copies furnished the court discloses no such error.

Nor is there anything in the further claim that the arrest was unlawful because the plaintiff offered to show the collector sufficient goods and chattels to pay the tax. The collector was not the servant of the assessors, and they are not responsible for his illegal act, if any such be shown. Although it is contended that two of the assessors personally directed the plaintiff's arrest, the evidence fails to substantiate this contention.

The entry will be:

Judgment for defendants.

(90 Me. 166)

PERKINS v. PENDLETON et al.

(Supreme Judicial Court of Maine. April 9, 1897.)

RIGHT OF ACTION—COMPELLING DISCHARGE OF SERVANT—LABOR UNION—PLEADING.

1. For a person to wrongfully—that is, by the employment of unlawful or improper means—induce a third party to break a contract with the plaintiff, whereby injury will naturally and probably, and does in fact, ensue to the plaintiff, is actionable; and the rule applies both upon principle and authority as well to cases where the employer breaks his contract as where it is broken by the employé; in fact it is not confined to contracts of employment.

2. Whenever a person, by means of fraud or intimidation, procures either the breach of a contract or the discharge of a plaintiff from an employment, which, but for such wrongful interference would have continued, he is liable in damages for such injuries as naturally result therefrom; and the rule is the same whether by these wrongful means a contract of employment, definite as to time, is broken, or an employer is induced, solely by reason of such procurement, to discharge an employé whom he would otherwise have retained, even if the terms of the contract of service are such that the employer may do this at his pleasure, without violating any legal right of the employé.

3. Merely to induce another to leave an employment or to discharge an employé, by persuasion or argument, however whimsical, unreasonable, or absurd, is not in and of itself unlawful, and the court does not decide that such interference may become unlawful by reason of the defendant's malicious motives, but simply that to intimidate an employer by threats, if the threats are of such a character as to produce this result, and thereby cause him to discharge an employé whom he desired to retain and would have retained except for such unlawful threats, is an actionable wrong.

4. Held, that a cause of action in this case is sufficiently stated in the declaration.
(Official.)

Exceptions from supreme judicial court, Waldo county.

Action by Webster C. Perkins against Fremont Pendleton and others. From an order overruling a demurrer to the declaration, defendants except. Exceptions overruled.

P. H. Gillin and R. F. Dunton, for plaintiff.
W. H. Fogler and W. P. Thompson, for defendants.

WISWELL, J. To the plaintiff's declaration, which appears in full in the statement of the case, the defendants filed a general demurrer, which was overruled by the justice presiding at nisi prius, and the declaration adjudged good. The case comes to the law court upon exceptions to this ruling.

The plaintiff alleges that upon a certain day he was, and for 22 years prior to that time had been, in the employ of the Mt. Waldo Granite Company as a stone cutter, working by the piece; that he was making large profits out of his employment; that he would have continued in such employment from the day named until the date of his writ "but for the wrongful acts, inducements, threats, persuasions, and grievances committed by said defendants against the said plaintiff as hereinafter set forth;" that on the day named, and "at divers other times thereafter until the date of the plaintiff's writ," the defendants "did unlawfully and without justifiable cause, molest, obstruct, and hinder the plaintiff from carrying on his said trade, occupation, or business as a stone cutter for the said Mt. Waldo Granite Company, and wrongfully, unlawfully, and unjustly had him discharged without any justifiable cause from the employment of the said Mt. Waldo Granite Company by willfully threatening, persuading, inducing, and by other overt acts compelling, the said Mt. Waldo Granite Company, against its will, and without any desire on its part so to do, to discharge the said plaintiff from its employ for the sole reason that the plaintiff would not become a member in the order of the Mt. Waldo Branch of the Granite Cutters' National Union"; whereby he suffered the injury specially set out in his declaration. Does this statement of facts sufficiently set out an actionable wrong upon the part of the defendants?

That an action lies under certain circumstances for procuring a third person to break his contract with the plaintiff has been frequently decided by the courts of England and of this country.

In *Lumley v. Gye*, 2 Hl. & Bl. 216, decided in 1853, the action was for knowingly and maliciously inducing an opera singer to break her contract with the plaintiff to perform exclusively for a certain time in his theater. The right of action was sustained by a majority of the court.

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In *Bowen v. Hall*, 6 Q. B. Div. 333, decided in 1881, a person had contracted to manufacture glazed bricks for the plaintiff, and not to engage himself to any one else for a term of five years. The English court of appeals held that an action could be maintained against the defendant for maliciously procuring a breach of this contract, provided damage accrued; and that to sustain the action it was not necessary that the employer and employé should stand in the strict relation of master and servant. It was said by the court in this case: "That wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. * * * If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person, or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him. * * * Merely to persuade a person to break his contract may not be wrongful in law or fact, * * * but, if the persuasion be used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore an actionable act if injury ensued from it."

The doctrine of these cases has been very generally adopted, and the cases themselves very frequently cited, by the courts of this country. *Walker v. Cronin*, 107 Mass. 555; *Bixby v. Dunlap*, 58 N. H. 456; *Noice v. Brown*, 39 N. J. Law, 569; *Haskins v. Royster*, 70 N. C. 601; *Daniel v. Swearengen*, 6 S. C. 297.

In view of these authorities and others, which it is not necessary to refer to, it must be conceded that for a person to wrongfully—that is, by the employment of unlawful or improper means—induce a third party to break a contract with the plaintiff, whereby injury will naturally and probably, and does in fact, ensue to the plaintiff, is actionable; and the rule applies both upon principle and authority as well to cases where the employer breaks his contract as where it is broken by the employé; in fact it is not confined to contracts of employment.

But in this case the plaintiff does not allege that the Mt. Waldo Granite Company was induced by the wrongful means adopted by the defendants to break a contract, nor that there was any contract between the plaintiff and the employer for any definite time. We must, therefore, assume that there was none, that either party had the right to terminate the employment at any time, and that the act of the Mt. Waldo Company in discharging the plaintiff was lawful, and one which the company had a perfect right to do at any time.

The question presented, then, is whether a person can be liable in damages for inducing and persuading, by threats or other unlawful means, an employer to discharge his employé when the terms of the contract of service are such that the employer may do this at his pleasure, without violating any legal right of the employé. The question is a novel one in this state, but it has already arisen and been passed upon by the courts of some other states.

In *Walker v. Cronin*, 107 Mass. 555, the plaintiffs alleged that the defendant did "unlawfully and without justifiable cause, molest, obstruct, and hinder the plaintiffs from carrying on" their business of manufacture and sale of boots and shoes, "with the unlawful purpose of preventing the plaintiffs from carrying on their said business, and willfully persuaded and induced a large number of persons who were in the employment of the plaintiff," and others "who were about to enter into" their employment, "to leave and abandon the employment of the plaintiff, without their consent and against their will," and alleged that the plaintiffs lost the services of said person and the profits and advantages they would otherwise have made, and suffered losses in their business. It will be noticed that there is no allegation here of any definite contract as to time between the plaintiffs and their employés who were induced to leave their employment, and one ground of action was that certain persons who were about to enter into their employment, but who had not commenced at the time, were induced to leave and abandon the employment of the plaintiffs. But the court held in an exhaustive opinion, which has been frequently cited by other courts in this country, and which was cited by counsel in the argument in *Bowen v. Hall*, supra, that the action could be maintained. It is said in the opinion: "This [declaration] sets forth sufficiently (1) intentional and willful acts (2) calculated to cause damage to the plaintiffs in their lawful business, (3) done with the unlawful purpose to cause such damages and loss, without right or justifiable cause on the part of the defendant (which constitutes malice), and (4) actual damage and loss resulting." The court quotes the general principles as announced in *Comyns' Digest*, "Action upon the Case": "In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages;" and goes on to say that "the intentional causing of such loss to another, without justifiable cause, and with a malicious purpose to inflict it, is of itself a wrong." Later in the opinion the court uses this language: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition or the exercise of like rights by others, it is *damnum absque injuria*, un-

less some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing, and falls within the principle of the authorities first referred to."

This case was not decided upon the ground that the plaintiffs could recover for the loss of the value of actual contracts by reason of their nonfulfillment, because, so far as the case shows, there was no breach of contract, but the gravamen of the action was, as expressed by the court, "the loss of advantages, either of property or of personal benefit, which, but for such interference, the plaintiff would have been able to attain or enjoy."

In *Chipley v. Atkinson*, 23 Fla. 206, 1 South. 934, the court decided that, although no contract existed between the master and servant, and no legal right, as between them, was violated, still the servant may maintain an action for damages against a third person who has maliciously procured his discharge. The court, in its opinion, after quoting freely from *Walker v. Cronin*, supra, and after referring to numerous other authorities, says: "From the authorities referred to in the last preceding paragraph, and upon principle, it is apparent that neither the fact that the term of service interrupted is not for a fixed period nor the fact that there is not a right of action against the person who is induced or influenced to terminate the service or to refuse to perform his agreement is of itself a bar to an action against the third person maliciously and wantonly procuring the termination of or a refusal to perform the agreement. It is the legal right of the party to such agreement to terminate it or refuse to perform it, and in doing so he violates no right of the other party to it; but, so long as the former is willing and ready to perform, it is not the legal right, but is a wrong, on the part of a third party to maliciously and wantonly procure the former to terminate or refuse to perform it."

In *Lucke v. Assembly*, 77 Md. 396, 26 Atl. 505, decided in 1893, the action was to recover damages for the wrongful and malicious interference of the defendant, by means of which the plaintiff was discharged from his employment, and thereby deprived of his means of livelihood. The defendant, a labor organization, gave notice to the plaintiff's employers that in case the plaintiff, a nonunion man, was longer retained, it would be compelled to notify all labor organizations of the city that their house was a nonunion house. The work of the plaintiff was entirely satisfactory to his employers, who intended to retain him permanently, but who, in their contract, reserved the right to discharge him at the end of any week. The court decided that the action could be maintained, and damages recovered from the defendant for maliciously and wantonly procuring his discharge. In that case the declaration alleged the procurement

of a breach of contract by the wrongful acts of the defendant. The court held that the evidence did not sustain the declaration, but allowed an amendment, saying: "If there was no agreement for any particular period of time, but the employment was one in which the agreement was that plaintiff should be given employment as long as he performed his work satisfactorily, and he has been discharged from it solely through the malicious and wrongful procurement of the defendant, and injury has resulted, he should have laid his case accordingly." We also quote from the same opinion, the following: "The appellant, by the action of the appellee, lost his place in the month of February, and, although persistently in quest of a position, he did not succeed in obtaining work until the following April, when he secured employment with a merchant tailor at five dollars less per week than he was receiving when he was discharged. It would be strange, indeed, if the law, under such a state of facts as this record exhibits, provided no remedy." In this latter case *Chipley v. Atkinson*, *supra*, is quoted, and expressly approved.

In *Raycroft v. Tayntor*, 68 Vt. 219, 35 Atl. 53, decided in 1896, it was held that one who procures the discharge of an employé, not engaged for any definite time, by threatening to terminate a contract between himself and the employer, which he had a right to terminate at any time, is not subject to an action by the employé for damages, whatever may have been his motive in procuring the discharge. But the doctrine of the latter cases cited in this opinion was expressly recognized and approved by the court in this language: "The authorities cited for the plaintiff clearly establish that if the defendant, without having any lawful right, or by an act or threat alluding to the exercise of a lawful right, had broken up the contract relation between the plaintiff and Libersont, maliciously or unlawfully, although such relation could be terminated at the pleasure of either, and damage had thereby been occasioned, the party damaged could have maintained an action against the defendant therefor."

In *Harvester Co. v. Meinhardt*, 24 Hun, 489, the court said: "A distinction has been sought to be made between the cases where there has been an unexpired time contract and cases where the services were by the day, or by the piece, but I do not think such distinction rests upon any sound reason. * * * In such case the injury to the property and business of the employer would not consist so much in breaking the contract which existed as in the loss of profits derived from the work of the laborer if he continued in the employment; and the probability or certainty of such loss would be, in each case, a question of fact."

The same principle has been applied to the procurement, by wrongful means, of the breach of contracts of sale. For instance, in the case of *Benton v. Pratt*, 2 Wend. 385, the plaintiff had made an oral contract for the sale of chattels. The contract was not enforceable, be-

cause within the statute of frauds. The defendant fraudulently represented that the plaintiff did not intend to carry out the contract, and deliver the chattels, and thereby procured a breach of the contract by the other party to it. It was said by the court: "It is not material whether the contract of the plaintiff with Seagraves & Wilson was binding on them or not. The evidence established beyond all question that they would have fulfilled it but for the false and fraudulent representations of the defendant."

And in *Rice v. Manley*, 66 N. Y. 82, one S. had contracted by parol to sell and deliver to the plaintiff a quantity of cheese, but, being made to believe, by the fraud of the defendant, that the plaintiff did not want the cheese, sold it to the defendant. The contract was not binding because within the statute of frauds, but it would have been performed by S. had it not been for the fraud of the defendant. The court held that an action was maintainable against the defendant therefor.

Our conclusion is that wherever a person, by means of fraud or intimidation, procures either the breach of a contract or the discharge of a plaintiff from an employment, which, but for such wrongful interference, would have continued, he is liable in damages for such injuries as naturally result therefrom; and that the rule is the same whether by these wrongful means a contract of employment definite as to time is broken, or an employer is induced, solely by reason of such procurement, to discharge an employé whom he would otherwise have retained.

The case of *Heywood v. Tillson*, 75 Me. 225, in no way conflicts with this result. There the court simply decided that the defendant was not liable for doing what he had a perfect and absolute right to do, even if in doing this he was actuated by a malicious motive against the plaintiff. Many cases were cited to the effect that "malicious motives make a bad act worse, but they cannot make that wrong which in its own essence is lawful."

We think that the important question in an action of this kind is as to the nature of the defendant's act, and the means adopted by him to accomplish his purpose. Merely to induce another to leave an employment, or to discharge an employé, by persuasion or argument, however whimsical, unreasonable, or absurd, is not, in and of itself, unlawful, and we do not decide that such interference may become unlawful by reason of the defendant's malicious motives, but simply that to intimidate an employer by threats, if the threats are of such a character as to produce this result, and thereby cause him to discharge an employé whom he desired to retain, and would have retained, except for such unlawful threats, is an actionable wrong. Nor do we differ from the recent decision of the Vermont court in the case above referred to, which holds that a threat to do what the defendant had a right to do would not be such a one as to make a defendant liable in an action of this kind.

It is the opinion of the court that the plaintiff's declaration fairly sets out a cause of action in accordance with these principles; that the question is one of proof, rather than of pleading; and that, if the plaintiff can prove the essential allegations contained in his declaration, he is entitled to recover.

Exceptions overruled.

(93 Me. 253)

WOLF v. RUNNELS.

(Supreme Judicial Court of Maine. April 27, 1897.)

LICENSE—ITINERANT VENDOR—ABANDONMENT OF RIGHTS.

1. An itinerant vender, who has obtained the local town license required by chapter 259, Laws 1893, as amended by chapter 97, Laws 1895, is authorized to do business in such town "so long as such licensee shall in good faith continuously keep, offer and expose for sale the same kind or line of goods specified in his application, except that such license and authority shall in any event terminate and expire on the first day of April next following the date of application."

2. But if he packs and removes his entire stock of goods from the town, and closes his store, he abandons all rights under his local license; and if later, during the same municipal year, he again desires to do business in the same town, it is necessary for him to procure a new license in the manner required by statute.

(Official.)

Agreed statement from supreme judicial court, Kennebec county.

Action by John H. Wolf against William S. B. Runnels. Submitted on agreed statement. Plaintiff nonsuited.

W. T. Haines, for plaintiff. F. A. Waldron, City Sol., and F. W. Clair, for defendant.

WISWELL, J. Chapter 259, Laws 1893, as amended by chapter 97, Laws 1895, requires of every itinerant vender, who desires to do business in this state, to first procure a state license from the secretary of state, and, when he intends to do business in any particular town in the state, he shall file his state license, and an application for a local license, with the collector of taxes for such town. The amount of the local license is a percentage upon the full value of his stock of goods equal to the tax rate of the last preceding taxation in the town, which amount is ascertained by the town assessors.

Having filed his state license, and applied for his local license, and having obtained and paid for the same, an itinerant vender is authorized to do business in such town "so long as such licensee shall in good faith continuously keep, offer and expose for sale the same kind or line of goods specified in his application, except that such license and authority shall in any event terminate and expire on the first day of April next following the date of application."

The plaintiff, an itinerant vender, who had obtained a state license, came to Waterville in the spring of 1895, after April 1st, with a stock of goods. He procured a store, obtain-

ed a local license in the manner provided by the statute, and commenced offering for sale, and selling, his goods. After about two weeks he closed his store, packed and removed from the store and from Waterville all of his goods, and remained away for a period of about two weeks, when he came back to Waterville with the same stock, except so much as he had sold while away, and with other goods of a like kind which he had added to his stock, and again commenced selling them in the same store previously occupied by him.

The municipal officers demanded, as a new license fee, a percentage upon the full value of his stock of goods equal to the last preceding tax rate. The plaintiff resisted this claim, on the ground that he had a right to continue to expose for sale, and to sell, his goods, under the local license previously obtained. But, being compelled to pay the new license fee, he did so under protest, and brings this action to recover the same of the collector of taxes, who still held the amount paid by the plaintiff at the commencement of the suit.

We think that the plaintiff's position is untenable, and that the action cannot be maintained. The local license first obtained continued in force so long as he in good faith "continuously" kept, offered, and exposed for sale the same kind or line of goods specified in his application, but not longer than the 1st day of April following. When the plaintiff closed his store, and packed and removed his entire stock of goods from the city, he abandoned all rights under his local license; and when later, during the same municipal year, he again desired to do business in the same place, it was necessary for him to again procure a new license, in the manner required by statute.

In accordance with the stipulation of the report, the entry will be:

Plaintiff nonsuited.

(90 Me. 178)

LAROCHE v. DESPEAUX.

(Supreme Judicial Court of Maine. April 9, 1897.)

EXCEPTIONS TO FINDINGS OF FACT.

1. Exceptions lie to rulings upon questions of law only, and not to findings upon questions of fact.

2. A bill of exceptions, to be available, must show clearly and distinctly that the ruling excepted to was upon a point of law, and not upon a question of fact, nor upon a question in which law and fact are so blended as to render it impossible to tell on which the adverse ruling was based.

(Official.)

Exceptions from superior court, Cumberland county.

Action by Simeon Laroche against Oren T. Despeaux. Judgment for plaintiff, and defendant excepts. Overruled.

Barrett Potter, for plaintiff. F. L. Noble and R. W. Crockett, for defendant.

WALTON, J. Exceptions lie to rulings upon questions of law only, and not to findings upon questions of fact. And a bill of exceptions, to be available, must show clearly and distinctly that the ruling excepted to was upon a point of law, and not upon a question of fact, nor upon a question in which law and fact were so blended as to render it impossible to tell on which the adverse ruling was based. And requests for rulings must be free from this ambiguity, or the withholding of them will not be error. In trials by juries these rules are generally observed; but in trials by the court without a jury they are often disregarded, and we have bills of exceptions in which there is no just or proper discrimination between questions of law and questions of fact.

In the present case we are informed by the bill of exceptions that the action is replevin for a soda fountain, and that the question submitted to the court was whether the soda fountain was covered by a mortgage given by the plaintiff to one Nelson Gagne; and the court was asked to rule as a matter of law that the mortgage covered the soda fountain. The court had already found as a matter of fact that the soda fountain, at the date of the mortgage, was the property of a third party, and was not intended to be covered by the mortgage, and declined to rule as requested, and decided the case in favor of the plaintiff. The exceptions then state that "to the foregoing rulings in matters of law" the defendant excepted.

We search this bill of exceptions in vain for "rulings in matters of law." Of course, the decision of the cause involved questions of law as well as questions of fact. Every cause does. But we look in vain for any such distinct ruling on a question of law as could furnish a basis for a valid bill of exceptions. The able and learned counsel for the defendant concede that the "pivotal point of inquiry" was the intention of the parties. But this was a question of fact, and was so regarded by the court.

"I find as a matter of fact," said the judge, "that the soda fountain in question was the property of A. D. Puffer & Sons Manufacturing Company on the 6th day of April, 1892, the date of the mortgage, and was not intended to be covered by the mortgage; and that, on the date of the writ, the soda fountain was the property of the plaintiff."

Here was no distinct ruling on a question of law; and the material facts having been found against the defendant, a refusal to rule that the mortgage did cover the soda fountain was inevitable. Practically, it was no more than a refusal to decide the case in favor of the defendant after having decided all of the material facts against him. The findings were affirmative. The refusal was negative. Both related to substantially the same proposition,

and the one was no more a ruling on a matter of law than the other. In fact, the bill of exceptions contains no distinct ruling on any question of law. In this particular it is fatally defective. It is substantially like the bill of exceptions in *Curtis v. Downes*, 56 Me. 24, which the court held to be insufficient. Exceptions overruled.

(30 Me. 180)

INHABITANTS OF DOVER v. MAINE WATER CO.

(Supreme Judicial Court of Maine. April 10, 1897.)

TAXATION — WATER COMPANIES — SITUS — ASSESSMENT — COLLECTION — DEMAND.

1. The aqueducts, pipes, and conduits of water companies are subject to municipal taxation unless the town takes water therefrom for the extinguishment of fires without charge.

2. They are real estate, and not personal property, and are liable to taxation in the town where they are laid.

3. The omission to tax the town poor farm, the hall where town meetings are held, a small parcel of land on which an engine house stands, and the land on which the county court house stands, does not vitiate and make invalid an entire assessment of taxes.

4. The municipal officers may direct in writing an action of debt to be brought for the recovery of taxes, and the defendant is liable in costs when payment of the tax has been duly demanded.

5. Held, that the demand is sufficient when made by the collector of taxes upon the company's agent or superintendent who has charge of the waterworks in the town, and the agent of the town, duly authorized to commence the action, first demanded in writing payment of the tax of the president and directors of the company.

Paris v. Water Co., 27 Atl. 143, 85 Me. 330, affirmed.

(Official.)

Report from supreme judicial court, Piscataquis county.

Action of debt by the inhabitants of Dover against the Maine Water Company to recover a tax. Submitted on report. Judgment for plaintiffs.

The defendant company owns by purchase from the Dover & Foxcroft Water Company, its predecessor in title, a plant in the villages of Dover and Foxcroft. At the time of the purchase the first-named corporation had a contract with the Dover & Foxcroft village fire corporation under which the latter paid the former for hydrant rentals \$1,500 per annum, and, in addition thereto, all taxes assessed upon the property of the water company by the towns of Dover, Foxcroft, and Sangerville. Prior to 1892 the valuation of the plant in Dover, where the reservoir is, was fixed at \$500; and the same valuation was placed in Foxcroft, where the pumping station is located. In 1892 the valuation was raised to \$10,000 in each town. When this tax was assessed, the Dover & Foxcroft Water Company objected to paying it, and after this action was brought the defendant corporation served notices upon the village fire

corporation requiring it to either pay the tax or assume the defense of the action; but the village fire corporation did neither.

The grounds of defense to the action are stated in the opinion.

H. Hudson, for plaintiff. J. B. Peaks, for defendant.

WALTON, J. This is an action against a water company to recover a town tax. Payment of the tax is resisted on several grounds.

1. Exemption. The aqueducts, pipes, and conduits of water companies are exempt from taxation when the town takes water therefrom for the extinguishment of fires without charge. Rev. St. c. 6, § 6, cl. 10. The defendants claim exemption under this provision of the statute. The claim cannot be sustained. The evidence fails to show that water is so taken by the town. The water company furnishes water to a village corporation for such a purpose, but not without charge. It is paid for all the water so furnished.

2. Illegality. It appears that the assessors omitted to tax the town poor farm, and a small parcel of land on which an engine house stands. They also omitted to tax the land on which the county court house stands, and the hall in which the town meetings are held. And the court is asked to determine if these omissions did not render the entire assessment illegal and void. We think not. If such omissions should be held to vitiate and render invalid the entire assessment, we doubt if there is one in the state that could be sustained. The consequences of such a doctrine are enough to condemn it. No case is cited in support of such a doctrine. The contrary has been held. *Williams v. School Dist. in Lunenburg*, 21 Pick. 75; *Watson v. Princeton*, 4 Metc. (Mass.) 599.

3. Nonresidence. It is claimed that the defendant corporation is not an inhabitant of the town of Dover; that its principal place of business is in Gardiner and, consequently, that its personal property is not taxable in Dover; and it is insisted that its reservoirs, pipes, and hydrants should be regarded as personal property. It is conceded that the court held otherwise in *Paris v. Water Co.*, 85 Me. 330, 27 Atl. 143. But it is claimed that that decision is of doubtful authority, and should be disregarded. It was there held that the pipes, hydrants, and conduits of a water company are, under the tax laws of this state, real estate, and taxable in the town or city where they are situated. That case was ably argued and carefully considered, and we think the question must be regarded as *res judicata*.

It is possible that some articles of personal property were included in the tax sued for; but of this there is no proof. Nothing appearing to the contrary, it is to be presumed that the assessors did not exceed their authority, and that they included no property

in their assessment except what was legally taxable.

4. Costs. It is claimed that, in any event, the plaintiffs cannot recover costs. Acts 1885, c. 350. This statute provides that the defendant shall not be liable for costs unless the tax sued for was first duly demanded. It is insisted that such a demand is not proved. We think the proof is sufficient. It appears that the collector of taxes demanded payment of the tax of the company's agent or superintendent who had charge of its works in Dover, and that the agent of the town, who was duly authorized to commence the action, first demanded payment of the tax of the president and directors of the company in writing. We think the proof sufficient to entitle the plaintiffs to costs.

The case is before the law court on report. Upon the proofs presented, it is the opinion of the court that the plaintiffs are entitled to judgment for the amount of the taxes sued for, and costs.

Judgment for plaintiffs.

(90 Me. 123)

KIMBALL v. MASONS' FRATERNAL ACC. ASS'N.

(Supreme Judicial Court of Maine. April 15, 1897.)

ACCIDENT INSURANCE—NOTICE OF INJURY—STATUTES—OPERATION AND EFFECT.

1. An accident insurance policy, dated October 11, 1892, contained a provision to the effect that written notice should be given to the defendant within 10 days of the accident and injury for which claim to indemnity is made; and that, unless such notice was received within the specified time, all claim to indemnity under the contract of insurance should be forfeited to the defendant.

Held, that the condition in the contract, at the time that it was made, was a valid one.

2. The act of the legislature approved March 17, 1893, to the effect that no such stipulation in an accident insurance policy which limits the time within which notice shall be given to a period less than 60 days (amended in 1895 to 30 days) after the accident, shall be valid, does not apply to a contract previously made. No legislative act can make invalid a provision in an existing contract otherwise valid.

3. *Held*, in this case, that the plaintiff cannot recover, he having failed to perform his condition of the contract as to notice of the injury, and there being no sufficient evidence of a waiver by the defendant of this provision.

(Official.)

Report from supreme judicial court, Somerset county.

Action by George E. Kimball against the Masons' Fraternal Accident Association. Submitted on report. Judgment for defendant.

F. W. Hovey, for plaintiff. J. W. Manson and G. H. Morse, for defendant.

WISWELL, J. The plaintiff was insured by the defendant corporation against bodily injury sustained through external, violent, and accidental means, by a written contract of insurance dated October 11, 1892.

The contract contained this provision:

"Written notice shall be given the said association at Westfield, Mass., within ten days of the date of the accident and injury for which claim to indemnity or benefit is made, with full particulars thereof, including a statement of the time, place, and cause of the accident, the nature of the injury, and the full name and address of the insured and beneficiary; and, unless such notice and statement is received as aforesaid, all claim to indemnity or benefit under this certificate shall be forfeited to the association."

On November 24, 1893, the plaintiff claims to have sustained bodily injury through accidental means so as to be entitled to the indemnity provided in the contract. The first written notice of any kind given to the association was a letter dated March 6, 1894.

The defendant, relying upon the terms of its contract, claims that the plaintiff failed to perform one of the conditions of the contract, and is not entitled to recover. We can see no answer to the defendant's position. The condition in the contract, at the time that it was made, was a valid one. "It was competent for the parties to make the agreement, and they are bound by it." *Heywood v. Accident Ass'n*, 85 Me. 289, 27 Atl. 154. The accident is alleged to have occurred upon November 24, 1893. No written notice of any kind was given until March 6, following.

The act of the legislature approved March 17, 1893, to the effect that no such stipulation in an accident insurance policy which limits the time within which notice shall be given to a period less than 60 days (amended in 1895 to 30 days) after the accident shall be valid, does not apply to a contract previously made. No legislative act can make invalid a provision in an existing contract otherwise valid.

Nor did the defendant in any way waive this provision in the contract. In his reply to the plaintiff's letter of March 6th, the defendant's secretary says, "Replying to same, beg to say that notice should have been sent to this office within ten days of the happening of accident, in accordance with the contract, in order to receive recognition by the board of directors." And in almost every subsequent communication from the secretary he calls attention to the fact that this condition had not been complied with. The whole correspondence shows that the association, instead of waiving this stipulation in the contract, intended to rely and insist upon it, and distinctly said so.

But the plaintiff testified that at the time of making this application he made this inquiry of the agent taking it: "What shall I do in the case of an accident?" and that the agent replied: "Employ your family physician, and notify the local agent, Mr. Haskell." He further testifies that he did verbally notify Mr. Haskell.

It is difficult to believe that the agent intended or that the plaintiff supposed that this reply was a part of the contract between the assured and the association, which should

have a controlling effect upon the plain provisions of the written contract subsequently made.

The plaintiff is bound by the contract. He has failed to perform one of its requirements, and according to its terms has forfeited all claim under it.

Judgment for defendant.

(90 Me. 246)

ROBINSON v. PALMER et al.

(Supreme Judicial Court of Maine. April 27, 1897.)

WILLS—CONTINGENT REMAINDERS—DESIGNATION OF BENEFICIARIES—PROPERTY UNDISPOSED OF.

1. A remainder is contingent when it is so limited as to take effect to a person not in esse, or not ascertained, or upon an event which may never happen, or may not happen until after the determination of the particular estate. It is contingent if it depends upon the happening of a contingent event, whether the estate limited as a remainder shall ever take effect at all.

2. While courts have generally adopted the rule of construction that no remainder will be construed to be contingent which may, consistently with the intention of the testator, be deemed vested, it is equally well settled that in the interpretation of wills the intention of the testator must control.

3. The will which the court is asked to construe contained this clause: "I give and bequeath to my beloved wife, Elizabeth J. Leavitt, all my estate, both real and personal, of which I may be possessed at the time of my decease, for her use and benefit during her life, and at her decease, whatever there may be left of said estate or the effect of the same, I hereby order and direct that it shall be apportioned equally among my children, to wit, Elizabeth J. Palmer, William C. Leavitt, Samuel K. Leavitt, and Caroline M. Goddard, if they shall be living, but if they or any of them shall [die] previous to the fulfillment of this or the death of my wife, Elizabeth J. Leavitt, then his or her portion or share in said estate shall descend to his or her children for their use and benefit forever."

Held, that the devise to the testator's four children after the death of a life tenant was of a contingent remainder.

4. Also, that the persons who were to take this remainder upon the termination of the life estate were not ascertained. They were the four children named, if living. Until the termination of the precedent estate by the death of the life tenant, it was impossible to tell who would take under this devise.

5. Three of the testator's children named in the clause above quoted died during the continuation of the life estate. Two of them left children, and one—Samuel K. Leavitt—left a widow, his sole legatee, but no children.

Held, that the testator created a contingency but did not provide for it. He did not dispose of one-fourth of the remainder, in the event of the death of Samuel K. without children. And that this one-fourth part of whatever of his estate was left by the life tenant at her death must be distributed as intestate estate of Thomas C. Leavitt.

6. And that, although Samuel K. took no interest under the will of his father, as an heir of his father he took one-fourth of the one-fourth of the remainder that was undisposed of, and his widow, as his sole devisee and legatee, will be entitled to his share.

(Official.)

Report from supreme judicial court, Penobscot county.

Bill in equity by Charles A. Robinson against Elizabeth J. Palmer and others for the construction of a will. Submitted on report.

D. F. Davis and O. A. Bailey, for plaintiff. F. H. Appleton, H. R. Chaplin, C. J. Hutchings, M. Laughlin, and D. E. Gould, for defendants.

WISWELL, J. By a bill in equity, submitted upon bill and answers, to which all of the persons interested are parties, the court is asked to construe the will of Thomas C. Leavitt. The clause of the will about which the doubt and controversy exists is as follows:

"Second. I give and bequeath to my beloved wife, Elizabeth J. Leavitt, all my estate, both real and personal, of which I may be possessed at the time of my decease, for her use and benefit during her life, and at her decease, whatever there may be left of said estate, or the effects of the same, I hereby order and direct that it shall be apportioned equally among my children, to wit, Elizabeth J. Palmer, William C. Leavitt, Samuel K. Leavitt, and Caroline M. Goddard, if they shall be living, but if they or any of them shall [die] previous to the fulfillment of this or the death of my wife, Elizabeth J. Leavitt, then his or her portion or share in said estate shall descend to his or her children for their use and benefit forever."

The testator died February 1, 1869, and his will was duly probated. Elizabeth J. Leavitt, the widow and life tenant, died March 27, 1895. During the continuation of the life estate three of the testator's children named in the quoted clause died. Two of them left children, and one—Samuel K. Leavitt—left a widow, his sole legatee, but no children.

The question submitted is whether the remainder after the death of the life tenant, devised to the four children, was vested or contingent. The question is not free from difficulty. It undoubtedly comes very close to the dividing line, and many authorities may be and are cited upon each side of the contention; but we are inclined to the opinion that, in accordance with the rule which has been laid down by the authorities in this state, the devise must be construed to be a contingent, rather than a vested, remainder. For while it is true that courts have very generally adopted the rule of construction that no remainder will be construed to be contingent which may, consistently with the intention of the testator, be deemed vested, it is equally well settled that in the interpretation of wills the intention of the testator must control.

A remainder is contingent when it is so limited as to take effect to a person not in esse, or not ascertained, or upon an event which may never happen or may not happen until after the determination of the particular estate. It is contingent if it depends upon the happening of a contingent event whether the

estate limited as a remainder shall ever take effect at all. *Woodman v. Woodman*, 89 Me. 128, 35 Atl. 1037.

The persons who were to take this remainder upon the termination of the life estate were not ascertained. They were the four children named, if living. Until the termination of the precedent estate by the death of the life tenant, it was impossible to tell who would take under this devise. The estate was so limited that its vesting depended upon a contingency. The testator used language commonly employed for the purpose of expressing an intention that the vesting of the remainder was to depend upon the contingency.

It is true that when it is doubtful whether the words of contingency applied to the gift itself or to the time of enjoyment they will be construed as applying to the latter. But we think that no such doubt exists as to this will. The phraseology of the will, "and at her decease whatever there may be left of said estate," shows that the apportionment therein provided for was to take place at the death of the life tenant among the children then living and the issue of deceased children. Although the word "then," referring to the time of the death of the life tenant, and to which word considerable weight has been given in many of the decided cases, was not used, the whole language is certainly equivalent thereto.

The case is almost identical with that of *Hunt v. Hall*, 37 Me. 363. In that case the language of the devise was: "After the decease of my dear wife, my will is that my executor hereafter named cause an equal division to be made among all my children and the heirs of such as may then be deceased." This was held to create a contingent remainder, because the persons who were to take were not those living at the death of the testator, but such of the children as should be living, and the heirs of deceased children, at the time of the termination of the precedent estate; and that until that time there was a contingency and uncertainty as to the persons who would take the estate. The reasons are equally applicable to the case under consideration. The persons who were to take were left uncertain. They might be or they might not be in existence during the continuation of the life estate; and, so far as this uncertainty is concerned, the word "heirs" in the case of *Hunt v. Hall* is identical in meaning with the word "children" in this case. This case has been frequently cited and affirmed in later opinions of the court.

In *Leighton v. Leighton*, 58 Me. 53, where a different conclusion was reached, the court, in referring to *Hunt v. Hall*, supra, and to *Olney v. Hull*, 21 Pick. 311, said: "In both these cases the remainder was limited to dubious and uncertain persons, and was held to be contingent. Not so in the case at bar."

In *Read v. Fogg*, 60 Me. 479, where a conveyance was to a daughter "for her use and

benefit during her lifetime, and after her decease to her legal heirs," the remainder was held to be contingent, because those who would take the remainder were the heirs of the life tenant at her decease, and they might be different individuals at different periods of time during the continuance of the life estate. The cases of *Hunt v. Hall* and *Read v. Fogg* are cited with approval in *Spear v. Fogg*, 87 Me. 132, 32 Atl. 791.

There are cases of high authority which hold that an estate limited upon a contingency, to which the effect of a condition subsequent is given, vests at once, subject to be divested upon the happening of the contingency. Thus in *Blanchard v. Blanchard*, 1 Allen, 223, where a testator devised to his wife all the income of his real and personal property during her natural life, and to five of his children all the property that might be left at the death of his wife, to be divided equally among them, and in a subsequent clause provided that, if any of the five children died before his wife, then the property should be divided equally between the survivors, the court held that the remainder was vested, laying stress upon the fact that there were no words of contingency, such as, "if they shall be living at her death," or "to such of them as shall be living," the usual language used for the purpose of showing that a contingency was intended. The court held that this could be regarded as a devise in fee to the five children, subject to be divested upon a condition subsequent.

Generally, in the cases where this doctrine has been upheld, it will be noticed that the condition is added as a separate clause after words which have already given a vested interest. In *Ducker v. Burnham*, 146 Ill. 9, 34 N. E. 558, it is said: "Whether the condition is really precedent or subsequent will depend upon whether it is incorporated into the gift to, or description of, the remainder-man, or is added as a separate clause afterwards, which words have already given a vested interest."

In *Blanchard v. Blanchard*, supra, the gift and the description of the remainder-men were sufficient to make the remainder vested, and the condition was added in a separate clause after the words which had already given a vested interest.

And so, also, in *Lenz v. Prescott*, 144 Mass. 505, 11 N. E. 923, the devise was unqualified. The condition was not incorporated into the gift, or the description of the remainder-men, but was added in a later clause.

And this is also true in *McArthur v. Scott*, 113 U. S. 340, 5 Sup. Ct. 652. The language of the testator in this case was: "It is my further will and direction that after the decease of all of my children now living, and when and as soon as the youngest or last grandchild in the next preceding clause but one of this will designated and described shall arrive at the age of twenty-one years, all my lands" in question "shall be inherited and equally divided between my grandchildren

per capita, the lawful issue of my said sons and daughters." And later, in the same paragraph, it is provided, "But it is to be understood to be my will and direction that if any grandchild aforesaid shall have died before said final division is made, leaving a child or children lawfully begotten, such child or children shall take and receive per stirpes (to be equally divided between them) the share of my said estate, both real and personal, which the parent of such deceased child or children would have been entitled to have and receive if living at the time of such final distribution." It is said in the opinion of the court: "This gift is not to such grandchildren only as shall be living at the expiration of the particular estate, but it is to my 'grandchildren per capita, the lawful issue of my said sons and daughters,'—words of description appropriate to designate all such grandchildren. * * *

The remainder, being vested according to the legal meaning of the words of gift, is not to be held contingent by virtue of subsequent provisions of the will, unless those provisions necessarily require it. The subsequent provisions of this will had other objects."

In *Moore v. Lyons*, 25 Wend. 119,—a case frequently cited, and relied upon by counsel in this case in support of the contention that the remainder was vested,—the court held that a devise to one for life, and from and after his death to three others, or to the survivors or survivor of them, gave a vested interest to the remainder-men at the time of the testator's death, construing the words of survivorship to refer to the death of the testator, and not to the death of the tenant for life.

But this case must be distinguished from these last referred to. Here the condition is a part of the description of the remainder-men; and the very phrases, the absence of which are commented upon in *Blanchard v. Blanchard*, supra, were used in the will under consideration. Nor, as we have seen, can the words of contingency in this will be construed as referring to the time of the death of the testator. This, being a contingent remainder, did not vest in Samuel K. Leavitt, and he, having died before the termination of the life estate, took no interest, under the will, which he could devise.

The testator created a contingency, but did not provide for it. He did not dispose of one-fourth of the remainder, in the event of the death of Samuel K. without children. This one-fourth part, then, of whatever of his estate was left by his widow, the life tenant, at her death, must be distributed as intestate estate of Thomas O. Leavitt. *Spear v. Fogg*, supra.

But, although Samuel K. took no interest under the will of his father, as an heir of his father he took one-fourth of the one-fourth of the remainder that was undisposed of; and his widow, as his sole devisee and legatee, will be entitled to his share.

The bill alleges that certain property and

property rights were left by the said Elizabeth J. Leavitt, standing in her own name, without any qualification or designation as to the nature of her holdings, or the source from which the same was derived. The complainant alleges upon information and belief that the property left as aforesaid was the estate of Thomas C. Leavitt, or the proceeds thereof held by Elizabeth J. Leavitt as life tenant. And the complainant, who is administrator of the estates both of Elizabeth J. and Thomas C. Leavitt, asks the court whether the property shall be administered and distributed as intestate property of Elizabeth J. Leavitt, or under the will of Thomas C. Leavitt.

Although these allegations are admitted in the answers, upon information and belief, we do not think that they are sufficiently definite for the court to authoritatively determine this question. It may be sufficient, however, to say, if the property mentioned in the bill was the estate of Thomas C., or the proceeds thereof, and held by Elizabeth J., as life-tenant, that it must be administered and distributed as the property and estate of Thomas C. Leavitt, three-fourths in accordance with the will, and one-fourth as intestate property.

Decree accordingly.

(90 Me. 186)

EKSTROM v. HALL et al.

(Supreme Judicial Court of Maine. April 15, 1897.)

MORTGAGE—FIXTURES—TROVER—DAMAGES.

1. Fixtures actually or constructively annexed to the realty after the execution of a mortgage of the real estate become a part of the mortgage security, and, while the mortgage is in force, cannot be removed or otherwise disposed of by the mortgagor, or by one claiming under him, without the consent of the mortgagee.

2. A mortgagor of real estate in possession cannot, without consent of the mortgagee, give a third party authority to erect buildings on the mortgaged property, so that such third party can hold the buildings against the mortgagee or his assignee.

3. In an action of trover the question is not who has the better title as between the plaintiff and defendant. It is incumbent upon the plaintiff to prove property in the articles sued for. This is because the measure of damages in an action of trover is the value of the article at the time of the conversion, and also because the recovery of a judgment and its satisfaction transfer the title to the defendant.

4. When, by reason of erroneous instructions, made for the purpose of giving progress to the case, the plaintiff recovers a verdict covering several items which he is not entitled to, but the amounts are made certain in special findings by the jury, exceptions will be overruled, if the plaintiff will remit the aggregate of such amounts. (Official.)

Exceptions from supreme judicial court, Hancock county.

Trover by Katie A. Ekstrom against the Standard Granite Company, Cyrus J. Hall, and others. Verdict for \$607.65. Included in the verdict, according to the jurors' answers to special questions framed by the

presiding justice, were the following items: "Carr boarding house," valued at \$300; "small house on quarry," valued at \$50; "house on land of Mrs. O'Dell," valued at \$102.

The plaintiff claimed title to these three houses as her personal property, and that they had been converted by defendants to their own use. Defendants claimed that the houses were real estate (that is, the "Carr boarding house" and "small house on quarry"), and that title to these two houses was in defendant the Standard Granite Company, by virtue of a deed of the land upon which they stood, from one Carr, and an assignment and foreclosure of a mortgage upon the same land, which mortgage had also been given by Carr.

These two houses were built upon the land by the plaintiff with Carr's consent, after the mortgage by Carr to Newman, and with the understanding, between the plaintiff and Carr, that they were to be and remain the property of the plaintiff. Defendants except. Overruled on conditions.

H. E. Hamlin, for plaintiff. A. W. King and O. F. Fellows, for defendants.

WISWELL, J. The plaintiff sued for the conversion of, among other things, "one house known as the Carr boarding house," and "one small house on the quarry." The plaintiff claimed and introduced evidence tending to show that these houses were built by her upon the land of one Carr, with the permission of the landowner, and under an arrangement with him that the houses were to be hers.

But the land upon which these houses were built was subject to a mortgage to one Newman, of whom Carr had bought, given upon the same day as the conveyance to Carr. Newman commenced a foreclosure of the mortgage, and, before the time of redemption had expired, assigned it to the defendants Hall, Warren, and Mixer, who subsequently conveyed the same property to the defendant corporation, the Standard Granite Company. The defendants were in possession of the real estate under a deed from Carr, and under the assignment of the mortgage from Newman.

The houses were both built after the execution of the mortgage to Newman, and while it was held by him. There was no evidence introduced in the case of any agreement, arrangement, or understanding of any kind between the plaintiff and the mortgagee in regard to the building of these houses, nor was it claimed by the plaintiff that there was any such arrangement.

Counsel for defendants requested this instruction: "That these defendants are not liable in this action for the buildings described in the writ as the Carr boarding house, nor for the little house described in the writ as on the Carr quarry, because the title to

those houses is in the defendants, by virtue of the mortgage from Carr to Newman, given before the buildings were built; there being no evidence in this case that those buildings were built upon the land covered by the mortgage by the consent of the mortgagee."

The presiding justice refused to give this instruction, but, in order to give progress to the case, instructed the jury as follows: "It is enough if Mr. Carr, who was the mortgagor and in possession, agreed to it, the building having been put on after the mortgage. * * * Therefore, I wish you to understand distinctly that I rule that Mrs. Ekstrom is not bound to show that the mortgagee consented to this arrangement. It is enough for her to show that Mr. Carr, the mortgagor in possession, did consent to it, if he did."

The effect of this instruction was that a mortgagor in possession can give a third party authority to erect buildings on the mortgaged property, without the consent of the mortgagee, so that such third party can hold the buildings against the mortgagee or his assignee. This is not the law.

Fixtures actually or constructively annexed to the realty after the execution of a mortgage of the real estate become a part of the mortgage security, and, while the mortgage is in force, cannot be removed or otherwise disposed of by the mortgagor, or by one claiming under him, without the consent of the mortgagee. *Wight v. Gray*, 73 Me. 297. The precise question here involved was decided in the case cited. In that case the building in controversy was erected upon mortgaged premises, by the husband of the mortgagor, with her consent, but without the consent of the mortgagee. The court held that, as to the mortgagee, the building was a part of the realty.

In *Meagher v. Hayes*, 152 Mass. 228, 25 N. E. 106, it was decided that a building put upon mortgaged land by the consent of the mortgagor, but without the consent of the mortgagee, was clearly, as to the mortgagee, a part of the realty. Numerous other cases to the same effect might be cited.

In such cases the question must be determined by the rule which prevails between mortgagor and mortgagee, and not by that which prevails between landlord and tenant. *Wight v. Gray*, *supra*.

It is contended by the counsel for the plaintiff that the rule does not apply to the present case, because of the temporary character of the buildings, and the manner in which they were annexed to the soil. Of this the case discloses nothing, but it was the evident intention of the court, in giving these explicit instructions, to reserve the precise question which we have discussed, as to whether buildings erected by third persons upon mortgaged premises, with the consent of the mortgagor, but without the consent of the mortgagee, remain the personal

property of the builder, without regard to the character of the buildings or the manner in which they are annexed to the soil.

Another of the articles sued for in the plaintiff's writ was a house described as "one house on land of Mrs. O'Dell." The land on which this house was built was owned by one Mrs. O'Dell. The plaintiff claimed that she bought the house of two men who were living in it. There was no evidence introduced that it was built on this land by the permission or with the consent of the landowner. The defendants did not claim this house as belonging to any real estate of theirs. Counsel for defendants requested these instructions: "That the plaintiff cannot recover in this action for the house described in the writ as on the O'Dell land, because said house is real estate; that, if the O'Dell house was built without the consent of the owner of the land, it became real estate."

The presiding justice declined to give these instructions, but did instruct the jury as follows: "Therefore I rule that it does not matter to them [the defendants] whether or not Mrs. Ekstrom had any agreement with Mrs. O'Dell or not, inasmuch as they [the defendants] claim it as personal property, and do not own the land on which it stands, and do not claim that they do. It is not for them to ask Mrs. Ekstrom to show the separation of the house from the land, because they themselves have taken it as personal property. Therefore the simple question for you is, as between these parties, which owns the house on the O'Dell land? Is Mrs. Ekstrom's title to the house on the O'Dell land better than the title of these defendants? Did she acquire a title first? If she got the title first, and has not parted with it, of course it is a better title than theirs."

We think that this instruction was also erroneous. In an action of trover the question is not who has the better title as between the plaintiff and defendant. It is incumbent upon the plaintiff to prove property in the articles sued for. This is because the measure of damages in an action of trover is the value of the article at the time of the conversion, and also because the recovery of a judgment and its satisfaction transfer the title to the defendant. If this were not so, the unjust and inequitable result would follow that a defendant, after he had satisfied a judgment for the full value of personal property converted by him, in favor of a plaintiff who merely had a better right to the property than the defendant had, would still be liable to the actual owner for the same conversion, and according to the same measure of damages.

To maintain the action of trover, it is necessary that the plaintiff should appear to be the legal owner of the goods, and entitled to the possession of them. *Haskell v. Jones*, 24 Me. 222.

"The cases cited in argument for the de-

defendants establish the position that the defendant in an action of trover may prove that the title to the property claimed was, when the suit was commenced, in a third person, and thus defeat the action. If he could not, he might subsequently be compelled to pay for the same property again to such third person, he being a stranger to the first suit." *Clapp v. Glidden*, 39 Me. 448.

This house was on the land of another. Unless it was built with the landowner's permission, it was a part of the realty, and the property of the owner of the land. The plaintiff failed to show such permission, or that the house was built under any circumstances which would make it a personal chattel. The plaintiff therefore cannot recover for its conversion for two reasons: She was not the owner of it; trover only lies for the conversion of chattels.

The amounts allowed by the jury for these three buildings, and included in their general verdict, are made certain by the jury's answers to special questions submitted by the court. These amounts aggregate \$452. If the plaintiff will remit this sum, the exceptions will be overruled; otherwise, they will be sustained. The entry will be:

Exceptions overruled if the plaintiff, within 30 days after the receipt of the rescript by the clerk, will remit the sum of \$452, as of the date of the verdict; otherwise, exceptions sustained.

(90 Me. 193)

PALMER v. PENOBSCOT LUMBERING ASS'N.

(Supreme Judicial Court of Maine. April 15, 1897.)

NEGLECT—RAFTING LOGS—DAMAGES—EVIDENCE.

1. A jury found that the plaintiff sustained damages in the sum of \$2,899.02 by reason of the defendant's failure to exercise reasonable diligence in rafting and delivering his logs in the spring and summer of 1893. *Held*, that it was the duty of the defendant corporation to exercise that care, diligence, and foresight which persons of reasonable and ordinary prudence, capacity, and discretion usually exercise under like circumstances, having due regard to the rights and interests of all persons likely to be affected by their acts.

2. Actual notice of the existing conditions, given by the letter of a director to the president of the company, is obviously a relevant fact, and one of the tests of diligence, and therefore admissible in evidence.

3. The difference between the "real market prices" at the time the plaintiff actually received his logs and the time when he should have received them is the measure of damages which the plaintiff is entitled to recover. The rule is based on the principle of just compensation, and is designed to give the aggrieved party an exact equivalent for the damages sustained. *Held*, in this case, that the rights of the defendant were carefully guarded by adequate instructions respecting any temporary or special prices which might be occasioned by the sale of small lots or other peculiar circumstances.

4. Where there is no indication of prejudice or misapprehension on the part of the jury, and no

valid reason is apparent for disturbing the verdict, it will not be set aside.

(Official.)

Exceptions from supreme judicial court, Penobscot county.

Action by Charles F. Palmer against the Penobscot Lumbering Association to recover damages for negligence in the management of the plaintiff's logs which came into the Penobscot boom in the spring of 1893. Verdict for plaintiff. Defendant excepts, and moves for new trial. Overruled.

The plaintiff, in his writ, set out four separate claims, in substance as follows:

First. That the defendant company neglected to have its booms in proper condition, and neglected to care for his logs, so that the logs escaped, went down the river, and were lost. He claims the loss of about 460,000 feet of logs, of value of about \$4,000.

Second. That by reason of such negligence about 72,000 feet escaped, and he was put to the expense of \$400 in picking them up and securing them.

Third. That the defendant wrongfully rafted the plaintiff's logs with logs of other persons, and plaintiff was put to the expense of \$284 in separating his logs from logs of other persons.

Fourth. That the defendant did not seasonably raft the plaintiff's logs out of the booms, especially those which came into the booms in the early part of the season, and he suffered great loss, to wit, \$10,000, there having being a falling off in the price of logs from the early season's price to the prices of the later part of the season and the next year.

The presiding judge instructed the jury to render special findings on each of these claims, and they returned a verdict of \$2,899.02 as the damages from defendant's negligence in the rafting of logs as set out in the last claim of plaintiff's writ.

Upon the question of damages the presiding justice instructed the jury as follows: "It is claimed on the part of the plaintiff that there has been evidence sufficient to satisfy you that up to July 6th a fair market price for logs of that character was \$11.50 to \$11.75, varying a little. But the defense says that this was a special price by reason of special and peculiar circumstances; that it was because of the fact that only a few logs were coming, and many logs were wanted, but that, if the great mass of the logs had been turned out suddenly, or with great rapidity, at that time, the price would have dropped; that it was a temporary price, affected by peculiar and temporary reasons, and was not the market price on which you should base your computations. If it is true, gentlemen, that that was only a special price by reason of the peculiar situation at that particular time, although the plaintiff might have sold a large quantity of his logs if he could have had them all at that time, still he was not entitled to his logs any faster than anybody else was entitled to their logs, without partiality, taking them as they came, driv-

ing them to the gap, through the gap, and rafting them. So, then, if you come to this question of damages, it is for you to say how much was this special price of \$11.50 to \$11.75 prior to July 6th affected, because, so far as it was affected, you should consider it in your computations.

"Now, next, did the market drop then, and, if so, how much? You see it is a matter requiring the carefulest consideration and computation to get an accurate result. How much did the market drop? How long was this plaintiff delayed longer than he should have been? You appreciate, of course, that if there had been but one mark of logs on the river, and this, of course, had been Mr. Palmer's, or anybody's else, that person could have gotten them there so fast as the river would have brought them, and there would have been no conflict between him and anybody else; but, inasmuch as numerous others had numerous marks of logs in the river, they were all entitled to equal and concurrent rights, and each must give way to the other so that they could all exercise them to the extent possible under the circumstances.

"[Well, gentlemen, I give you this general rule: that if, by reason of the neglect of this corporation to exercise reasonable diligence, in view of the whole situation, in obtaining, rafting, and delivering logs, this plaintiff's logs were unreasonably delayed, and that during the period of that unreasonable delay there was a drop in the real market price so that between the time when Mr. Palmer ought to have had his logs and the time when he did have them there was a drop of one cent, or one dollar, or two dollars a thousand, in the difference between the real market price at the time when he should have had them and when he did have them, that difference would be the measure of damages that he would be entitled to in that respect, upon such logs as he should have had but did not have. That is all there is to it.]"

To so much of the foregoing charge as is embraced in brackets the defendant took exceptions.

The defendant also took exceptions to the admission of the following letter, written by one of the directors of the defendant company to its president:

"Bangor, Me., May 25, 1893.

"John Cassidy, Esq. Dear Sir:

"I am continually being importuned by different interests, log owners as well as manufacturers. It seems to be the universal opinion that the logs were never rafted so slowly at the boom before, and that the only way out of it is to hoist Nebraska, advertise for men, and get men there. I tell them, as you do, that it would be of no use, that the class of men who do that kind of work are satisfied with their wages, and that a proffered advance would bring out no more than the present scale of prices; but am told that this may all be true, but that an advance has brought an influx of laborers far in excess of the de-

mand, and men had to be sent away who applied for work at this advance.

"At the same time this is a serious matter, Mr. Cassidy, for the interests on the river, the way the rafting is being conducted, and I herewith, Mr. President, hand in my resignation as director, as I am tired and sick of being talked to by so many people.

"Yours, very truly, F. W. Ayer."

P. H. Gillin and C. J. Hutchings, for plaintiff. C. P. Stetson, for defendant.

WHITEHOUSE, J. In this case the jury returned special findings that the defendant corporation failed to exercise reasonable diligence in rafting and delivering the plaintiff's logs in the spring and summer of 1893, and that by reason of the defendant's negligence in that respect the plaintiff sustained damages in the sum of \$2,899.02. The case comes to this court on exceptions and a motion to set aside the verdict as against evidence.

In the first place, the defendant excepts to the ruling of the presiding justice admitting in evidence the letter of F. W. Ayer, one of the directors of the defendant corporation, to John Cassidy, its president, dated May 25, 1893, in which it was declared "to be the universal opinion that the logs were never rafted so slowly at the boom before, and that the only way out of it is to hoist Nebraska, advertise for men, and get men there." The case shows that the letter was admitted "for the purpose of showing notice to the president of the corporation, and so stated at the time."

The ruling was undoubtedly correct. The letter was clearly admissible for the purpose stated. It was incumbent on the plaintiff to prove that under the circumstances and conditions existing during the period in question the defendant corporation did not exercise that care, diligence, and foresight which persons of reasonable and ordinary prudence, capacity, and discretion usually exercise under like circumstances, having due regard to the rights and interests of all persons likely to be affected by their acts; to show that the defendant either performed some act which ordinarily careful and prudent persons in the same relation would not have done, or omitted some duty which ordinarily prudent and careful persons would have performed under the same circumstances and conditions. The care and diligence must vary according to the exigencies which require vigilance and attention, and conform in amount and degree to the particular circumstances under which they are to be exerted. *Topsham v. Lisbon*, 65 Me. 455. "Ordinary care or due diligence" is a relative term, and the question must be determined with reference to the peculiar conditions existing in each case, and the degree of knowledge which the defendant has of these conditions. Actual notice from one of the directors of the corporation was obviously a relevant fact, and one of the tests of diligence in the case at bar.

Exceptions were also taken to the following instruction to the jury upon the question of damages: "If by reason of neglect of this corporation to exercise reasonable diligence, in view of the whole situation, in obtaining, rafting, and delivering logs, this plaintiff's logs were unreasonably delayed, and that during that period of unreasonable delay there was a drop in the real market price, so that between the time when Mr. Palmer ought to have had his logs and the time when he did have them there was a drop of one cent, or one dollar, or two dollars in the difference between the real market prices at the time when he should have had them, that difference would be the measure of damages that he would be entitled to in that respect upon such logs as he should have had, but did not have. That is all there is to it." And such is the opinion of the court. The rule is based on the principle of just compensation. It is designed and adapted to give the aggrieved party an exact equivalent for the damages sustained. It is the rule established by the previous decisions of this court in similar cases. *Weston v. Railway Co.*, 54 Me. 376; *Grindle v. Express Co.*, 67 Me. 322. See, also, *Cutting v. Railway Co.*, 13 Allen, 386; *Ingle-dew v. Railroad Co.*, 7 Gray, 88; *Smith v. Railroad Co.*, 12 Allen, 531.

The term "market value" or "market price" is not limited to the price which an article might realize at a forced sale. It means the fair value of the property as between one who desires to purchase and one who desires to sell. It is not what could be obtained for it under peculiar circumstances, when, by reason of the necessities of another, more than a fair price could be realized. *Chase v. City of Portland*, 86 Me. 367, 29 Atl. 1104, and cases cited. As stated in the rule given, it is the "real market price," and not the speculative value. The objection made by the learned counsel for the defendant, that the rule in question is "too broad," because in the spring of 1893 the high price paid was only for small lots of logs purchased for a temporary supply, does not affect the soundness of the rule to which the exceptions were taken; and it appears from another part of the charge of the presiding justice that the rights of the defendant were carefully guarded by adequate instructions respecting any "special or temporary price which might be occasioned by such special and peculiar circumstances" as those suggested by the counsel for the defendant. The amount of the verdict sufficiently indicates that the jury were not misled by the subsequent statement of the general rule.

After a careful scrutiny of the evidence reported bearing upon the question of the defendant's liability, it is the opinion of the court that the motion to set aside the verdict as against evidence must also be overruled. The issue of fact involved in this special finding was not intricate, or difficult to be understood. A plain business proposition was pre-

sented to the jury in a charge that was full, clear, and discriminating, and they could hardly fail to apprehend the true relation of the facts to the issue. There is no indication of prejudice, misapprehension, or mistake on their part, and no valid reason is apparent for disturbing the verdict.

Exceptions and motion overruled.

(90 Me. 129)

CONWAY v. LEWISTON & A. HORSE R. CO.

(Supreme Judicial Court of Maine. April 15, 1897.)

NEGLIGENCE—PROXIMATE CAUSE—STREET RAILROADS—DISCHARGING PASSENGERS.

1. No action for negligence will lie when the defendant's negligence has no causal connection with the plaintiff's injury.

2. When the defendant's act or omission is not the real or proximate cause of the injury, but only affords the occasion for a purely accidental occurrence, causing damage without legal fault on the part of any one, no action can be maintained.

3. The plaintiff, in alighting from one of the defendant's open cars of a horse street-railway, accidentally stepped on a rolling stone lying in the street between the car and the sidewalk, and received an injury to her ankle.

Held that, in determining the question of the defendant's negligence, it is proper to consider that the company could not select the places in the streets where its track should be laid or its cars run. It could not construct nor control any places at which passengers were to stop on or off its cars. It had to locate its track and run its cars where the public authority directed. It had to leave the center, sides, and surface of the streets to the same authority. Passengers entering or leaving the cars had to use the streets in the condition in which they were left by the authority in control of them. Such passengers were not in the care of the company till they got on the car. They were no longer in its care when they stepped off the car. And in this case the defendant's cars were drawn by horses, and operated without regular stations or established places for passengers to get on and off the cars.

4. In alighting from one of the defendant's cars in the evening, a short distance from a street crossing, the plaintiff stepped on a rolling stone lying in the street between the car and the sidewalk, and sustained a fracture of the ankle. She recovered a verdict of \$1,183.33, for negligence imputed to the defendant company by reason of the failure of the conductor to stop the car at the crossing, and his invitation and proffered assistance for her to alight at a point described as a ditch and a dangerous and unsuitable place.

Held, that the evidence wholly fails to establish any liability on the part of the defendant company. Under the existing circumstances and conditions, the failure of the conductor to stop the car precisely at the crossing cannot be deemed legally culpable; nor was the place of alighting so difficult and unsuitable as to render it actionable negligence to permit a vigorous young woman to step down from the side board of the car, either with or without assistance.

5. Also, it was undoubtedly the duty of the conductor to exercise all reasonable care, diligence, and prudence to ascertain the conditions existing at all points where the car was required to stop, and otherwise to promote the convenience and guard the safety of passengers at all times when entering or leaving the car; but he had no reason to apprehend danger at the point where the plaintiff alighted, and had no information to give her which she did not already possess.

See Conway v. Railroad Co., 32 Atl. 901, 87 Me. 283.

(Official.)

Action by Lottie Conway against the Lewiston & Auburn Horse-Railroad Company. There was a verdict for plaintiff, and defendant moves for a new trial. Sustained.

A. R. Savage and H. W. Oakes, for plaintiff. Wallace H. White, Seth M. Carter, and W. F. Estey, for defendant.

WHITEHOUSE, J. On the evening of August 21, 1892, the plaintiff was a passenger on one of the defendant's open cars, going up College street, in Lewiston; and, in alighting from the car near the corner of College and Skinner streets, she accidentally stepped on a rolling stone lying in the street between the car and the sidewalk, and received a sprain or fracture of the ankle.

At the former trial of this case the jury returned a verdict for the plaintiff for \$347.17. At that time the precise nature and extent of the injury, or the question of complete and permanent recovery, had not been determined. But at the second trial Dr. Garcelon, one of the attending surgeons, testified as follows in relation to the recovery: "I think it is as perfect as anything could possibly be. The limb speaks for itself. The appearance of the limb is very normal. There is no deformity." Yet the jury at this trial rendered a verdict for \$1,183.33; and, in presenting the motion for a new trial, the counsel for the defendant calls attention to this fact as an indication of the probable influence of sympathy, or of bias and prejudice, in the deliberations of the jury respecting the question of liability, as well as the amount of damages.

The plaintiff claims that when the car reached the corner of Vale street, a point quite distant from Skinner street, she asked the conductor to stop for her to get off at the corner of College and Skinner streets; that she made no further request, and gave no signal to the conductor as the car approached her destination; that the conductor did not heed her request to stop the car at the corner, but went beyond the crossing; and that she was aware of the fact that the car was "round the corner," or "beyond the crossing," before it stopped. Her manner of alighting is thus described in her testimony: "When the car stopped, the conductor stood by the side of the seat where I was sitting, and I got up to get out of the car, and he took hold of my hand to help me; and, as I got out, I stepped on a rock, on which I suppose my ankle turned and broke."

It is charged in the plaintiff's writ that the failure of the conductor to stop the car for the plaintiff to get off at the crossing, and his invitation and proffered assistance for her to alight a short distance therefrom, at a point on Skinner street, described as a ditch and a dangerous and unsuitable place, constituted actionable negligence on the part of the defendant company.

It will be observed, however, that, in her account of the accident above quoted, the plaintiff makes no reference to the existence of a ditch at the point where she stepped from the car, and no complaint of an unexpectedly long or difficult step from the car to the ground; but, in another part of her testimony, she compared it in length to the step from the floor of the court room to the platform on which she stood when testifying. It appears, also, that, in describing the accident to the surgeon, she stated, in substance, that in going from the car to the sidewalk, after she alighted, she stepped on a stone, and turned her ankle; and, again, that she "got out from the car, and stepped on a rock, and turned her ankle." It is true that, in answer to further and specific inquiries, she testifies that she stepped into the ditch, but there is no claim or suggestion in her testimony that the length of the step from the car to the ground was the cause of the accident.

It also appears from her testimony that the car had only passed beyond the crossing or "over the corner" about the "length of the judge's desk," before it stopped.

It is provided by the city ordinance in force at that time that, when a car is required to be stopped at the intersection of two streets, it shall be "stopped so as to leave the rear platform slightly over the further crossing." The plaintiff was sitting at the end of one of the transverse seats, "about the middle" of the open car, and would be expected to alight, as she did, from the side of the car at the point opposite her seat. Thus, if the car had been stopped immediately after the rear platform had passed the crossing, she would not have alighted precisely on the crossing, but probably 15 feet beyond it, and 7 or 8 feet beyond the point where the ditch commenced. Indeed, it is not insisted in argument that the mere failure to stop the car so that the passenger could alight on the crossing was improper. Nor is it claimed that the existence of a small rolling stone by the side of the track would necessarily render the street at that point a dangerous place to alight. It is still contended, however, that the point in question was not a suitable place for the plaintiff to alight in the evening; that the conductor selected it as the place for her to get off; and that the defendant company should be held liable for the act of the conductor in thus inviting and assisting the plaintiff into danger.

But aside from the omission of the plaintiff, in her account of the accident, to ascribe her injury to the depth of the ditch, as noted above, it appears from the testimony of the civil engineer that the easterly rail of the track was $7\frac{1}{2}$ feet from the center of the ditch; that the ground sloped gradually from the rail to the bottom of the ditch; and that at no point was the ditch more than a foot in depth. It is not claimed that there was any dangerous excavation or any special depression at the particular point where the

plaintiff stepped from the running board of the car to the ground. It was a well-wrought street, with a smooth surface, and a regular slope from the rail to the sidewalk.

In determining the question of the defendant's negligence, it is proper to consider that the company "could not select the places in the street where its track should be laid or its cars run. It could not construct nor control any places at which passengers were to step on or off its cars. It had to locate its track, and run its cars, where the public authority directed. It had to leave the center, sides, and surface of the streets to the same authority. Passengers entering or leaving the cars had to use the streets in the condition they were left by the authority in control of them. Such passengers were not in the care of the company till they got on the car. They were no longer in its care when they stepped off the car." *Conway v. Railroad Co.*, 87 Me. 283, 32 Atl. 901. It should also be remembered that the defendant's cars were drawn by horses, and operated without regular stations or established places for passengers to get on or off the cars. They were not run from station to station only, but, upon signal or request, stopped as near the point desired as practicable either to take on or to discharge passengers. It was undoubtedly the duty of the conductor to exercise all reasonable care, diligence, and prudence to ascertain the conditions existing at all points where the car was required to stop, and otherwise to promote the convenience and guard the safety of passengers at all times when entering or leaving the car. But in this case the conductor had no special information to give the plaintiff in relation to the condition of Skinner street which she did not already possess. He denies that she informed him at Vale street that she wished to get off at the corner of Skinner street, and states that the only signal she gave to stop the car was given just as the car was rounding the curve at Skinner street, and that the car was thereupon stopped as soon as it reasonably could be. He also testifies that she promptly stepped off the car into the street without any suggestion or assistance from him, and that she did not fall to the ground, as she stated, but walked to the sidewalk, and he had no knowledge that she met with an accident until a day or two afterwards. Daniel McIntire, a passenger on the car at the same time, and a disinterested witness, fully corroborates the conductor's testimony that the plaintiff gave a signal to stop at the corner of Skinner street; that she stepped off the car without assistance from the conductor, and started to walk off towards the rear of the car; and that he did not see her fall.

But, assuming the plaintiff's description of the accident to be correct, it is the opinion of the court that the evidence wholly fails to establish any liability on the part of the defendant. As already seen, the failure of the conductor to stop the car precisely at the

crossing cannot be deemed legally culpable; nor was the place of alighting so difficult and unsuitable as to render it actionable negligence for the conductor to permit a vigorous young woman to step down from the car either with or without his assistance.

But, even if any act or omission of the conductor respecting the place or manner of alighting could be deemed culpable negligence, the defendant is not chargeable with it in this action, for the reason that it had no causal connection with the plaintiff's injury. There was no greater probability that she would step upon a rolling stone at that point than at the crossing or at any other point on the street. Her injury was not the ordinary or probable result of stopping at that particular point, but was due to an unexpected event, which could not reasonably have been anticipated. The negligence imputed to the conductor was not the real or proximate cause of the injury. It simply presented an opportunity for the operation of the true cause,—the movement of a rolling stone upon which the plaintiff unfortunately stepped. It only afforded the occasion for a purely accidental occurrence causing damage without legal fault on the part of any one. *Conley v. Express Co.*, 87 Me. 352, 32 Atl. 965.

Motion sustained.

(90 Me. 229)

BENNETT v. TALBOT.

(Supreme Judicial Court of Maine. April 24, 1897.)

AGENCY—DECLARATIONS OF AGENT—INSTRUCTIONS.

1. The declarations of an agent are admissible only when the existence of the agency has been satisfactorily established by other competent evidence.

2. Though such declarations become evidence as parts of the *res gestæ* if made in the conduct of the business intrusted to the agent, they cannot bind the principal without other evidence of the agency. And if such declarations are received *de bene esse* upon a promise that other proof of the agency shall be forthcoming, they will be disregarded if the promise is not fulfilled.

3. It is a well-established rule of procedure in this state that the court may properly instruct the jury to return a verdict for either party when it is apparent that a contrary verdict would not be allowed to stand on the evidence introduced.

4. *Held*, in this case, that the plaintiff was not employed by the defendant, nor was her son acting as her agent.

(Official.)

Exceptions from supreme judicial court, Waldo county.

Action by Richard D. Bennett against Sarah E. Talbot. Judgment for defendant, and plaintiff excepts. Overruled.

J. H. & C. O. Montgomery, for plaintiff.
O. F. Fellows, for defendant.

WHITEHOUSE, J. This is an action of *assumpsit*, brought by the plaintiff to recover a balance alleged to be due for labor performed by him in June and July, 1893, in the construction of a wharf on land owned

by the defendant in Stockton Springs. The evidence is reported to this court on exceptions taken by the plaintiff to the ruling of the court below directing the jury to return a verdict for the defendant.

It is a well-established rule of procedure in this state that the court may properly instruct the jury to return a verdict for either party when it is apparent that a contrary verdict would not be allowed to stand on the evidence introduced. *Bank v. Sargent*, 85 Me. 349, 27 Atl. 192, and cases cited.

After a careful examination of all the evidence reported in this case, it is the opinion of the court that the ruling of the presiding justice ordering a verdict for the defendant was undoubtedly correct, on the ground that there was no evidence presented which would authorize a verdict for the plaintiff.

It is not in controversy that the plaintiff performed the labor in question in building a wharf on the defendant's land, and that he was employed by Francis T. Sargent, the defendant's son, who had charge of the work. But it is confidently urged in behalf of the defendant that she was not engaged in the granite business, and had not assumed any responsibility for the construction of the wharf, and that her son Francis T. Sargent, in superintending the building of it, and employing laborers for that purpose, was acting as the agent of the Penobscot Bay Granite Company, and not as the agent of the defendant.

The defendant's two sons, Francis T. and W. O. Sargent, for some time prior to the transaction in question, had been engaged in conducting operations upon different granite quarries in Waldo county, and the defendant appears to have furnished the money to purchase the tracts of land in question at Stockton Springs, containing granite suitable for quarrying, and to have taken the conveyances in her own name. Subsequently she executed a lease of a part of this property to Patrick Gallagher, and a second lease of another part of it to the Penobscot Bay Granite Company. It is admitted that Francis T. Sargent was employed by Gallagher and the Penobscot Company, successively, to superintend their respective operations in cutting and hauling granite, and that he was so acting as the authorized agent of the latter at the time the plaintiff performed his labor in building the wharf; but it is denied by that company that Sargent was acting as their agent in the construction of the wharf. The oral evidence introduced by the plaintiff only tends to show that Sargent personally employed the men to build the wharf, and agreed to pay them; and the depositions of Wheeler and Edgar of the Penobscot Bay Granite Company tend to show that "Sargent, on behalf of Mrs. Talbot, agreed to furnish the quarry, and equip it with a road leading directly to the river in front of it, and a wharf at the end of the road on the river." But nowhere in any of

the evidence is a single word, oral or written, imputed to the defendant tending to show that she had authorized Francis Sargent to build a wharf on her credit and responsibility, or that she had any knowledge whatever of the building of the wharf. Nor can any provision be found in either of the conveyances accepted by her, or in the leases signed by her, referring in any manner to the construction of a wharf.

It is an elementary rule of evidence that the declarations of an agent are only admissible when the existence of the agency has been satisfactorily established by other competent evidence. "To permit the proving of the agency by proving the declarations of the agent would be assuming without proof that which is a prerequisite to the admissibility of the declaration." 2 Whart. Ev. § 1183; *Hazeltine v. Miller*, 44 Me. 177; *Eaton v. Association*, 89 Me. 58, 35 Atl. 1015. Though such declarations become evidence as parts of the *res gestæ* if made in the conduct of the business intrusted to the agent, they cannot bind the principal without other evidence of the agency. The court must have proof of the agent's authority to speak before it will listen to what he has said. And if, in a report of evidence, such declarations are received *de bene esse* upon a promise that other proof of the agency shall be forthcoming, they will be disregarded if the promise is not fulfilled.

In the case at bar such proof of agency is entirely wanting. There is no evidence that Francis T. Sargent had been accustomed to perform acts of the same general character and effect with the knowledge and assent of the defendant. There is no evidence of acts of prior adoption and ratification on her part, from which an authority for Sargent to build a wharf on her credit and responsibility can be implied. The fact that she paid the purchase money for the land affords no ground for such an inference. The fact that she was willing to aid her son by purchasing the land for cash has no tendency to prove that she gave him unlimited authority to contract debts on her account.

But, while an agent's declarations in pais are not proof of his authority to speak, he is a competent witness in court to prove or disprove the agency alleged. Accordingly, Francis T. Sargent appears as a witness for the defendant. He testifies positively that he was not employed by the defendant, and was not acting as her agent, in the construction of the wharf, and "was never her agent in any way, shape, or manner"; that he was in the employment of the Penobscot Bay Granite Company at the time of the construction of the wharf, and was expressly directed by them to build it, and was paid by them for all services rendered in that behalf.

In corroboration of this, it appears that the plaintiff and other workmen brought suit against the Penobscot Company to recover for their labor on the wharf, and that the amount

due for the labor in June was thereupon paid by that company. The defendant's position is further strengthened by the letter of July 28, 1898, written by William S. Edgar, treasurer, and one of the directors, of the company, to George Carleton Comstock, its president. This distinctly impeaches Edgar's testimony given in his deposition, and appears to recognize the construction of the wharf as the undertaking of his company. It furnishes the president of the company with a statement of the "June time for the men on the wharf," and asks him to forward his share of the amount due them. Against these facts, the able and ingenious argument of the counsel for the plaintiff fails to convince us that any other conclusion than that announced in the court below would be justified by the evidence.

Exceptions overruled.

(20 R. I. 226)

MERRILL et al. v. BOWLER.

(Supreme Court of Rhode Island. July 28, 1897.)

INSOLVENCY — CONSTITUTIONAL LAW — TRIAL BY JURY — FEES.

1. Gen. Laws, c. 274, providing for the distribution of an assigned insolvent estate without providing for a jury trial of the validity of claims presented against the estate, is not contrary to Const. art. 1, § 15, which provides that "the right of trial by jury shall remain inviolate," since at the time of the adoption of the constitution there was no provision for a jury trial of such claims,—and this especially in view of section 18 of said chapter, providing that a debtor may prevent insolvency proceedings until declared insolvent by a jury.

2. Gen. Laws, c. 274, providing for the removal of an assignee appointed by an insolvent making a voluntary general assignment, and for the appointment of one acceptable to the creditors, and for such distribution as seems just to the legislature, is not unconstitutional.

3. The rule adopted in connection with Gen. Laws, c. 274, requiring a deposit of \$50 before the filing of a petition of insolvency, is not contrary to Const. art. 1, § 5, declaring that every person "ought to obtain justice and right freely and without purchase, completely and without denial, promptly and without delay."

Petition in insolvency by Frank W. Merrill and others against James I. Bowler. Constitutional questions raised by respondent's objections were certified to the full court. Objections overruled.

Saml. R. Honey, for petitioners. Chas. Acton Ives, for respondent.

DOUGLAS, J. This is an involuntary petition in insolvency, brought by certain creditors, alleging that they hold claims not less than three-fourths in amount of all the debts of the respondent; that the respondent is an inhabitant of this state, and owes debts therein to the amount of \$300 or over, and has within four months prior to the filing of the petition made conveyances of certain parts of his property with intent to hinder, delay, or defraud his creditors; that, while insolvent, he has, for the purpose of giving a preference, made a conveyance, mortgage, pledge, or

transfer of certain of his property; that he suffered certain of his property or assets to be taken and levied upon by process of law; and that he has made an assignment for the benefit of his creditors; and praying that he may be adjudged insolvent, and that such proceedings may be taken in the premises as are provided in chapter 274 of the General Laws of Rhode Island. The respondent, having been duly cited, comes in his own person, and objects to further proceedings on the petition on the grounds: (1) That said chapter 274 is unconstitutional and void. (2) That respondent made a legal assignment for the benefit of his creditors before the filing of the petition, and so much of said chapter as attempts to set aside such an assignment is unconstitutional and void, and there is no property whatever that can be affected by proceedings upon this petition. (3) That at the time of making said assignment the respondent had not estate sufficient to enable him to comply with the rule of requiring a deposit of \$50 as a condition of being permitted to file a petition in insolvency, and that said rule is unconstitutional as to such persons as are unable to comply with it. These objections, raising constitutional questions, were certified to and heard by the full court. At the hearing the respondent appeared by counsel, who, in his printed brief, defined the objections to the law as follows: (1) There is no provision in the act under which this case is brought (chapter 274, Gen. Laws R. I.) by which the assignee, in whom are vested the rights of the insolvent, or the insolvent himself, may have a jury trial of the validity of any claim presented against the estate; and the entire act is therefore repugnant to the constitution, and void. (2) The provisions invalidating all assignments for the benefit of creditors (sections 16, 39, and 51) are unconstitutional and void. (3) The requirement (by rule) of a deposit of \$50 as a condition precedent to relief under the act, if valid, takes out of the category of acts done in fraud of the act all acts done by an insolvent by reason of his inability to comply with the rule. And as to such acts of an insolvent the enforcement of the act becomes and is unconstitutional.

In support of the first objection it is urged that a creditor has a constitutional right to try by jury his claim against the estate of the insolvent in the hands of the assignee, and that the distribution of the assigned estate by direction of the court without reference to a jury is taking the debtor's property from his control, and giving it to others, contrary to the constitution. There is no provision in the constitution of Rhode Island which provides that all controversies regarding property shall be brought in the form of a common-law action, or be tried by a jury. Article 1, § 15, provides, "The right of trial by jury shall remain inviolate," which means simply that in those proceedings in which a right to trial by jury existed at the time of the adoption of the constitution the right shall still continue.

Crandall v. James, 6 R. I. 144, 148. "The constitution requires simply the conservation, not an extension, of the right of jury trial." *Bishop v. Tripp*, 15 R. I. 466-469, 8 Atl. 692. And it would be a sufficient answer to this objection to say that at the time of the adoption of the constitution no provision was made for ascertaining claims against the estate of an insolvent by jury trial between the claimant and the assignee. At the time of the adoption of the constitution an insolvent law was in force in this state, though suspended in its operation by the United States bankruptcy act of 1841. It was enacted January 19, 1828, afterwards repealed and re-enacted with some amendments January 11, 1832. It provided for voluntary insolvency only, and its discharge was simply from imprisonment of the debtor's body. This act conferred jurisdiction in insolvency upon the supreme judicial court, "with power to carry into full effect all the provisions of the act," and the reviving act provided for an appeal to the general assembly. Section 8 provided: "* * * And said assignee or assignees shall also have power to submit any and all claims and demands against said estate or in favor thereof to the final decision of referees, under a rule of any competent court." No provision is made therein for a determination of any issue by jury trial. The assignee is authorized to take upon himself the conduct of actions pending, and this provision is substantially contained in section 25 of the present law. But it is argued that the claims provable under this act are mostly simple contract claims, and such as are more appropriately the subject of common-law procedure. A glance at the plan and scope of the statute will remove this impression. The statute, like every bankrupt or insolvent law, takes away from an insolvent debtor the control of his property, and vests the legal title to it in an assignee in trust for his creditors. This step, if objected to, cannot be had under this act till his insolvency has been established by verdict of a jury. Section 18. A jury trial, therefore, stands at the threshold of these proceedings, and no man's property can be taken from him by the act, against his will, except by a jury of his peers. When the estate has once been taken from him, it becomes subject to other rules. It can no longer be reached at common law, but becomes a trust fund, the administration of which is only within the jurisdiction of a court of equity. A voluntary assignee cannot be sued by a creditor of his assignor at common law any more than an assignee under this act. The creditor is, therefore, deprived of no right of action which he possessed against the estate of the debtor, but is only relegated to the proper proceeding to enforce his claim upon what has now become the subject-matter of a different jurisdiction. If the act of the law which creates a trust fund of the debtor's property violates the constitution by depriving a creditor of the right to follow it in a court of common law, a voluntary assignment by

the debtor does the same thing. All that the constitution guaranties as a right is an appropriate remedy for the case, and a jury trial is not an appropriate proceeding for the enforcement of a trust. We do not agree, however, with the construction placed upon the provisions of this statute by respondent's counsel, which precludes the appellate division of this court sitting in insolvency cases from directing issues to a jury in its discretion. Its jurisdiction in these matters is that of a court in equity. The case is, in substance, the equitable distribution of a trust fund, and, though the mode of procedure in certain respects is modified by the statute, and additional officers of the court are created to facilitate its proceedings, the general powers and instruments of the court are unimpaired. Before the adoption of the constitution, the general assembly expressly conferred upon the supreme judicial court supervision over voluntary assignees as a part of its chancery jurisdiction. Act passed January 21, 1837, entitled "An act in addition to an act entitled 'An act vesting chancery powers in the supreme judicial court in certain cases.'" Section 16 of the act provides, among other things, that "any person, being an inhabitant of this state, shall be adjudged insolvent if he has within four months prior to the filing of the petition in insolvency against him * * * made an assignment for the benefit of his creditors." Section 39: "The assignment shall vest in the assignee * * * all property conveyed by an assignment for the benefit of creditors made not more than four months prior to the time of the first publication aforesaid." Section 51 denies a discharge to an insolvent if he has given or suffered to be created a preference, as herein defined, under an assignment for the benefit of creditors or otherwise, which preference has not been surrendered. In considering these provisions, we construe them as relating to a general assignment for the benefit of creditors. Partial assignments, if made to hinder, delay, or defraud creditors, are referred to in other clauses of the act. It will not, certainly, be urged that the legislature may not forbid assignments with preferences, as nearly all the state legislatures have done so without question. Neither can it be successfully argued that the legislature may not prescribe by general law what acts on the part of a debtor shall constitute bankruptcy or insolvency, and what disposition shall be made of the estate of a bankrupt or insolvent among his creditors.

One of the most important functions of government is to provide means for the collection of debts and the enforcement of the performance of contracts. So a state may regulate and control the form of conveyances, and prohibit such as it may consider contrary to public policy. Restrictions upon the power to make wills and create trusts are common, and proper subjects of general legislation. That the several states of the Union have power to enact bankruptcy and insolvency laws which

are operative within certain limits while no federal bankruptcy law exists has been settled by repeated adjudications by the supreme court of the United States. *Sturges v. Crowninshield*, 4 Wheat. 122; *Bank v. Smith*, 6 Wheat. 131; *Ogden v. Saunders*, 12 Wheat. 213; *Baldwin v. Hale*, 1 Wall. 223. In our constitution there is no limitation upon the power of the general assembly to legislate on this subject. The question made by respondent's counsel rather, by implication, recognizes the power. Article 1, § 11, to which he refers, reads as follows: "The person of a debtor, where there is not strong presumption of fraud, ought not to be continued in prison, after he shall have delivered up his property for the benefit of his creditors, in such manner as shall be prescribed by law." Clearly, this implies that laws may be enacted prescribing the mode and terms and conditions in and upon which a debtor shall convey his property for the benefit of his creditors. This is all that is done by the sections of the law now under consideration. The statute provides that a general assignment to an assignee chosen by the debtor shall not stand if a certain number of the creditors within four months ask the court to appoint an assignee acceptable to them, and then to proceed to distribute the debtor's estate in a manner which seems to the legislature to be equitable and just. Respondent's counsel says, "It is only an assignment by an insolvent debtor which may be set aside without violation of the constitution." But a general assignment by a debtor has been held to be conclusive proof of insolvency. *Moorewood v. Hollister*, 6 N. Y. 309. Indeed, the conveyance by a debtor of all his property to an assignee for the purpose of paying his debts is a confession that he is incapable of managing his estate so as to fulfill his obligations as a debtor, and so invokes the jurisdiction of the law to provide for the management of it, as in the case of an infant or person of unsound mind. The act of making an assignment is a resignation of his duties and responsibilities, which the state may justly make the occasion of assuming control of the debtor's property through regularly constituted instruments. The making of a general assignment is not evidence of insolvency only; it is an act of insolvency itself; for a man who has put all his property out of his hands cannot himself pay his debts as they come due in the ordinary course of business. Says Gardner, J., in *Moorewood v. Hollister*, 6 N. Y. 323: "The execution of such an assignment is of itself an act of insolvency of the most unequivocal character. The debtor thereby voluntarily divests himself of all means of payment, and renders it impossible that his creditors at large should obtain satisfaction of their demands by due course of law. He and they must await the winding up of the trust. If the defendant is chargeable with the necessary consequences of his own acts, when he made up his mind to assign all his property he contemplated in-

solveny; when he consummated his purpose, he became insolvent in fact."

The third objection to the statute is not properly raised in this case, for the fee required has been paid by the petitioning creditors; but the legality of such fees under the constitution has been fully discussed by this court in *Perce v. Hallett*, 13 R. I. 364, where it is said, in the concluding words of the opinion: "In the light of both history and legislative practice, therefore, we think the legitimate conclusion is that the declaration of the constitution was intended to prohibit, not fees like those prescribed in the fee table, but gratuities, or exactions, given or demanded for the direct purpose of influencing the course of legal proceedings." It is difficult to believe that a person so situated as to be unable to raise the deposit required by the rule should have any need of the relief afforded by the act. It was only intended to apply to cases that are of sufficient importance to justify the attention and supervision of the court in their settlement. An honest debtor possessing no estate has ample protection from the laws restricting imprisonment for debt. The objections must be overruled, and further proceedings had upon the petition according to the statute

(30 R. I. 190)

IRELAND v. GLOBE MILLING & REDUCTION CO.

(Supreme Court of Rhode Island. July 12, 1897.)

CORPORATIONS—TRANSFER OF STOCK—AGREEMENT BEFORE INCORPORATION.

Under the laws of the state of Maine (Rev. St. 1883, tit. 4, c. 48, § 19), providing that the signers of articles of incorporation, and their successors and assigns, shall be a corporation from the time of filing the required certificate in the office of the secretary of state, an agreement between such subscribers prior to organization, or between them and such organized body prior to such filing of such certificate, is invalid to prevent the transfer of stock without first giving the corporation the option of purchase.

On rehearing on additional pleas. For former opinion, see 32 Atl. 921.

William H. Sweetland, for plaintiff. Warren R. Perce and Irving Champlin, for defendant.

TILLINGHAST, J. In the opinion heretofore given in this case it was held that the by-law of the defendant corporation providing for the right of pre-emption of the stock in question was invalid. Since the rendition of that opinion the defendant, by leave of court, has filed additional pleas, setting up that by virtue of an agreement entered into on July 27, 1892, between the subscribers to the stock of the then proposed corporation, and also of an agreement between said subscribers and the corporation on August 10, 1892, the stock in question could not be transferred without first giving to the corporation the option of purchase. Without referring to

the voluminous pleadings in detail, it is sufficient to say that the main question now raised thereby is whether the alleged agreements had the effect to bind the plaintiff's vendor, William R. Stearns, who was one of said subscribers, to offer the stock in question to the defendant corporation at the lowest price at which he was willing to sell, before selling said stock to the plaintiff. The case shows that, although the defendant corporation was organized at Saco, Me., on the 10th of August, 1892, under the laws of the state of Maine (see chapter 48, §§ 16-19, printed in connection with our former opinion),¹ as alleged in defendant's pleas, yet that it did not become a corporation, so as to be able to transact business, until the 31st of August, 1892, at which time the certificate required by section 19 of said chapter was filed with the secretary of state. And, this being so, we fail to see any force in the alleged contract with the corporation prior to that time. In other words, the contract or agreement set up by defendant was made before the corporation was in existence as a legal entity. And it is hardly necessary to argue against the power of a person not in being (if, indeed, there can properly be said to be such a person) to make a contract. A corporation like the defendant is purely a creature of statute, and only exists, for the transaction of business, when all of the requirements prescribed for the creation thereof have been complied with. In 1 *Thomp. Corp.* § 480, the learned author says: "The corporation must have a full and complete organization and existence as a legal entity before it can enter into any kind of a contract, or transact any business." In *Gent v. Insurance Co.*, 107 Ill. 658, the court says: "That a corporation should have a full and complete organization and existence as an entity before it can enter into any kind of a contract or transact any business, would seem to be self-evident. This is unconditionally true, unless the act of incorporation authorizes the incorporators to perform acts and enter into contracts to bind the company when it shall be organized. As well say a child in ventre sa mère may enter into a contract, or that its parents may bind it by contract. A corporation, until organized, has no being, franchises, or faculties. Nor do those engaged in bringing it into being have any power to bind it by contract, unless so authorized by the charter." The supreme court of Maine has expressly decided that a corporation like the defendant does not become a corporation until the certificate of the attorney general be obtained as required by the provisions of said chapter 43, § 19, of the Revised Statutes of that state. *Association v. Clarke*, 61 Me. 351. See, also, *Albertype Co. v. Kent & Stanley Co.* (R. I.) 35 Atl. 152; *Uteley v. Tool Co.*, 11 Gray, 141; *Match Co. v. Hapgood*, 141 Mass. 148, 7 N. E.

22; 4 Am. & Eng. Enc. Law, 197-199. It is to be observed, in this connection, that there is a manifest difference, as to the effect of omission of the requirements of the law in the organization of corporations, between a case where the corporation is created by special charter and there have been acts of user, and a case where individuals seek to form themselves into a corporation under provisions of the general law. In the latter case—which is the one before us—it is only in pursuance of the provisions of the statutes for such purposes that corporate existence can be acquired. *Bigelow v. Gregory*, 73 Ill. 197. But defendant contends that the case presented is not that of an agreement between the promoters of a corporation and other parties, but is that of an agreement between the incorporators themselves. But, suppose it is, how does that change the case? It is then only a contract between the incorporators, or rather the proposed incorporators, individually, and not one of which the defendant can avail itself. And therefore, even assuming that a contract between said proposed incorporators not to transfer their stock, when obtained, without giving the option of purchase to the corporation, would be binding on them as individuals, yet the only remedy for a breach of such contract would be a personal one against the offending stockholder. Thus in *Carmody v. Powers*, 60 Mich. 30, 28 N. W. 801, it is held that an agreement with individuals that when they become incorporated they will give plaintiff a certain amount of paid-up stock, cannot, on any rule of law, be considered as a dealing with the corporation itself, or as one which would bind the future corporation when organized. The case of *Vansands v. Bank*, 26 Conn. 155, cited by defendant's counsel, is quite different from the case at bar. There the question arose as to whether the bank had a lien on the stock held by the insolvent stockholder for the amount of his indebtedness to the bank. The certificate of stock which he held expressly provided that the shares were subject to the indebtedness of the stockholder to the bank, and the court held that this provision was binding on him by his acceptance of the certificate, such an acceptance being tantamount to an agreement between him and the defendant that his stock should be subject to his indebtedness. The court, in referring to the terms of the certificate, said: "That provision is a qualification or restriction of the title of Smith to the stock, of which title it was the object of that certificate to furnish the legal evidence, or rather of which the certificate was the consummating act; and, as the muniment of Smith's title, we think that it must be treated as an entire instrument of which the qualification is a part, and that the latter, therefore, cannot be disjoined from it, or treated as of no validity. To consider it otherwise than as an agreement would be to disregard the plain

¹ See note at end of case.

intention of the parties, which courts will always, if possible, carry into effect, and to sanction the perpetration of a fraud on the defendants. Smith having received the certificate proffered to him by the defendants with that restriction, neither he nor his assignee should be permitted to deny his assent to it, and that would be sufficient to constitute an agreement." It will be observed that this was a case where the corporation was in existence, and fully competent to transact business, when the stock was issued and the lien thereon created. The case of *Waln's Assignees v. Bank*, 8 Serg. & R. 86, which is specially relied on by defendant, is very similar to the one just cited. There the court found that by a long usage and course of dealing, well known to and acquiesced in by the assignor of the stock in question, the bank had a lien on the stock for the indebtedness to it of its stockholders; and that the plaintiff, who was the assignee of Waln, and therefore stood precisely in his situation, was bound by the custom, usage, and well-known understanding, which was tantamount to a contract with the bank regarding said transfer. In this case, as in the other, it will be seen that there were two parties fully competent to enter into the contract in question. *McCready v. Rumsey*, 6 Duer, 576, is also similar to the cases just referred to, except that there, under the articles of association, no stockholder could transfer his shares while he was indebted to the bank. And the court held that the assignee of the stockholder, as his successor, and under the statute, took the stock subject to the same liabilities. In *re Dunkerson*, 4 Biss. 227, Fed. Cas. No. 4,158, is a case where the articles of association expressly authorize the restriction on the sale of the stock which is contained in the by-law, and hence was properly held to amount to a binding contract between the subscribers and the bank. *Bank v. Laird*, 2 Wheat. 390, is a case where the act of incorporation provided that no stockholder should transfer his stock until his indebtedness to the bank was satisfied, unless the president and directors should direct to the contrary. In *Stebbins v. Insurance Co.*, 3 Paige, 350, also, the act of incorporation prohibits a transfer of stock until the stockholder's liabilities to the corporation are satisfied.

We have examined the numerous other cases cited by defendant's counsel in his elaborate brief bearing upon the questions under discussion, but we do not find that they sustain the position taken. But, even admitting that they do, the decided weight of authority, as well as the better reason, is to the contrary. Even conceding, therefore, that the defendant's contention as to the validity and effect of such an agreement or contract as is set up in its pleas, when made between parties who are competent to enter into it, is correct, yet, as no binding contract, and, indeed, no contract at all, is shown to have been made between

Stearns and the defendant corporation regarding the restrictions on the transfer of the stock, as claimed, by reason of the fact that the defendant was not capable of making it, the entire defense, in so far as said pleas are concerned, necessarily falls. It is earnestly insisted by defendant's counsel, however, that the agreement in question, although made before the corporation was in existence, became operative upon the complete organization thereof by reason of the issuance of stock to the subscribers, including said Stearns. It is to be observed, incidentally, that the defendant does not allege in its pleas that any ratification of the contract said to have been made on August 10, 1892, ever took place. But, even assuming such an allegation therein, we do not think it would be of any avail, so long as there is no vote of the corporation in any way relating thereto; and we do not think that the mere act of the corporation in issuing the certificates of stock to Stearns, after the corporation was in fact in existence, amounted to a ratification by it of a contract made simply between the subscribers to the stock prior to the time when the corporation became a legal entity. In order to avail itself of the agreement alleged to have been made by the incorporators with the corporation before the existence of the corporation, the defendant must, as argued by plaintiff's counsel, show some new and positive act done after its complete organization ratifying said alleged agreement. The case at bar, in which the defendant seeks to avail itself of an agreement made before its incorporation, differs very materially from the case of a corporation which has accepted the benefit arising from a contract made by its promoters, and is held to be bound by such contract. The English authorities hold that a corporation cannot adopt or ratify a contract made before its incorporation. *Kelner v. Baxter*, L. R. 2 Q. B. 174; In *re Northumberland Ave. Hotel Co.*, 33 Ch. Div. 16. This rule has been followed in Massachusetts. In *Abbott v. Hapgood*, 150 Mass. 252, 22 N. E. 907, Knowlton, J., says: "If a contract is made in the name and for the benefit of a projected corporation, the corporation, after its organization, cannot become a party to the contract, even by adoption or ratification of it." "Such a contract must derive its vitality from the meeting of minds when both parties are in existence. Until then it can be nothing more than an offer by one party." *Match Co. v. Hapgood*, 141 Mass. 148, 7 N. E. 22. Having thus come to the conclusion that the agreement set up in the defendant's pleas is invalid, and that the plaintiff is not bound thereby, any further consideration of the case at this time becomes unnecessary. We desire to add, however, that it has been brought to our notice in the amended pleadings, and also in the defendant's new brief, that there are certain other statutes of Maine in addition to chapter 46, § 6, relied on in our former opinion, relating to the power of corporations to pass by-laws. And the defendant now claims that,

under said statutes and the decisions of the supreme court of Maine, the by-law aforesaid is valid. As the case is only before us on the amended pleadings, however, and as this question is not discussed in the plaintiff's brief, we cannot now decide it. In view, however, of the importance of the question, and of the newly-discovered statutes aforesaid, a motion for reargument of the original question would be entertained by the court.

NOTE. The statute of the state of Maine (Rev. St. 1883, tit. 4, c. 48, §§ 16-19) referred to in the foregoing opinion (ante, p. 116), and also in the former opinion in the cause (32 Atl. 922), is as follows:

"Sec. 16. Three or more persons may associate themselves together by written articles of agreement, for the purpose of forming a corporation to carry on any lawful business, including corporations for manufacturing, mechanical, mining or quarrying business and also corporations whose purpose is the carriage of passengers or freight, or both, upon the high seas, or from port or ports in this state to a foreign port or ports, or to a port or ports in other states, or the carriage of freight or passengers, or both, upon any waters where such corporation may navigate; and excepting corporations for banking, insurance, the construction and operation of railroads or aiding in the construction thereof, and the business of savings banks, trust companies or corporations intended to derive profit from the loan or use of money, and safe deposit companies, including the renting of safes in burglar-proof and fire-proof vaults; also excepting telegraph and telephone companies.

"Sec. 17. Their first meeting shall be called by one or more of the signers of said articles, by giving notice thereof, stating the time, place and purposes of the meeting to each signer, in writing, or by publishing it in some newspaper printed in the county, at least fourteen days prior to the time appointed therefor. At such meeting they may organize into a corporation, adopt a corporate name, define the purposes of the corporation, fix the amount of the capital stock, which shall not be less than one thousand, nor more than two million dollars, divide it into shares, and elect a president, not less than three directors, a clerk, treasurer, and any other necessary officers, and may adopt a code of by-laws.

"Sec. 18. Before commencing business, the president, treasurer, and a majority of the directors shall prepare a certificate setting forth the name and purposes of the corporation, the amount of capital stock, the amount already paid in, the par value of the shares, the names and residences of the owners, the name of the county where it is located, and the number and names of the directors, and shall sign and make oath to it; and after it has been examined by the attorney general, and been by him certified to be properly drawn and signed and to be conformable to the constitution and laws, it shall be recorded in the registry of deeds in the county where the business is to be done, in a book kept for that purpose, and a copy thereof certified by such register shall be filed in the secretary of state's office, who shall enter the date of filing thereon, and on the original certificate to be kept by the corporation, and shall record said copy in a book kept for that purpose. Such corporation shall pay the attorney general and secretary of state five dollars each for their services in advance.

"Sec. 19. From the time of filing such certificate in the secretary of state's office, the signers of said articles and their successors and assigns shall be a corporation, the same as if incorporated by a special act, with all the rights and powers, and subject to all the duties, obligations, and liabilities provided by this chapter and chapter forty-six."

(67 N. H. 499)

NORWAY PLAINS SAV. BANK v. YOUNG.

(Supreme Court of New Hampshire. Rockingham. March 16, 1894.)

INSOLVENCY—DECREE—RIGHT TO APPEAL.

Pub. St. c. 200, § 1, permitting appeal by a person aggrieved by a decree of a judge of probate, which concludes his interest, and is not strictly interlocutory, authorizes appeal by creditors from decree of insolvency which dissolves their attachments (chapter 201, § 26), and concludes their rights acquired thereby.

Appeal from probate court, Rockingham county.

A decree of the judge of probate adjudged Warren F. Putnam, "said to be a resident" in the county, an insolvent debtor, under Pub. St. c. 201, § 42. The Norway Plains Savings Bank appeal therefrom, alleging that they are creditors of Putnam, and attached certain property belonging to him, and summoned one Folsom (who, it is alleged, holds a fraudulent mortgage of the attached premises) as trustee, on a writ made within three months before the decree, and still pending. John E. Young, assignee, appears specially, and moves to dismiss the appeal, and to strike out the reasons assigned therefor, because it does not appear that plaintiffs' interest is such as to entitle them to appeal, and because the reasons are insufficient in law. He also moves for appointment of a receiver of Putnam's property during the pendency of the appeal. Motions denied.

The following are the reasons alleged for the appeal: (1) That Putnam was not a resident or inhabitant of this county at the time of the filing of the petition. (2) That the petition "was not duly executed under the provisions of law." (3) "That, at the time of said adjudication, there were no claims filed or proved in amount of \$300, and no evidence offered" that Putnam was owing that amount, "as shown by the record." (4) That said Folsom, with his agents, associates, and others, by fraud and collusion, caused the petition against Putnam to be filed, for the purpose of defeating the rights acquired by the plaintiffs by their attachment. (5) That the petitioner did not prove any claim before the adjudication, and, at the special instance and request of those interested in defeating the plaintiffs' rights under their attachment, and to make their fraud more complete, and to realize therefrom, procured the services of one Knight, attorney for one Conner, to appear and prosecute the petition for the appointment of a messenger; that neither the said Knight nor the party he claimed to represent complied with the provisions of law in joining in said petition. (6) That the insolvency of the debtor was not proved, nor any act of insolvency shown at or prior to the time of the decree.

Worcester, Gafney & Snow, for plaintiffs. Eastman, Young & O'Neill and A. O. Fuller, for defendant.

BLODGETT, J. "Any person aggrieved by a decree, order, appointment, grant, or denial of a judge of probate, which may conclude his interest, and which is not strictly interlocutory, may appeal therefrom to the supreme court at the next trial term to be holden for the county." Pub. St. c. 200, § 1. The decree of insolvency against the debtor dissolved the plaintiffs' attachments upon his property, which were made within three months before the beginning of the insolvency proceedings (Id. c. 201, § 26), and concluded their rights acquired by the attachments. This gave them an appealable interest in the decree.

The claim of the defendant that all of the reasons of appeal are insufficient in law is not well founded. While the insufficiency of most of them is apparent, the sufficiency of some of them is so manifest that no argument to the contrary can be other than futile. No reason appears for the appointment of a receiver during the pendency of the appeal. Motion to dismiss denied.

CHASE, J., did not sit. The others concurred.

(87 N. H. 500)

SCOTT v. KNIGHT.

(Supreme Court of New Hampshire. Rockingham. Dec., 1893.)

INSOLVENCY — EXAMINATION BEFORE PROBATE COURT — JURISDICTION.

On examination before the probate court, under Pub. St. c. 201, § 27, providing that such court may, on cause shown by affidavit of a person interested in an insolvent's estate, examine a person suspected of having in his possession any of the assets of the estate or any knowledge relating thereto, it can merely take the examination, to serve as a basis for other proceedings in the proper court, and cannot, on the facts elicited, decree that the person deliver over the property.

Appeal from probate court, Rockingham county.

Examination before the judge of probate court, under Pub. St. c. 201, § 27, on cause shown by affidavit of Robert Scott, plaintiff, assignee of Page & Dowe, insolvent debtors, of Charles H. Knight, defendant. It appeared that Page & Dowe had assigned certain contracts to Van Wart & Co. as collateral security, and that Van Wart & Co. assigned the contracts to one Knapp, who put them in the hands of defendant, an attorney at law, for collection. On the facts obtained by such examination, the judge decreed that defendant deliver the contracts to plaintiff. From the decree defendant appealed, assigning, as one reason therefor, the lack of jurisdiction or power in the probate court to make such a decree. At the trial term the decree was reversed, on the ground that the proceeding before the judge of probate was an inquisition, in which he had no authority to make the decree. Plaintiff moves to set aside the reversal. Motion denied.

Eastman, Young & O'Neill, for plaintiff. **C. H. Knight**, for defendant.

BLODGETT, J. The probate court had no authority to make the decree. It could do nothing except to take the examination of the person complained of, to serve as a basis for other proceedings, by suit or otherwise, in the proper court. *Dodge v. McNeil*, 62 N. H. 168. Motion denied.

CHASE, J., did not sit. The others concurred.

(87 N. H. 119)

JONES et al. v. CONCORD & M. R. R. et al.
(Supreme Court of New Hampshire. Hillsborough. March 11, 1892.)

CORPORATIONS—CONTRACT OF UNION—APPORTIONMENT OF STOCK—INCREASE OF CAPITAL—RIGHT OF SUBSCRIPTION—VOTE FOR INCREASE—ANNUAL MEETING—SUFFICIENCY OF NOTICE—NECESSITY FOR INCREASE—CORPORATE DISCRETION—DIRECTORS—RIGHT TO VOTE.

1. Where a corporation increases its capital stock, each holder of original stock is entitled to a portion of the new stock, because it includes an undivided part of the common property, of every part of which he is an owner, and of which a conveyance can be made only with his consent, or by legal process.

2. Two corporations, C. and M., made a contract of union. There were four classes of former shares, of unequal values, and their inequality was adjusted in the new company by dividing its shares into four classes with unequal rights to dividends. The contract provided that the capital should "be apportioned among the stockholders of the parties hereto as follows: (1) To holders of the preferred stock of the * * * M. Railroad, one share of the stock of class 1 for every share of said preferred stock held by them." By similar clauses the other classes of stock were assigned to the proper classes of persons. There was a provision for an increase of capital, but there was no express stipulation as to the distribution of the right to subscribe for the increase. *Held*, that the existing stockholders, without reference to dividend discriminations, were entitled to the new stock at par value in such proportion as the number of shares already owned by them bore to the whole number of shares before the increase.

3. Gen. Laws, c. 147, § 4, provides that corporations may adopt by-laws not repugnant to the laws of the state. Chapter 148, § 6, permits the increase of the capital of a corporation at "any meeting called for the purpose." A by-law of a corporation provided that "any business within the power of the corporation may be transacted at annual meetings, although the subject-matter thereof is not specified in the notice." *Held*, that an increase of the capital was not authorized by a vote at an annual meeting, where the notice merely recited that the meeting would be held at a specified time and place to act on the report of the directors, "and to transact any other business that may be brought before the meeting," since the by-law was controlled by the statutory provision.

4. The necessity of an increase of capital authorized by law is a question left to the judgment of the corporation.

5. Directors of a corporation are not disqualified to vote as stockholders for an increase of capital.

Bill by Frank Jones and another against the Concord & Montreal Railroad and its di-

rectors for an injunction restraining defendants from issuing the whole or any part of certain preferred stock which the corporation at its annual meeting held October 13, 1891, voted to issue, and from distributing the same to all the classes of stockholders in proportion to their respective holdings. Decree for plaintiffs.

Oliver E. Branch, Charles H. Burns, and Charles B. Gaffney, for plaintiffs. Bingham & Mitchell and Frank S. Streeter, for defendants.

DOE, C. J. 1. Under Laws 1889, c. 5, the Concord Railroad and the Montreal Railroad have united and formed a new corporation called the Concord & Montreal Railroad, on terms agreed to by a two-thirds vote of each party. Chapter 46 relates merely to the corporate name. The stockholders of the uniting corporations being members of the new corporation, their rights as members of it are equal, except in those respects in which inequality is established by chapter 5, the contract of union which that chapter authorized, and the number of their shares. With no agreement to the contrary, a share of Concord & Montreal stock would be a proportional share of the equitable title of the corporate property, and among the components on incidents of the title would be proportional shares of the right to receive dividends and to control the management of the property by the voting power. The rights comprised in each share are the same as those comprised in every other share, with such differences as were introduced by the contract of union, which includes the laws under which it was made. If these differences were not satisfactory to any member of either of the uniting corporations, he was not required to submit to them. He could not be forced into the new company. *Clearwater v. Meredith*, 1 Wall. 25, 41; *Lauerman v. Railroad Co.*, 30 Pa. St. 42, 46; *Mowrey v. Railroad Co.*, 4 Biss. 78, 85, Fed. Cas. No. 9,891; *Black v. Canal Co.*, 24 N. J. Eq. 455; *Mor. Corp.* § 646. By dissenting he could compel that company to buy his stock at its value, ascertainable under section 1. Before the union, the Concord and the Montreal, being business corporations, were partnerships, with common-law partnership rights and liabilities, modified in some respect by statute. By becoming members of those companies, the stockholders had accepted the charters and other corporation laws as their partnership contracts. By becoming members of the Concord & Montreal, they assumed the relation of partners, whose contract is in the act of 1889 (which contains the new charter), in the old charters, materially amended by the new; in other laws; and in the agreement of union which formed the new corporation. Their rights, so far as they are involved in this case, are contractual; and their intention, proved as a fact by competent evidence, is their con-

tract. The provision of section 8 of the act of 1889 that "the stockholders in the uniting corporations who have assented" to the union (exchanging their certificates of stock being a manifestation of assent) "shall be members of the new corporation," seems to have no peculiar significance, and to be of no importance. The union of the old companies would import membership in the new company, and equality in the shares of that company, unless a different purpose were shown by the true construction of the "agreement for union." Such an agreement, made in general terms, without a specific provision for membership, would naturally mean a formation of one company out of the members of several companies on a footing of equal rights in the property of the new company in proportion to the number of their shares, except so far as an intention to create or continue in equality were provided by competent evidence found in some part of the contract. In this case the provision that the assenting members of the old companies shall be members of the new one is nothing more than would be implied from a general agreement to unite the old companies. The Concord stockholders were the Concord Company. The Montreal stockholders were the Montreal Company. The union of the companies was a union of the stockholders. The property of each of the uniting companies belonged to its members. The property of the Concord & Montreal belongs to its members. The circumstance that they are an incorporated trustee, holding the legal title, is immaterial. One material fact is that they are beneficiaries, holding the equitable title, and that the rights involved in this case are not affected by the mere division of their title into legal and equitable parts, but are what they would be if the owners were an unincorporated body, holding their property as tenants in common and partners without a trust, and with the power of increasing their capital that was accepted by their partnership contract.

Section 10 of the new charter authorizes the new company to buy 12 other roads,—the Mt. Washington, the Whitefield Jefferson, the New Zealand Valley, the Profile & Franconia Notch, the Penigewasset Valley, the Lake Shore, the Tilton & Belmont, the Suncook Valley, the Suncook Valley Extension, the Manchester & North Weare, the Concord & Portsmouth, and the Nashua, Acton & Boston. "For the purpose of facilitating said purchases, and to carry into effect the agreement or agreements made as hereinbefore authorized," the Concord & Montreal may "increase its capital stock to such amount as may be requisite," with a proviso limiting the amount of capital on which dividends can be paid, and a stipulation that after a purchase of either of the 12 roads the Concord & Montreal shall "have and enjoy all the rights, privileges, and franchises theretofore had and enjoyed by the selling"

corporation. This provision in relation to an increase of capital is one of the articles of the partnership contract. In none of those articles is there an express stipulation as to the distribution of the right to subscribe for the increase of capital authorized by section 10. It was one of the subjects that could have been expressly regulated by the contract, by which the stockholders of the uniting companies were empowered to determine and did determine, the terms of their union. But it was one of the subjects on which they left their contract to be inferred from the stipulation of section 8 that all the stockholders of the old companies who assented to the "agreement for union" should "be members of the new corporation," and from any other clauses of their compact containing evidence of their intention. Another of their partnership articles is section 6, c. 148, Gen. Laws. The first section of this chapter provides that "the rights, powers, and duties set forth in this chapter shall be incident to all corporations having for their object a dividend of profits, hereafter incorporated." For the purpose of the present inquiry, the Concord & Montreal was incorporated after the enactment of chapter 148. *Railway Co. v. Berry*, 113 U. S. 465, 474, 475, 5 Sup. Ct. 529. Section 6 of that chapter is: "The corporation, at any meeting called for the purpose, may increase or reduce its capital stock, and the number of shares therein, but the capital stock when so increased shall not exceed the amount authorized by law." The distribution of new capital under this clause, like the distribution under section 10 of the act of 1889, was not expressly stipulated, but was left to be implied from all competent evidence furnished by the partnership contract. If all the shares of the old companies had been of equal value, and it had been agreed merely that the holder of each of those shares should have a share of the new company, the equality of the former shares would have been maintained. The contract of union shows there were four classes of former shares, of unequal values,—three of Montreal and one of Concord,—and that their inequality was adjusted in the new company by dividing its shares into four classes with unequal rights to dividends. The contracting parties could also have agreed that these classes should be unequal in the ownership of the road, and in the right to vote. But on neither of these points is there any express provision against equality.

Chapter 1177, Laws 1851, authorized the issue of preferred Montreal stock to complete the road to Wells River. This stock was to be "entitled to a preference or priority in dividends, so that said stock shall first receive, from the net income of the road, dividends to the amount of six per cent. per annum." If there was no other stipulation on the subject, a share of preferred and a share of common stock were equal in ownership of capital, and

equal in the right to vote. Except in dividends, the rights comprised in a common share were no more affected by the issue of 100 preferred shares, under the act of 1851, than they would have been by an authorized issue of 100 common shares. The issue of preferred shares was not a conveyance of the whole road to the preferred stockholders, or of so much of it as would make a holder of a preferred share a larger owner of the capital than a holder of a common share. With the consent of the stockholders and the legislature, the road could have been sold. By due process of law it could have been sold on prosecution, or foreclosure, or under an exercise of eminent domain, notwithstanding the unanimous objection of the preferred stockholders. If it had been sold, the proceeds left after payment of debts would have been legally divisible among the owners of the road in proportion to the number of their shares. A holder of a common share, being the equal of a holder of a preferred share in ownership of the property sold, would receive an equal share of the proceeds, unless he consented, before or after the sale, to take less. The contract which united the Montreal and the Concord Companies tends to show that between the preferred stock and the old stock of the Montreal Company, considered solely as dividend-paying investments, there was a difference of value, and so great a difference that an equal division of the dividend-earning capital (the proceeds of a sale of the road) among the stockholders without distinction of classes would have been grossly inequitable. And it does not appear that the original partnership articles of the Montreal Company, or the supplementary article for the issue of preferred stock under the act of 1851, contained any stipulation against such a division. The reason of the omission of an explicit agreement on a subject that might become so important is not stated. A conveyance of half of a farm in common and undivided, to A., with a preferred right to 10 per cent. on his investment, to be paid him annually out of the income of the farm, would inform him what the common capital would be on partition by sale or otherwise. Having acquired but half of the title, and made no contract, either against a partition or for a partition, that would give him more than the share he bought, his rights would not be infringed by an equal partition that would materially damage him and materially benefit his co-tenant by terminating the preferred right to income. Parol evidence that the possibility and probability of a partition were overlooked when he took his conveyance would be inadmissible. The written contract could not be altered without the consent of both parties. To obtain a reformation of his deed, it would not be enough for him to show that partition was not thought of. The contract was, not something that did not occur to the parties, but their intention and understanding expressed in writing. They intended that A.

should have half of the land title, and the law could not violate their contract by giving him more. It is not an unusual occurrence that a bargain turns out better for one party than for the other by reason of something not expected by either.

It does not appear that any information on the subject of a total or partial division of capital was expressly given by the certificates of preferred Montreal stock; that attention was called to it by what was written, said, and done; or that it was in the mind of any of the persons concerned in the issue of that stock. The shares of stock, old and preferred, were personal property. A large part of the corporate property was real estate. It may be unsafe to assume that any Montreal stockholder, common or preferred, regarded his certificate as evidence of his being, in any legal sense, a landowner. The rights of each stockholder of each class, as an owner of a part of every piece of the corporate property, was a subject on which there may have been little, if any, discussion or discourse, and on which the prevailing ideas were probably limited and indistinct. It is probable that a difference in the value of the different classes of Montreal stock was anticipated when the preferred stock was issued. It may have been supposed that the preferred would be at par, and that the old would be worthless. The future value of the old stock may have been a question on which no trustworthy opinion could be formed. On the face of the transaction, with no other information of it than the case gives, it seems improbable that it was understood and intended that the old and the preferred shares could be made of equal value by a sale of the road. But, strong as the presumption appears against the existence of such an understanding, the point is one on which there may have been no actual understanding. The preferred stockholders being part owners of the road, it could be sold only by their consent, or by due process of law. They could withhold their consent; they could sell their shares without a sale of the road; they may not have heard of a railroad's being sold without the owner's consent; and the possibility of such a sale of the Montreal may not have occurred to them. Even if a sale was thought of, their foresight may not have gone beyond to a division of the proceeds, operating as a partition of the property, and an unjust equalization of the positions of classes of owners. If this contingency was not foreseen, it did not become an element of the market price of either class of stock. Had a partition by sale been anticipated as an event likely to happen immediately, the preferred stock might not have been taken without a contract against such a partition as would be a great gain for one class and a great loss for another class. Numerous reported cases illustrate the limited knowledge of the future on which railroad and other business investments and enterprises are made and undertaken. In many corporations

there have been and are different classes of stockholders, and in the omission of a provision against a division of capital (in cash or in new stock) on the basis of the numerical proportion of shares the Montreal seems not to have been an exceptional case. It is understood that such a provision is generally omitted.

It is said that upon the dissolution of a corporation, and the distribution of its assets, preferred stockholders have no priority over common stockholders, because the preference given and acquired relates to dividends, and not to the capital stock; but that, where a preference as to capital is contracted for (which is not generally the case), the rule is, of course, otherwise. Cook, Stocks & S. § 278. The result is controlled by the contract of the parties. Subject to the payment of debts, the proceeds of a sale of the Montreal road would have belonged to the stockholders, because the road was theirs. When A. paid the company \$100, and received a certificate of a share of preferred stock, the money became the property of all the stockholders, and he became one of the owners of all the corporate property, under a special contract concerning a preference in dividends, but with no contract qualifying the evidence (furnished by their certificates) that their ownership of the capital stock was in proportion to the number of their shares; and a total or partial division of the capital among them would have followed that proportion, not by reason of a peculiar rule of corporation law, but because, by contract, they had determined the shares in which they owned the road; and no law could authorize a partition of it according to any other title than that by which they held it. Stock dividends and issues of preferred stock stand on the same ground as a partition of the whole road. The issue of a certificate to a new stockholder, making him one of the owners of the road, would be a conveyance of title which can be made only with the owner's consent or by legal process. When a stock dividend is made, or new stock (preferred, common, or deferred) is issued, each stockholder is entitled to a portion of it, not merely because the issue may affect his right to dividends, but also because the new stock includes an undivided part of the road, of every part of which he is an owner, and because every shred of his title is as indefeasible and inviolable as the whole of it would be if he were the sole unincorporated owner of the road.

When the members of the old companies formed themselves into the Concord & Montreal, and united the two roads, a holder of a preferred Montreal share put into the capital of the new company no more of the Montreal road and rolling stock than was contributed by an owner of a Montreal common share. And as the Montreal preferred and common shareholders had been equal, except in the particular in which they had established an inequality by their partnership contract, so in the

new company equality and inequality are determined by the "agreement for union" by which the company was created and the rights of its members were fixed. In that agreement the unequal value of the four existing classes of stock was not overlooked. Their inequality was adjusted in a manner that shows that the extent of the disparity in market price was well known, and it may properly be inferred that every important stipulation was inserted in the contract that the circumstances of the case were supposed to require. If the possibility of a sale of the road or an increase of capital had not been seen, the omission of a specific agreement for distribution among the owners of the road would have been accounted for. But the clause expressly stipulating that the capital might be increased to an amount requisite for buying the 12 roads and carrying into effect the agreements authorized by the act of 1889 shows that such an increase was thought of, and that either the mode of distributing the new stock was overlooked, or the classes of shareholders could not agree on any other measure of distribution than the numerical proportion of their shares, or that for some reason it was not considered necessary or expedient to make distribution the subject of an express and plain agreement. The apparent difference in value (for a dividend purpose) of such classes of stock as the Montreal preferred and the Concord on the one hand and the other two classes on the other, and the importance of the question whether distribution should be according to the number or according to the value of the shares, or whether it should be limited to one or two classes, are cogent proofs of the intention of the contracting parties. The stock of the new company was divided into four classes because the Concord & Montreal road was to be owned by four classes of shareholders,—three Montreal classes and one Concord class. It must be inferred that such equalities and such inequalities were introduced as were supposed to correspond, in some just degree, to the existing state of things, which included the market values of the three classes of Montreal stock and the single class of Concord. Had it been understood that, if the whole capital were distributed in cash on a sale of the road, or a part of it were distributed in certificates by a stock dividend or by an increase of capital, the distribution should be made on some other basis than the ownership of the capital, for what reason could that understanding have been left to be inferred from the terms of a written contract containing no express allusion to the subject? If they had intended that on a division of the property the owner of one share should have more and another less than his fraction, how could they have failed to say how much more should go to one and how much less to the other? Probable as it is that the parties did not understand distribution would be equal (that is, in proportion to the number of shares held by each owner of the road), it seems

equally probable that, if any other rule or measure of distribution had been intended than the shares of the title by which the stockholders held the road, it would have been fully set forth, or at least distinctly and specifically mentioned, in the contract.

The third article of the contract is very explicit: "The capital stock of said new corporation shall be \$4,800,000, divided into shares of the par value of \$100 each, and into classes of the kinds and amounts following: * * * Class 1, to be known as ' * * * Montreal Preferred Stock,' shall consist of 8,000 shares, and shall be entitled to [specified dividends]. * * * Class 2, to be known as ' * * * Montreal New Stock,' shall consist of 5,404 shares, and shall be entitled to such dividends * * *. Class 3, to be known as ' * * * Montreal Old Stock,' shall consist of 4,596 shares, and shall be entitled to such dividends * * *. Class 4, to be known as 'Concord Stock,' shall consist of 30,000 shares, and shall be entitled to such dividends * * *." The fourth article is equally clear: "Said capital stock shall be apportioned among the stockholders of the parties hereto as follows: (1) To holders of preferred stock of the * * * Montreal Railroad, one share of the stock of class 1 for every share of said preferred stock held by them." By similar clauses, the other classes of stock are assigned to the proper classes of persons. The classification is of the right to dividends, and there is nothing in its terms indicating that it is of anything else. Each owner of a share of the uniting companies is entitled to a share in the new company. A share of what? "The capital stock of said new corporation shall be \$4,800,000, divided into shares of the par value of \$100 each." There are 48,000 shares. Each share is of the capital stock of the new firm, and the capital stock is all the partnership property, real and personal. Every shareholder of every class is an owner of the Concord & Montreal road, not in proportion to the value of his former or his present shares, or his right to dividends (which materially affects the value of his share of the road), but in proportion to the number of his forty-eight thousandths of the capital stock. Of his title as a proportional owner (aside from the right to dividends), and his incidental proportional power of controlling the management of the common property by his vote, there is no express or implied limitation. His unqualified right to vote is expressly recognized in section 5 of the act of 1889. As a division of the whole capital, on a sale of the road, would be a division of property a part of which is his, so an issue of new shares on an increase of the capital is a division of a part of his estate, no part of which can be taken from him without his consent or legal process. His right to his own property on a distribution caused by a sale of the road or by an issue of new shares is as free from express qualification as his title to the realty and rolling stock and his right to vote. The fact that the contract,

which fixes with exactness his proportional ownership of the capital so long as it remains undivided, does not expressly provide for a transfer of any part of his share to his partners on a total or partial division of capital, is conclusive evidence that no such transfer was intended.

There is, moreover, an insuperable difficulty in the question, what part of his share is to be transferred to others? On this point the contract is silent; and it certainly was not understood that on a sale of the road all the proceeds would be paid to stockholders of class 4, and that the entire property of class 1 (entitled to 6 per cent. dividends before any are paid to class 4) would be extinguished. A contract by which the former owners of the Montreal would lose its whole value by the union with the Concord, followed by a sale of the Concord & Montreal (under eminent domain or other legal compulsion), cannot be implied. Nor is there any ground for implying such a distinction between a total and a partial division of the capital that on a division of the whole capital class 4 of the stockholders would take the whole, but on a partial division, by an issue of new shares, they would take less than the whole amount distributed. On a total or partial division of capital they must be entitled either to the whole amount divided or to only their forty-eight thousandths of it. The contract does not allude to any other proportion or fraction as a measure by which a division of capital can be made. Inequitable as it seems that on a division of the whole capital a holder of a share of class 3 should receive as much as a holder of a share of class 1 or class 4, the payment of the whole capital to class 4 would be open to equal objection on the score of justice. Between these inequitable results the contract makes no compromise. As to the intention of the parties, equity furnishes no argument in favor of the right of class 4 to the whole capital, divisible on a sale of the road, or to all that part of it divided by an issue of new stock. In the absence of an agreement for a different partition, there is nothing to prevent the proportional division that is one of the rights comprised in the proportional ownership of the property.

The fourth article of the contract provides that "the stock of the new corporation shall be full payment for the stock of the old corporation for which it is to be exchanged as aforesaid." This clause leaves no ground for a claim of any class that their forty-eight thousandths of the Concord & Montreal road were not received in full payment for their surrendered shares. The clause would have apparently been superfluous but for the provision of section 7 of the act of 1889 that \$3,000,000 of the capital stock of the new company should be issued to the stockholders of the Concord in part compensation for their contribution to the capital of the new company, and that the balance of the \$4,800,000 should be issued as compensation for the Montreal contribution. If that distinction between compensation and

part compensation had not been annulled, it would have been necessary to look not only for competent evidence of a contract that further payment was to be made, but also for evidence of an agreed mode and amount, and to inquire whether an agreement was proved that payment was to be completed by giving class 4 all the shares of the other classes, or some ascertainable part of them, on a total or partial division of the Concord & Montreal capital. But this subject is disposed of by the performance of the subsequent agreement that the stock of the new corporation should be received in full payment. If the expression "part compensation" in the new charter recognized the right of the Concord stockholders to insist upon further payment, it was, at most, a provision for their benefit, which they could waive in forming the new company "on such terms and conditions as" should be agreed to by themselves and the Montreal, and which they did waive by accepting $\frac{39}{48}$ of the new company's stock in full payment as one of the "terms and conditions" of union.

The agreement that class 1 shall be entitled to 6 per cent. "dividends from earnings, * * * and shall never be entitled to greater dividends," and that "classes 2 and 3 shall not be entitled to dividends from any source except that resulting from a saving of interest," is a restriction of the right to dividends of the described earnings and savings, and not of the right to dividends of capital. The word "dividends" is here used in its ordinary sense as a description of divided profits and gains arising from the use and management of the capital. "Dividends are of the earnings or product of the road, and not of, nor can be of, the corporate capital." Rorer, R. R. 188. On a proper occasion there may be a dividend of capital, but in this contract there is no agreement that on partition the whole capital, or the whole of it that is divided, shall go to one class of its owners. It is incredible that the parties intended, if the state should take the consolidated road as soon as the union was completed, that the union should be nothing but a gift of the Montreal to the owners of the Concord. And if it is also credible that the parties had a positive and distinct intention that no discrimination should be made between the classes on a total or partial division of capital, these negotiations do not entitle one class to all the new stock issued on an increase of capital. In the absence of competent evidence proving an actual intention at variance with that shown by ownership in common, no class of the common owners can be deprived of their property by partition.

2. By the notice of the annual meeting held October 13, 1891, at which the company voted to increase the capital, the meeting was not called for the purpose of increasing the capital, within the meaning of section 6, c. 148, Gen. Laws, which permits an increase of capital "at any meeting called for the purpose." The notice was that the annual meeting would

be held at a specified place and time "to act on the report of the board of directors, to choose a board of directors for the ensuing year, and to transact any other business that may be brought before the meeting." In their report the directors recommended the increase of \$1,200,000 that was voted at the meeting, and it is averred in the answer that this report "had been distributed generally among the stockholders several days before the meeting." The notice does not refer to the report as an annexed or as an accompanying document, nor in any way make it a part of the notice. The notice does not state that an increase of capital was one of the purposes for which the meeting was called, nor inform the stockholders that a question of increase would be submitted to them, or that there was or would be anything in the directors' report relating to that subject. The company's first by-law contains this clause: "Any business within the power of the corporation may be transacted at annual meetings, although the subject-matter thereof is not specified in the notice." There was a similar by-law in *Richardson v. Railroad Co.*, 44 Vt. 613, 619, and it may be a common regulation. It is evidently based on reasons on which the authorities have established a difference in the notices required for regular and those required for special meetings. *Mor. Corp.* §§ 479, 481, 482; *Cook, Stocks & S.* §§ 594, 595, 598; *Dill. Mun. Corp.* §§ 262, 264; *Mechem, Pub. Off.* §§ 172-176; *Paine, Elect.* §§ 384-387; *Oooley, Const. Lim.* 759. In a Vermont case, the notice was that the annual meeting of the stockholders would be held at a specified place and time. The court said: "A manifest distinction obtains between general stated meetings of a corporation and special meetings. * * * Stated meetings of a corporation are usually general; i. e. for the transaction of all business within the corporate powers. * * * Where the meeting is stated and general, no notice is required either of the time or place of holding the meeting, or of the business to be transacted. *Ang. & A. Corp.* 275. Such is the general law of private corporations. * * * The annual meeting, of all others, is the one when, not only usually, but always, all business is expected to be transacted. And the common custom of a country is of great force in the construction of statutes as well as contracts. * * * The clerk here served a notice * * * stating the time and place of the meeting, and that it was the annual meeting of the company. This was certainly all the notice which could be given of the annual meeting. As each corporator knew that it was competent at this meeting to transact all business pertaining to the corporate interests, the very term 'annual meeting' was, *ex vi termini*, notice to the effect; and it could have answered no good purpose to repeat this in the notice." *Warner v. Mower*, 11 Vt. 385, 387, 391, 392, 394. "As a general rule, it may be safely affirmed, perhaps, that in regard to general meetings of the company, which are for the transaction of

all business, no notice of the particular business to be done is necessary." *Redf. R. R.* § 21. In other authorities the rule is stated with material qualifications. In this case the notice contained information which the by-law did not require to give. The by-law would have been complied with by a notice of the time and place of the annual meeting.

The statutory provision that the capital can be increased at a meeting called for the purpose is a part of the partnership contract, but, being also a law of the state, it cannot be suspended or repealed by any other power than that of making law. The by-law is to be construed as if it contained a proviso excepting from its regulation of notices of annual meetings the business which cannot be legally done at those meetings without specific notice. If it were construed to allow an increase of capital at a meeting not called for the purpose by the notice, it would be inoperative in this case, because not authorized by section 4, c. 147, *Gen. Laws*, which affirms the general rule of the common law that corporations may "adopt by-laws not repugnant to the laws of the state." The legislative power of altering the law of the land cannot be delegated to the defendants. The grant of power to increase capital "at any meeting called for the purpose" is a grant limited in an important particular. The limitation is a general law, applicable to an increase of capital under section 10 of the act of 1889, and chapter 3 of the act of 1891. *De Lancey v. Insurance Co.*, 52 N. H. 581. If there is a lack of corporate capacity to increase capital at a meeting not called for the purpose, the want cannot be supplied by a by-law. The clause "at a meeting called for the purpose" is to be so construed as to accomplish the legislative design. Its operation can be neither more nor less extensive than the end it was meant to be a means of attaining. If it was intended to be, not an absolute withholding of the power of increasing the capital at a meeting not called for the purpose, but a protection of stockholders against a special danger arising from their not having adequate information of a proposed increase, the question is whether the stockholders have had the intended protection. In *Rex v. Langhorn*, 4 Adol. & Ell. 538, on quo warranto, the question was whether a meeting of the burgesses of Berwick-upon-Tweed, at which the defendant was elected mayor of the borough, was duly assembled. The custom was for all resident burgesses to receive a personal summons. One of them—Robertson, a fisherman—was not summoned, for the reason, as the notifying officer testified, that Robertson had several times told him not to summon him, as he was frequently out at sea. It was held that attendance was a public duty on the part of each burgess; that notice was required, not for his personal benefit, but as an admonition to perform his public duty; that the public had a right to the security afforded by the service of notice on each member of the corporation, and that he could not waive the public right. The

reason of that decision is not applicable to the present case. The requirement of a notice of a proposed increase of capital in the call for a railroad meeting is not a security for the performance of a public duty, but a protection of the private rights of each stockholder against the harm that might result from an increase of capital voted at a meeting not called for the purpose. The general rule is that any one can waive a proceeding required for his exclusive benefit. When the object of a statute is completely accomplished, the law is often satisfied, although some of its prescribed methods have not been followed. If, on a point affecting an individual's private rights, he has all the information he is entitled to, telling him what he knows is not always an essential ceremony. If every Concord & Montreal stockholder had attended the annual meeting in October with full knowledge of the proposed increase of capital, and had enjoyed all desired opportunity to oppose it, and to prepare for opposition, there would be strong ground to argue that the vote was not void for want of words in the notice that would have been as useless, for the practical purposes of the stockholders, as the most unmeaning procedure that could be devised.

"It is objected that notice of the meeting for the election of directors was not proved; but the objection is, in this case, unimportant, as from the evidence it appears that the subscribers here sued were present by proxy, and voted." *Jones v. Milton & R. Turnpike*, 7 Ind. 547. "We are inclined to the opinion that, all the stockholders being notified and present at the meeting, and no objection having been then made to the regularity of the notification, all objections on that ground have been conclusively waived." *Stebbins v. Merritt*, 10 Cush. 27, 34. "The court rejected the offer of the defendant to prove that no notice had been given of the first election of directors. I think this was properly rejected, on the ground that the defendant could not avail himself of a neglect to give notice to any other stockholder. The defendant himself was present at that meeting, and voted, and was elected a director. He has not suffered by an omission to serve notice, and he is not in a situation to object as to others." *Plank-Road Co. v. Thatcher*, 11 N. Y. 102, 108, 113. There are other authorities on this point. *Cook, Stocks & S.* § 599; *Dill Mun. Corp.* §§ 263, 264, 266; 18 Am. Dec. 103. *Sherwin v. Bugbee*, 17 Vt. 337, was trespass against a tax collector of a school district for taking the plaintiff's oxen in the collection of tax voted at a meeting of the district. It did not appear from the record of the warning that the hour of the day at which the meeting was to be held was specified in the warning. The defendant offered parol evidence to prove that in the original warning for the meeting, which was posted up in the district, the hour of meeting was set at 6 o'clock in the afternoon. This evidence was excluded. The defendant offered to prove by parol evidence that all the

legal voters were present and voted at the meeting, and that they all met at about 6 p. m. This evidence was excluded. The defendant then moved that the case be continued, and that the clerk of the district be permitted to amend his records so as to conform to the fact as to the warning. The motion was denied, and the plaintiff had judgment in the county court in apparent pursuance of an exceptionally harsh practice in tax cases that is obsolete in this state. The supreme court held that the defendant's parol evidence concerning the original warning, and the attendance of all the voters at the meeting, was rightly rejected. "The subject of imposing taxes," say the court, "has always been scrutinized and narrowly watched; and a strict and rigid compliance with the law has been required to make the taxes legal. The case of an election has usually been construed more liberally." Decisions of other jurisdictions are necessarily considered here in view of the fact that an equal division of our public expenses is not now obstructed by strained and quibbling interpretation, a strict observance of frivolous formality, and a disregard of substance and of principle. On quo warranto to determine title to office, such evidence as the defendant offered in *Sherwin v. Bugbee* is ordinarily received. Its competency in a tax or railroad case need not now be examined. In *Com. v. Smith*, 132 Mass. 289, on quo warranto to determine the defendant's title to the office of county commissioner, the question was upon the validity of the notice of the annual meeting in the town of Gay Head. The statute required "a warrant under the hands of the selectmen, directed to the constables or some other persons appointed by the selectmen for that purpose, who shall forthwith notify such meeting." The chairman of the selectmen posted on the door of the meeting house a notice, not directed to constables or other persons appointed by the selectmen. Eight registered voters were absent from the meeting. Of those present all voted for county commissioner but one. Of the eight who were not present, five had actual notice of the time and place of the meeting, and that a county commissioner was to be voted for, and did not remain away from the meeting on account of any want of notice; and of the other three two were at sea, and one was confined to his bed by sickness. "If these facts are competent," say the court, "it becomes apparent that the defects in the notice or warrant and in the mode of serving it worked no injury, and that the election was as fully attended as if all the provisions of the law in calling the meeting had been strictly followed. These facts are competent, unless the provisions of the statute which have been disregarded are strictly mandatory; and we are of opinion that they are not. * * * The main purpose of a warrant for meetings for such elections is to remind legal voters of their right and duty to vote, and of the officers to be elected. * * * If this election at Gay Head be declared void, there can

be no new election for county commissioner at Gay Head, and the voters there will have been deprived of their votes without fault on their part, in consequence of the negligence of the selectmen." It was held that the election at Gay Head was not void.

Whatever may be the rule as to the admission of evidence to show that no actual injury resulted from a defective notice of a corporate meeting, it is necessary to consider the nature and extent of the protection intended to be given to stockholders by the requirement of a meeting called for the purpose of increasing the capital. The law applicable to this branch of the case was enacted not merely for the benefit of the owners of the Concord & Montreal road in its present situation, but for the security derivable by this and many other companies in various conditions from a specific call to all members to exercise their judgment, with opportunity for inquiry and consultation, and to vote for or against an expenditure and expansion that might be judicious and might be disastrous. If the plaintiffs could complain of their own want of information only, and not of an omission to give notice to other stockholders, the question might arise whether their objection, made at the meeting, to the sufficiency of the notice, would avail, or whether that objection would be obviated by their attending the meeting with all the information a sufficient notice would have given them. But there seems to be no good reason for a construction of the statute that would limit the plaintiff's right of objection to the sufficiency of the notice as a means of giving themselves information. If a written notice had been given to each of them, stating that the meeting was called for the purpose of increasing the capital from \$4,800,000 to \$6,000,000, it might be claimed that they had all the information on the subject of increase that the legislature intended they should have. But, if the same information were withheld from other stockholders, the plaintiffs might be damaged by a vote to increase the capital, which could not have been passed on due notice of a meeting specifically called for the purpose. Each stockholder was entitled to the protection that would be furnished by such a notice as would inform those who read it of a meeting called for the purpose of increasing the capital. A proposed increase, which would be carried against the resistance of the voters alone, might be defeated by the arguments and votes of others, if all were notified of the business to be done. If the passenger and freight stations in Concord were burned, the complaint of a single stockholder that a fire bell was not rung would not be answered by proof that he had all the knowledge any alarm would have given him, and was present, and endeavored to save the property from destruction. If the

presence of all the stockholders at the October meeting was all the protection the plaintiff would have received from a meeting specially called, and all they are entitled to, the defense fails, because it does not appear that all the stockholders were present.

3. A stock vote was not taken, and does not appear to have been called for. It would seem that this objection is not reasonable, because not made at the meeting, when it could have been obviated. As the injunction against the performance is sustained for insufficiency of notice, it may not be necessary to decide all the questions raised in the argument; but of some not adverted to a decision may be needed. The necessity of an increase of capital authorized by law is a question left to the judgment of the corporation. A stockholder does not lose his right to vote by being a director. The directors were not disqualified to vote as stockholders for the increase.

4. Under the partnership contract, the Concord & Montreal, at "any meeting called for the purpose, may increase * * * its capital stock and the number of shares therein, but the capital stock, when so increased, shall not exceed the amount authorized by law." Gen. Laws, c. 148, § 6. Under the same contract, it may increase its capital to the amount requisite to buy the 12 roads named in section 10 of chapter 5 of the act of 1889, with a limitation of the dividends payable on the capital thus increased, and a compliance with all the requirements of that chapter. Chapter 3, Laws 1891, authorizes the Concord & Montreal to "increase its capital not exceeding \$3,000,000, to be used from time to time for the purpose of adding an extension of the Whitefield & Jefferson Railroad, and of such other branches or leased roads of the Concord & Montreal Railroad as it is or may be authorized to construct, and for the purpose of providing additional depots, yards, and other terminal facilities at Nashua, Manchester, Portsmouth, Concord, Laconia, Lake Village, and elsewhere on the lines of its railroad, of providing additional tracks, wharves, and coal and other storage facilities at tide-water in Portsmouth, of changing the line and improving the terminal facilities at Groveton village, and for providing additional equipment for its railroad, and for the improvement of its railroad and of other property owned or leased by it." The plaintiffs contend that for some of the purposes named in the act of 1891 and in the directors' report and recommendation there can be no lawful outlay of capital, old or new, without the unanimous consent of the stockholders, and that for such purposes the capital cannot be increased. Power to increase the capital for the purposes named in the act of 1889 is a part of the partnership contract, but the act of 1891 was passed after the contract was made. Without unanimous consent, the contract could not be altered by a statute permitting the company to build or buy a road not within the scope of the part-

nership articles. The stockholders' agreement that the company may increase the capital to an amount authorized by law (Gen. Laws, c. 148, § 6) gives authority to enlarge, not the sphere of business for which the company was formed, but the capital employed in that business. A statute giving the state's consent to a purchase by the Concord & Montreal of the Boston & Maine road, or the plant of the Amoskeag Manufacturing Company, would not alter the partnership contract in which a corporate authority to make those purchases was not included.

The case does not state all the facts necessary to be known in a consideration of all the items of proposed expenditure of new capital to which the plaintiffs object. The increase was voted "for the purpose of providing for expenditures authorized by law." The amount of increase corresponds with the directors' recommendation; and the natural inference is that the company intended to expend the new capital for the 11 purposes recommended by the directors. The first item is, "Extension of Whitefield & Jefferson Railroad to Berlin." The report states that this piece of road "is now in process of construction, and will be ready for business about July 1, 1892." If the facts are what this statement seems to indicate, the objection to this item is not seasonably made. *Chamberlain v. Lyndeborough*, 64 N. H. 563, 14 Atl. 866; *Hoyt v. Latham*, 143 U. S. 553, 12 Sup. Ct. 568. The second item is, "To acquire the Profile & Franconia Notch Railroad property." This is one of the 12 roads named in section 10 of the act of 1889. The third item is, "One-half in the Franklin & Tilton Railroad, built by this corporation and the Boston & Maine, * * * and now substantially completed." This is a branch of the Concord & Montreal, and if it is substantially completed it is too late to object to the investment. The fourth item is the completion and improvement of "the Lake Shore Railroad, owned by the corporation." The completion and improvement of the Lake Shore, like the completion and improvement of the Montreal and the Concord, is within the scope of the contract. The facts relating to the fifth and sixth items are not stated in the case. To the other five items it does not appear that any valid objection can be made. If another vote is passed to increase the capital, it may take a form that will not require further consideration of the details of the directors' report. A vote like that of October, "for * * * expenditures authorized by law," might be valid even if the plaintiffs should obtain an injunction against some investments which the company proposed to make. The company's scheme might embrace an amount of lawful outlays that would absorb all the new capital. Decree for plaintiff.

CHASE, J., did not sit; the others concurred.

38 A.—9

(36 Md. C3)

CRANE v. JUDIK et ux.

(Court of Appeals of Maryland. June 22, 1897.)

SPECIFIC PERFORMANCE—FALSE REPRESENTATIONS.

Specific performance will not be decreed against a purchaser at auction of a ground rent, the statement in the advertisement and by the auctioneer that it was a well-secured rent being false.

Appeal from circuit court of Baltimore city.

Bill by J. Henry Judik and wife against Joseph Crane. Decree for complainants. Defendant appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, PAGE, BOYD, BRISCOE, and RUSSUM, JJ.

Wm. A. Fisher and R. H. Bernard & Son, for appellant. Harry M. Benzinger and James S. Calwell, for appellees.

RUSSUM, J. The bill of complaint in this case was filed in the circuit court for Baltimore city, to enforce the specific performance of a contract made by the appellant with the appellees, to buy an original ground rent, of \$140 per annum, issuing out of a lot No. 148 Forrest street, near Gay, in said city. The bill was demurred to, and the court below sustained the demurrer, and, on appeal to this court, the cause was remanded, without either affirming or reversing the decree, under section 36 of article 5 of the Code, to enable the complainants to amend their bill, and to prove certain facts which are necessary to a recovery, and which this court supposed to exist. *Judik v. Crane*, 81 Md. 610, 32 Atl. 276. It is necessary to a clear understanding of the case that we should repeat the particulars of the title. In August, 1871, Edmund Law Rogers and wife leased a quadrangular lot of ground on Forrest street to John M. Brock, for 99 years, renewable forever, at an annual rent of \$240. Brock made a mistake, and, instead of running his second and fourth lines perpendicular to Forrest street, ran them oblique, and parallel with Lowe street, which crossed Forrest street a short distance south-westerly; and he entered upon and improved the lot thus bounded. The lot thus occupied by Brock takes in, on one side, a small triangle not embraced in the lease, and omits, on the other side, a small triangle which was included in the lease. Brock mortgaged the leasehold according to the lines in the lease, and afterwards, in July, 1872, executed a surrender of his lease to the reversioners, and received from them, on the same day, a new lease, describing, by metes and bounds, the lot actually occupied by him. The mortgage of the leasehold was foreclosed, and the property conveyed by the description in the first lease. In May, 1894, the reversioners conveyed to David S. Collett the rent and reversion reserved in the second lease, and he conveyed them to J. Henry Judik, one of the complainants. Since the auction sale of the

ground rent to the appellant, Judik and wife have released \$100 of the ground rent, so that the amount now payable is \$140. In the opinion remanding the cause (81 Md. 618, 32 Atl. 277) this court said: "Brock's surrender of his lease, and the acceptance of another in its place, could have no effect against the mortgagee, or any tenant holding under the title derived from him. Consequently, the second lease and the reservation of rent contained in it would be inoperative to bind the successive assignees of the original leasehold. The court therefore properly sustained the demurrer. But there are other facts very strongly implied, although not stated in the bill. From the known and ordinary course of business, we think it highly probable—in fact, almost certain—that the assignees of the original leasehold, who can claim title only under the mortgage sale, have entered upon and taken possession of the lot inclosed and improved by Brock, and have paid the reversioners the rent reserved. If so, he has recognized them as tenants, and they have acknowledged him as landlord." It was then said that "the title is perfectly good, if the facts are as we suppose them to be," and the case was therefore remanded, that the complainants might allege and prove them to exist.

The first question, therefore, is, have the complainants furnished such proof of the existence of these facts as will entitle them to a decree? We think not. Of the witnesses who have testified in the cause, Mr. Rogers, Mr. Collett, and Mr. Judik are the only persons who could state anything concerning these facts. After stating that the inclosure coincided with the description in the second lease, Mr. Rogers testified that some of the older tenants paid him rent, but he could not say whether any of the latter tenants had recognized him, or when the last collected any rent, but he thought that the Socrates Building Association was the last to pay any, and it was very remiss in its payments. It appears that during his ownership of the reversion there were two other succeeding holders of the record title, as originally described, prior to Overton. Mr. Rogers admits that, some time before the sale of the reversion to Collett, the tenants had repudiated him, but he did not know "what kind of repudiation it was." When we examine the testimony of Mr. David S. Collett and Mr. J. Henry Judik, it is discovered that neither of them testifies that the assignees of the original leasehold, who claim title under the mortgage, had taken possession of the lot inclosed by Brock, and paid the rent reserved to the reversioners. Mr. Collett's testimony indicates that he felt it to be his duty to evade every question the answer to which would have afforded an opportunity for a truthful and intelligible account of the transactions relating to the property, except in his examination in chief, in which the questions were broadly suggestive of the desired answer, and is altogether too

vague and indefinite to be relied on. Mr. Judik's evidence simply establishes the fact that it is possible for a gentleman to have a suit pending for the specific performance of a contract without knowing a single fact relating to it or its subject-matter that would be to the benefit or advantage either of himself or the opposite party. The complainants have therefore failed to fulfill the fair expectations of this court in remanding the cause, by furnishing the proof necessary to establish their title.

But was this contract, in all respects, full, fair, and honest in the beginning, and such that may be fairly and conscientiously required to be performed? The ground rent which was sold to appellant was "an old, original, irredeemable, and well-secured rent, for one hundred and forty dollars," on 418 Forrest street, near Gay. This was the statement of the advertisement, as well as of the auctioneer. The meaning of this language is that the ground rent offered for sale was well secured and irredeemable, and that it was created for the sum of \$140, and had been in existence many years. The proof is that it was neither an old nor an original rent for that sum, but a rent for two hundred and forty dollars, to be reduced to one hundred and forty dollars. But assuming, *ex gratia* argumenti, that this makes no difference to the purchaser, was it true that it was well secured? In addition to the fact that no such ground rent exists on the property as inclosed and occupied by Brock, the preponderance of the testimony shows conclusively that it was not a well-secured rent. And a review of the whole case shows very plainly the acquisition of the leasehold estate, subject to a rent of \$240, which had really been abandoned, with several years' rent in arrear, and which was about to be sold for taxes; the pretended consideration of \$1,600 in the agreement between Judik and Overton; the allegation that all the tenants, down to the time the appellant purchased the property, had paid the ground rent of \$240 to Rogers; the false statement that the Globe Bond Company paid Overton \$2,500 for his interest in the property, —are only masks assumed to consummate the purpose to preserve the irredeemable feature of this rent, in order that they who controlled it might be able to find a purchaser, by representing it as an old, original, irredeemable, and well-secured rent. In making the sale of a ground rent of \$140, under the circumstances of this case, whether fraudulently or innocently, a false impression was conveyed, and made the basis of the contract, and the extraordinary jurisdiction of a court of equity ought not to be exercised by coercing a specific performance. *Carberry v. Tannehill*, 1 Har. & J. 224; *Gurley v. Hiteshue*, 5 Gill, 223; *Keating v. Price*, 58 Md. 535, 536. The decree of the court below will therefore be reversed, with costs above and below, and bill dismissed.

(86 Md. 68)

CRANE v. JUDIK et ux.

(Court of Appeals of Maryland. June 22, 1897.)

REHEARING—DISCRETION OF COURT.

Petition for rehearing is in the nature of a motion for new trial, and addressed to the sound discretion of the court, from the exercise of which no appeal lies.

Appeal from circuit court of Baltimore city.

Bill by J. Henry Judik and wife against Joseph Crane. From a decree dismissing petition of defendant for rehearing, he appeals. Appeal dismissed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, PAGE, BOYD, BRISCOE, and RUSSUM, JJ.

Wm. A. Fisher and R. H. Bernard & Son, for appellant. Harry M. Benzinger, James S. Calwell, and C. W. Henisler, for appellees.

RUSSUM, J. The appeal in this case is taken from an order of the circuit court for Baltimore city dismissing the petition of the defendant for the rescission of the decree passed in this cause on the 26th day of May, 1896, and for a rehearing. It is settled by repeated decisions in this court that a petition for a rehearing is in the nature of a motion for a new trial, and is addressed to the sound discretion of the court, from the exercise of which no appeal will lie. *Jacobs v. Bealmear*, 41 Md. 487; *Zimmer v. Miller*, 64 Md. 299, 1 Atl. 858. The appeal must therefore be dismissed, with costs.

(86 Md. 279)

GREEN v. WESTERN NAT. BANK OF BALTIMORE.

(Court of Appeals of Maryland. June 23, 1897.)

MARKET STALLS—LIEN OF EXECUTION—PRIORITIES—SUBROGATION—APPEAL—REVIEW.

1. On appeal from order distributing proceeds of sale of certain property, neither the decree determining in whom was title, nor that authorizing the sale, is open for review.

2. Existence of a mortgage whereby legal title to the mortgaged property is in the mortgagee, with only an equity of redemption in a judgment debtor, does not defeat the lien of execution, though the aid of equity is necessary for its enforcement.

3. The right acquired by purchase of market stalls, a right to occupy particular stalls for purposes of the market only, and which is sold by the city under power conferred by the legislature, is subject to lien of execution.

4. Property of C., which was subject to mortgage to M., was, after judgment against B. and issue of execution thereon, sold by the administrators of C., and purchased by B. in the name of G. The mortgage was then released, being satisfied, partly with means of B., and the residue with part of a loan of \$1,200 obtained from G. by B.; such part being, at direction of B., paid by check of G. At the same time, G. executed agreement to sell to B. for \$1,200. *Held*, that the rights of G. in the property were subject to the lien of the execution, and that he could not be subrogated to rights under the released mortgage.

Appeal from circuit court of Baltimore city.

Bill by the Western National Bank of Baltimore against Charles W. Brown and others to subject certain property to payment of complainant's judgment against said Brown. From an order ratifying audit distributing proceeds of sale of the property, defendant George W. Green appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BOYD, FOWLER, BRISCOE, and PAGE, JJ.

Lewis Hockhelmer, Charles A. Briscoe, and F. S. Hoblitzell, for appellant. W. Burns Trundle, for appellee.

PAGE, J. This is an appeal from an order of the court below ratifying an audit distributing the proceeds of the sale of certain market stalls in the Lexington and Hanover Markets, in the city of Baltimore. The stalls were originally the property of Charles Brown, now deceased. In May, 1892, he borrowed \$200 from the appellant, and, to secure its payment, pledged to him stalls Nos. 5 and 5½ in the Lexington Market. There is no controversy over this transaction. On the 24th February, 1892, the Baltimore Butchers' Mutual Protective Association loaned him \$2,000, and on the 4th of April of the same year the further sum of \$500. To secure the payment of these two sums, amounting in the aggregate to \$2,500, the association received a mortgage from Brown on all the stalls, and also the transfer of the licenses therefor on the books of the city comptroller. At the same time, to comply with the rules of the association, Charles W. Brown, the son of Charles Brown, in his own name, as trustee for Elenora Brown, his wife, subscribed for certain shares of stock of the association, and pledged them as additional security for the loan. In his lifetime Charles Brown paid no portion of this debt. Charles W. Brown, however, kept the stock paid up, according to the rules of the association. Brown states, as the reason why the shares were subscribed for by him as trustee, that the association required the borrower to become a member by subscribing for its stock; and, his father not being "in a condition" to do so, he consented to take them as trustee for his wife, and pledge them for the debt of his father. It was not insisted at the argument that the payments made by Brown on account of the stock were out of his wife's money, as Brown in his answer had alleged. There is no proof in the case that would enable us to find that Mrs. Brown's money was so used. Although, at the requirement of the association, she joined in the receipt to it for the amount standing to the credit of her husband, as trustee, there is nothing in the record to satisfy us that she had any interest in the matter whatever. In January, 1895, Charles Brown died, and within a month thereafter Charles W. Brown and Euril Budnitz qualified as the administrators of his estate. On the 27th of

November, 1895, the appellee recovered a judgment in the Baltimore city court against Charles W. Brown for \$1,209.80, with interest and costs, and on the same day execution by way of fieri facias was issued, and reached the sheriff's hands two days later. It is clear that, at the time of the issuing of this writ, the title to the stalls was in the administrators of Charles Brown, subject to the lien of George Green on stalls Nos. 5 and 5½ in the Lexington Market, and the lien of the butchers' association on all the stalls of the deceased in both markets. On the 4th day of December, 1895, the orphans' court passed an order directing the administrators to make sale of the stalls. The report of the administrators to the orphans' court fails to give the date of the sale made in pursuance of the order. But Mr. Budnitz, in his answer, states that it was made, reported, and ratified before the 9th day of December. He also testifies that Brown told him, "two or three days before the report of sale," that Green was to be reported as purchaser, and, acting on this, he (Budnitz) prepared the report, and filed it. It was immediately ratified; and "the appointment was then made for all the parties in interest to meet at his office on the 9th of December." That the sale was completed before that day is further borne out by a consideration of the purpose and plan Brown had in view. His purpose was to secure the title to himself; his plan, to have Green returned purchaser, so that the latter could hold the legal title until the loan was repaid; and, to effect all this, it was necessary, when the time came for Green to advance the money and for the association to release the mortgage, that the title should be safely vested in Green. How long before the 9th of December the sale was made is not material, because, if it was made at any time prior to that day, the lien of the appellant's judgment fastened upon the property. Nor is it proper to inquire whether, upon the facts proved, the title became vested in Charles W. Brown. The circuit court, by its decree of the 6th of October, 1896, so determined; and with the correctness of that decision, it not having been appealed from, we are not now concerned. *Phelps v. Stewart*, 17 Md. 242. This appeal having been taken from an order distributing the proceeds of sale, the original decree authorizing the sale is not open to review by this court. *Newbold v. Schlens*, 66 Md. 590, 9 Atl. 849; *Porter v. Askew*, 11 Gill & J. 351.

Brown's title having accrued prior to the return day of the writ,—that is, prior to the 9th day of December,—if it be assumed that market stalls are such property as may be taken in execution, it is clear the appellee acquired a lien, subject to such prior liens as might exist. The fact that the butchers' association held a mortgage, whereby the legal title was in it, with only an equity of redemption in Brown, could not avail to de-

feat the lien of the execution. It could not be enforced at law, it is true; and because of that it is that the appellant had the right to seek the intervention of a court of equity, in order that he may be paid his claim, after the prior lien has been discharged. "It is an established legal principle that a debtor's equitable estate in personal property cannot be seized and sold under a writ of fieri facias. The usual mode is to issue a fi. fa., cause it to be levied or returned, thus showing that his remedy at law has failed, by which acts of diligence a creditor acquires, in the eye of a court of equity, a priority of right from the time his execution was placed in the sheriff's hands, and a court of equity will permit him to redeem the prior incumbrance, or grant a decree for a sale." *Myers v. Amey*, 21 Md. 305. We are of opinion there is nothing in the nature of the right or estate acquired by the purchase of market stalls to exempt them from the lien of an execution. Such right is "in the nature of an easement in, not a title to, a freehold in the land. * * * It is limited in duration to the existence of the market, and is to be understood as acquired subject to such changes and modifications in the market during its existence as the public needs may require. The purchase confers an exclusive right to occupy the particular stalls, with their appendages, for the purposes of the market, and none other." *Rose v. Mayor, etc.*, 51 Md. 270. It is a valuable right, sold by the municipal authorities, under the power conferred by the legislature "to lease, sell, or dispose of" it "in any manner and for any term they may think proper." *Public Local Laws*, art. 4, § 678. It is transferable, may be given and taken as security for debts, or sold, and special provision is made in the city code for the passage of the title. *Savings Inst. v. Wilcox*, 63 Md. 531. It is also an interest issuing out of the realty of determinate duration, such as the term of years for which it may be granted, or during the existence of the market. It is a chattel real and personal property (2 Bl. Comm. p. 386), and therefore liable for the debts of the owner, and subject to seizure and sale under a fieri facias (2 Tidd, Prac. 1039).

Subsequent to the sale, by appointment, Mr. Budnitz testifies the "parties in interest" met in his office, on the 9th of December. At that time Green was chargeable with full knowledge of the exact state of the title. He had actual notice of the mortgage, and of the fact that the association held the license as collateral security only for the payment of the debt due to it by Charles Brown. An examination of the records in the orphans' court would have informed him that the administrators had included the market stalls in the inventory of the estate, had obtained an order for the sale, and had sold them, and reported him as the purchaser, without his knowledge or consent. He knew he was not the owner of the stalls, and in

asmuch as it was within his knowledge that Brown wanted to get the stalls free from the claim of the association, and the title in "some individual, where he could pay the money on notes when it came due," it required no especial astuteness to enable him to infer that whatever was done was at the instigation of Brown himself. He states in his evidence that he asked Brown "if the stalls were all right in his name, and he said they were," and that satisfied him. He seems to have made no examination, either among the orphans' court proceedings, or in the comptroller's office. It was under these circumstances that, on the 9th of December, the claim of the association was paid and its mortgage released. The release recites: "Whereas, all covenants," etc., "have been performed, and the whole sum of money and interest secured thereby has been paid, the said body corporate doth grant and release," etc. The receipt of the association is for \$2,514.34, of which \$1,086.74 was paid by the check of Green. The residue was settled for by the receipt of Brown and wife for \$1,427.37, the same being the amount to their credit on the books of the association. The amount so paid by Green's check was part of the \$1,200 loaned to Brown, and was so paid at Brown's request. The residue of the loan was paid to Brown. At the same time, Green obtained a transfer of the license from the association, and also entered into an agreement with Brown to sell the stalls to Brown's firm (Brown & Merritt) for \$1,200, payable in two years; they to have the possession of them upon payment of that sum, with interest, and the license and all expenses thereon. It is not contended that Green acquired any title or interest in the property by the transfer of the license, superior to the lien of the execution. It is also clear that, up to the date of the sale by the administrators, the equitable title to the stalls was in Charles Brown or his representatives, and after that in Charles W. Brown. So that, when the mortgage was released, its lien was absolutely destroyed, and the lien of the execution became the first, unless, upon some principle of equity, Green can be subrogated to the lien of the mortgagor. Upon this point the counsel for the appellant have cited many decisions of courts beyond the state, but we deem it unnecessary to enter upon an examination of them, for the reason that, as to a case of this kind, the proposition involved has been firmly settled by our own courts, and, we may add, in conformity to the great weight of authority everywhere. *Boyd v. Parker*, 43 Md. 201.

It may be premised, in view of the facts as we have stated them, that to hold the lien of the association still exists would be to defeat the intent of the parties manifested by declarations and acts in the most unequivocal manner. When Brown obtained the loan from Green, it was well understood by

both of them that the money was to be used in procuring the release of the association's mortgage. This was in fact accomplished by the release from the association. Green, who at the time knew or ought to have known the exact condition of the title, contented himself with taking, as his only security, a transfer of the license from the association, which, he was well aware, held it only as a security for its claim. Why, it may be asked, should not be applied the rule, than which none is better settled, that these who enter into contracts must be governed by them as made, according to their true intent and meaning, and must submit to the legal consequences from them? *Boyd v. Parker*, supra. Can Green, under these circumstances, derive any aid from the doctrine of subrogation? That doctrine is not founded in contract, but is altogether a creature of equity, and only resorted to to afford relief to a meritorious creditor. It is never applied when, by so doing, it will work an injury upon other persons, by destroying their legal or equitable rights. In *Milholand v. Tiffany*, 64 Md. 460, 2 Atl. 831, the court says: "It may be applied on equitable principles, in behalf of one who, at the instance and request of the debtor, pays a lien or incumbrance which he was under no legal obligation to pay, provided it does not interfere with intervening rights and incumbrances. It will not, of course, be applied against superior or equal equities." *Woollen v. Hillen*, 9 Gill, 185; *Com. v. Canal Co.*, 32 Md. 546; *Boyd v. Parker*, supra; *Clabaugh v. Byerly*, 7 Gill, 354; *Robertson v. Mowell*, 66 Md. 538, 8 Atl. 273. For these reasons, we think Green is not entitled to be subrogated to the lien of the mortgage. Finding no error in the order of the court below, it will be affirmed. Order affirmed, with costs.

(123 Pa. St. 355)

In re PITMAN'S ESTATE.

(Supreme Court of Pennsylvania. May 21, 1897.)

WILLS—SPECIFIC DEVISES—PAYMENT OF DEBTS.

Under a will devising a particular field to an adopted daughter, another field to his nephew, subject to a legacy of \$500 to a niece, and devising and bequeathing the balance of the land and estate, subject to a bequest of \$150 to his adopted daughter, to his wife, all three devises are specific, and must therefore contribute to payment of the debts, for which no provision was made, and most of which were adjudged against the estate after death of testator, on a claim to which he supposed there was a good defense.

Appeal from orphans' court, Fulton county.

In the matter of the estate of George J. Pitman, deceased. From a decree for sale of decedent's lands for payment of debts, and providing that those devised to Elizabeth Pitman should be sold first, she appeals. Reversed.

J. Nelson Sipes, W. R. Gillan, and W. U. Brewer, for appellant. John P. Sipes and Geo. A. Smith, for appellees.

DEAN, J. George J. Pitman died 17th September, 1891, leaving a widow, but no children. He left an estate consisting largely of land, part being a valuable improved farm of 135 acres. Of this, he devised a particularly described field of 20 acres to an adopted daughter, Olive D. Pitman; another field, of 30 acres, particularly described, to his nephew Thomas Johnston,—this last, subject to the payment of \$500 to a niece, Pleasant E. Mann. To his wife, Elizabeth, he devised and bequeathed the balance of the land and estate, subject to the payment of \$150 to his adopted daughter, Olive D. Pitman; she (Olive), however, to pay the collateral inheritance tax on the field before devised to her. By a codicil, instead of an absolute estate in the balance, he gave to his wife the use thereof during life, with authority to sell, convey, and dispose of the same, and use the proceeds if she thought necessary. If anything remained at her death, then it was to go to certain nephews and nieces in particular allotments. Thomas Johnston accepted the devise of the field, paid the collateral inheritance tax, and the charge of \$500 in favor of the niece. Olive D. Pitman paid the collateral inheritance tax on the field devised to her. The testator, some years before his death, had incurred a liability as surety on an administration bond in a considerable amount. Though the bond was in suit at his death, it appears he expected the defense set up would be successful. Therefore he seems not to have had in mind any depletion of his estate on account of this liability, or any other, and made no provision for payment of debts in his will. However, after his death the event of the suit on the bond fixed his indebtedness in this particular at \$2,004.49, which, with counsel fees, funeral expenses, and a few other items, made the entire debts for which the estate was answerable \$3,064.49. In addition to the land, there was some personal property, which was taken by the widow, the value of which is in dispute, but it was stated by the counsel in argument before us as worth about \$600, and for the purpose of ending strife we adopt that valuation in making up our decree. Under these circumstances, application was made by the widow and executrix to the orphans' court for an order of sale to pay debts, with a request that the court direct in what order the land should be sold; she contending that, as widow, the land devised to her should be last resorted to. The two other devisees contended that theirs were specific devises, and the widow's a residuary one; therefore, under the law, the latter must be first subject to payment of the debts. The court below was of opinion that the devise to the widow was residuary, having no semblance of a specific devise, and therefore must be first appropriated in payment of the unanticipated indebtedness.

Without citing the many cases on the question, the reasons for the judgments in them not always being in harmony, one rule, in substance, is announced in all of them. As summarized by Lewis, J., in *McGlaughlin v. McGlaughlin*, 24 Pa. St. 20, it is this: "On a question of marshaling assets under a will, the residuary clauses necessarily furnish the most important evidence of the intention of the testator, because they dispose of the surplus that remains after satisfying all the other directions of the will. On this account it is very natural to presume that the testator intends to charge upon them all the deficiencies in the other portions of his estate, in paying debts and legacies, and hence it is very generally decided that debts and legacies not otherwise effectively provided for fall upon the residuary devises and legacies." That is, legacies and debts are charged upon the residuary estate because the testator so intended. The intent is not expressed, but is generally—not always—presumed, because in giving the surplus he gives only what remains after his special benefactions and the lawful demands on his estate are satisfied. The remarks of Woodward, C. J., in *Gallagher's Appeal*, 48 Pa. St. 121, in discussing the question as to whether a legacy should be charged on a residuary devise, points out the difficulty in a case like the one before us: "When does a testator make the pecuniary legacies a charge upon the land devised? It would be easy to answer, when he manifests an intention to do so by express language. But it often happens there is no express charge, and language which the testator directed to other objects has to be so construed as to get at his presumed intention upon this particular point." What was the intent of this testator? If it was that his wife was to have only what remained, after the two legacies to his nephew and adopted daughter, and his debts, were paid, then the property devised to the wife must be first sold. It will be noticed that neither in the will nor in the codicil does he speak of debts, and as it is admitted the obligation of suretyship, with the expenses incident to a defense against it, with a trifling exception, constitute his whole indebtedness, it is not probable the testator considered the matter as of sufficient gravity to warrant a direction concerning debts. The principal part of his estate consisted of his 135-acre farm, and he disposes of this first, by giving a particular field of 20 acres to his adopted daughter, then a particular field of 30 acres to his nephew, imposing upon that a specific charge of \$500. This left 85 acres of the farm, and his personalty. He then says: "I give and bequeath to my beloved wife, Elizabeth, her heirs and assigns, forever, the balance of all my property, real, personal, and mixed, of what nature or kind soever, and wheresoever the same shall be at death, subject, however, to the payment of one hundred and fifty dollars to my adopted daughter, Olive D. Pitman, before mentioned." It is wholly immaterial that he commences by giving the fields first, and the balance to his

wife afterwards; for, as is said by Sharswood, J., in *Re Willard's Estate*, 68 Pa. St. 327, "The residue of a man's estate, in testamentary language, means whatever is not specifically devised or bequeathed; and, in whatever part of a will it may happen to be found, it ought to have that meaning, unless the whole will, taken together, shows clearly it was not so intended." Taking the whole will together, does it not clearly appear the testator intended three specific devises? Was not the devise to his wife just as specific as the fields to his adopted daughter and nephew? He could just as precisely and specifically have expressed the same intention by saying, "I devise and bequeath to my wife all my estate, real and personal, except the twenty-acre field which I devise to my daughter, and the thirty-acre field which I devise to my nephew, subject to a charge of \$500." Then all three, it is not questioned, would have been specific. The wife's would have been determined by an inspection of his titles and a schedule of his personalty; the daughter's and nephew's, by pointing out to them the designated fields. It was perhaps more convenient to note the exceptions to the wife's devise first, but in doing so hers was not made less specific. The word "balance" left to her the 85 acres of the farm, and every article of personal property, as specifically as if enumerated and described at length. He does not leave to her a balance, in the sense that she was to have what remained after payment of debts and legacies. She was to have the balance, distinct and specific, after cutting off the two fields. The devise was not a residue of an estate, implying an unknown value or quantity of property by one in conscious ignorance of possible claims or charges. It was a specific devise of the land and a bequest of the personalty, capable of absolute certainty the day after his death, by one having full knowledge of his estate, and believing it subject to no charges except those directed in his will. In view of the testator's surroundings, the character and value of his estate, the objects of his bounty, and the language used to express his intention, there is no room for the presumption that by the use of the word "balance" he meant to give his wife the residue of his estate after deducting the devises specified, debts not known, and other charges. He meant just what he expressed,—a specific devise to her of all his estate after taking out the two devises of the two fields, and the \$150 directed to be paid his adopted daughter.

The argument that, the widow having accepted the devise, it must be considered as in lieu of dower, and therefore she must be treated as a purchaser for a valuable consideration, is not sustained by the facts under this will. As pertinently said in the opinion of the court below, "She must certainly accept her devise subject to all the limitations and conditions imposed upon it by the testator, either by express words or necessary implication." Here, by express words, all three were specific de-

vises, and by necessary implication all are answerable for the indebtedness. In equity all three should contribute pro rata, according to value, towards payment of the unexpected indebtedness.

The learned judge of the court below has found from the evidence the value of the devises, as follows:

Olive D. Pitman	\$ 800 00
Thomas Johnston	1,275 00
Elizabeth Pitman, \$5,500, to which we add admitted value of personal property, \$600, making.....	6,100 00
	<u>\$8,175 00</u>
Total debts	\$3,064 49

To pay this would require a pro rata contribution from each devisee of 37.486 per cent. on the value of each devise, making for—

Elizabeth Pitman	\$2,286 646
Olive D. Pitman	299 888
Thomas Johnston	477 946
	<u>\$3,064 48</u>

Each amount should bear interest from June 9, 1896, the date of final decree in the court below.

It is therefore ordered that the decree of the court below be reversed, and it is further decreed by this court that the property of each legatee be subject to the payment of the heretofore specified pro rata amounts, respectively, and each is directed to pay the same to the executrix, to be applied in payment of the aforesaid debt. It is further ordered that, if default be made in said payment by either for a period of 60 days after the filing of this decree, then an order issue from the court below for the sale of the land of the devisee or devisees so in default; on such terms, however, as the court below, in its discretion, may decree. As this litigation arises from an uncertainty of legal right, occasioned by the language of the will itself, it is but just that the costs of this appeal should be borne equally. It is therefore ordered that each devisee pay one-third of same.

(182 Pa. St. 246)

HIRSCH v. WENGER et al.

FRAIM v. SAME.

(Supreme Court of Pennsylvania. July 15, 1897.)

FRAUDULENT CONVEYANCE—EVIDENCE.

On an issue between plaintiff, claiming property under execution sale on judgment confessed in his favor for a large amount by his son immediately after defendants commenced action against the son, and defendants, who levied on the property as that of the son, claiming that the confession of judgment and proceedings thereon were fraudulent, defendants may show that at the time plaintiff claimed to have made advancements to the son for which the judgment was claimed to have been confessed he was not of sufficient pecuniary ability to do so, that he was then pressed for money with which to pay taxes, that his real estate was heavily incumbered, and that he was actually insolvent.

Appeal from court of common pleas, Lancaster county.

Issues under the sheriff's interpleader act, between A. Hirsch, as plaintiff, and D. H. Wenger & Bro. and another, as defendants, and between M. W. Fraim, as plaintiff, and the same defendants. Judgments for plaintiffs. Defendants appeal. Reversed in first case, affirmed in second case.

John A. Coyle and D. McMullen, for appellants. Brown & Hensel, J. W. Johnson, and Chas. I. Landis, for appellees.

WILLIAMS, J. These were issues under the sheriff's interpleader act. The facts which gave rise to them are substantially as follows: B. W. Hirsch was the proprietor of a livery stable. D. H. Wenger & Bro. and Christian Reedmiller were dealers in feed, and had been supplying Hirsch with feed for his horses. Finding that they could neither obtain payment of or security for their bills, they brought action against him on the 9th day of November, 1893. Judgments were recovered in these actions on the 25th of the same month; that in favor of Wenger & Bro. being for \$980.44, and that in favor of Reedmiller for \$1,287.87. Two days after these actions were begun, Hirsch confessed a large judgment in favor of his father. A writ of *fi. fa.* was issued on the same day, and without much loss of time the horses, harness, wagons, and other personal property comprising the livery establishment were seized, brought to sale by the sheriff, and sold to the plaintiff in the writ, the father of B. W. Hirsch. The amount of the judgment confessed, the relationship of the parties, the time when the judgment was entered, and the circumstances surrounding the sale were, to say the least, suggestive. The defendants in these cases issued writs of *fi. fa.* on their judgments as soon as they were revived, and levied on the same property, kept at the same livery stable. At the sheriff's sale the father appeared, and claimed the property as his by virtue of the sheriff's sale made to him on his own judgment. These issues were framed to determine the bona fides of his judgment and the validity of his title.

The allegation of the defendants was that the confession of judgment by B. W. Hirsch to his father, and the subsequent proceedings upon it, were a fraud, intended to hinder and defeat the collection of the debts due them. They depended upon circumstances for the support of this allegation. Among other things, they sought to show that the father was not of sufficient pecuniary ability to furnish his son the amount of money claimed, that he was pressed during the time when the alleged advances were being made for money with which to pay his taxes, that his real estate was heavily incumbered, and that he was actually insolvent. If this proof had been admitted, as we think it should have been, the burden would have been on the father to establish to the satisfaction of the jury that he had the

money he claimed to have advanced to his son; that he did advance it in good faith; and that it was unpaid, and honestly due, when the judgment was confessed. The door should have been opened for an investigation of the alleged fraud, and latitude allowed in examining the circumstances surrounding the alleged advances. *Railroad Co. v. Hoge*, 34 Pa. St. 214. The principle laid down in *Glessner v. Patterson*, 164 Pa. St. 224, 30 Atl. 355, is applicable to this case. The straitened circumstances of the father was a fact having an important bearing upon the bona fides of the alleged indebtedness. If his debts and the pressing demands on him for money were such as to render it improbable that he could have raised and advanced to his son the sums claimed at the time when he asserted it had been done, this went strongly to affect the credibility of his testimony, and sustain the allegation of fraud. The second, third, fourth, and seventh assignments of error are sustained. The fifth and eighth assignments appear to be to rulings, not turning on the manner of proof offered, but on its relevancy. We think the proof was relevant. The defendants, under the peculiar circumstances of this case, had a right to show the insolvency of A. Hirsch at the time when he alleged he was advancing large sums of money to a son who was also a bankrupt, and utterly unable to return the money so advanced. Some of the questions raised by the other assignments may become important upon another trial. This is especially true of that raised by the ninth assignment. If, as is alleged, there were large judgments and debts not of record, due from the plaintiff, and he was without property sufficient to pay them, this made a case of actual insolvency which would have been a strong reason for treating the judgment against the son and the sale by the sheriff of the stock of the livery stable upon the *fi. fa.* as contrived and executed for a fraudulent purpose. The judgment is reversed and a *venire facias de novo* awarded. In the other cases in which Fraim was plaintiff in the court below we see no sufficient reason for disturbing the judgment, and it is accordingly affirmed.

(180 Pa. St. 509)

UNION WATER CO. et al. v. BOROUGH OF ROCHESTER et al.

(Supreme Court of Pennsylvania. April 12, 1897.)

BOROUGH—PROVIDING WATER FOR INHABITANTS—INJUNCTION—DIVISION OF COSTS.

1. A borough which, under General Borough Act April 3, 1851 (P. L. p. 320, § 2, subd. 20), empowering it to provide a supply of water for the use of the inhabitants, and to make needful regulations for protection of pipes and reservoirs and to prevent waste of water so supplied, may either construct its own water works, or adopt other means for supplying water, executes its power (which it has by virtue of the statute only) by authorizing a water company to lay its pipes and erect hydrants in its streets, subject to the approval of the borough engineer, and contracting

with it to supply pure filtered water, at a certain pressure; the price to private consumers not to exceed a certain price, and the borough to pay a certain amount per year for five years, with the option of continuing the contract for five years more, for each of the fire plugs furnished; the water company being incorporated under Corporation Act 1874 (P. L. 73), which requires such companies to furnish pure water, gives any consumer the right to file a bill alleging impurity or deficiency of supply, or excessive rates, and requires the court to correct the evils, and provides that the borough may purchase the company's property, after 20 years, on paying the net cost, with 10 per cent. interest, after deducting all dividends declared by the company; and, so long as the company furnishes an adequate supply, the borough cannot furnish another supply by erecting its own water works.

2. Where notice of suit to enjoin a borough from exceeding its powers by erecting water works of its own, when a sufficient supply is already furnished by a water company, is not given till several days after the borough has contracted for sale of its bonds to raise funds for such erection, which contract was not made till 20 days after it was authorized by ordinance, and two months after vote of the people in favor of the proposition submitted by ordinance two months before, costs of the suit will be divided between the parties.

Bill filed in the supreme court by the Union Water Company and by Aaron Wilson and others, taxpayers of Rochester, against the borough of Rochester and the burgess and councilmen thereof, to restrain the issue and sale of the borough bonds, and the erection of proposed water works for it. Decree for plaintiffs.

The case was referred to a referee, who found, *inter alia*: That the borough was incorporated by Special Act March 20, 1849 (P. L. 283), and that September 7, 1871, it accepted the provisions of General Borough Act April 3, 1851 (P. L. 320). That the Valley Water Company was incorporated February 10, 1890, under Corporation Act 1874 (P. L. 73), and supplements thereto, to supply water to the public in the borough of Rochester, and to parties residing therein and adjacent thereto; said act authorizing the incorporation of water companies to supply the places for which they are chartered; requiring them to furnish pure water; giving any citizen the right to file his bill, alleging impurity or deficiency of supply, or excessive rates, and requiring the court to correct the evils; forbidding them to construct works within any municipality which has works, without its consent; and providing that the city, borough, town, or district may purchase the works and property of any company, after 20 years, on paying the net cost, with 10 per cent. interest, deducting from the interest all dividends declared by the company. That prior thereto the borough of Rochester had not provided any system of water works. That May 7, 1890, a contract was made by the Valley Water Company and the borough of Rochester whereby the company was to furnish pure filtered water at a certain pressure, erect a certain number of fire plugs, and as many more as the borough might thereafter desire, —the system of piping and the location of the

fire plugs to be subject to the approval of the borough engineer; and the borough agreed to pay a certain amount per year for each fire plug, for five years, with the option of continuing the contract for five years additional; it being stipulated that the private consumers should not be charged in excess of a certain price. That by ordinance of May 8, 1890, the borough granted to said water company, its successors and assigns, subject to the contract, the use of the streets for laying pipes for conveying water. That, pursuant to the contract and ordinance, the company constructed an adequate plant. That December 30, 1892, the Union Water Company, incorporated May 14, 1890, under the corporation act of 1874 (P. L. 73), to supply water for the public in the borough of Beaver Falls, and to parties residing therein and adjacent thereto, acquired the rights and properties and assumed the liabilities of the Valley Water Company. That said companies have fairly complied with the contract. That September 14, 1895, the council of Rochester by ordinance submitted to vote of the people a proposition to increase the debt \$60,000 for the purpose of erecting water works. That on November 5, 1895, the vote was taken and the proposition was carried. That pursuant thereto said council, by ordinance of December 12, 1895, authorized the issue of \$60,000 of bonds, and at the same time passed an ordinance for the erection of the water works, and said proceedings were of the usual public character. That December 8, 1895, it made a contract of sale of the bonds, and delivered them January 17, 1896. That on January 4, 1896, notice was served on the borough by plaintiffs, warning it of the intention to file a bill to restrain the erection of water works. That January 15, 1896, the borough made a contract for erection of water works. That the water works of the Union Water Company are superior to those proposed to be built by the borough, and the quality of water furnished by the present works is superior to that which can be supplied by the proposed works, and the expense of maintaining the new system will exceed the annual cost of the present one. As conclusions of law, the referee found that the borough of Rochester has no power to provide a supply of water for the use of its inhabitants, except as contained in General Borough Act April 3, 1851 (P. L. p. 320, § 2, subd. 20), viz.: "To establish a night watch, to light the streets, to provide a supply of water for the use of the inhabitants, to make all needful regulations for the protection of the pipes, lamps, reservoirs and other constructions or apparatus and to prevent the waste of water so supplied." That in the execution of the power so conferred by the act of 1851 the borough was not restricted to the single mode of building its own water works, but it could adopt other appropriate means for providing a supply of water for the use of its inhabitants. That the contract of May 7, 1890, between the water company and borough, is not lim-

ited to five years, except as to the compensation to be paid by the borough for fire hydrants; the borough having the option, however, of continuing the said rates for an additional period of five years. That under its charter the Union Water Company is made subject to the jurisdiction of the court of common pleas of Beaver county, and it can at all times be compelled to furnish pure water, in sufficient quantities and at reasonable rates, at the instance of either the borough or any private party using the water. That by the contract of May 7, 1890, and the ordinance of May 8, 1890, the borough lawfully executed the power conferred on it by the act of 1851, and did thereby provide a supply of water for the use of its inhabitants; and it still is, in that manner, performing the duties imposed on it by law, and it and its inhabitants are now provided with an ample supply of pure water at reasonable rates. That so long as the Union Water Company furnishes an adequate supply of pure water as required by the contract of May 7, 1890, the borough has no power to provide another supply by erecting its own water works. That no necessity exists for the borough's providing a supply of water by the erection of water works, and the ordinance for the erection of water works, therefore, is unreasonable. That an injunction should issue to restrain the borough from erecting said water works. That the costs of the case should be divided between the plaintiffs and the borough. The referee, in his opinion, stated that the power of a borough to provide a supply of water is not inherent from the nature and purpose of its organization, but that a borough possesses no powers not conferred by statute; and he stated as the reason for dividing the costs that plaintiffs made no move till after the borough had made a contract for sale of its bonds, and had incurred all the liabilities incident thereto, although all the proceedings of the borough, beginning in September, 1895, were public, and there was no allegation that such proceedings were unknown to plaintiffs.

D. T. Watson, Chas. H. McKee, C. Heydrick, and John G. Johnson, for plaintiffs. Lewis E. Grim, Richard W. Stiffey, and Milard F. Mecklem, for defendants.

PER CURIAM. It is very evident from a close inspection of this voluminous record that a full and patient hearing was accorded to the parties by the learned referee in this case; and the painstaking consideration that was afterwards given by him to all the questions—both of fact and of law—that were presented by the pleadings and evidence is fully attested by his exceptionally clear, methodical, and exhaustive report of the case to us. When his report was completed and ready for filing, the parties were invited to examine the same and except to anything therein that either of them might consider erroneous. Availing themselves of this invitation, both

parties filed exceptions,—5 on behalf of the plaintiffs, and 69 on behalf of the defendants. Fifty-three of the latter are to questions of fact. This necessitated a careful revision of his report by the referee, with special reference to said exceptions, the net result of which was the amendment of his fourth and ninth findings of fact by adding to the end of each the words "as may desire the same," employed in the charter of each of the water companies.

The argument before us was substantially confined to some of the main questions involved in the exceptions, together with the question of costs; but in disposing of those questions we have carefully examined the record, and considered all the exceptions relating to the referee's findings of fact as well as his conclusions of law, and the result has been that no substantial error in either has been disclosed. In view of the careful consideration that has been given by the referee to the questions involved, and the satisfactory manner in which they have been disposed of in his report, further discussion of them, or either of them, has been deemed unnecessary. We are all satisfied as to the substantial accuracy of his findings of fact as well as his conclusions of law; and the exceptions filed by the respective parties are therefore dismissed, and his report confirmed.

The facts and conclusions of law thus satisfactorily established bring this case fairly within the principles recognized and applied in *Metzger v. Borough of Beaver Falls*, 178 Pa. St. 1, 35 Atl. 1134, and entitle the plaintiffs to the decree, recommended by the referee in his eighth conclusion of law. In view of all the circumstances, we also concur with the referee in his last conclusion, that the costs should be paid one-half by the plaintiffs, and the residue by the borough of Rochester, defendant. It is therefore adjudged and decreed that an injunction issue, restraining the borough of Rochester, defendant, its officers, agents, and servants, and each and every one of them, from constructing, or in any manner authorizing the construction of, the proposed water works referred to in the bill, or any part of said works, and also from doing or authorizing to be done any other matter or thing in furtherance of the construction of said water works or any part thereof; and it is further ordered and decreed that the costs of this proceeding, including \$1,500 referee's fees, be paid one-half by the plaintiffs, and the residue by the defendant the borough of Rochester.

(90 Me. 206)

WHITCOMB et al. v. HARRIS.

(Supreme Judicial Court of Maine. April 15, 1897.)

USURY — COMPOUND INTEREST — MORTGAGES — EXPENSES OF FORECLOSURE.

1. In this state the law does not allow a creditor to recover interest upon interest that be-

comes due after the maturity of the principal. And if compound interest is required by a mortgagee, and paid under protest by one claiming under the mortgagor, in order to prevent the expiration of the right of redemption, the mortgage having been foreclosed, it may be recovered by the person who paid it under such circumstances.

2. The fact that a demand is made for the interest when it becomes due does not affect the question. Upon an indebtedness without interest, payable at no particular time but upon demand, a demand is necessary to make the indebtedness due, and interest only begins to run from the time of maturity; but a demand does not affect the matter of interest where the debt is payable at a definite time.

3. The general rule is that whenever the debtor knows what he is to pay, and when he is to pay it, he shall be charged with interest if he neglects to pay. The only reason why this rule does not apply in the case of interest due at a stipulated time, and unpaid, is because the law regards it as against public policy to allow a creditor to recover compound interest.

4. When a mortgage is foreclosed by publication, one who is entitled to redeem must, before he can do so, pay the necessary expense of such foreclosure. This includes the amount paid for publishing the notice of foreclosure in a newspaper, and the recorder's fee for recording the same.

5. But the amount paid an attorney for professional services in such matters, however wise such employment may be, and sometimes almost absolutely necessary, is not legally a necessary expenditure. Therefore the person entitled to redeem is not obliged to pay it.

(Official.)

Agreed statement from municipal court of Western Hancock.

Assumpsit by John F. Whitcomb and others against Amy Eddy Harris. Submitted on an agreed statement. Judgment for plaintiffs.

This was an action of assumpsit, brought in the Western Hancock municipal court, to recover money claimed to have been paid by the plaintiffs to redeem from a certain mortgage, held by the defendant, in excess of the amount actually due upon said mortgage. The case was certified by the presiding justice to the law court for decision upon the following agreed statement:

The defendant in this action was the owner and holder of a certain mortgage upon real estate in Bar Harbor, Eden, Me., given by Lucy A. Barron and George A. Barron to James Eddy, to secure a negotiable promissory note for the principal sum of \$3,000, as follows:

"\$3,000. Bar Harbor, Aug. 3, 1886.

"Four years from date, for value received, we promise to pay James Eddy, or order, the sum of three thousand dollars, with interest at six per cent. per annum, payable annually.

Lucy A. Barron.

"Geo. A. Barron."

Interest on this note had been paid in full to August 3, 1890. The defendant, as legal owner of the note and mortgage, foreclosed said mortgage for breach of its condition, by publication, and the right of redemption of said mortgaged premises would have been barred upon the 7th day of January, A. D. 1893. The plaintiffs, legal owners and hold-

ers of a subsequent or second mortgage upon the same property covered by said mortgage of the defendant, demanded of the defendant, through her attorneys, Messrs. Deasy & Higgins, a true account of the sum due upon her said mortgage, which statement the defendant rendered to the plaintiffs, claiming as due on her said mortgage, January 3, 1893, the sum of \$3,469.30, as follows: Principal, \$3,000; interest, \$454.80; costs of foreclosure, \$14.50. The plaintiffs, to save a forfeiture, paid said sum of \$3,469.30, as of said January 3, 1893, under protest, in writing, claiming that it was in excess of the real amount due under the mortgage, and notifying the defendant that an action would be instituted to recover such excess. The defendant took said sum of \$3,469.30, insisting that she would not discharge the mortgage for any less amount, and thereupon executed and delivered to the plaintiffs a discharge of the mortgage, and also delivered to the plaintiffs the mortgage note.

It was admitted that the defendant, in fixing the amount due upon said mortgage, computed interest upon all overdue interest at the rate of 6 per cent. per annum. The item of \$14.50, costs of foreclosure aforesaid, was made up as follows:

Paid attorneys for legal services, consisting of drafting foreclosure notice and attending to publication and recording of same, \$10; paid for publishing and recording, at regular rates, \$4.50.

It was also agreed that, when the interest fell due, the mortgagee wrote and mailed, postpaid to the mortgagors, a letter demanding payment of the interest, which letter was directed to the mortgagors at their regular post-office address. Such letter was mailed when the interest fell due, both in 1891 and 1892. But the plaintiffs, at the time of paying the mortgage, had no knowledge of such demand having been made.

H. E. Hamlin, for plaintiffs. L. B. Deasy, for defendant.

WISWELL, J. The defendant was the owner of a mortgage upon certain real estate, to secure a note for \$3,000, dated August 3, 1886, payable in four years from date, with interest at 6 per cent. per annum, payable annually. Interest upon this note had been paid in full to August 3, 1890, the time of its maturity, but had been unpaid since that time. The defendant had commenced a foreclosure of the mortgage for breach of its condition, and the right to redeem would have expired upon January 7, 1893. Shortly before that time, the plaintiffs, owners of a subsequent mortgage upon the same premises, demanded of the defendant a true account of the amount due upon the mortgage. She rendered an account, claiming that there was due on January 3, 1893, the sum of \$3,469.30, which sum included, in addition to principal and interest thereon, interest upon

the overdue interest at 6 per cent., from the time that the same had become due, and the costs of foreclosure, consisting of \$4.50 paid for publishing and recording notice of foreclosure, and \$10 paid for counsel fees.

The defendant refusing to accept less than the above sum, the plaintiffs paid it under protest, to prevent the mortgage from becoming fully foreclosed, and in this action seek to recover the amount which they claim is in excess of the sum that the defendant was entitled to.

That the action may be maintained if the defendant has received more than she is entitled to retain is conceded. Rev. St. c. 90, § 22.

The first question raised is whether the defendant was entitled to interest upon the overdue annual interest which became due after the maturity of the note, a demand having been made for the same when it became due.

There has been much diversity of opinion in the courts of this country upon the question as to when and under what circumstances, if at all, compound interest can be recovered; some courts holding that interest upon interest can never be recovered, and that an express promise, made at the time of the original contract, to pay interest upon any interest that may not be paid in accordance with the terms of the contract, is invalid, because iniquitous and against public policy; while others have laid down the rule that overdue interest will carry interest from the time of default, without any promise or demand therefor.

However much force there may be in the argument that a debtor who has agreed to pay at stipulated times interest upon money loaned should, in case of his default to pay in accordance with his contract, be liable to pay interest, at the rate fixed by law, as damages, upon the sums which he ought to have paid, we think that so far as interest becoming due after the maturity of the principal sum is concerned, at least, the question is not an open one in this state. As to whether there is any difference in the rule when interest is sought upon annual or semiannual interest that became due before the maturity of the principal, need not be here considered.

The first case upon the subject in this state, and one which has been very frequently cited with approval here and elsewhere, is that of *Doe v. Warren*, 7 Greenl. 48, in which it was decided that the law does not allow interest upon interest, not even where a promissory note is made payable with interest annually. In that case, speaking of interest, it is said: "It is an accessory or incident to principal. The principal is a fixed sum; the accessory is a constantly accruing one. The former is the basis or substratum from which the latter arises, and upon which it rests. It can never, by implication of law, sustain the double character of principal and accessory."

In *Bannister v. Roberts*, 35 Me. 75, it is

said: "When a note is made payable with interest annually, whether by installments or not, the interest accruing before the whole of the principal becomes payable may be collected, if a suit be commenced to recover it before the whole of the principal becomes payable. If no suit be commenced for that purpose until after that time, interest upon interest not paid, from the time when it should have been paid, cannot be recovered in a suit for the principal and interest due upon the note."

In *Kittredge v. McLaughlin*, 38 Me. 513, it was decided that compound interest cannot be reckoned upon proceedings in equity to redeem a mortgage to secure notes on annual interest, in estimating the amount due. See, also, to the same effect, *Lewis v. Small*, 75 Me. 323.

But it is true, as urged in argument, that in none of these cases had there been a demand for the interest. We do not think that this affects the question. Upon an indebtedness without interest, payable at no particular time, but upon demand, a demand is necessary to make the indebtedness due, and interest only begins to run from the time of maturity; but we do not think that a demand affects the matter of interest where the debt is payable at a definite time. The general rule is "that, whenever the debtor knows what he is to pay and when he is to pay it, he shall be charged with interest if he neglects to pay." *People v. New York*, 5 Cow. 331, quoted with approval in *Swett v. Hooper*, 62 Me. 54. And the only reason why this rule does not apply in the case of interest due at a stipulated time, and unpaid, is that the law regards it as against public policy to allow a creditor to recover compound interest.

In the case of *Parkhurst v. Cummings*, 56 Me. 155, this court adopted a much more stringent rule than it is necessary to sustain in this case. A mortgage was given to secure a note with interest annually. After the note had been running many years, the mortgagor gave a new note for the accumulated interest upon the first note, and made that with interest annually. In a bill in equity to redeem, brought by the holder of a junior mortgage, the holder of the first mortgage claimed interest upon the interest note, as well as the unpaid interest upon the original principal; but the court held that the holder of the second mortgage was entitled to redeem upon payment of the original note and simple interest thereon, notwithstanding the fact that the mortgagor had given a second interest-bearing note for the accumulated interest on the first note.

In view of these authorities, the court is of opinion that the defendant was not entitled to retain the interest upon interest which was paid by the plaintiffs.

This mortgage was foreclosed by publication, one of the methods provided by law. The statute is silent as to whether one who is entitled to redeem must pay the costs of a

foreclosure in this method before he shall be allowed to redeem; but we have no question that the necessary expense of such a foreclosure must be paid by the mortgagor, whose default has made the expenditure necessary, or by another who has obtained from the mortgagor the right to redeem. This applies to the amount paid for publishing the notice of foreclosure in a newspaper, and the recorder's fee for recording the same. But the amount paid an attorney for professional services, however wise, and sometimes almost absolutely necessary, it may be to employ an attorney for such service, is not legally a necessary expenditure. Therefore the person entitled to redeem should not be obliged to pay it.

The plaintiffs are therefore entitled to recover the sum of \$19.80, excessive interest paid by them, and the further sum of \$10, the attorney's fee for services in foreclosing the mortgage, together with interest from January 3, 1896.

Judgment accordingly.

(90 Me. 215)

LITTLEFIELD v. INHABITANTS OF WEBSTER.

(Supreme Judicial Court of Maine. April 15, 1897.)

TOWNS—DEFECTIVE WAYS—NOTICE.

1. It is settled law in this state that the 24 hours' actual notice to the municipal officers of a town or road commissioner of defect in the highway, whereby a traveler may recover damages for an injury received, must be of the identical defect itself. Notice of another defect, or of the existence of a cause likely to produce a defect, is not sufficient.

2. The words "actual notice" in the statute (Rev. St. c. 18, § 80) signify something more than an opportunity to obtain notice by the exercise of due care and diligence. The facts and circumstances in a given case may justify the conclusion that the officers must have had actual notice unless grossly inattentive, but proof of gross inattention is not proof of actual notice.

3. The plaintiff obtained a verdict against the defendant town for a personal injury sustained by reason of a defective plank in the sidewalk. The written notice served on the town after the injury stated that the "defect and want of repair consisted of a board or plank in a sidewalk which had become rotten and decayed on the under side thereof, and unsafe for public travel." *Held*, that the verdict must be set aside, there being no evidence to show that the municipal officers or road commissioner of the town had 24 hours' actual notice of such defect.

Hurley v. Inhabitants of Bowdoinham, 84 Atl. 72, 88 Me. 293, affirmed.

(Official.)

Action by Clarence R. Littlefield against the inhabitants of Webster, in which there was a verdict for plaintiff. Defendants move for new trial. Sustained.

D. J. McGillicuddy and F. A. Morey, for plaintiff. F. L. Noble and R. W. Crockett, for defendants.

WHITEHOUSE, J. The plaintiff obtained a verdict of \$616.66 as compensation for a per-

sonal injury alleged to have been sustained by him on the 29th day of May, 1895, by reason of a defective plank in the sidewalk at Sabattus village.

The defendants ask to have the verdict set aside on the ground that there is no evidence to show that the municipal officers or road commissioner of the town had 24 hours' actual notice of such defect.

It is alleged in the plaintiff's declaration that at a point in the sidewalk about 35 feet north of Margaret Moody's house, and opposite Charles Meres', was a plank or board that had become rotten, and incapable of sustaining the weight of a person, and that when the plaintiff stepped on this plank it broke, letting a portion of his body through the hole thus made, nearly three feet, to the ground, the end of the plank so broken striking him in the side. The written notice served on the defendants by the plaintiff within 14 days after the injury stated that "said defect and want of repair consisted of a board or plank in a sidewalk which had become rotten and decayed on the under side thereof, and unsafe for public travel, and said sidewalk at that point was two and one-half or three feet above the ground." The plaintiff's evidence tended to support these allegations in the writ and notice.

The sidewalk in question was constructed of spruce and hemlock planks four feet long, laid crosswise on stringers. It was examined in June, 1894, and all visible defects repaired. The plaintiff testified that prior to the accident he had been in the habit of passing over the sidewalk where the defective plank was alleged to be, sometimes every day or every night and sometimes twice or three times a week; that he never discovered anything on the upper side to indicate that there was anything wrong there; that it looked to be reasonably safe at that point, and that he never saw anything to suggest that it was defective.

Webb Hall, a witness called by the plaintiff, testified that he found a plank out of the sidewalk, and lying in the street, but that this was north of the Meres house, and not in front of it. When the plank that caused the accident was exhibited for his inspection, he stated unequivocally that it was not the plank found by him in the street, in regard to which he spoke to the road commissioner. He was afterwards recalled, and more definitely located the place in the sidewalk where the latter plank belonged. He had notified the commissioner once before that there was a plank out of the sidewalk. The second one was about two rods above the place of the accident, and the first one still further up.

This is the only direct evidence in the case tending to show actual notice to the selectmen or road commissioners of a defective condition of the sidewalk at any point, and this is found to have no relevancy to the question in issue, for the reason that neither of the notices from Hall to the road commissioner referred to the defective plank in question, but both related to other and different defects, located at a dis-

tance of 2 rods and 100 feet, respectively, from the point of the accident.

It appears from the testimony of three other witnesses called by the plaintiff that in the spring of 1895, prior to the accident, some of the planks in the vicinity of the Meres house had become loose, and been seen to tip up on several occasions; that one of the stringers near there appeared to be too unsound to hold nails, and that pieces of slabs had been nailed over the holes in some places. But there is no direct evidence that the plank in question had ever tipped up, or was known to be loose, or that a slab had ever been nailed over any part of it. There is no testimony that either of these witnesses gave the road commissioner or selectmen any notice of the defects discovered by him, or ever had any interview with either of them in regard to the condition of the sidewalk. It does not appear that either of them ever gave any information in regard to the plank in question, or that either of them had any such information to give. It is clear that neither the road commissioner nor the selectmen ever received from these sources any actual notice of the particular defect which caused the injury.

It does appear, however, that the selectmen and road commissioner had frequently passed over this sidewalk in the spring of 1895 prior to the accident; and, inasmuch as actual notice is a conclusion of fact which may be established by circumstantial as well as direct evidence, it is strongly insisted by the learned counsel for the plaintiff that, if these officers had not been guilty of negligence in the discharge of their duties, they would have derived actual notice of the defect in question, and that they ought to be deemed to have had actual notice of it, from their personal observation of the walk in passing over it.

But it will be remembered that the defect complained of is described in the plaintiff's notice as a "plank rotten and decayed on the under side thereof, and unsafe for public travel," and that it is expressly admitted in the testimony of the plaintiff, who lived within two rods of one of the termini of the sidewalk, that there was nothing in the appearance of the upper side of the planking at the point in question to indicate the existence of a defect there. Twelve credible witnesses for the defendants state, in substance, that they had occasion to pass over the walk before the accident, and that it had the appearance of a sound and smooth sidewalk, with nothing to suggest the concealed defect at the point of the accident. The selectmen and road commissioners expressly deny that they ever, in fact, had any personal knowledge of the rotten condition of the plank which the plaintiff broke through, and there is no direct evidence that either of them ever did have any such knowledge. It only appears that, in view of the elevation of the sidewalk above the ground, the road commissioner, without extraordinary exertion, might have made a thorough examination of the stringers and of the under side of the walk,

and thus discovered the actual condition of the planking at the place of the accident. But, as stated in the case of *Hurley v. Inhabitants of Bowdoinham*, 88 Me. 293, 34 Atl. 72, which this case closely resembles: "The words 'actual notice' in this statute signify something more than an opportunity to obtain notice by the exercise of due care and diligence. The facts and circumstances in a given case may justify the conclusion that the officer must have had actual notice unless grossly, inattentive, but proof of gross inattention is not proof of actual notice."

As stated in *Smyth v. Bangor*, 72 Me. 249: "The notice must be of the defect itself,—of the identical defect which caused the injury. Notice of another defect, or of the existence of a cause likely to produce a defect, is not sufficient."

Motion sustained.

(90 Me. 227)

RICHARDSON v. HOXIE et al.

(Supreme Judicial Court of Maine. April 24, 1897.)

LOGGING LIEN—WHEN ALLOWED.

The defendant contracted to haul certain logs, and in making up his team he hired of the plaintiff a horse, double harness, and double sled at an agreed price per month. During part of the time the horse was used alone and part of the time with another horse of the defendant. During all the time the horse was driven by an employé of defendant, and was under defendant's control, but the plaintiff was not engaged to drive the horse, or perform any labor in connection with these logs. Held, that the plaintiff was not entitled to a lien on the logs. He did not, within the meaning of the statute, labor "at cutting, hauling, rafting, or driving" said logs or lumber, and therefore is not entitled to "a lien thereon for the amount due for his personal services and for the services performed by his team."

(Official.)

Report from supreme judicial court, Piscataquis county.

Action by Charles E. Richardson against Daniel F. Hoxie and another. Judgment for plaintiff.

G. W. Howe, for plaintiff. F. E. Guernsey, for log owner.

WHITEHOUSE, J. This is an action of assumpsit, brought by the plaintiff to enforce a lien claimed by him for the service performed by his horse in hauling certain poplar logs.

It is provided by section 38 of chapter 91 of the Revised Statutes that "whoever labors at cutting, hauling, rafting or driving logs or lumber * * * has a lien thereon for the amount due for his personal services and for the services performed by his team."

It appears from the testimony reported that the defendants contracted to haul a quantity of poplar from a tract of land in Willimantic to Ship Pond stream, and employed five teams in the execution of the work. To make up one of these teams the defendants hired of the plaintiff the horse in question, together with a set of double harnesses and a set of

double sleds, and agreed to pay him therefor the sum of \$10 a month. During a part of the time the plaintiff's horse was harnessed to these sleds by the defendants with another horse of their own, and used in this double team, and a part of the time he was used alone, in hauling the logs out of the woods. During the entire period of the service for which the lien is claimed, the plaintiff's horse was driven by an employé of the defendants, and was under their superintendence and control. The plaintiff himself was not engaged to drive the horse, or to perform any labor for the defendants, and did not perform any labor whatever for them in connection with these logs, or otherwise, during the time his horse was thus used by them. He did none of the things prescribed by the statute as the basis of a lien in his favor on the logs.

As already seen, the only thing he did having any relation whatever to the performance of the defendants' contract to haul the logs, was to let them his horse, harnesses, and sleds for \$10 a month, and to place the property in their possession and under their dominion and control while it continued in their service under this contract.

Upon this state of facts it is manifest that the services for which the lien is claimed were not performed by the plaintiff's team, but by the defendants' team. It is immaterial that the defendants did not have title to one of the horses in this team. *Kelley v. Kelley*, 77 Me. 125. They were entitled to the possession and control of the horse during the time in which this labor was performed, and had a right to receive the fruits of his labor under their contract. The lien is not given and attached by the statute to any horse, harness, or sled that may be used in hauling logs, but is acquired by the person who "labors at cutting and hauling logs," etc., "for the amount due for his personal services and the services performed by his team." The plaintiff neither performed any such labor himself, nor, in contemplation of law, was any labor performed by his team.

It is therefore considered by the court that the plaintiff has no lien on the logs described in the plaintiff's writ, but it is not controverted that against the defendants the Hoxie Brothers there should be entered—

Judgment for plaintiff for \$35, with interest from the date of the writ.

(30 Me. 223)

BRADFORD v. HUME et al.

(Supreme Judicial Court of Maine. April 24, 1897.)

MUNICIPAL CORPORATIONS—STREETS—BOUNDARIES.

1. When the bounds of a street cannot be made certain by either records or monuments, and a fence has existed in the same place for more than 40 years, it is to be deemed the true bounds of the street. *Rev. St. c. 18, § 95.*

2. In an action of trespass against the mayor and one of the aldermen of the city of Eastport for removing a fence in front of the plaintiff's house,

the defendants justified its removal on the ground that the fence was within the limits of the street. The plaintiff denied that the fence was within the limits of the street, and claimed that it had existed in the same place for more than 40 years, and was, therefore, under the statute, to be deemed the true bounds of the street. The jury returned a verdict for the plaintiff. *Held*, that the verdict ought not to be disturbed, it appearing to the court, among other reasons, that the fence had existed in front of the plaintiff's house for more than 40 years; and, although a new fence was built in 1876, it seems that if a fence fronting on one of the public streets of the city was moved three or four feet into the street, the fact was open to the observation of all passing by it, and must be known to hundreds of persons. The street, as laid out in 1807, was only 30 feet wide; and an encroachment upon so narrow a street could not escape the notice of any one passing upon the street.

(Official.)

Trespass by Alden Bradford against Charles W. Hume and another. There was a judgment for plaintiff, and defendants move for a new trial. Overruled.

J. F. Lynch, L. H. Newcomb, and G. R. Gardner, for plaintiff. J. H. McFaul, G. M. Hanson, G. A. Curran, and I. G. McLaren, for defendants.

WALTON, J. This is an action of trespass against the mayor and one of the aldermen of the city of Eastport for causing the removal of a fence in front of the plaintiff's house. The defendants justify the removal on the ground that the fence was within the limits of the street. The plaintiff denies that the fence was within the limits of the street. He says that the bounds of the street cannot be made certain by either records or monuments, and that a fence had existed in the same place for more than 40 years, and was, therefore, to be deemed the true bounds of the street, as provided by *Rev. St. c. 18, § 95.*

There seems to be no doubt that a fence had existed in front of the plaintiff's house for more than 40 years. But the plaintiff admits that a new fence was built in 1876, and the real controversy was whether the new fence was built on the same place on which the old fence stood, or was built some three or four feet nearer the center line of the street.

The fence fronted on one of the public streets of the city, and if it was moved three or four feet into the street, the fact was open to the observation of all passing by it; and it would seem as if it must have been known to hundreds, and perhaps thousands, of persons. The street, as laid out in 1807, was only 30 feet wide; and it seems incredible that such an encroachment upon a street so narrow should have escaped the notice of any one passing upon the street. The carpenter who built the new fence swears positively that he placed it on the same spot occupied by the old fence. The plaintiff swears that it was so placed. Other witnesses so testify. The number of witnesses who testify to the contrary are comparatively few. The parties called as many witnesses as they thought proper, and then

rested. The case was then submitted to the jury, and they returned a verdict for the plaintiff. No exceptions were taken to the charge, and presumably it was satisfactory to both parties.

The defendants move for a new trial, first, on the ground that the verdict was contrary to the weight of the evidence produced at the trial; and, secondly, on the ground that since the trial they have discovered some new evidence,—that is, some more witnesses who are willing to swear that the fence was moved.

We have examined the evidence, the old and the new, with great care. In fact, we have spent an unusual amount of time in the examination of the evidence. And we are surprised that there should be such a conflict in relation to such a fact,—a fact that must have been open to the observation of hundreds, and perhaps thousands, of persons if it really existed. We think it was fortunate for the parties that the jury was able to agree, and we are profoundly impressed with the belief that it would be a misfortune to the defendants, as well as the plaintiff, to protract the litigation. We do not feel entirely satisfied that the verdict was right, nor do we feel entirely satisfied that it was wrong. In such a case, the verdict must stand. The evidence claimed to be newly discovered is not such, in the opinion of the court, as to justify protracting the litigation.

Motions overruled.

(90 Me. 223)

STATE v. THOMAS.

(Supreme Judicial Court of Maine. April 24, 1897.)

GAME—INDICTMENT—DUPPLICITY.

1. A complaint charging that the defendant "did have in his possession seventeen dead ruffed grouse, commonly called partridge, which said grouse were then and there intended by said John F. Thomas for consumption outside the limits of this state; and the said John F. Thomas, on said 6th day of November, aforesaid, unlawfully carried said grouse from said Morrill to said Belfast, and there delivered the same to the Boston & Bangor Steamship Co., to be by said company transported to Boston," etc.,—adequately sets out but one offense, under chapter 238, Acts 1893; that is, of having in his possession, not alive, ruffed grouse, commonly called partridge, not intended for consumption within this state.

2. This section also imposes the same penalty for several other distinct offenses, as follows: "Nor shall any person or corporation carry or transport from place to place in open season any of the above mentioned birds, unless open to view, tagged and plainly labeled with the owner's name and accompanied by him; * * * nor shall any person or corporation carry or transport at any one time more than fifteen of any one variety of birds above named, as the property of one man."

Held, that this complaint does not set out either of these offenses in adequate terms,—not the first, because it does not allege that they were not "open to view, tagged and plainly labeled with the owner's name"; and not the second, because it does not allege that they were transported "as the property of one man."

(Official.)

Report from supreme judicial court, Waldo county.

John F. Thomas was convicted before a magistrate of violating the game law, and he appealed to the supreme judicial court, where he demurred to the complaint for duplicity. Submitted on report. Demurrer overruled.

Complaint.

"Waldo—ss.:

State of Maine.

"To the Judge of the Police Court of the City of Belfast, in the County of Waldo:

"George W. Frisbee, of Belfast, in said county, on the 7th day of November, in the year of our Lord one thousand eight hundred and ninety-three, in behalf of said state, on oath complains that John F. Thomas, of Morrill, in said county of Waldo, laborer, on the 6th day of November, in the year of our Lord one thousand eight hundred and ninety-three, with force and arms, at Morrill, aforesaid, in the county of Waldo, aforesaid, did have in his possession seventeen dead ruffed grouse, commonly called partridge, which said grouse were then and there intended by said John F. Thomas for consumption outside the limits of this state; and the said John F. Thomas, on said 6th day of November, aforesaid, unlawfully carried said grouse from said Morrill to said Belfast, and there delivered the same to the Boston & Bangor Steamship Co., to be by said company transported to Boston, in the commonwealth of Massachusetts, there to be delivered to Adams, Chapman & Co., against the peace of said state, and contrary to the form of the statute in such case made and provided.

"Wherefore, the said George W. Frisbee prays that the said John F. Thomas may be apprehended and held to answer to this complaint, and dealt with relative to the same as law and justice may require.

"Dated at Belfast, aforesaid, this 7th day of November, in the year of our Lord one thousand eight hundred and ninety-three.

"George W. Frisbee.

"On the 7th day of November aforesaid, the said George W. Frisbee makes oath that the above complaint by him signed is true. Before me,

"Ruel W. Rogers,

"Judge of the Police Court of the City of Belfast."

The respondent was duly arrested and tried before the magistrate on the general issue, and was found guilty, and fined; whereupon the defendant appealed to this court, and, by consent of parties, was allowed to demur to the complaint for duplicity, with leave to plead over if the demurrer be overruled.

The case was reported to the full court to determine the questions presented.

Ellery Bowden, Co. Atty., for the State. W. H. McLellan, for defendant.

WHITEHOUSE, J. It is alleged in this complaint that the respondent, on the 6th day

of November, 1893, "did have in his possession seventeen dead ruffed grouse, commonly called partridge, which said grouse were then and there intended by said John F. Thomas for consumption outside the limits of this state; and the said John F. Thomas, on said 6th day of November, unlawfully carried said grouse from said Morrill to said Belfast, and then delivered the same to the Boston & Bangor Steamship Co., to be by said company transported to Boston," etc.

By virtue of the warrant issued on this complaint, the respondent was arrested and tried before a magistrate on the general issue, and was found guilty, and sentenced. Thereupon the respondent took an appeal to this court, and "by consent of parties," as the case shows, "was allowed to demur to the complaint for duplicity, with leave to plead over if the demurrer be overruled." The case was then reported to the full court, to determine the question presented.

It is a satisfaction to observe, in the first place, that the state would have been justified in withholding its consent to the respondent's proposal to demur and plead over after a trial on the general issue before the magistrate; for if the complaint were amenable to the objection of duplicity, on the ground that two distinct offenses are sufficiently charged in the same count, the demurrer must be sustained, the complaint adjudged bad, and the respondent discharged. On the other hand, if the state had declined to waive its right to proceed on the plea of not guilty, entered before the magistrate, the objection which the respondent proposed to raise by his demurrer might properly have been obviated by entering a nol. pros. as to the allegations constituting one of the offenses set out in the complaint, even though both were sufficiently and properly charged. 1 Bish. Cr. Proc. § 448; State v. Merrill, 44 N. H. 624; State v. Haskell, 76 Me. 399; State v. Bean, 77 Me. 486.

Fortunately for the state in this instance, however, only one substantive offense is adequately set out in the complaint,—that of having grouse in possession, not alive, and not intended for consumption in this state. Acts 1893, c. 288. As to this offense, the complaint sufficiently states the fact that the respondent had 17 grouse in his possession, and properly negatives the exceptions found in the enacting clause of the section on which the complaint is based.

But this section of the statute named imposes the same penalty for several other distinct offenses, as follows: "Nor shall any person or corporation carry or transport from place to place in open season any of the above mentioned birds, unless open to view, tagged and plainly labeled with the owner's name and accompanied by him; * * * nor shall any person or corporation carry or transport at any one time more than fifteen of any one variety of birds above named, as the property of one man." The allegation in the complaint,

however, that the respondent "unlawfully carried said grouse from said Morrill to said Belfast," etc., does not set out either of these offenses in adequate terms. With respect to the former, the allegation is insufficient because it fails to negative the exceptions in the enacting clause by stating that they were not "open to view, tagged and plainly labeled with the owner's name," this negative being clearly descriptive of the offense. 1 Bish. Cr. Proc. § 636; State v. Boyington, 56 Me. 512; State v. Gurney, 37 Me. 149. With respect to the latter offense described in the statute, the allegation in question is insufficient to constitute the charge because it lacks the necessary averment that the respondent carried the 17 grouse "as the property of one man."

This allegation of carrying was evidently not designed to charge a separate offense, but was incautiously introduced as a statement of the evidence tending to substantiate the previous charge by showing that the grouse were not intended for consumption in this state. It may be rejected as surplusage.

Demurrer overruled.

Case to stand for trial.

(68 N. H. 306)

HUNT v. NEW HAMPSHIRE FIRE UNDERWRITERS' ASS'N (GRANITE STATE INS. CO., Intervener).

(Supreme Court of New Hampshire. Merrimack. July 26, 1895.)

REINSURANCE—RIGHTS AND LIABILITIES OF INSURERS INTER SE.

1. One insurer was reinsured as to one-third of the risk by a second insurer, which was as to one-half the risk by it assumed reinsured by a third insurer, which agreed to settle a loss "pro rata with the reinsured, and at the same time and place, and upon the same terms and conditions." A loss occurred, which the first insurer paid. The second insurer paid no part of the loss, and went into liquidation, and it was uncertain whether its assets were sufficient to satisfy its liabilities. Held, that the third insurer was liable for one-sixth of the loss, irrespective of the amount the second insurer might ultimately pay.

2. The first insurer, and not the receiver, was entitled to the fund.

Assumpsit by Nathan P. Hunt, receiver of the People's Fire Insurance Company, against the New Hampshire Fire Underwriters' Association, Granite State Insurance Company, Intervener. Judgment for the Intervener.

April 1, 1893, the Granite State Insurance Company insured for one year property of the Boston & Maine Railroad for \$25,000. August 10, 1893, the property was destroyed by fire to the extent in value of \$2,300, which sum the Granite State paid in October following. April 1, 1893, the People's Fire Insurance Company reinsured the Granite State Company for one-third part of the risk, and on the same day the defendants reinsured the People's Company for one-half their risk. The defendants' contract contained the following clause, namely: "Loss, if any, to be

settled and paid pro rata with the reinsured, and at the same time and place, and upon the same terms and conditions." In October, 1893, the plaintiff, Hunt, was appointed by the court receiver of the People's Company, and is now acting as such under the direction of the court. The People's Company is in process of liquidation and settlement of its affairs by the receiver, and it is not now known whether the assets are sufficient to satisfy the liabilities. The plaintiff claims that the defendants are bound to pay to the People's Company one-sixth of the total loss, without waiting for the settlement of the People's Company affairs, and without regard to the dividend that may be ultimately paid to their creditors. The defendants claim that they are liable to pay to the plaintiff one-half only of the sum which the People's Company may ultimately pay. Upon notice given them of the action, the Granite State Company appeared, and claimed to be entitled to whatever sum the defendants are bound to pay.

D. Cross, for plaintiff. Leach & Stevens, for defendants. Granite State Ins. Co., pro se.

CARPENTER, J. There is no suggestion that the action is brought for the benefit of the Granite State. The question presented is whether the defendants are bound to pay to the People's Company the entire amount of the loss against which they agreed to indemnify the People's, or only such a part thereof as the insolvent People's may ultimately pay. The defendants received a full consideration for the risk against which they insured, and there is no reason why they should not be required to pay the full amount of the loss. *Blackstone v. Insurance Co.*, 56 N. Y. 106. The premiums received by them, and the sum to be paid by them in case of loss, were intended to be, and in theory of law are, precisely equivalent. *King v. Insurance Co.*, 7 Cush. 1, 9. Their position is, in legal effect, the same as it would be if the People's, for the purpose of paying the loss, had deposited with them the full amount of it in money. But the further question whether the money due on the contract equitably belongs and should be paid to the People's or to the Granite State arises on the face of the case. For convenience of consideration, a simpler parallel case may be taken. The People's insure A.'s house for \$10,000, and immediately reinsure for the same amount with the defendants. The house is burned, and shortly after the People's become insolvent, and, as may be supposed, unable to pay any part of their indebtedness. The defendants, willing to perform their just obligations, file a bill of interpleader against A. and the People's, and pay the \$10,000 into court. To which party—A. who has lost that amount, or the People's, who have lost nothing—does the money, in equity, belong? The particular terms of the policy issued by the defendants are not mate-

rial. It must be assumed that by it the defendants merely stipulate to indemnify the People's to the extent of the sum named, against loss by reason of the destruction of A.'s house by fire, because they have no power to make any contract of insurance except contracts of indemnity. In *Bank v. Herrick*, 62 N. H. 174, Jarib Herrick, as principal, and John W. Herrick, as surety, were indebted to the plaintiffs upon a promissory note. January 27, 1877, Jarib gave John W. a mortgage of real estate conditioned to indemnify him against loss by reason of his having signed the note. In 1878, Jarib obtained his discharge in bankruptcy. His assignee sold the land, subject to the mortgage, to the defendant S. In 1879, John W. died, insolvent. No part of the note being paid, the plaintiffs brought their bill in equity against Jarib, the administrator of John W., and S., praying that the mortgage be assigned to them, and prevailed. The condition of the mortgage was not that Jarib should pay the note, but that he should save his surety harmless. The surety paid, and could pay, nothing. The condition, according to its literal terms, was not, and apparently never could be, broken. The court said that equity disregards mere form, and held that the transaction was, in substance, an appropriation of the mortgaged property for the payment of the debt in case it was not otherwise satisfied by the mortgagor. The purchaser at the assignee's sale took the property with notice. In equity it belonged to the plaintiffs for the purpose of satisfying their debt, and to the extent necessary for that purpose. Their right did not depend upon privity of contract. In fact, there was none. It did not appear that the plaintiffs had any knowledge of the mortgage until they filed their bill. It was immaterial that the relation of principal and surety existed between the mortgagor and mortgagee. The result would have been the same had they been joint principals, or if the mortgage had been given by the surety to the principal. It was equally immaterial that the mortgagee was bound to pay the debt, except that his liability was essential to the form of the security given. The result would have been the same if Jarib had given a deed of the same property to a stranger on condition that the grantee indemnify and save him harmless from his liability on the note. In short, the decision rested wholly upon the broad ground that in equity and good conscience the mortgaged property should be applied to the satisfaction of the plaintiffs' debt. The facts, in all material respects, and the judgment of the court, in *Holt v. Bank*, 62 N. H. 551, and *Barton v. Croydon*, 63 N. H. 417, were the same as in *Bank v. Herrick*. These cases establish the propositions that a creditor, for the satisfaction of his debt, may, in equity, avail himself of any subsisting provision made by his insolvent debtor for its payment, and that an appropriation or pledge of property by the debtor for the purpose of

indemnifying against the debt any person liable upon it is equitably equivalent to a provision for its payment. The principle of the first proposition is often applied in actions at law. *Burr v. Beers*, 24 N. Y. 178; *Reed v. Paul*, 181 Mass. 129; *Butterfield v. Hartsborn*, 7 N. H. 345; *Berry v. Gillis*, 17 N. H. 9; *Hodgdon v. Merrill*, 26 N. H. 18. If A., for a good consideration, agrees with B. to indemnify him against his indebtedness to C., A., as between him and B., becomes the principal debtor. The debt is, in equity, his debt, and not B.'s. Having received a full consideration for his undertaking, he is morally and equitably as much bound to pay the debt to C. as he would be if B. had delivered to him and he had accepted the amount of the debt in gold coin, in trust for its payment. If, for technical reasons, the law is powerless to enforce the duty, equity is subject to no such weakness. *Philbrick v. Shaw*, 61 N. H. 356. It will not permit him to retain the money, the consideration of his agreement, and escape its performance on the flimsy pretext that, until B. is compelled to pay the debt, or a part of it, he has fulfilled the letter of his obligation. He may be compelled at law to pay the debt if B. is solvent, and in equity, at least, he is not relieved from the duty by the accident of B.'s insolvency. Whether the agreement may be revoked at any time before C. is informed of and assents to it need not be considered. It is enough for present purposes that it cannot be annulled after C. intervenes and asserts against B. his claim for its performance. An insurance contract is a contract of indemnity. "It does not differ from a bond of indemnity or a guaranty of a debt, since the obligor or guarantor takes upon himself certain risks to which the obligee or creditor would otherwise be exposed. The only difference is in name and form of the instrument, the consideration for an insurance being always called a premium, and the instrument containing the terms of the contract, a policy." 1 Phil. Ins. (2d Ed.) 2. By a contract of reinsurance, in whatever language expressed, the obligation of the reinsurer is to indemnify the insurer against his liability for the loss by fire of the property insured. They stand in a relation to each other much like that of principal and surety. The only material difference is that the reinsurer is not, in law, directly liable to the insured. As between the two, he is the principal obligor. In the case supposed (as in the actual case), as long as the People's are solvent there is no difficulty or question. A. recovers of them the full amount of his loss, and they recover the same sum of the defendants. The contracts of both companies are performed. There is no occasion for this circuit. The sole duty of the defendants under their contract is to hold the People's harmless. They have the right to pay directly to A. the amount of his loss. By so doing they fully perform their contract. The People's obligation to A. is discharged. But, whichever

method is adopted, A. is indemnified, and the People's, assuming that the same premium is paid for the insurance and for the reinsurance, neither gain nor lose by the transaction. The plaintiff claims that, by the mere accident of the People's insolvency and inability to pay more than say 10 per cent. of their liabilities, the defendants' contract is materially modified. They are no longer at liberty to perform it by paying directly to A. the amount of his loss. It is not now enough that, in compliance with the literal terms of the contract, they protect the People's from loss. They must, it is said, pay the full amount of the loss to the People's, and A., in common with their other creditors, is entitled to 10 per cent. only of the sum justly due to him. In other words, the People's, for the sole reason that they can pay 10 per cent. only of their indebtedness, are, it is claimed, justly entitled to realize out of A.'s loss of \$10,000, which, by their contract, they are bound to pay, a net profit of \$9,000. They are to profit by their losses. It is for their interest—for the interest of every one of their creditors—that all the property insured by them, and by them reinsured in a solvent company, be destroyed by fire. Such a result equity will not tolerate. It is not good law or good morals that one should profit by the destruction of his neighbor's property (1 Story, Eq. Jur. § 493), especially if he has himself agreed to make the loss good. "A contract to tempt a man to transgress the law * * * is void by the common law." *Collins v. Blanton*, 2 Wils. 347, 350. The People's, under their contract with defendants, are entitled to protection against loss by reason of the destruction of the insured property, and to nothing more. They cannot object to a judgment or decree which has that effect. The defendants cannot object to a judgment that they pay the money to the insured, because it is to them immaterial whether they pay it to him or to the insurer. Upon the filing of a proper bill in equity by the Granite State, there will be a decree in their favor, or they may, upon reimbursing the plaintiff for all expenses hitherto incurred by him in the prosecution of this action, take judgment therein for their use. *Herckenrath v. Insurance Co.*, 3 Barb. Ch. 63, and the later cases which have followed it, have been considered, and their doctrine is not approved. Case discharged. All concur.

(69 Vt. 497)

JENNE v. PIPER.

(Supreme Court of Vermont. Windsor. July 17, 1897.)

TRESPASS QUARE CLAUSUM—RIGHT OF WAY—LOCATION—PLEADING—WITNESSES—COMPETENCY OF WIFE.

1. Defendant in an action of trespass on the freehold need not plead or prove his defense of right of way by necessity, when such right is conceded by plaintiff.

2. On an issue of the position of a right of

way as located by the owner of the servient tenement, evidence of what position he assigned it, in remarks made before the conveyance to defendant, to prospective purchasers, who would necessarily use it, and also of what land had actually been used for the purpose by those entitled to the right, was admissible.

3. A wife being incompetent to testify in her husband's behalf, except as to her acts committed as his authorized agent, the offer of her testimony may be refused, unless accompanied by an offer to show her agency also.

Exceptions from Windsor county court; Tyler, Judge.

Trespass by H. N. Jenne against S. H. Piper. From judgment for defendant, plaintiff brings exceptions. Affirmed.

Gilbert A. Davis and Sanford E. Emery, for plaintiff. W. W. Stickney and J. G. Sargent, for defendant.

ROSS, C. J. On the trial the plaintiff conceded that the defendant had a right of way of necessity across the premises where the alleged trespass was committed. This concession relieved the defendant from the necessity of pleading it. He need not plead what he need not prove. He had no occasion to prove that he had a right of way across the premises, when the plaintiff conceded that he had. The court had no occasion to admit, and admitted no testimony to establish that the defendant had such right of way. The exceptions do not raise the point made by the counsel for the plaintiff that a right of way or license must be specially pleaded when relied upon by the defendant to justify the alleged trespass. Such plea is only necessary when the defendant has to establish such right of way or license by proof, to make out a justification. The exceptions show that no proof was offered by the defendant to establish that he had a right of way across the premises, but that the fact that he had it was conceded by the plaintiff. There is no foundation for the contention that there was error because the defendant must plead a right of way or license to justify his walking across the plaintiff's premises. The plaintiff conceded that he had that right. The only contention on the trial, made by the testimony offered, was with reference to the location of the defendant's right of way. Where one has a right of way of necessity across premises owned or occupied by another, unless he waives it, the other has the right to fix the location of the way, provided it is reasonably convenient for the use of the one having it. The testimony of both parties, so far as shown by the exceptions, was to the point that the plaintiff had exercised this right, and located the right of way. The plaintiff's testimony tended to show that he had located it on the east side of the tenement house, and the defendant's testimony tended to show that the plaintiff had located it on the west side of the tenement house. This same way would accommodate other lots owned by the plaintiff's wife in the immediate vicinity of the lot sold to the defendant's wife, on which he had

erected a dwelling, and was residing. On this contention, in regard to which party was right as to the location made by the plaintiff of the way, either party had the right to introduce any fact or circumstance which would render his claim in regard to its location more probable. To establish his claim the defendant could show, as he did, that the plaintiff had said to others, when speaking of selling the other lots, that the way was to be on the west side of the tenement house. Such declarations, although made before the sale to the defendant's wife, could be shown, as they tended to render it more probable that at the time of the sale to defendant's wife he located the way where he had before said he should locate it, to accommodate this and his other lots. The use of the way, without objection on the part of the plaintiff, and with his knowledge, by the defendant, and by others who had occasion to go to defendant's house, was clearly admissible on this contention. These principles cover all the testimony admitted against the plaintiff's exception.

The court properly refused to allow the plaintiff's wife to testify. She could only do so in matters in which she acted in the premises as the agent of the plaintiff. In offering her to testify in his behalf, the plaintiff did not offer to show that he ever authorized her to act in the matter for him, or ever recognized her as his agent in that matter. Being incompetent on the ground of public policy, because of the marital relations existing between her and the plaintiff, except when she acted as his agent, the agency must first be shown, to render her competent to testify in his behalf. Judgment affirmed.

(60 Vt. 494)

POWERS v. NEW ENGLAND FIRE INS. CO.

(Supreme Court of Vermont. Windham. July 20, 1897.)

ASSUMPSIT—PROMISE—PLEADING—INSURANCE—MORTGAGEE—RIGHT OF ACTION.

1. In assumpsit on a fire insurance policy the declaration set forth the policy, showing a contract by which the loss was "to be paid sixty days after proof" thereof. *Held* that, on general demurrer, this was a sufficient allegation of the promise to pay.

2. An action on a fire insurance policy containing a mortgage subrogation clause should be brought in the name of the insured, for the benefit of the mortgagee.

Exceptions from Windham county court; Start, Judge.

Assumpsit by Lafayette C. Powers against the New England Fire Insurance Company on a fire insurance policy. A general demurrer was overruled, and, defendant having waived his right to plead over, judgment was entered for plaintiff. Defendant excepts. Affirmed.

Clarke C. Fitts and Waterman, Martin & Hitt, for plaintiff. Butler & Maloney, for defendant.

TAFIT, J. It is claimed that the declaration discloses no promise of the defendant to pay the plaintiff. The policy declared upon is set forth in words and figures, and shows a contract of insurance, the loss, if any, "to be paid sixty days after proof shall have been made." This at least is an argumentative way of alleging that the defendant promised to pay the plaintiff, and is sufficient as against a general demurrer. Can the plaintiff maintain this action? The contract was made with him, the consideration moved from him, the promise was made to him; and the decisions in this state are that a suit to enforce the contract must be brought in the name of the one to whom the promise is made, and from whom the consideration moves. *Fugure v. Society*, 46 Vt. 362. In *Davenport v. Association*, 47 Vt. 528, it was held that the beneficiaries could maintain the action, the court construing the contract as containing a promise to pay to them. Many cases from other states have been cited, but they are not authority here, and no reason is disclosed in any of them why we should overturn the well-settled practice and decisions of our own state. A policy of insurance is sometimes made payable to the insured and his assigns, sometimes to the mortgagee of the premises, naming him, and at other times to any one holding a mortgage upon the insured property at the time of the loss, whoever he may be. The effect of the provision is to give a mortgagee a lien upon the insurance money in case of loss, securing him by substituting the proceeds of the policy in place of the property, provided it burns, thus letting the property go to the substantial owner if the property is mortgaged, as is often the case, to its full value. But this interest of the mortgagee in the policy is an equitable, not a legal, one, and will be protected in a law court. *Upton v. Moore*, 44 Vt. 552. If a policy is made payable to a mortgagee, the insurer is not at liberty to pay any sum due under the policy to the insured in disregard of the rights of the beneficiary. A policy of insurance is a mere chose in action; it is non-negotiable; it is not assignable at common law, so that the assignee can sue in his own name; and, though it may be payable to the insured and his assigns, still, if a loss happens, an equitable holder of the policy must sue in the name of the original insured. *Aldis, J.*, in *Wood v. Insurance Co.*, 31 Vt. 552. Under our system of pleadings—and no better one has as yet been devised—the insurer cannot be subjected legally to any suit save the one in the name of the party to the contract, and the beneficiary can always protect his rights by suit in the name of the insured. This suit is brought, in accord with our system of pleadings, in the name of the party to the contract, for the benefit of the mortgagee, to the extent of its claims. This fact is alleged in the declaration in express terms. The mortgagee has the right to control the judgment, and any execution issued thereon, until

his claim under the policy is extinguished, after which the mortgagor (the plaintiff) is the only party in interest and of record. The judgment will be a complete protection to the defendant against any further suit in respect to all claims under the policy. Judgment affirmed, with directions to the clerk to deliver any execution issued thereon to the beneficiary under the policy until its claim thereunder is extinguished.

(60 Vt. 558)

MACK v. CAMPEAU.

(Supreme Court of Vermont. Addison. July 17, 1897.)

PLEADING—AVERRING CRIME.

1. Orator alleged that one E. had accused defendant of crime; that "E. was threatening legal proceedings * * * to recover damages," and to subject him to criminal prosecution; and that defendant, realizing his liability thereto, and to save the expense and punishment incident thereto, besought the orator for his services in that behalf, and the latter thereupon interceded, and induced E. to refrain from prosecuting or instituting legal proceedings against defendant. These services formed the consideration for the contract sought to be specifically enforced. *Held*, that there was a sufficient allegation of a crime by defendant to warrant the court in treating it as committed.

2. Another allegation was: "And in consideration that the orator should intercede and use his influence with E. to dissuade him from instituting legal proceedings against," etc. *Held*, that this allegation must be taken in connection with the others, and that, so taken, the words "legal proceedings" imported criminal, as well as civil, proceedings, and hence the contract would not be enforced, because of the tainted consideration.

Appeal from chancery court, Addison county; Tyler, Chancellor.

Bill by Thomas Mack against P. A. Campeau to enforce a contract. A demurrer incorporated into the answer was sustained, and the bill was dismissed, and orator appeals. Affirmed.

The bill alleged that the orator had been for a long time in the business of buying and selling coal in the city of Vergennes, making therein a reasonable profit; that the defendant, Campeau, was the pastor of the Roman Catholic Church in the same city, and engaged in the coal business, which he conducted at such prices that the orator could not compete with him; that Campeau had been accused by one Egan of criminal intimacy with Egan's wife, and alienating her affections, and that Egan was threatening legal proceedings against him, to recover damages, and to subject him to criminal prosecution; that Campeau, realizing his liability to such proceedings, and desiring to avoid the expense and damage of the same, and to save the exposure, punishment, and scandal that would be incident thereto, besought the orator's services in that behalf, and, in consideration that the orator would intercede and use his influence with the said Egan to dissuade him from instituting legal proceedings against Campeau upon said criminal relations, and in further consideration that the orator would purchase Campeau's

entire stock of coal, he, Campeau, promised the orator that he would not thereafter engage in the coal business in Vergennes in competition with the orator; that the orator had performed upon his part, but that Campeau was still competing with him in the coal business,—and prayed for an injunction. The defendant, Campeau, answered, denying the principal allegation, and insisting that the contract set forth in the bill was illegal and void as against public policy, asking to have the same benefit thereof as if he had demurred to the bill for that cause.

F. W. McGettrick and F. L. Fish, for appellant. Roberts & Roberts, for appellee.

ROSS, C. J. The orator contends that the demurrer should have been overruled, because the bill does not, in terms, allege that defendant, Campeau, had been guilty of criminal intimacy with the wife of Egan, and for that reason no crime is shown by the bill to have existed which could have been the subject of the negotiations between the orator and Campeau. The bill alleges that Egan had accused Campeau with having been criminally intimate with Egan's wife, and that he had alienated her affections; that Egan was threatening legal proceedings against him to recover damages, and to subject him to criminal prosecution; that Campeau, realizing his liability to such proceedings, and desiring to avoid the damage and expense of the same, and to save the exposure, punishment, and scandal that would be incident thereto, besought the orator for his services in that behalf. The bill further alleges that the orator entered upon the employment, and did intercede with, influence, persuade, and induce Egan to forego and refrain from prosecuting or instituting legal proceedings against Campeau on account of the alleged criminal relations. Under the decisions of this state, these allegations are a sufficient setting forth that Campeau had been guilty of the alleged criminal intimacy. By his employment of the orator to dissuade Egan from prosecuting or instituting legal proceedings against him on account of his alleged criminal relations with Egan's wife, he admitted that he was guilty of the crime charged. *Dixon v. Olmstead*, 9 Vt. 310; *Bowen v. Buck*, 28 Vt. 308. *Dixon v. Olmstead* is trower to recover for the conversion of a horse. To sustain the action, these facts, in substance, were shown: The defendant, residing in New Hampshire, sent his agent into this state, who, after procuring a warrant for the plaintiff's arrest and surrender to the authorities of New Hampshire, to be tried on an alleged charge of forgery committed in that state, induced the plaintiff, who denied the charge, and declared himself innocent of it, to settle by giving the defendant the horse, among other things. No other evidence that a forgery had been committed by the plaintiff in New Hampshire was given. The defendant contended that the alleged

crime must be established, and that the horse had been given in settlement of the crime, to entitle the plaintiff to recover. But the court said: "For the purposes of this trial, it must be considered, first, that the plaintiff was guilty of the offense; for if, when he was threatened only with legal process and the ordinary proceedings in such cases, he saw fit to come forward, and compromise the matter, it is not in his mouth to deny his guilt." *Bowen v. Buck* follows the doctrine announced in *Dixon v. Olmstead*, and holds that the parties to such transactions are to be held and treated as they treat themselves; that if they enter upon negotiations and settlements in which they treat themselves as guilty of the alleged crime, they will be so treated when those negotiations and settlements are brought under legal investigation. Hence the bill alleges sufficient facts to have the court treat the transactions between the orator and Campeau as they treated them, as of and concerning criminal relations existing between Campeau and the wife of Egan.

The orator also contends that if Campeau had been guilty of having criminal relations with Egan's wife, Egan would have a valid claim against him, growing out of those relations, and that Campeau could lawfully employ the orator to settle or adjust the claim of Egan growing out of the same. The contention is sustainable, if the allegations of the bill do not fairly include in the orator's employment the prevention of a criminal prosecution to be set on foot by Egan. To support his contention, the orator relies upon this allegation: "And in consideration that the orator should intercede and use his influence with Egan, to dissuade him from instituting legal proceedings against Campeau, based upon the aforementioned criminal relations," etc. He contends that the only legal proceedings Egan could institute against Campeau, growing out of such relations, were those to recover private damages. This construction possibly might be given to this allegation if it stood alone; yet it must be remembered that Egan might, by complaint to the proper officer, be instrumental in commencing a criminal prosecution against Campeau. It was his duty, as a citizen, to make such complaint, if he had knowledge of the commission of the crime. But when this allegation is read in connection with that which immediately precedes (that Egan had threatened to subject Campeau to criminal prosecution; that Campeau, desiring to save the exposure, punishment, and scandal that would be incident thereto, sought the orator's services in that behalf), and in connection with what follows (that the orator did induce Egan to refrain from prosecuting and instituting legal proceedings), it fairly imports that the orator was employed, not only to prevent Egan from instituting a civil suit, but also to prevent him from causing to be commenced a criminal prosecution. The meaning of words and phrases in pleadings very fre-

quently depends upon the context. *Royce v. Maloney*, 58 Vt. 445, 5 Atl. 386. The language relied upon by the orator,—“Instituting legal proceedings,”—when read in connection with the context, fairly imports criminal, as well as civil, proceedings. It is not contended that if part of the consideration for the agreement which the orator asks to have enforced was the suppression of criminal prosecution, equity will aid the orator in enforcing it. The decree of the court of chancery, sustaining the demurrer, and adjudging the bill insufficient, is affirmed, and cause remanded.

(182 Pa. St. 90)

In re WRIGHT & SCHMID'S ESTATE.

Appeal of VLETOR et al.

(Supreme Court of Pennsylvania. July 15, 1897.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—WHEN TAKES EFFECT—CREDITORS ATTACKING JUDGMENTS—PAYMENTS BY ASSIGNEE—COUNSEL FEES.

1. Counsel for assignee should not be paid out of the assigned estate, where he was also attorney for the assignor and for certain creditors, one of whom was the assignee, to whom the assignor confessed judgments on which, before the assignment, executions were levied on part of the assignor's property.

2. As against an assignor and persons claiming through him, the assignment for benefit of creditors takes effect from the time the assignor delivers it to his attorney for recording.

3. General creditors who would benefit by having a judgment against the assignor defeated, may attack it, before the auditor, as having been paid, or as confessed for more than was due, to cheat and defraud them.

4. An assignee who, without order of court, pays money that belongs *prima facie* to the assigned estate to one who, under the assignment, has no right to it, does so at his own risk, and assumes the burden of showing every fact necessary to establish title of the one to whom it is paid.

Appeal from court of common pleas, Philadelphia county.

In the matter of the assigned estate of Joseph S. Wright and another, trading as Wright & Schmid. From a decree dismissing exceptions to and confirming the report of the auditor, appointed to audit the account of William H. Schmid, assignee for the benefit of creditors, Frederick Vletor and another, creditors, appeal. Reversed.

John Sparhawk, Jr., George P. Rich, Henry C. Boyer, and William A. Manderson, for appellants. Alexander Simpson, Jr., for appellee.

WILLIAMS, J. It is matter for congratulation that the assignments of error do not make it necessary for us to consider the facts in this case at any length. Their flavor is not pleasant. Still a brief outline of them seems necessary to a proper understanding of the legal questions presented on the record. Wright & Schmid were merchants in the city of Philadelphia. In June, 1891, and for some time prior thereto, they were hopelessly bankrupt. Their assets consisted of some \$12,000 in bank, some \$10,000 or \$12,000 worth of stock, and bills re-

ceivable for a somewhat larger sum. The liabilities were not far from \$50,000. On the 4th day of June, 1891, the firm called its legal adviser to its assistance for the purpose of closing up its affairs. The first thing done was to confess judgments in favor of several relatives and favorite creditors for about \$10,000. Then the money on hand was disposed of. In the next place, after writs of *fi. fa.* had issued on the judgments, and the sheriff had seized the stock of goods, a general assignment was made in favor of creditors which could be operative only on the bills receivable. This was made to a son of one of the partners who had been the bookkeeper of the firm, and was one of the judgment creditors who had a levy on the goods. This assignment was executed on the 4th day of June, and left with the attorney for the purpose of having it recorded, which was actually done on the next day. It is now alleged that on the same day a secret assignment of the most available of the bills receivable was made by the firm to the judgment creditors as collateral security, and that, inasmuch as the judgments were not fully paid out of the stock, they should now be paid out of the funds in the hands of the assignee because of this secret assignment. Mr. Carr, the attorney who prepared all these papers, says as a witness: “I placed it [the assignment as collateral] among the papers of Wright & Schmid, and I have it yet.” It seems never to have been delivered to the judgment creditors, or to any one for them, but to have remained under the control of Wright & Schmid from the beginning to the end of these proceedings. The judgment creditors did not know of its execution. The assignee did not. No one seems to have had any knowledge of its execution but Wright & Schmid and their legal adviser, and the reason the latter gives for this is, in his own words, “I have never been accustomed to make a display of my client's papers, and I did not in this case.” He evidently regarded the papers as belonging to Wright & Schmid.

It appears that it was the confident expectation that all the judgments would be paid out of the proceeds of the sheriff's sale, and this was not even doubted for some time after these papers were executed. The secret assignment might, therefore, have been intended by the assignors as a provision against a contingency not then looked for, and not to be delivered until the necessity became apparent for withdrawing money from the assignee for the payment of the judgments. Upon these facts several questions are raised which may be very briefly disposed of. First. Should the assignee be entitled to withhold the money paid by him for counsel fees? Mr. Carr appears to have been the attorney for the plaintiffs and the defendants in all the judgments. He was the attorney of the assignors. The assignee alleges that he also employed him as his adviser. The antagonism between the judgment and the unsecured creditors was apparent. It was impossible for a man to serve both sides with equal fidelity. As a consequence, all doubts

were resolved in favor of the judgment creditors, and the unsecured creditors were without a friend in the assignee, because they were without counsel in a position to look after their interests. The assignee was one of the judgment creditors. His own personal interests were adverse to those of the creditors, whom, as assignee, he was bound to protect; and, if he employed the attorney of the other judgment creditors as his own, it must have been because his interest was with them. In such a case it may be proper enough for him to pay counsel for services rendered to him, but not with the money of the creditors. The first question should be answered in the negative, and all the credits for money paid to counsel for the other side of this controversy should be struck out from his account. It seems impossible that a fair-minded assignee could have believed it right for him to employ as an attorney for the assigned estate one whom he knew to be already employed to represent hostile interests. Whether he did or not, the creditors have an unquestionable right to object, and in this case their objection is sustained.

The assignee has charged for five quarters' rent paid during the settlement of this small estate, and about \$100 for "stationery, stamps, etc.," in several items scattered through the account. These items seem unreasonably large, and, when this case is again examined, should be considered. If they are vouched, and seem reasonable under the circumstances, they should be allowed, otherwise they should be reduced.

When did the general assignment take effect? Beyond any doubt it took effect when it was delivered to Mr. Carr for recording, on the 4th day of June. The assignors then parted with the possession and control of it, and it started on its way to the recorder and the records. It was the act of the assignors in its delivery, not that of the agent or attorney, that gave it legal effect. As against the assignors and all persons claiming through them the assignment took effect when they delivered it to one to take to the recorder's office.

Another question presented is whether the general creditors have a right to attack a judgment before the auditor as having been already paid, or as confessed for more than was due, in order to cheat and defraud them. If the allegation is true, the money should go to the assignee for the benefit of the general creditors; if not true, then the judgment creditors are entitled to take it. This question can be mooted before the auditor, and if necessary, or either party require it, an issue may be awarded to ascertain whether anything, and, if so, how much, is due upon the judgment so attached. *Bichal v. Rank*, 5 Watts, 140. An irregularity in the entry of the judgment a defendant may waive, but he cannot waive his own fraud in confessing it to defraud his creditors. Any creditor against whom the fraud was intended to operate may raise the question. *Dougherty's Estate*, 9 Watts & S. 196;

Gates v. Johnston, 3 Pa. St. 52. The elements of the fraud must be shown or appear in the application for the issue (*Robinson's Appeal*, 36 Pa. St. 84), since a mere general allegation of fraud is not enough. Nor will a creditor who cannot reach the fund be allowed to enter upon a contest over the bona fides of the claim presented, because, whatever might be the result of his contest, he is neither better nor worse in position because of it. *Kelly v. Herb*, 157 Pa. St. 41, 27 Atl. 559. Here is a fund which must go to one of two classes of claimants. If the judgment creditors, or any of them, have not an honest demand on that fund for the sum apparently due upon his judgment, so much of the fund must go to the unsecured creditors through the assignee. The only other question is that of the right of the assignee to pay without the direction of the court money collected by him to one not entitled under the assignment to receive it. He can arbitrarily and upon his own authority make such payment, but he makes it at his own risk, and assumes the burden of showing satisfactorily every pertinent fact necessary to establish the title of him to whom he makes the payment. He ought not to make such payment. It is in hostility to the trust he holds, and which he is bound to protect with reasonable fidelity. It was in this case a preference of his own interest as a judgment creditor over the interests of the unsecured creditors, his individual interest over his official obligations. One who finds himself between such conflicting motives ought, in justice to himself, to invoke the aid of the proper court in deciding to which he shall yield himself. If, without the direction of the court, he follows his personal interest, and pays money that belongs prima facie to the assigned estate to one who under the assignment has no right to it, the presumptions are against him, and he must overcome them by satisfactory evidence establishing his own fairness, and the legal right of the person to whom he has made the payment. This he has not yet done. If not fully done upon a rehearing, it will be the duty of the auditor to surcharge him with all the money so paid. It is a significant circumstance that this controversy is between the assignee and those whose interests he should have protected, and that it is over money apparently belonging to the creditors which he has paid to Mr. Carr for the benefit of himself and other judgment creditors. It shows how unfortunate it was in this case, and must be in all cases, where one is selected as assignee whose position is necessarily hostile to those interested in the fund, and where such an assignee employs as his official adviser an attorney whose previous engagements prevent the possibility of his representing the unsecured creditors in the only controversy to be anticipated in which their interests are involved, and in which they will need professional aid. The decree is reversed, and the record is remitted for further proceedings in accordance with this opinion.

(90 Me. 217)

CITY OF BANGOR v. INHABITANTS OF ORNEVILLE.

(Supreme Judicial Court of Maine. April 24, 1897.)

INSANE PAUPERS—COMMITMENT—NOTICE—RECORD—OFFICERS.

1. In an action of assumpsit, under Rev. St. c. 143, to recover for sums paid by plaintiff town for the support of an insane pauper at the insane hospital, it was admitted that the insane person had a pauper settlement in the defendant town. Two points were urged in defense, viz. want of proper notice, and failure to keep a proper record of the proceedings respecting the examination and commitment of the pauper.

Held, that a notice sent to the overseers of the poor of the defendant town, containing proper facts, from the "office of the overseers of the poor" of Bangor, by "L. C. Davis, overseer of the poor, and secretary," is sufficient; and thereby the defendant town becomes charged for all sums paid by the plaintiff town within three months prior, and two years after, the cause of action accrued.

2. The record of the proceedings attending the examination and commitment will be held valid, although not extended for nearly two years after the commitment, it appearing that it was made during the municipal year immediately succeeding the commitment and by the clerk, who continued to hold his office by re-election.

3. It is established in New England that a clerk who has made an erroneous or incomplete record while in office, or after re-election, may complete such records; and where he continues in office for several years he may amend former records notwithstanding intervening re-elections.

4. A record of such proceedings that omits to state, according to the statute, that the two practicing physicians who made the medical examination were also "respectable," will be held sufficient when it appears to contain a statement of all facts requisite to establish the regularity of the proceedings and a legal commitment; no evidence being adduced that the two physicians, who signed the certificate, were not in fact respectable. In such cases the court is aided by the presumption in regard to public officers, expressed by the maxim, "*Omnia præsumuntur rite esse acta.*"

(Official.)

Report from supreme judicial court, Penobscot county.

Assumpsit by the city of Bangor against the inhabitants of Orneville. Submitted on report. Judgment for plaintiff.

E. C. Ryder, City Sol., for plaintiff. J. B. Peaks, for defendant.

WHITEHOUSE, J. This is an action of assumpsit to recover the sums paid by the plaintiff city for the support of Maurice Foley in the insane hospital, including the expenses of his examination and commitment, amounting in the aggregate to \$101.02.

It is admitted that Foley had a legal settlement in the defendant town, that he was adjudged insane by the "board of examiners" of Bangor, and by their authority committed to the insane hospital, and that the expenses sued for were incurred and paid by the plaintiff city. But it is strongly urged that the city is precluded from recovering in this action by reason of its failure to give the requisite notice of the facts to the overseers of the defendant town; and, secondly, by its

omission to keep a proper record of the proceedings of the municipal officers respecting the examination and commitment of the insane person.

It is provided by section 13 of chapter 143, Rev. St., that "the municipal officers of towns shall constitute a board of examiners, and on complaint in writing of any relative, or of any justice of the peace in their town, they shall immediately inquire into the condition of any person in said town alleged to be insane; shall call before them all testimony necessary for a full understanding of the case; and if they think such person insane, and that his comfort and safety, or that of others interested, will thereby be promoted, they shall forthwith send him to the hospital, with a certificate stating the facts of his insanity, and the town in which he resided or was found at the time of examination"; and that "they shall keep a record of their doings and furnish a copy to any interested person requesting and paying for it."

It is further provided by section 19 of the same chapter that "the certificate of commitment to the hospital after a legal examination is sufficient evidence, in the first instance, to charge the town where the insane resided, or was found at the time of his arrest, for the expenses of his examination, commitment and support in the hospital"; and by section 21 that "any town thus made chargeable, in the first instance, and paying for the commitment and support of the insane at the hospital may recover the amount paid from the insane, if able, * * * or from the town where his legal settlement is, as if incurred for the expense of a pauper." Section 34 declares that "in all cases of preliminary proceedings for the commitment of any person to the hospital, the evidence and certificate of at least two respectable physicians, based upon due inquiry and personal examination * * * shall be required to establish the fact of insanity, and a certified copy of the physicians' certificate shall accompany the person to be committed."

The evidence reported discloses a copy of the certificate of commitment, issued by the municipal officers of Bangor, April 7, 1894, duly attested by the city clerk, stating the facts according to the directions of the statutes, with an attested copy of the certificate of two "practicing" physicians, reciting the facts required by the statute; and it is not in controversy that on the 7th day of April, 1894, Maurice Foley was committed to the insane hospital. The report also discloses a copy of what purports to be a true "record of the commitment" of Maurice Foley to the hospital, dated April 7, 1894, duly attested by the city clerk of Bangor. And it is not questioned that, barring the omission of this record to state that the two practicing physicians were also "respectable" physicians, it contains a statement of all the facts requisite to establish the regularity of the proceedings and a legal commitment of Foley to the hospital.

But it appears from the testimony of the city clerk of Bangor that this record in its present form was not extended on the book entitled "Record of Commitments to the Insane Hospital," introduced at the trial, for nearly two years after the commitment of Foley.

It is therefore contended by the learned counsel for the defendant that it is not a valid and authentic record which can be accepted as evidence legally importing the verity of the statements therein contained.

It appears, however, from the testimony of the city clerk, that he made the extended record in question during the municipal year immediately succeeding that when the warrant for Foley's commitment was issued, and he continued to hold the office of city clerk by re-election at the time the extended record was made.

It is an established rule in New England, respecting the amendment of the records of a city or town, that the clerk who has made an erroneous or incomplete record may, while in office, or after a re-election to the same office, amend or complete such record according to the truth, being liable like a sheriff who amends his return for any abuse of the right. 1 Dill. Mun. Corp. § 294; *Chamberlain v. Dover*, 13 Me. 463; *Hartwell v. Littleton*, 13 Pick. 229; *Welles v. Battelle*, 11 Mass. 477. In the last-named case it was distinctly determined that when a clerk continues in office several years by repeated annual elections he may amend the record of a former year, notwithstanding an election has intervened, and though he does not hold the office under the same appointment; and this case was cited with approbation in *Chamberlain v. Dover*, supra. In *Hartwell v. Littleton*, supra, Chief Justice Shaw, speaking of an amendment by a clerk after a re-election, says: "The clerk not only knows the fact in relation to which the amendment is to be made, * * * but he still enjoys the confidence of the town, is by their vote intrusted with the custody of their records, and is held responsible for their purity and correctness under the sanction of an official oath, and all such other guards as the law has thought it necessary to prescribe in the case of a clerk actually in office. The intervening election is substantially a continuance of the clerk in the same office." So, in *Mott v. Reynolds*, 27 Vt. 206, Redfield, C. J., says: "We think in general it must be regarded as the right of the clerk of a town or other municipal corporation, while having the custody of the records, to make any record according to the facts. His having been out of office and restored again could not deprive him of that right." Again, in *Turnpike Co. v. Pomfret*, 20 Conn. 590, it was held that the clerk, still continuing in office, was competent to amend the record of a town meeting six years after it was held; that this power is derived solely from his official character, and does not depend on the permission of the court in which the record is offered as an instrument of evidence, nor on inquiry in-

to the truth of it as originally made or as amended, and that such a record is in such an action conclusive evidence of its own truth. See, also, *Gibson v. Bailey*, 9 N. H. 168.

In the case pending before us, it appears from the certificate of commitment that the city clerk was himself the justice of the peace who made the complaint to the municipal officers upon which the adjudication was made respecting Maurice Foley; and the city clerk testifies that he preserved a copy of the certificate of commitment and the original certificate of the two physicians as data from which to make a permanent record; that the delay in making this record was occasioned by the adoption about that time of a different book for a new form of record, and that the "record of the commitment" of Maurice Foley, introduced in this case, was the official record of the facts made by him as city clerk.

It thus appearing that in extending this record the city clerk acted in entire good faith in the discharge of an official duty, it is the opinion of the court that this "record of commitments" is a valid record, which should be received as conclusive evidence of the facts therein stated.

The statute requires the evidence and certificate of at least two "respectable" physicians to establish the fact of insanity, and it is objected that the record only shows that the evidence and certificate of two "practicing" physicians were before the board. But both the certificate of commitment signed by the municipal officers and the record signed by the city clerk state that the board had before them "all testimony necessary for a full understanding of the case," as required by the provision of section 13, c. 143, Rev. St.; and it has been seen that the evidence and certificate of two "respectable" physicians are declared by section 34 to be "necessary." It is not suggested that either the city physician, who signed the certificate, or the other eminent physician whose name appears on that instrument, was not in fact "respectable"; and it is the opinion of the court that, aided by the presumption in regard to public officers expressed by the maxim, "Omnia præsumuntur rite esse acta," the evidence is sufficient to justify the conclusion that there was a full compliance with the requirements of the statute in this respect.

The notice sent to the overseers of the poor of the defendant town from the "office of the overseers of the poor" of Bangor by "L. C. Davis, Overseer of the Poor and Sec'y," appears to be the inartificial result of an attempt to adapt the established formula employed in ordinary pauper cases to the modified conditions existing in this case; and, while it is not to be commended as a precedent, it states with reasonable clearness and precision all the essential facts involved in the case, and leaves no opportunity for a misunderstanding respecting its purpose and object. It must therefore be deemed a substantial compliance with the requirements of

the statute. It bears date April 9, 1894, and appears to have been sent after the expense of commitment, amounting to \$13 06, had been actually paid by the city of Bangor; and, being the first and only notice sent, it was obviously received before any payments had been made by the defendant town on account of the expenses therein said to have been incurred. The notice is therefore sufficient to charge the defendant town for all sums paid by the plaintiff within three months prior to such notice, and all expenses subsequently accruing and paid by the plaintiff within two years after the cause of action accrued. Rev. St. c. 24, § 35; Veazle v. Howland, 53 Me. 39; Jay v. Carthage, 48 Me. 357; Bowdoinham v. Phippsburg, 63 Me. 497.

The plaintiff's right to reimbursement for all the items of expense specified in the account annexed to the writ having been established, the entry must be,

Judgment for plaintiff.

(30 Me. 313)

BOOTHBY v. BOSTON & M. R. R.

(Supreme Judicial Court of Maine. May 29, 1897.)

RAILROAD—NEGLIGENCE—NOISE OF LOCOMOTIVE.

1. The plaintiff recovered a verdict upon the following undisputed facts: At the time of the accident the defendant railroad company had a train consisting of a locomotive and several flat cars standing on its track, near a crossing. The locomotive was headed towards the crossing, and was distant therefrom about 40 feet. The train was stationed there to load the flat cars with logs. The locomotive had steam up, as was necessary in order to quickly move the train from time to time; but no steam was escaping. Neither the engineer nor the fireman was on the locomotive, but both were seated on the bank, some 30 feet distant. The plaintiff's intestate, riding with her husband in a wagon behind a horse along a traveled road, came to this crossing, and stopped before passing over. At this moment steam suddenly escaped from some part of the locomotive, making a noise that frightened the horse, which ran away, throwing out the plaintiff, and inflicting injuries upon her from which she afterwards died.

Held, that whether the steam escaped through the safety valve on top of the locomotive, with a sudden, sharp, and loud noise that would frighten an ordinarily well-broken horse, or it escaped through the cylinder cocks, making only a slight, hissing noise, insufficient to frighten an ordinary horse, were questions of fact for the jury, who have found for the plaintiff under instructions not complained of. The court considers that the evidence is not untrue.

2. Under the instructions of the court, the jury rendered a special finding that the defendant was in fault in not sufficiently guarding against such an escape of steam at that time.

3. Upon this issue the jury found that the defendant's servants, the engineer and fireman, by the exercise of reasonable care, could have kept the steam up to the necessary working point while the locomotive was stationary, and yet prevented its sudden escape. The court considers that there is practically no evidence that this was impossible or improbable. It seems probable, and the engineer practically admits it.

4. *Held*, that the defendant was bound to anticipate that travelers with teams might, at any time, approach this crossing, and was bound to be mindful of the danger to them of steam suddenly

escaping at high pressure, although the fee in the crossing was in the defendant, who had been unable to prevent or limit travel over it, but finally gave it up, removed all bars and other obstructions, put up the usual sign of a railroad crossing, and suffered people to pass freely across the track without objection.

(Official.)

Action on the case by Joseph Boothby, administrator, against the Boston & Maine Railroad, to recover damages for the death of his wife at a railroad crossing of defendant. There was a verdict for plaintiff, and defendant moves for a new trial. Overruled.

H. Fairfield, L. R. Moore, and J. M. Stone, for plaintiff. G. O. Yeaton, for defendant.

EMERY, J. The undisputed facts are these: At the time of the accident the defendant railroad company had a train, consisting of a locomotive and several flat cars, standing on its track, near a crossing. The locomotive was headed towards the crossing, and was distant therefrom about 40 feet. The train was stationed there to load the flat cars with logs. The locomotive had steam up, as was necessary in order to quickly move the train from time to time; but no steam was escaping. Neither the engineer nor the fireman was on the locomotive, but both were seated on the bank, some 30 feet distant.

The plaintiff's intestate, riding with her husband in a wagon behind a horse along a traveled road, came to this crossing, and stopped before passing over. At this moment steam suddenly escaped from some part of the locomotive, making a noise that frightened the horse, which ran away, throwing out the plaintiff, and inflicting injuries upon her from which she afterwards died.

The plaintiff contended, and there was evidence tending to show, that the steam escaped through the safety valve on the top of the locomotive, and that the noise was sudden, sharp, and loud, and calculated to frighten ordinarily well-broken horses. The defendant stoutly contended that the steam escaped through the cylinder cocks, and made only a slight, hissing noise, insufficient to frighten an ordinary horse. These are pure questions of fact. As the jury found for the plaintiff under instructions not complained of, we may assume the facts to be as contended by him in this respect. The evidence for the plaintiff, if true, furnishes a sufficient basis for the verdict on these issues, and we do not feel clear that the evidence is untrue.

The jury further found (the plaintiff's intestate being in the exercise of due care) that the defendant was in fault in not sufficiently guarding against such an escape of steam at that time.

This finding is specially assailed, and is to be reviewed.

The defendant's locomotive, with all its machinery and appliances, was rightfully there. The steam necessary for its quick working under its load was rightfully kept up to an efficient working point. All noises

occasioned by the necessary and efficient management of the locomotive and the train at that time and place, such as pumping water, emptying cylinders, maintaining pressure, etc., were rightfully made. People driving horses in that vicinity were obliged to take the risk of all such noises. *Whitney v. Railroad Co.*, 69 Me. 208.

On the other hand, in the care of its locomotives, whether stationary, with steam up, or running, the railroad company must bear in mind the danger to others from the noises caused by escaping steam, and must exercise reasonable care to prevent the steam escaping with such suddenness and force as to injure others. While it may, for various purposes, rightfully sound the steam whistle, no matter who is frightened, it should not do so unnecessarily in the vicinity of travelers with horses. *Hill v. Railroad Co.*, 55 Me. 438.

Could the defendant's servants, the engineer and fireman of this locomotive, by the exercise of reasonable care, have kept the steam up to the necessary working point with the locomotive stationary, and yet have prevented its sudden escape through the safety valve at the time the plaintiff's horse was at the crossing, some 40 feet distant? The jury have found that they could, but did not. Is there any good reason for such a finding which could properly influence reasoning men, or is the finding without reason?

It appears that the safety valve was set at 150 pounds pressure, while 100 pounds pressure was sufficient working pressure. It is urged by the plaintiff that, had the engineer or fireman been watchful of the steam gauge, he could have seen the rising pressure, and easily lowered it before the extreme limit was reached, there being at the time no immediate need of more than the ordinary pressure. This seems to us very probable. The engineer practically admits it. There is practically no evidence of its impossibility or improbability.

The defendant earnestly contends, however, that it had no reason to expect the plaintiff's intestate to be in that vicinity with a horse; that she had no right to be there; and hence it was not bound, as to her, to guard against the sudden and noisy escape of steam through the safety valve. The defendant owned the fee of its location, including the crossing and the spot where the horse took fright. There was no regularly located road over the crossing. But there had been a path or road, more or less traveled with teams, before the location of the railroad across it many years ago. After locating its railroad and purchasing the fee of the land, the defendant tried for a while to prevent or limit the travel over the crossing, but finally gave it up, removed all the bars and other obstructions, put up the usual sign of a railroad crossing, and suffered people to use the crossing for passing the track without objection. The road was freely, if not frequently, used by all having occasion.

The plaintiff's intestate, in undertaking to

pass over the track at this place under these circumstances, was not such an offender against the law or the defendant as to relieve the defendant from the duty of due care. The defendant was bound to anticipate that travelers with teams might at any time be approaching that crossing, and was bound to be mindful of the danger to them of steam suddenly escaping at high pressure.

We must defer to the judgment of the jury on all the various issues of fact.

Motion overruled.

(30 Me. 255)

AUGUSTA NAT. BANK v. HEWINS et al.
(Supreme Judicial Court of Maine. May 1, 1897.)

BILLS AND NOTES—INTEREST.

A promissory note payable on a certain time after date, with interest at the rate of 9 per cent. until paid, carries interest at that rate after the maturity of the note as well as before.

(Official.)

Exceptions from supreme judicial court, Kennebec county.

Action by Augusta National Bank against George E. Hewins and others, executors, on a promissory note. The only question raised was whether or not the note bore interest at 9 per cent. from date to the time of judgment, or only to its maturity. The presiding justice ruled that it bore interest until time of judgment, and defendant excepted. Exceptions overruled.

E. W. Whitehouse and W. H. Fisher, for plaintiff. S. & L. Titcomb, for defendants.

WALTON, J. This is an action upon a promissory note of the following tenor:

"\$2,300. Augusta, Maine, June 2, 1893.

"Six months after date, for value received, I promise to pay to the order of E. A. Getchell the sum of twenty-three hundred dollars, with interest at rate of nine per centum per annum, principal and interest payable at office of E. W. Whitehouse, Augusta, Maine, until paid.

"E. A. Getchell."

It will be noticed that at the end of the note are the words "until paid." The only question is whether these words carry interest at the stipulated rate (9 per cent.) after the maturity of the note as well as before.

We think they do. They were written into the note for some purpose, and we think there can be no reasonable doubt what that purpose was. We think it must have been for the purpose of guarding against that very construction of the note for which the defendants now contend. It had already been decided that without these words such a note would draw the stipulated interest till maturity, and only the legal rate of interest (6 per cent.) thereafter. *Eaton v. Bolsonnault*, 67 Me. 540. We think it was to guard against this result that the words "until paid" were inserted in the note now under consideration. True, the words "until paid" are separated from the in-

terest clause by a clause naming the place of payment of the note; but we do not think this separation destroys the effect of the words, or leaves their meaning at all doubtful.

Such, in effect, was the ruling in the court below, and it is the opinion of the law court that the ruling was correct.

Exceptions overruled.

(90 Me. 257)

DUDLEY v. POLAND PAPER CO.

(Supreme Judicial Court of Maine. May 8, 1897.)

SALES—ASSUMPSIT—DECLARATION—EVIDENCE—EXCLUSION.

1. When goods are sold, to be delivered at a place named at a future time, and before delivery they are accidentally lost or destroyed, the loss falls upon the buyer if at the time of the loss the title had passed to him; otherwise the seller must bear the loss.

2. When the writ contains a count on an account annexed, in which the various kinds of goods sued for are accurately specified, *held*, that such a form of declaring is sufficient when the goods sold have been delivered, and by the terms of the sale the price of the goods was to be paid in money. When the price of goods sold is to be paid otherwise than in money, a special count is necessary.

3. When the defendant's request for an instruction is equivalent to a nonsuit, the court may properly withhold the instruction.

4. A postponement of the admission of evidence during a trial, by order of the court, is not an exclusion, when its admissibility is reserved for further consideration. If such testimony is not offered again, and the attention of the court is not called again to it, an exception will not be sustained on the grounds that it was excluded.

(Official.)

Exceptions from supreme judicial court, Oxford county.

Assumpsit by Ansel Dudley against the Poland Paper Company for the value of poplar pulp wood, which the plaintiff agreed to sell the defendant, and deliver in the Androscoggin river. There was a judgment for plaintiff, and defendant excepts, and moves for a new trial. Overruled.

The declaration contained an account annexed, the money counts, and a count for goods bargained and sold.

A principal question in controversy was as to the precise time when the title to the pulp wood passed from the plaintiff to the defendant. The court submitted this question to the jury with full instructions, and stated to the jury in the beginning the following: "If it passed when it was surveyed on the banks of the tributaries of the Androscoggin, then a very important balance would be found due the plaintiff. If, on the other hand, that title did not pass, under the mutual understanding and intention of the parties, until the wood was delivered in the Androscoggin river, then a very different balance would be found due, if anything, to the plaintiff. So one of the principal questions, perhaps the principal question, involved here is what was the real intention of the parties in relation to the passing of the title from the

plaintiff to the defendant company of that pulp wood in the spring of 1895."

The plaintiff claimed that the title to the poplar wood passed to the defendant at the time of survey on the banks of the streams tributary to the Androscoggin river. The defendant claimed that the title did not pass until the poplar wood was delivered in the Androscoggin river.

The defendant requested the following instructions, among others, which the presiding justice declined to give: (1) In this action plaintiff can recover no part of the contract price. (2) Plaintiff can recover none of the advance money mentioned in the contract. (3) Plaintiff can recover for only the exact number of cords of poplar actually received by the defendant during the spring and fall of 1895. (4) Plaintiff cannot recover from the defendant the price of the value of the poplar left in the tributaries on the Androscoggin river in 1895. (5) Plaintiff cannot recover of the defendant for the poplar that was not driven into the Androscoggin river before the fall of 1895. (6) To constitute a delivery of the poplar mentioned in the contract, within the terms thereof, it must have been delivered in the Androscoggin river in the spring of 1895, etc.

The instructions touching these questions given to the jury by the presiding justice, and to which no exception was taken, were full and elaborate.

J. S. Wright and J. P. Swasey, for plaintiff. W. H. Payson, H. R. Virgin, and O. H. Hersey, for defendant.

WALTON, J. When goods are sold to be delivered at a place named at a future time, and, before delivery, they are accidentally lost or destroyed, it often becomes a difficult question to determine whether the buyer or the seller must bear the loss. If at the time of the loss the title had passed to the buyer, he must bear the loss; otherwise the seller must bear the loss. But in many cases it is extremely difficult to determine whether or not the title had passed to the buyer.

This is such a case. The plaintiff agreed to furnish the defendant with a large quantity of pulp wood, to be delivered into the Androscoggin river during the spring of 1895, and a large quantity was so delivered. But some of the logs which had been surveyed remained upon the banks of streams leading into the Androscoggin river, and the next fall or winter were carried out to sea by a freshet, and were lost. The question is whether, under the circumstances disclosed by the evidence, the plaintiff or the defendant must bear this loss. The plaintiff claimed in his writ that there was due him a balance of \$2,005.25. He obtained a verdict for \$969.38. How the jury reached this result we do not know. Perhaps they thought it would be equitable to apportion the loss. One of the questions is whether this verdict is so clearly

wrong as to require us to set it aside and grant a new trial. We do not think it is.

The defendant insists that the form of the action is such that the plaintiff should not be allowed to recover. We think the form of the action is well enough. The writ contains a count on an account annexed, in which the various lots of logs sued for are accurately specified. Such a form of declaring is sufficient when the goods sold have been delivered, and by the terms of the sale the price of the goods was to be paid in money. When the price of the goods sold is to be paid otherwise than in money, then a special count is necessary. But when, as in this case, the plaintiff claims that the goods have been delivered, and the price is payable in money, a count on an account annexed is sufficient. This mode of declaring has long been sanctioned in this and other states, and its sufficiency in a case like this cannot now be questioned. *Cape Elizabeth v. Lombard*, 70 Me. 396.

We think the defendant's requested instructions were properly withheld. If they had been given, the effect would have been equivalent to a nonsuit. We think the evidence was such as to justify submitting the case to the jury; and, as already stated, we do not think their verdict is so clearly wrong as to require us to set it aside.

The defendant claims that evidence was improperly excluded. The record fails to show that the evidence referred to was excluded. Its admissibility was only reserved for further consideration, and it was not again offered. What took place was this: John Reed, a witness for the plaintiff, was asked on cross-examination to state whether it was the custom on Swift river, and wherever he had driven, before putting wood into the streams to drive, to know whether the booms at the place of destination were out or not. The plaintiff's counsel objected, and the court said: "Omit that for the present." The defendant's counsel then put substantially the same question in another form, and the court said: "If that becomes material, you may recall him; I will save your rights in the matter." And later in the trial the court allowed the defendant to introduce evidence of the custom referred to, and Mr. Reed was again put upon the stand, but the question was not again asked him. The right to again offer the testimony of Mr. Reed upon the point was reserved to the defendant, and Mr. Reed was again upon the stand, and the defendant had an opportunity to again offer his testimony in relation to the custom; and, if the defendant had again offered it, we cannot entertain a doubt that it would have been received.

But we rest our decision upon the ground that a postponement is not an exclusion; that when the admissibility of evidence is reserved for further consideration, and it is not again offered, and the attention of the court is not again called to it, an exception cannot be

sustained on the ground that it was excluded. We hold that in such cases postponement is not exclusion, and cannot be so treated.

Motion and exceptions overruled.

(90 Me. 267)

STATE v. MAINE CENT. R. CO.

(Supreme Judicial Court of Maine. May 11, 1897.)

RAILROADS—DEATH BY WRONGFUL ACT—REMEDY—CIVIL ACTION.

1. An indictment against a railroad corporation for negligently causing the death of a person is no longer maintainable. The remedy is now by a civil suit for damages.

2. *Held*, that the statute of 1891 (chapter 124) supersedes and abrogates the remedy by indictment in all cases for which it provides a remedy by a civil action.

(Official.)

Exceptions from supreme judicial court, Sagadahoc county.

The Maine Central Railroad Company was indicted for the death of one Brown, killed October, 1893. Under Rev. St. c. 51, § 68, defendant demurred on the ground that such statute was repealed by implication by chapter 124, St. 1891. The demurrer was overruled, and defendant excepted. Exceptions sustained.

Grant Rogers, Co. Atty., H. M. Heath, and O. L. Andrews; for the State. O. D. Baker and F. L. Staples, for defendant.

WALTON, J. The question is whether the act of 1891 (chapter 124), giving a remedy by civil action for an injury causing death, superseded the previously existing remedy by indictment.

We think it did. The remedy by indictment was always regarded as anomalous and incongruous. It was essentially a civil suit, prosecuted for the benefit of private parties; but criminal in form, and prosecuted at the public expense. In some particulars it was subject to the rules of the criminal law, and in others it was governed by rules applicable only to civil suits. It was applicable to only a small class of cases, leaving other injuries of a similar character unprovided for. We think the act of 1891 (chapter 124) was intended to remedy these evils; that the purpose of the legislature was to provide a more appropriate remedy, and extend its application.

The act of 1891 (chapter 124), after describing the nature of the injuries for which redress is to be had, then declares that in "every such case" the remedy shall be by an action for damages. This language clearly includes the cases in which indictments had before been maintainable; and, if the new remedy does not supersede the old one, two conflicting remedies will exist for one and the same class of injuries. It is impossible to believe that the legislature intended such a result. And our conclusion is that the act of 1891 (chapter 124) supersedes and abrogates the remedy by

indictment in all cases for which it provides a remedy by a civil action; and that an indictment against a railroad corporation for negligently causing the death of a person is no longer maintainable; that the remedy is now by a civil suit for damages; and, consequently, that the indictment in this case cannot be sustained.

Exceptions sustained.

(90 Me. 269)

GLIDDEN v. KORTER et al.

(Supreme Judicial Court of Maine. May 12, 1897.)

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE.

1. To justify the court sitting in equity to compel specific performance, and compel a defendant to make a conveyance, the plaintiff must show that he has a clear title to the conveyance prayed for. A doubtful or contingent title is not sufficient; it must be a complete and perfected title.

2. *Held*, that the plaintiff does not have such a title. His right to the conveyance prayed for depended upon the happening of a future event, and the event has not happened.

3. The language of the bond for a deed held by the plaintiff was this: "The deed, at the end of one year from date, to be given at the request of the said John S. Glidden [the obligee], provided the said Jones and Glidden agree." The obligor Jones died within the year, and the agreement and the demand for a deed were never made. *Held*, that the right to the deed was contingent. It depended upon the happening of a future event,—an event which might or might not happen; and such a right is contingent. If the event happened, the right is perfected; if it does not happen, the right remains imperfect.

(Official.)

Report from supreme judicial court, Knox county.

Bill by John S. Glidden against Lizzett Korter and Etta Glidden, as heirs of Sarah J. Jones, deceased, for specific performance. Submitted on report. Bill dismissed.

"Know all men by these presents, that I, Sarah J. Jones, of Washington, in the county of Knox, stand firmly bound and obliged unto John S. Glidden, his heirs and assigns, in the sum of one thousand dollars, to the payment of which I bind myself and my heirs firmly by these presents.

"Sealed with my seal, and dated the eleventh day of August, A. D. 1893.

"The condition of this obligation is such that whereas the said Sarah J. Jones has this eleventh day of August, A. D. 1893, agreed to deed, in one year from date, the land deeded to her by Nancy Tribou, May 19, 1888, and recorded in Knox Registry of Deeds, Book 75, page 580, to which reference may be had for a more particular description. Also at her death that all personal property which she may die possessed to be the sole property of the said John S. Glidden. The deed at the end of one year from date to be given at the request of said John S. Glidden, provided the said Jones and Glidden agree. The said Glidden or his heirs shall well and truly support the said Sarah J. Jones at her house in Washington, meaning the Jones house; provide her

with suitable clothing and food, care in sickness, medicine, and medical attendance. The said Glidden to pay all taxes legally assessed upon said property. The said Jones to have the use of the front room in the chamber and front room below, fronting the hotel. The main travel in and out of said house by said inmates to be from the back or rear door.

"The said Glidden to keep said buildings in good repair. The said Glidden to furnish said Jones a suitable team to ride on suitable occasions.

"Now, if the said John S. Glidden shall well and truly perform all the conditions set forth in the foregoing, then this bond shall be void, otherwise to remain in full force and virtue.

"Sarah J. Jones. [Seal.]

"Signed, sealed, and delivered in presence of L. M. Staples."

T. P. Pierce, for plaintiff. C. E. & A. S. Littlefield, for defendant Lizzett Korter.

WALTON, J. This is a suit in equity. The plaintiff says that in consideration of an agreement on his part to support one Sarah J. Jones, she agreed to convey to him her real estate, and that at her death he should have all of her personal property, and that she died without having conveyed her real estate to him; and he prays that her two daughters, who are her only heirs, and one of whom is his own wife, may be compelled to make the conveyance. His wife does not resist, but the other daughter (Mrs. Korter) does.

There is no doubt of the power of the court to make such a decree, but to justify its exercise the plaintiff must show that he has a clear title to the conveyance prayed for. A doubtful or a contingent title is not sufficient. It must be a complete and perfected title.

We do not think the plaintiff has, or ever had, such a title. His right to the conveyance prayed for was contingent at the beginning, and it has never been perfected. His right to the conveyance prayed for depended upon the happening of a future event, and the event has not happened.

The contract on which the plaintiff relies is found in the conditions of a bond given by Mrs. Jones to him. The contract is very imperfectly stated, and it is not free from ambiguity. But we infer from the language used that Mrs. Jones, at least, and perhaps the plaintiff, were apprehensive that they might not be able to live together pleasantly; for it was stipulated that the deed to the plaintiff should not be given till the expiration of a year, and that it should not then be given unless they should be able to agree. The language of the bond is this: "The deed, at the end of one year from date, to be given at the request of the said John S. Glidden, provided the said Jones and Glidden agree."

It is plain, therefore, that the right to a deed was contingent. It depended upon the happening of a future event,—an event which might or might not happen. Such a right is contingent. If the event happens, the right

is perfected; if it does not happen, the right remains imperfect.

In this case the event did not happen. Mrs. Jones died within the year. She lived with the plaintiff only three months, at the end of which time she died of pneumonia, having been sick only eight days. The year's test was cut short, and the agreement, and the demand for a deed, which were necessary to complete the plaintiff's right to a conveyance, were never made. No obligation rested upon Mrs. Jones at the time of her death to make the conveyance prayed for, and of course no such obligation descended to her heirs.

The support furnished Mrs. Jones was in her own house. She did not go to the plaintiff's house; he moved into her house. And the plaintiff concedes that the entire expense incurred by him for her support, including her doctor's bill, in addition to her seat at his table, would not exceed \$40 or \$50. He had the use of her furniture and her carriages, and since her death he has retained the possession of her furniture, and his wife has claimed the right to dispose of her mother's clothing, and she has sold one article of it (a fur-lined cape) for \$22. Mrs. Jones left about \$250 in a savings bank, and the plaintiff has kept the savings bank book. Surely, the balance due the plaintiff, if anything, upon a quantum meruit, must be very small. His own wife is one of the two heirs of the deceased, and, of course, inherits one-half of her estate; and it seems to the court that it would be very harsh indeed to compel the other daughter (Mrs. Kortter) to convey her interest in her mother's real estate to the plaintiff upon a claim so weak, and the court declines to do it. Bill dismissed, with costs for Mrs. Kortter.

(30 Me. 273)

STATE v. HERSOM.

(Supreme Judicial Court of Maine. May 13, 1897.)

ASSAULT — PRESUMPTION — EVIDENCE — CRIMINAL LAW — PRACTICE.

1. The superior court for Kennebec county has authority, by section 75, c. 77, Rev. St., to order that a certified copy of a bill of exceptions taken in a criminal case in that court, together with the written argument of counsel, be transmitted within 30 days from the date of the order to the chief justice, for a decision of the same by the law court; there being no ruling that the exceptions are frivolous, or intended for delay.

2. A photograph, like a plan or other picture, if its correctness be proved, may be used in a trial before a jury to illustrate the evidence in the case.

3. The statutory term of assault with intent to commit manslaughter means an assault with an intent to commit an act which, if committed, would constitute the offense of manslaughter.

4. The presumption that a person intends the natural consequences of his act does not apply in a case where the circumstances show that a respondent threw a rock at a complainant, and missed hitting him. In such case he intended one act, and accidentally committed another, the presumption being thereby negated.

(Official.)

Exceptions from superior court, Kennebec county.

John Hersom was convicted of assault, and excepted. Exceptions overruled.

G. W. Heselton, Co. Atty., for the State. S. S. Brown, Jos. Williamson, Jr., and L. A. Burleigh, for defendant.

PETERS, C. J. The counsel for the respondent energetically protest against the order of the superior court of Kennebec county that these exceptions be argued in writing, and that the arguments be transmitted to the chief justice of this court within 30 days after the date of such order. There being no ruling or suggestion that the exceptions are frivolous, or intended for delay, we do not perceive why the judge of that court may not make such an order by virtue of the power conferred on him by section 75 of chapter 77 of the Revised Statutes, relating to procedure in the superior courts of the state. That section provides that "all exceptions arising within the exclusive jurisdiction of either of said superior courts may be certified at once to the chief justice of the supreme judicial court, and shall, when so certified, be argued in writing on both sides within thirty days thereafter, unless the time for good cause be extended by the judge of said court." This seems to be a general provision applicable to civil and criminal cases alike. We think, however, that this discretionary power of the judge should be sparingly exercised in important criminal cases, for the reason that the order deprives a respondent of the privilege—which he may consider very valuable—of discussing his case before the court of last resort in open session. Anciently, personal presence of the accused was considered an indispensable necessity in all the stages of a trial until the final result.

Complaint is made by the respondent that a photograph of the room, and fixtures therein, in which the assault was alleged to have been committed by the respondent, was admitted in evidence. The correctness of the photograph was certified to by witnesses, and the jury visited and inspected the room for themselves. The defense had the same opportunity that the government had to ascertain how closely and correctly the picture represented the appearance of the room. It seems to us the criticisms by the defense are not well founded. Any plan or picture may be admitted, in the discretion of the court, in illustration or explanation of the testimony introduced at a trial, and many courts have so decided the question.

The accusation against the respondent is that he assaulted the complainant by throwing a rock at his head while the latter was standing behind the counter of an hotel office, and that the rock missed his head, striking against a key rack or board just out of range with his head. A specious contention was set up at the trial by the defense that, on the principle that a person is presumed to intend the probable

consequences of his act, the respondent should be presumed as intending to miss the complainant, and not to hit him. The judge, correctly ruled, we think, that the principle invoked by the defense does not apply where a criminal act was intended, but not accomplished. The maxim appealed to is not of universal application. A person does not intend to do an act unintentionally. It would lead to the absurd proposition of saying that if a man intended to hurt another, but accidentally hurt himself, instead of the other person, he consequently intended to hurt himself. Anything done accidentally cannot be done intentionally. Had the respondent hit a person standing where the key-board was, although he aimed his rock at the head of the complainant, and there were an indictment against him for an assault on such other person, then the presumption invoked here would be applicable. *State v. Gilmann*, 69 Me. 163. In fact there is no such legal presumption. It is merely a presumption of fact which the law sometimes sanctions or approves, or allows a jury to act upon; and the admission that it is an inference of fact, and not of law, proves that its application depends on varying circumstances. *Whart. Cr. Ev.* (8th Ed.) § 734, and following sections.

It is urged that the terms an assault with intent to commit murder, or to commit manslaughter, are illogical, and not intelligible to common minds. But we think the difficulty disappears when accompanied with the explanation that an assault of that kind means with the intention to commit such criminal acts as would, when committed, amount to the one crime or the other. It is not to be supposed that any criminal really appreciates in his own mind, when meditating the commission of crime, the exact degree of the offense he may be guilty of,—whether murder in the first or second degree or manslaughter,—and that can only be determined by the result of his criminal act; and here it is where the presumption before discussed has an application, and where a jury would be authorized to say that he intended to do the particular act actually done by him.

Exceptions overruled.

(6 VL 452)

DIBBLE et al. v. DEERFIELD RIVER CO.
(Supreme Court of Vermont. Bennington. July 31, 1897.)

VENDOR AND PURCHASER—ASSUMPSIT—PLEAS—REPLICATION.

1. In special assumpsit, on allegations that plaintiffs contracted to convey to defendant by quitclaim deed certain land in their possession to which they had color of title, and that they had tendered the deed thereof, which had been accepted, but the consideration not paid, five pleas were filed, four of them denying possession of the lands by plaintiffs, as well as any interest or title to them, while the other denied the acceptance by defendant of the deed. *Held*, that the four pleas were good, but the other insufficient.

2. To the above pleas a general replication was filed, denying "each and every material fact" in the pleas. *Held*, that the replication was bad

for duplicity, not coming within the exception provided for by V. S. § 1151, which allows a general replication only to pleas in confession and avoidance.

3. Upon above allegations, a plea that, although the defendant took possession of the land, he did so under another deed, conveying an interest adverse to that of plaintiffs, is not a plea in confession and avoidance, within said exception.

Exceptions from Bennington county court: Thompson, Judge.

Special assumpsit by Dibble & Canedy against the Deerfield River Company. A demurrer to the replication was overruled, and the cause passed to the supreme court on defendant's exceptions before final judgment. *Reversed*.

Henry A. Harman, for plaintiffs. Charles S. Chase and Batchelder & Bates, for defendant.

MUNSON, J. It is alleged in both special counts that the plaintiffs were possessed of a certain parcel of land under color of title derived from a certain warranty deed, and that, in consideration of their undertaking to execute to the defendant a quitclaim deed conveying all their right, title, interest, and estate in and to said parcel, and to forward the same to the Wilmington Savings Bank for the defendant, the defendant undertook to accept said deed, and pay a specified sum for such right, title, interest, and estate, and that the plaintiffs did execute such a deed, and delivered the same, as required, and that the defendant, with knowledge of these facts, took possession of said land. In the first count it is alleged that the defendant would not accept the deed, nor pay for the interest conveyed. In the second count an acceptance of the deed is alleged, and the assignment of the breach is confined to the nonpayment. In the first plea to the first special count, it is alleged that the plaintiffs were not possessed of said parcel, and that, although the defendant took possession of it, it did so under another deed, conveying an adverse interest. In the second plea to the same count it is alleged that the plaintiffs had neither possession, nor right, title, interest, or estate. The first plea to the second special count alleges that the defendant did not accept the deed. The second and third pleas to that count are substantially the same as the pleas to the first count, with a further allegation denying that the defendant took possession of the deed. The replication is to all these pleas, and is that the plaintiffs "deny each and every material fact so by the said defendant pleaded, as aforesaid." The replication is demurred to, the causes specially assigned being its failure to deny and put in issue any single and material fact stated in the plea, and its duplicity in putting in issue two or more several and distinct matters. Both counts disclose a cause of action. They show that the defendant agreed to pay a specified sum for a quitclaim deed of certain land of which the plaintiffs were in possession under the color of title afforded by a warranty deed, and that the plaintiffs executed and delivered a quitclaim deed of all their right, title, interest, and estate in and unto said land.

Both pleas to the first special count and the second and third pleas to the second special count are good in substance. They allege that the plaintiffs were not in possession of the land described in the deed tendered. If this was true, the tender of the deed did not fulfill the plaintiffs' agreement, and the defendant was not bound to accept it. The plaintiffs undertook to give a quitclaim deed of land of which they had not only obtained a warranty deed, but of which they were in possession. Their possession of the land was a material element of what they undertook to convey. That possession might give value to the quitclaim, even though the previous warranty was worthless.

The first plea to the second special count is bad. The denial of an acceptance of the deed does not answer the count. The defendant was liable if the plaintiffs had tendered a deed which the defendant was bound to accept.

It is clear that the replication is bad at common law, and we do not understand counsel to claim the contrary. V. S. § 1151, permits a general denial only as against matter pleaded in confession and avoidance. So, if these pleas are held to be not of that character, the insufficiency of the replication is established. None of the pleas admit the facts alleged, and avoid their effect by the introduction of new matter. All the pleas held good deny the possession of the plaintiffs, and the allegation of some of the pleas that, although the defendant took possession of the land, it did so under another deed, conveying an adverse interest, does not admit a taking of possession in the sense charged. The pleas not being in confession and avoidance, the replication is clearly insufficient.

Judgment reversed, and demurrer sustained. Judgment that the replication and third plea are insufficient, and that the first, second, fourth, and fifth pleas are sufficient, and cause remanded, without costs to either party.

(69 Vt. 446)

TRUDEAU v. FIELD et al.

(Supreme Court of Vermont. Orleans. July 17, 1897.)

COVENANTS — CONSTRUCTION — ENFORCEMENT — EQUITY JURISDICTION — WATER PRIVILEGES.

1. As against subsequent owners affected with notice, equity will enforce covenants entered into between prior grantors and grantees in regard to the use of property that came from a common source.

2. Where a covenant in a deed to land granting water privileges connected with a dam provided that the covenantee should "be at one-half the expense of keeping the dam in repair," equity would not compel the grantee to contribute to building a new dam after the old one was swept away, since equity will not in the least enlarge the fair scope of such a covenant.

3. Plaintiff, owning a water privilege connected with a dam, cannot recover from defendant, owning another privilege, connected with the same dam, on a covenant of defendant with his grantor to contribute to the rebuilding of said dam when necessary, where such grantor was not plaintiff's grantor.

4. A deed granting water privileges, not to be used "to the injury of privileges granted hereto-

fore," creates no burden upon such previously granted privileges, and hence the owners thereof are not bound to contribute to the rebuilding of a dam upon which depend all of said privileges.

5. A deed granting merely the right of drawing water from a dam imposes no obligation upon the grantor or his assignee to rebuild the dam when swept away.

Appeal from chancery court, Orleans county; Taft, Chancellor.

Bill by Israel Trudeau against Clarissa Field and others. From a decree sustaining a demurrer and adjudging the bill insufficient, orator appeals. Affirmed.

W. W. Miles, for appellant. John Young, for appellees.

ROSS, C. J. The demurrer challenges the sufficiency of the facts set forth in the bill to entitle the orator to the relief prayed for. The bill sets forth: That on August 28, 1827, Calvin Harmon and D. W. Harmon owned land on both sides of Black river, in Coventry, on which there stood a saw mill and a grist mill, operated by a water power created by a dam across the river immediately above the saw mill. That on that day, by a deed containing the usual covenants, they conveyed the grist mill, with the land on which it stood, and certain rights in the water power, to Elijah Cleveland & Co., which company was a partnership, consisting of Cleveland and three others. In the descriptive portion of the deed is this clause: "Cleveland & Co. to be at one-half of the expense of keeping the dam in repair." That by subsequent conveyances by Cleveland alone his right and title in the grist-mill property and water rights vests now in the defendant Clarissa Field and the other defendants interested with her. The bill does not show whether or how the rights of the other three partners, if at all, became vested in Cleveland, but it alleges that the condition or agreement in regard to bearing one-half the expense of keeping the dam in repair was in the subsequent conveyances. The bill then states that on April 6, 1836, Calvin Harmon, without stating whether he had become possessed of the rights and title of D. W. Harmon therein, conveyed another portion of property by metes and bounds, and therewith certain water rights connected with the water power and dam, to Elijah Cleveland. This conveyance was by deed poll, and contained in the descriptive part of the property and rights conveyed this provision: "Provided, nevertheless, that it is understood and agreed that the said E. Cleveland shall be holden and bound to be at one-twentieth part of the expense of keeping the dam in repair from which the above water is to be taken." This right is called the "Starch Factory Right," and is restricted to be so used as not to damage the grist-mill right. The bill alleges that this right is now in defendant George D. Walworth. It does not show whether Cleveland owned the grist mill and

its rights and privileges when he owned the starch-factory premises and its rights and privileges. In the chain of title of the starch-factory premises, Cleveland conveys to Aldrich & Burbank, but no subsequent conveyance by Aldrich is alleged or set forth. The deed from Cleveland to Aldrich & Burbank contains the provision in his deed in regard to being at one-twentieth of the expense of repairs of the dam, and adds thereto, "or of building a new dam, should it become necessary." The bill further sets forth that Calvin Harmon alone, by deed, June 11, 1842, conveyed to Benjamin F. Herbert, his heirs and assigns, forever, certain premises, denominated in the deed "a certain piece of land," described as follows: "The right of drawing water from the dam across Black river just above Bean's clothier shop, for the purpose of doing all things that may be done by water power in carrying on the tanning and dressing of leather: provided, at all times, that said water shall not be used for any other purpose, nor to the injury of privileges granted heretofore for other purposes." The deed contains the usual covenants by the grantor of ownership, right, and title to convey, and that the premises are free from incumbrance. It then sets forth a deed by the administrator of Charles F. Herbert to the orator of a tannery and land on which it stands (describing it), "with the privileges and appurtenances thereof." It is not claimed that the last deed conveys what was conveyed by the deed from Calvin Harmon to Benjamin F. Herbert otherwise than what may be included in "the privileges and appurtenances thereof." Although not stated in the bill, it is conceded, on agreement, that Charles F. Herbert took the water rights of Benjamin F. Herbert, and that the former had died intestate before the making of the administrator's deed. The bill then states that Calvin Harmon, by quitclaim deed, conveyed the saw-mill premises to Elijah Cleveland, which, by like conveyances, have come to defendant George D. Walworth; that one of the intermediate conveyances from E. H. Taylor to Henry Hays contains the clause, "And said Hays agrees to do $\frac{9}{10}$ of the expense of keeping the dam across the river at the head of the aforesaid mill." All the conveyances are by deed poll. None of them are alleged to have been recorded. Nor is it directly alleged that the conveyance of the right to the water from the dam had ever been put to use, and connected with any tannery works. The dam existing at the time of the several conveyances was swept away, and rebuilt mostly by the orator.

From these conveyances the orator avers and contends that by virtue of the deed from Calvin Harmon—the common source, whence all the water rights sprang—to Benjamin F. Herbert of the tannery rights, and that he, his heirs and assigns, should forever enjoy the rights, an implied covenant arose on the part of the common grantor that there should

forever thereafter be kept and maintained a dam substantially like the one existing at the time of the grant, from which Herbert, his heirs and assigns, could take water as provided in the deed; that the grant was an easement in the premises and water rights then owned by Harmon, consisting of the saw-mill premises, the right to make the owner of the starch-factory premises contribute one-twentieth of the expense of keeping the dam in repair, and the right to make the owner of the grist-mill premises contribute one-half such expense, and that thereby the saw-mill premises, grist-mill premises, and starch-factory premises became burdened with the easement, and bound to keep the dam in repair in such a manner that Herbert, his heirs and assigns, forever thereafter might fully enjoy the rights and privileges conferred by the deed to him from Calvin Harmon. Is this contention sound? In considering the soundness of this contention, we need not consider the nice questions and distinctions which have been taken and established in regard to covenants which run with land, and which are available to the covenantee's assigns,—such as whether such covenants can arise on the part of the grantee in a deed poll, whether a privity of estate exists between the parties, and whether the covenant on the part of Harmon to Herbert was personal, or a covenant in gross; many of which have been presented in argument, and authorities in support of them cited. This is a proceeding in equity. Equity enforces contracts and covenants in regard to property entered into between prior grantors and grantees in regard to the use of the property, especially if common property, or property descending from a common source, against subsequent owners affected with actual or constructive notice of such contracts and covenants. Pom. Eq. Jur. §§ 689, 1296, 1342. Although not so alleged in the bill, it is probable that all the conveyances set forth of these several properties and rights, surrounding and connected with this water power, were duly recorded, so that the parties to this suit have constructive notice of the contents of the several deeds. It is also probable that the right to take water from the dam given by the deed from Calvin Harmon to Benjamin F. Herbert was in use and connected with some tannery works which were conveyed to the orator by the administrator of Charles F. Herbert, so that the water right then in use would be appurtenant to the tannery premises conveyed. Such use, once established under the deed from Calvin Harmon to Benjamin F. Herbert, would be notice to or put upon inquiry (which would be equivalent to notice) all persons subsequently taking a conveyance of the water rights connected with the saw mill, and probably of the water rights connected with the grist mill and starch factory, because arising from a water power in which all had some common rights. The bill is clearly demurrable as now

framed. For the purpose of passing upon the sufficiency of the bill, if amended, as it probably could be in regard to notice of the orator's rights, we shall consider it as though the amendments were made. The parties have desired us so to treat it.

The orator's contention is that he has a right in equity, through Calvin Harmon, from whom, in part at least, all parties to the bill derive title to their interests in the water power and water rights, to compel those interested in that power connected with the grist mill and with the starch factory to contribute towards the expense of putting in a new dam in the same proportions which Calvin Harmon, if alive and still owning the saw mill and its privileges, could have compelled them. Granting, for present purposes, without conceding it, that the orator has succeeded to the rights of Calvin Harmon in this respect, could Calvin Harmon have compelled the owners of the grist-mill property and of the starch-factory property to contribute towards building a new dam across the river at that point, in case the old dam should be swept away? We think not. By accepting the property under the deeds from Calvin Harmon, the grantees did not directly nor impliedly covenant nor agree to contribute towards building a new dam in case the old one should perish, or be swept away. They only covenanted or agreed to contribute towards the expense of keeping the existing dam in repair. This is all the record of Harmon's deeds of these rights would notify subsequent purchasers that the grantees had agreed to do. An agreement to contribute towards the building of a new dam is a different thing, and involves different considerations, from an agreement to contribute towards the expense of keeping an existing dam in repair. The former would be for all time during which, by change of conditions and circumstances, the property might have no use, or no profitable use, for the water rights, and might involve large expense. The latter would ordinarily involve much less expense, be limited in duration, and leave the owner of the property the right to elect whether he would further use the power, and so make himself liable to contribute towards its creation and maintenance. Equity does not make contracts for parties; it only enforces those made by them. It does not treat such contracts between prior grantor and grantee, in regard to the use of property, as the personal obligations of subsequent owners, but treats the property as charged with the expenses incurred in accordance with such contracts. *Pom. Eq. Jur. supra.* The English courts of equity confine relief to such portions of those agreements as are restrictive of the use of the property, and refuse relief when the payment and expenditure of money is required. *Manufacturing Co. v. Staples (Mass.) 41 N. E. 441*, and cases cited in opinion. But in the United States generally relief is granted against assignees which involves the doing of

positive acts and the payment of money. *Manufacturing Co. v. Staples, supra.* The ground on which equity furnishes relief, being that an action of law might not be available because the agreement might not be a technical covenant running with the land, inhibits the court from enlarging in the least the fair scope of the original agreement when applied to the circumstances and the property. We think it is clear that Calvin Harmon, against his grantees of the grist-mill premises and the starch-factory premises, if they were now alive and owning the property, had no agreement with them to contribute towards the expense of erecting a new dam if the one existing at the time of the conveyances should be swept away. Much less has the orator against the assignees of such grantees. The orator does not, on any principle in law or in equity, stand so related to the conveyance by Cleveland to Aldrich & Burbank and to the conveyance by Taylor to Hays that he can take advantage of the clauses inserted therein in regard to building a new dam, or keeping the dam. As concerns the orator, those were provisions which apply between the grantors and grantees in those deeds. On these views the orator, on the facts set forth in his bill, if amended as indicated, would have no right to the relief prayed for against the owners of the grist mill and owner of the starch-factory premises.

Has the orator any equitable right arising from the conveyances set forth in the bill to compel the owner of the saw-mill premises and rights to contribute towards building the new dam? By his deed to Benjamin F. Herbert, Calvin Harmon could not impose, and did not undertake to impose, the burden of any easement upon that portion of the common water power and water rights which he had before conveyed with the grist-mill and starch-factory premises. The description of what that deed conveys is peculiar, and should receive attention. It reads: "The right of drawing water from the dam across Black river just above Bean's clothier shop, for the purpose of doing all things that may be done by water power in carrying on the tanning and dressing of leather: provided, at all times, that said water shall not be used for any other purpose, nor to the injury of privileges granted heretofore for other purposes." The privileges before granted by Harmon were the grist-mill and starch-factory privileges. The privilege granted by the deed was not to create a burden upon such privileges, and so become an injury to them. Notwithstanding the deed in the granting part speaks of the premises as "a certain piece of land," the thing described as granted is the right of drawing water from the dam,—clearly an easement, as characterized by the orator in his bill. The deed conveys nothing more; no land; nor does it limit the place whereon the water taken is to be used. From the deed the easement granted cannot be determined to be an appurtenance to any other particular premises. From the rec-

ord of the deed no subsequent purchaser of other rights in the water power would receive actual or constructive notice that the right granted was an appurtenance of any certain premises. It was an easement to which, by the terms of the grant, the dam then in existence was servient, and only to the extent the grantor was owner thereof. The dam existing was subject to decay, and to destruction by decay, or by being swept away by the water. The easement arose from the power created by that dam. It was an easement or right to use for service a structure which of itself was perishable. The grant by Harmon to Herbert of this right forever was a grant of it only so long as it continued in existence. It was not unlike the grant of a way through a part of a building which one owns to another part of the same building which the grantee has the right to use. When the building decays, or is destroyed by fire, no grant to rebuild it would be raised by implication. The deed says nothing in regard to Harmon, or his heirs or assigns, being obliged to replace the existing dam by a new one when it should from any cause cease to exist, and no implication arises of such an obligation. It is clear that no such obligation was intended to be incurred. The consideration for the deed, as expressed therein, is only \$10. A covenant or agreement never arises by implication out of a transaction against the intention of the parties to it. The right to take water is neither land nor tenement, and covenants made in conveying such right are not covenants which run with land, and are not available, at law, to the assigns of the covenantee. *Mitchell v. Warner*, 5 Conn. 515, in which the question is fully considered. By such conveyance the grantee acquires only an incorporeal hereditament. *Gould, Waters*, § 299; *Tuttle v. Harry*, 56 Conn. 194, 14 Atl. 209; *Reservoir Co. v. Mackenzie*, 132 Mass. 75. By the deed from Harmon to Benjamin F. Herbert, the latter, his heirs and assigns, acquired the right to take water for the purposes named from the then existing dam only so far as the grantor or his assigns had rights therein, and could become thereby obligated. *Linthicum v. Ray*, 9 Wall. 241. Hence the bill, on the basis on which it is drawn and seeks relief, is insufficient. What right to use the water from the present dam in his tannery arising from the fact that he was allowed to rebuild the dam under his arrangement with Mrs. Field under a claim of the right, and what rights, in equity, he has to require contribution towards the expense of rebuilding the dam of those owners who are using the power thereby created, under our decisions, especially under *Hill v. Shorey*, 42 Vt. 614, *Webb v. Laird*, 59 Vt. 108, 7 Atl. 465, and *Tullar v. Baxter*, 59 Vt. 467, 8 Atl. 493, and how his agreement with Mrs. Field may affect his equitable rights against the mortgagees of the grist mill and its water rights, we have not considered, and do not decide. The bill is not drawn with reference to a determination of his rights, if any, under such cir-

cumstances. The decree sustaining the demurrer and adjudging the bill insufficient affirmed, and cause remanded.

(59 Vt. 461)

STATE ex rel. GOODELL v. McGEARY.
(Supreme Court of Vermont. Chittenden. July 17, 1897.)

MUNICIPAL ELECTIONS—ELIGIBILITY OF CANDIDATES—BALLOTS—VALIDITY—QUO WARRANTO—JUDGMENT OF OUSTER.

1. Under Burlington city charter, providing that the "legal voters in each ward shall annually elect one alderman * * * from among the legal voters therein, and shall also vote for mayor and city judge," an alderman, to be eligible for office, must be a legal voter of the ward for which he is elected.

2. A provision of Burlington city charter requiring residence in a certain ward is not fulfilled by one who, while owning a house in such ward, and preparing it for his own occupation, and moving furniture into it, still actually continues his dwelling in another ward.

3. One who voted for an ineligible candidate must be clearly shown to have purposely done so, before the vote can be thrown aside, and not counted, in determining whether the opposing candidate received a majority of the votes cast.

4. When the eligibility of an alderman of a large city to hold his office is contested, and the unexpired term is nearly two years, leave will be granted to file an information in quo warranto against him, and a judgment of ouster thereon will be rendered, if the information be sustained, notwithstanding no one has been elected to the office.

Complaints by the state, and also upon the relation of J. W. Goodell, praying that a writ of quo warranto be issued against J. W. McGeary as usurping the office of alderman. Writ granted, and judgment of ouster ordered.

Roberts & Roberts and W. L. Burnap, for relator. Seneca Haselton, for respondent.

ROSS, C. J. The disposition of this case involves several inquiries. Was J. W. McGeary duly elected alderman of ward 5 in the city of Burlington at the annual meeting holden March 2, 1897? He received a majority of the votes cast for such officer at that meeting. Was he, then, eligible to the office? The answer to this question depends upon the ascertainment of the length of residence in ward 5 which the charter of the city then required to render him qualified to hold the office, and whether he had resided in that ward for the required length of time. There is no contention in regard to his qualifications for the office in other respects. The charter of the city, as it was March 2, 1897, divided the city into five wards. The same section of the charter which makes the division provides: "The legal voters in each ward shall annually elect one alderman, and the ward officers hereafter named, from among the legal voters therein, and shall also vote for mayor and city judge." We think that this requires a person, to be eligible to the office of alderman, to be a legal voter in the ward. This the ordinary and natural meaning of the

language "from among the legal voters therein." "Therein" means in the ward at the time of the annual election. That is the time the alderman is to be elected or selected out from among the legal voters in the ward. It does not mean, as contended by the counsel for Mr. McGeary, from among the legal voters for mayor or city judge, or other city officer, then resident in that ward. This would make the quoted clause read, "from among the legal voters of the city then resident in the ward." It would apply to the other ward officers as well. The ward officers, by other provisions of the charter, are to be chosen by the legal voters of the ward. Section 18 of the charter creates a vacancy in the office of alderman if he removes from the ward, to commence from a certain specified time. We find no provision of the charter which changes the ordinary and natural meaning of the clause quoted, or allows the voters of a ward to select their alderman from any other class than their own number, or from the then legal voters in the ward. The charter prescribes the qualifications of voters at a city election, and also the qualifications of voters in a ward election. For the latter he must be a voter in a city election. The charter then further provides: "Every such voter shall vote only in the ward of which he is at the time an inhabitant, and he shall not vote for alderman, school commissioner, or ward officers, in any ward in which he has not resided for two months preceding any such election." Had Mr. McGeary resided in ward 5 for two months prior to the annual election of March 2, 1897, when he claims to have been elected alderman for that ward? He admits that for some years prior to January 1, 1897, he had resided in ward 4 of the city. There he had rooms, which he occupied with his wife. He continued to occupy these rooms, and pay rent therefor, until January 6, 1897. He paid rent by the month until January 1, 1897. Before that time he had arranged with his landlord that if he remained longer than until January 1, 1897, he should pay rent only for the time he remained. Hence, until January 6, 1897, he occupied these rooms with his wife, and slept in them, of right. In fact, he did not remove from them, and take up his abode or place of dwelling in his new house in ward 5, until January 6, 1897. All he had done in purchasing the lot in ward 5, in erecting a dwelling house thereon, in preparing it for occupancy, in moving into it the things necessary for occupying it for a home from his rooms in ward 4 and from other sources, was preparatory to making his abode therein January 6, 1897. For a year or more he had been intending to make the new house his home at some future time, but the intention alone, nor with the preparations added, did not make it his home. The final act which transferred his home from the rooms in ward 4 to the new house in ward 5 was when he ceased to occupy the rooms, with his wife, as a place of abode, on January 6, 1897, and took up his

abode in his new house in ward 5. Hence, on March 2, 1897, he had not resided two full months in ward 5, was not therein a legal voter for ward officers, and therefore not eligible to be elected alderman for that ward.

Was the relator duly elected alderman for ward 5 at this election? He did not receive a majority of the votes cast. It is not established that the legal voters of the ward who cast their votes for Mr. McGeary knew that the provisions of the then charter required them to elect an alderman from among the legal voters in the ward, nor that he was not then a legal voter in the ward. By all the decisions, English and American, such knowledge by the voter must be clearly established, to have his vote treated as knowingly and purposely cast for a person ineligible to the office, and for that reason not to be counted, but to be treated as thrown away. Hence, under the most liberal rule in regard to rejecting votes cast by legal voters at an election, the votes cast for Mr. McGeary are not to be treated as though they had not been cast, but under our system of government, where the will of the legal voters, as expressed by their ballots, controls, it has been almost universally held that to insure an election a majority or plurality, as may, by law, be required, of the legal votes cast, must be received. Votes cast by legal voters are not to be rejected, although cast for a person known by the voter to be ineligible to the office. *Rex v. Hawkins*, 10 East, 211; *Rex v. Parry*, 14 East, 549; *State v. Giles*, 52 Am. Dec. 149, and note; and other cases cited by the defendant. Hence the relator cannot be declared elected if McGeary is ousted.

It is conceded, as is held by our decisions, that the granting or withholding leave to file an information in the nature of a quo warranto against a respondent for exercising the functions of an office to which he has not been duly elected, either because he did not receive the required number of legal votes or was not then eligible to the office, rests in sound judicial discretion. If the office is of very small importance; if it is for a short term, or the term has nearly expired; if no other person complains of being deprived of the office; and if the objection taken to the respondent's holding the office is technical, and of no considerable practical importance,—the leave to file an information is refused. *State v. Fisher*, 28 Vt. 714, indorsed in *State v. Mead*, 56 Vt. 353. But if it is an office of importance, the proper exercise of which may seriously affect public interests or private rights, like the management and control of great moneyed corporations, or the quiet and good government of a municipality, involving the interests of large numbers, leave is usually granted to file the information, and judgment of ouster from the office is rendered thereon, although no other person has been duly elected to the office. The office in contention is an important one, touching many interests of the largest city of the state and of its inhab-

itants, and is to continue for nearly two years. Under our form of government, "of the people, by the people, for the people," it is of importance that no one should be allowed to exercise the functions of an important municipal office unless duly elected thereto according to law. In no other way can a high respect for law be maintained. Without a general prevalence of high respect for the law among the people, the rights of the people become unstable and insecure. No one has been legally elected alderman for ward 5. It is an office of importance. It is the right of the legal voters of the ward to determine who shall serve them in that capacity. Let the information be filed, and judgment of ouster against the respondent be indorsed thereon. No costs to either party.

(6 Vt. 510)

COURT OF INSOLVENCY v. MELDON et al.
(Supreme Court of Vermont. Bennington. July 17, 1897.)

APPEAL BONDS—LIABILITY FOR COSTS—STATUTORY AMENDMENTS—CONSTRUCTION.

1. An appeal bond given is enforceable only to the extent that appellants were required by law to furnish security for their appeal.

2. R. L. § 1870, provides that security given for costs on appeal from the court of insolvency upon a question of the insolvency of a debtor shall be the same as the security given on appeal on questions of disallowance of claims as provided by section 1810, relating to other appeals. The latter section was afterwards amended. *Held*, that such amendment did not affect the law regarding security upon appeal on the question of insolvency.

3. A debtor appealed from a decision of the court of insolvency, declaring him insolvent, and a messenger was appointed. Defendants were bondsmen for the costs of appeal, which was unsuccessful. Laws 1884, Act No. 125, § 5, makes the messenger's fees part of the costs of appeal, but payable out of the estate, if the decree of insolvency is affirmed. *Held*, that the bondsmen were not liable for the messenger's fees.

Exceptions from Bennington county court; Thompson, Judge.

Debt on the prosecution of J. B. Hollister against P. M. Meldon and G. E. Lawrence on a bond given to the court of insolvency for the district of Manchester. A general demurrer to the declaration was overruled, and the judgment rendered for such court for the penalty and in favor of prosecutor for \$300, being for the fees of the messenger pending the appeal in the insolvency proceedings, paid by prosecutor as assignee under order of court. The rulings and judgment were all pro forma. Defendants excepted. Reversed.

Butler & Maloney, for plaintiff. P. M. Meldon and G. E. Lawrence, pro se.

ROSS, C. J. The contention is in regard to the validity, or the extent of the validity, of the defendants' bond given to the court of insolvency. A creditor brought a petition to the court of insolvency to have S. F. Prince and J. F. Prince, partners doing business under the name of D. L. Kent & Co., adjudged to be insolvent.

They were so adjudged, and from that adjudication appealed to the county court. For the prosecution of the appeal the bond in suit was given. It is conditioned to pay all intervening damages and costs occasioned by the appeal, if they should fail to prosecute the appeal to effect. They did so fail. Being given in a legal proceeding, it is enforceable only to the extent the appellants were required by law to furnish security for their appeal. *Stevens v. Matthews*, 6 Vt. 269. The bond is dated June 8, 1893. The laws then in force on the subject were the Revised Laws of 1880, modified by Act 125 of the Session Laws of 1884. By R. L. § 1870, an appeal was allowed to the petitioning creditor, or to the petitionees, from the decision of the judge of the court of insolvency, "upon the question of the insolvency of the debtor, as is provided in this chapter for appeals from the finding of the judge to the county court." R. L. § 1810, provides for such appeals. Among others, it contains this provision: "Security for costs shall be given by the party appealing as in cases of appeal from the probate court." On appeals from the probate court the appellant was to give a bond conditioned for the payment of such costs. R. L. § 2273. Act 125 of the Session Laws of 1884 is an addition to the law then in force in regard to such appeals. Section 1 provides, "Before an appeal shall be allowed from any other decision," etc., of such court the person appealing shall give a satisfactory bond conditioned that he will prosecute his appeal to effect, and pay intervening damages and costs occasioned by such appeal. This evidently means appeals from such decisions and judgments as the Revised Laws had made no provision for, because in section 3 it proceeds to enact: "The security required to be taken in section one thousand eight hundred and ten of the Revised Laws shall be for intervening damages and costs." R. L. § 1810, relates to appeals from the judge's allowance or disallowance of claims, and not to appeals from adjudications upon a petitioning creditors' application to have their debtors adjudged to be insolvent. Those appeals, as we have seen, were provided for in R. L. § 1870. This class of appeals is spoken of in sections 4 and 5 of the act of 1884. Section 4 is to the effect that such appeals shall stand for trial in the county court at the term they are entered, and that the judgment of the county court shall be conclusive. Section 5 is that, after an adjudication of insolvency upon the application of creditors, if an appeal is taken, the court may appoint a messenger to take care of the person's property, "and the fees of such messenger shall be a part of the costs of the proceeding to be paid from the estate, if the decision of the court of insolvency is affirmed, and to be paid by the petitioner if the adjudication is removed." There can be no doubt that under the statutes cited the defendants in this suit are holden on their bond for the payment of the costs of the appeal. This obligation arises from the reference in R. L. §

1870, to R. L. § 1810, whereby the appealing party is required to give security for such costs. But the reference in R. L. § 1870, to R. L. § 1810, is to it as it stands in the Revised Laws. The effect of such reference is to incorporate the provision in R. L. § 1810, in regard to the appealing party giving security for costs, into R. L. § 1870. It does not refer to it as amended and enlarged by section 3 of the act of 1884. End. Interp. St. §§ 233, 492; Suth. St. Const. § 257. The latter says, "Such adoption does not include subsequent additions or modifications of the statute so taken unless it does so by express intent." In support of this he cites several cases. Hence, when the bond was given, the debtors were not required to give security for intervening damages, and this part of the condition of the bond was without the authority of the statute, and not obligatory upon the defendants.

The plaintiff contends that section 5 of the act of 1884, making the messenger's fees a part of the costs of the proceeding relating to such appeals, obligates the defendants, under their bond for costs, to pay such fees. But that section in terms declares that, if the decision of the court of insolvency is affirmed, such fees or costs shall be paid from the estate. There is no provision that such fees shall be a part of the costs taxable against the appealing debtor. Costs are not taxable against a party except when made so by statute. In this section it is clearly provided how such fees or costs shall be paid. If the adjudication is affirmed, they shall be paid from the estate; if removed, by the petitioning creditor; and there is no provision by which the assignee of estate can charge them over to the debtors as a part of the costs to be paid by them, if they fail to prosecute their appeal to effect. Hence we conclude that such fees, though denominated costs, are not taxable to the appealing debtors, and therefore not recoverable under this bond. The other costs attendant upon the appeal in the county court may be recovered in this action on the bond against the defendants. The assignee is entitled to all funds which belong to the estate for distribution. In his official capacity he was interested in whatever is recoverable upon this bond and properly allowed to prosecute it. The pro forma judgment reversed, and cause remanded to have the costs held recoverable ascertained, and judgment rendered therefor.

(90 Me. 294)

KNIGHT v. BURNHAM.

(Supreme Judicial Court of Maine. May 27, 1897.)

SALE OF LUMBER—RECOVERY OF PRICE—SURVEY.

On a sale of boards by the thousand the statute requires a survey by a legally appointed and sworn surveyor. Without such survey, the seller cannot recover the purchase price. The owner and seller of the lumber, although a legal surveyor, is not authorized to survey his own

lumber, sold by him, in the absence of an express agreement. It must be done by a disinterested surveyor.

Held, in this case, that no survey of the lumber sued for was made by any one except the owner. This does not meet the requirements of the statute.

(Official.)

Exceptions from supreme judicial court, Oxford county.

Action by Charles G. Knight against Albion H. Burnham. Verdict for plaintiff, and defendant excepts. Exceptions sustained.

J. P. Swasey and C. E. Holt, for plaintiff.
A. H. & C. E. Walker, for defendant.

STROUT, J. Plaintiff claims to recover the price of boards sold by him to defendant by the thousand feet. Defense that the boards were not surveyed by a sworn surveyor before delivery, as required by Rev. St. c. 41, § 15. If not so surveyed, no recovery can be had. *Richmond v. Foss*, 77 Me. 590, 1 Atl. 830. Plaintiff replies that he surveyed the boards, and that he was a legal surveyor of lumber.

If he was a legally qualified surveyor of lumber, did a survey by him meet the requirements of the statute? The presiding justice instructed the jury that if they became satisfied from the evidence that the plaintiff "was a qualified sworn surveyor of lumber for the town of Waterford at the time when this lumber was sold, and had measured it, in accordance with the terms of the statute, before delivery, then I instruct you, notwithstanding he may have been the party selling the lumber, that fact of itself would not be sufficient to prevent his recovery upon that ground. * * * If Mr. Knight, although he is the party plaintiff, the party who made delivery of the lumber as his own, was a qualified sworn surveyor, and had surveyed the lumber, * * * the mere fact that he was a party—the party who sold the lumber—would not destroy his official capacity so as to prevent his recovery, if he is entitled to recover in other respects."

Exception is taken to this instruction. The statute requires surveyors of lumber "to measure the same, and mark the contents thereof, making reasonable allowance for rots, knots and splits, drying and shrinking." Rev. St. c. 41, § 15. These provisions are for the protection of the purchaser. To discharge such duty, honest, unbiased judgment is imperative. Disinterestedness is essential to that. The law does not allow a man to be judge in his own case. The infirmities of human nature are such that a party whose interest is involved can seldom judge or act indifferently. If honest, he is liable to be unconsciously warped, and, if dishonest, his opportunities for gain are largely increased. The statute contemplates a survey by a disinterested party. A survey by the plaintiff, the owner and seller of the lumber, even if he was a duly-qualified surveyor of lumber, is not a

compliance with the statute according to its intent, scope, and meaning. Chapter 59 of the Laws of 1895 applies only to actions hereafter brought. This suit was commenced October 27, 1893.

The instruction given was erroneous.
 Exceptions sustained.

(90 Me. 302)

WOODMAN v. CARTER et al.

(Supreme Judicial Court of Maine. May 26, 1897.)

TRUSTEE PROCESS—NEGOTIABLE NOTE.

The provision of Rev. St. c. 86, § 55, that no person shall be adjudged trustee by reason of any negotiable note made by him, does not apply to a case where the note is effectually controlled by its maker, and is divested of its negotiability by depositing it in the hands of a third party under a written agreement of the parties, and to be thus held until notified that a contract for the sale of lumber between the parties has been complied with; and it further appears from the facts and circumstances that the note was not intended, and did not operate, as payment of any definite amount of lumber.

(Official.)

Report from superior court, Cumberland county.

Action by Albert S. Woodman against Daniel Carter and others. The Portland Coopersage Company was served as trustee. By agreement of parties, the liability of the trustee was reported. Trustee charged.

A. S. Woodman and John H. Hill, for plaintiff. A. F. Moulton, F. C. Payson, and H. R. Virgin, for trustee.

WHITEHOUSE, J. This is an action on certain promissory notes aggregating \$325, brought by the plaintiff against Daniel Carter, James L. Carter, W. A. Carter, and O. H. Carter, of Scarborough, as principal defendants, and the Portland Coopersage Company, trustee. The writ was served on the trustee June 21, 1895. October 18, 1895, Daniel Carter and James L. Carter filed their petition in insolvency, and John Howard Hill, assignee of James L. and W. F. Dresser, assignee of Daniel, duly appeared to prosecute by leave of court.

The case comes to the law court on report from the superior court, and the only question to be determined is whether the coopersage company shall be held as trustee of Daniel and James L. Carter, by reason of the purchase of a quantity of lumber from them prior to the service of the writ. It is stipulated in the report, however, that the alleged trustee shall not, in any event, be chargeable for more than 50,318 feet of boards at \$9 per 1,000.

The principal facts essential to the decision of this question are found in the statement contained in the amended disclosure of the trustee, as follows:

"On May 3, 1895, we agreed to take of said Daniel Carter and James L. Carter an in-

definite quantity of white pine boards, sawed or to be sawed by them during the season of 1894-95, if the quality was suitable for our business, the amount to be not less than fifty thousand (50,000) feet in any case, and, if the boards were satisfactory, and the needs of our business required it, perhaps the entire quantity which they would cut at their mill during said season of 1894-95. The boards were, when suitably dried, to be delivered by said Carters during the summer of 1895 at our mill in Portland, and payment was to be made upon or after said delivery. On May 10, 1895, upon the statement of said Carters that they needed money with which to pay their help, we advanced them one hundred (\$100) dollars on account of said agreement.

"On June 17, A. D. 1895, believing from statements made to us by the attorney for said Carters that said Carters were neither insolvent nor in contemplation of insolvency, in pursuance of said agreement, and to protect ourselves on said advancement, we purchased of said Daniel Carter and James L. Carter about one hundred thousand (100,000) feet of said boards, and, in addition to said sum of one hundred (\$100) dollars, gave them in payment therefor our negotiable promissory note for one thousand (\$1,000) dollars, payable to their order on demand. At the time of this purchase, the boards bought by us were a part of a large lot of boards said to contain about two hundred and fifty thousand (250,000) feet, then being at and about the mill of said Carters at Scarborough; and in order to get the boards purchased by us we took from said Carters a bill of sale of the entire lot, and sent our foreman to take possession of the same.

"At the time of this purchase the treasurer and manager of our company was absent in Philadelphia, and from the best knowledge we had of the needs of our business without his advice we expected to require about one hundred thousand (100,000) feet of the boards; but it was agreed between said Carters and ourselves that, if we should find that our business required a less amount, we could return to said Carters whatever of the one hundred thousand (100,000) feet, above fifty thousand (50,000) feet, of the boards, we did not require, having credit therefor upon said note. Said foreman went to Scarborough on June 17th, viewed and walked over the entire lot of boards, and told the Carters he took possession of them under the bill of sale, and then came away, leaving the boards where they were, putting no keeper in charge of them, and doing nothing further to retain possession of them.

"The said Carters were, by the terms of the purchase, to deliver at our mill in Portland the one hundred thousand (100,000) feet of boards, more or less, paid for by us; and as security for this agreement on their part the note given by us to said Carters in payment for said boards was, by agreement between said Carters and ourselves, deposited with

Charles O. Bancroft, cashier of the Merchants' National Bank of this city, to be held by him until we had notified him that said Carters had delivered the boards at our mill as aforesaid.

"After said Carters had, in pursuance of said agreement, delivered at our mill fifty thousand three hundred and eighteen (50,318) feet of said boards, we found that we did not need the balance of the one hundred thousand (100,000) feet, more or less, bought by us, and, by agreement with said Carters, surrendered said balance to them, and said Carters gave us an order on Mr. Bancroft for the note, which had been fully settled, and the same was delivered to us by him, and destroyed. Payment of the note was partly by money payments made to said Carters by us and partly by boards surrendered to said Carters as aforesaid. Prior to the service of the writ in this case we notified A. S. Woodman, then attorney for the plaintiffs, that we had purchased of said Carters a certain portion of boards at and about their mill at Scarboro, but had not purchased, and did not claim, the entire lot."

It appears, however, from the testimony of the president of the coopeage company, that the manager of that company was in the habit of making a record of agreements for the purchase of lumber, and that the memorandum of the transaction with the Carters, dated May 3, 1895, is as follows: "Bo't of J. L. Carter, 50,000 pine boards, 25¢ to be hard pine and 75¢ white pine, all good quality, at \$9 per thousand, delivered on our wharf." He also testifies explicitly that he was advised by the manager of his company on or before June 17th "that the boards in controversy were to be attached by a creditor of the Carters," and states that it was the absolute and clear intention of the parties that the title to the boards to the amount of the 100,000 mentioned in the agreement should pass to the coopeage company.

The practical result of these elaborate transactions was that immediately after the service of the writ on the trustee the Carters actually delivered at the mill of the coopeage company, in Portland, 50,318 feet of the boards in question, and received in payment the sum of \$100 advanced May 10th before the service of the writ, and three other sums paid after the service on the trustee, viz. \$200 June 22, \$100 September 26, and \$19.28 October 4, 1895.

Under the circumstances it is not questioned that the boards in controversy must be regarded as "intrusted" to the coopeage company, so as to render the company chargeable for the price of the 50,318 feet, less the advance payment of \$100; but it is claimed that the contract of June 17th was a completed sale of a definite number of boards at an agreed price, and that payment in full was made before the service of the writ by the negotiable promissory note of the trustee.

It is the opinion of the court, however, that

this contention of payment by virtue of the note for \$1,000 cannot be sustained.

It is provided by Rev. St. c. 86, § 55, that no person shall be adjudged trustee by reason of any negotiable note made by him. But it is confidently replied by the assignees that, although negotiable in form, the note for \$1,000 in question was effectually controlled, and practically divested of all negotiability by the agreement in writing which accompanied its deposit with Mr. Bancroft; and, furthermore, that all the facts and circumstances attending the transaction satisfactorily show that the note was never intended as payment and never operated as payment of the price of any definite amount of lumber purchased.

It has been seen that at the time of the service of the writ, June 21st, the only absolute and unconditional contract subsisting between the parties was for the purchase of 50,000 feet of boards. The coopeage company was under no legal obligations to accept more than that. The amount which would be required in its business was then undetermined and uncertain, but it seems never to have been anticipated that more than 100,000 would be needed. Yet the note for \$1,000, together with the \$100 advanced May 10th, would be sufficient to pay for 122,000 feet at \$9 per 1,000. Under these circumstances the company obviously deemed it hazardous to give to persons in the financial condition of the Carters a negotiable note for \$1,000, which could be put into circulation. It was, therefore, prudently arranged as a part of the same transaction to have the note deposited with a third person; and a formal written agreement signed by the parties declared that they "will and do deposit the said note of the said coopeage company in the hands of Charles O. Bancroft, of said Portland, to be held by him, said Bancroft, in trust, to be delivered to them, the said Carters, when he, said Bancroft, shall be notified by C. D. Merrill or other proper officer of said company that the contract of said Carters in respect to hauling said lumber and otherwise has been complied with." Thus the note was effectually retained within the control of the company. The fact that the note was passed into the hands of one of the Carters, and by him delivered to Mr. Bancroft, is immaterial. The law has regard to the substance, rather than the form, of such a transaction. It is manifest that by the formal act of passing the note to Mr. Carter the coopeage company did not intend to relinquish all control over it, for Carter immediately deposited it with Bancroft, and this was obviously done as a part of the same transaction, in pursuance of the written agreement which was executed before the delivery to Mr. Carter, and deposited with the note.

It is a familiar rule that, as between parties and those having actual notice, a negotiable instrument may be construed with ref-

erence to a contemporaneous written agreement between the same parties relating to the same matter; and it is immaterial that such agreement is written on a separate paper, provided the two appear to be connected by the terms of the agreement. *Rogers v. Smith*, 47 N. Y. 324; *Davlin v. Hill*, 11 Me. 434; 1 Daniel, Neg. Inst. 81a.

In *Stone v. Dean*, 5 N. H. 502, it was recognized as an established rule in that state, prior to the enactment of a statute on the subject, that the maker of a negotiable note could not be charged as trustee of the payee while the note was still current. But while announcing this general doctrine the court charged the trustee in that case, and say: "When the process was served upon the trustee, he had the notes he had given in his own hands, and under his own control, and those notes could not be transferred to any other person in the ordinary course of business while he thus held them, nor can he be held to pay them again if he shall be charged in this suit on that account. The reasons on which the rule is founded do not appear to exist in this case."

Again, it is plain that the note for \$1,000 in question was not intended by the maker or accepted by the payee as payment and satisfaction of any known debt. The amount did not correspond with the price of any definite quantity of boards that had been mentioned in the agreement of the parties. The payments actually made by the cooperage company for the lumber purchased appear to have been made without any regard to this note, or the depository, Mr. Bancroft. No mention of any indorsements of such payments on this note can be found either in the disclosure of the trustee or the testimony of the president of the company. It was rigorously excluded from circulation, and was never intended to be used in the ordinary course of business.

It is the opinion of the court that this transaction did not relieve the trustee from liability to be charged for the amount due for the 50,318 feet of boards actually received by the company, less the advance payment of \$100. The trustee is not charged "by reason of a negotiable note made by the company," but by reason of an indebtedness for lumber existing at the date of the service of the trustee process.

Trustee charged.

(90 Me. 262)

LIBBY v. TOWLE.

(Supreme Judicial Court of Maine. May 8, 1897.)

SLANDER—DAMAGES.

1. An excessive verdict in a slander suit set aside, and a new trial granted, it appearing that the conduct of the plaintiff had contributed in part to the injury of his business, and for which he claimed special damages.

2. *Held*, that verdicts are subject to revision of the court, and it is as much the duty of the court

to protect parties against unconscionable verdicts as it is to sustain just ones.

(Official.)

Action on the case by Moses M. Libby against George W. Towle. There was a verdict for plaintiff for \$3,000, and defendant moves for new trial. Sustained.

This was an action on the case for slander, in which there were 10 distinct and separate utterances declared on and set out in the plaintiff's declaration, as follows, viz.: (1) "That he took the note, and that Libby had destroyed the note." (2) "That Libby signed the note, but took it." (3) "That Libby knows where that note is." (4) "You took that note, and have got it, or know where it is, or have destroyed it." (5) "Moses, there is a hard report around town about you. They say you took that note, and have got it, or know where it is, or have destroyed it." (6) "I think Moses stole, or took, or knows where it is." (7) "Libby took. I know it." (8) "Dod darn it all, I can't produce the note. You stole the note, and know where it is, or destroyed it." (9) "He knew Mose Libby stole that note, dod darn him." (10) "That said plaintiff knew where the note was, or had made way with it."

The jury rendered a verdict for \$3,000 in favor of the plaintiff.

J. P. Swasey, for plaintiff. Geo. F. Clifford and E. F. Gentleman, for defendant.

WALTON, J. This is an action of slander, and the plaintiff has obtained a verdict for \$3,000. It is the opinion of the court that this amount is clearly excessive.

Briefly stated, the case is this: The plaintiff and his wife, after living together about nine years, concluded to separate. The title to their property, real and personal, was held by the wife. But she agreed that, if her husband would pay her \$650 for the furniture, she would give him a deed of the real estate. She did so, and took from him what she supposed was a note for that sum, payable in one year, and a mortgage of the furniture to secure it. She left these papers with the defendant, who was her uncle, for safe-keeping. Her uncle soon afterwards discovered that the note was not signed, and he called the attention of the plaintiff to that fact. The latter said it was an oversight, and offered to sign the note then; and the papers were handed to him to enable him to do so. The defendant left the plaintiff for a few minutes to attend to some other business, and he says that when he returned he put the envelope, which he supposed contained the note and the mortgage, into a pigeonhole in a desk in his store. But afterwards, when the year had expired, and the plaintiff and his wife came to him, and called for the papers, the note was missing; and that, after a most diligent search, he could not find it. And, so far as appears, it never has been found. Vexed at the loss of a paper which had been left with him for safe-keeping, and provoked by what seemed to him

to be the obstinate and unreasonable refusal of the plaintiff to accept a receipt on an indemnifying bond, or in any way to settle with his wife without the production of the note, the defendant finally expressed his opinion or belief that the plaintiff knew what had become of the note. And one witness (Nancy Towle) testifies that on one occasion, when she was at the defendant's house, she asked him about the note, and he said the plaintiff stole it.

This charge is the basis of the present suit; and, as already stated, the plaintiff has obtained a verdict for \$3,000.

The plaintiff says that he was much hurt and prejudiced in his good name and credit as a merchant. His credit does appear to have been somewhat impaired. But he had recently, and while the title to his property, real and personal, was held by his wife, obtained a discharge from his debts by proceedings in the court of insolvency; and he states, and, if we understand him correctly, somewhat boastfully, that while he paid some of his creditors in full, he left others to wait till he was more able to pay. Such a proceeding may be very gratifying to one's desire to reward friends and punish enemies, but we think all will agree that its tendency is to leave one's credit as a merchant somewhat impaired. And we think the evidence shows very clearly that it was this treatment of his creditors, and not what the defendant said, which weakened and ultimately wrecked the plaintiff's credit as a merchant.

It is undoubtedly true, as said by the able and learned counsel for the plaintiff, that much must be left to the sound judgment and discretion of the jury in this class of cases, and that they are allowed, in proper cases, to add punitive damages to the actual damages. But it is also true that their verdicts are always subject to the revision of the court, and that it is as much the duty of the court to protect parties against unconscionable verdicts as it is to sustain just ones. And the court feels that in this case the verdict is monstrously disproportionate, and that it is clearly their duty to set it aside, and grant a new trial.

Motion sustained.

(90 Me. 284)

SAUNDERS v. SAUNDERS.

(Supreme Judicial Court of Maine. May 27, 1897.)

IMPLIED CONTRACTS—FAMILY RELATIONS—PRESUMPTIONS—EVIDENCE.

1. When valuable services are rendered by one person at the request or with the knowledge and consent of another, under circumstances not inconsistent with the relation of debtor and creditor between the parties, a promise to pay for such services is ordinarily implied on the part of him who knowingly receives the benefit of them, and such promise is enforced on grounds of justice, in order to compel the performance of a legal and moral duty.

2. A son rendered services, after he became of age, upon his father's farm. *Held*, that the defendant, the father's administratrix, in a suit

brought by the son to recover for these services, is not entitled to an instruction "that the plaintiff cannot recover unless an express promise can be shown on the part of the father to pay the son, or to give him certain property therefor, which he failed to do."

3. All true contracts grow out of the mutual intention of the parties; and if, in a particular instance, there is evidence arising from the situation, conduct, or family relationship of the parties tending to show that the service was rendered without expectation of any payment, or without other payment than such as was received as the service progressed, it cannot be said as a matter of law that a contract is implied on the part of the defendant to pay for such services.

4. In such cases, as neither the justice of the plaintiff's claim nor the moral obligation or duty of the defendant is at once apparent, the law creates no contract in favor of the plaintiff, and, aside from the ordinary burden of proof, raises no presumption against him. It simply leaves it as a question of fact to be determined by the jury upon the peculiar circumstances and conditions existing in each case.

5. If it can properly be said that there is any presumption in a given case that the services rendered to a father by a son after he becomes of age are gratuitous, it is clearly a presumption of fact, and not of law. It rests on probability, and is the effect of evidence, the result of inferences to be drawn from the facts in the case, at the discretion of the jury; the force of it varying according to circumstances.

6. A contract which, as a question of fact, not of law, is implied, does not differ from an express one except in form of proof.

7. Upon a motion for a new trial the court held that the jury undoubtedly found as a fact that there was a mutual understanding that the plaintiff was to have the property at the decease of the father, and that the services in question were rendered by the plaintiff in the expectation and belief that he was to receive compensation in that form, and that the conduct of the father, the situation of the family, and all the circumstances existing in the case justified such expectation and belief. *Held*, that this conclusion of the jury is not so unmistakably wrong as to justify the court in setting the verdict aside.

(Official.)

Exceptions from supreme judicial court, Hancock county.

Action by Fred S. Saunders against Lydia S. Saunders, administratrix. There was a verdict for plaintiff, and defendant brings exceptions, and moves for new trial. Overruled.

A. W. King and G. M. Warren, for plaintiff.
H. E. Hamlin, for defendant.

WHITEHOUSE, J. The plaintiff recovered a verdict of \$988.30 for services rendered by him on his father's farm, after he became of age, and the case comes to this court on exceptions, and a motion for a new trial as against evidence.

At the trial the defendant requested the presiding judge to instruct the jury "that the plaintiff cannot recover unless an express promise can be shown on the part of the father to pay the son, or to give him certain property therefor, which he failed to do." The presiding justice declined to give this instruction except as shown in the charge, and it appears from the colloquy at the close of the charge, though not in the formal bill of exceptions, that the defendant excepted to the refusal to give this instruction.

In the charge the presiding judge instructed the jury as follows, *inter alia*:

"There is no express promise shown or undertaken to be shown. Mr. Saunders does not claim that he and his father sat down together and made a trade that he was to work for his father for a certain sum per month,—a specific agreement made about it; but he says that he rendered these services under such circumstances as would justify him in believing that he was to be paid for them. * * * So, in every case where there is not an express agreement testified to, * * * we have to investigate the circumstances of the service rendered, if any, and see whether or not, under all these circumstances, it was expected that pay should be given for it. * * * Now, what is shown here? And whether or not, under all the circumstances, it seems to you that whatever work was done by this young man was done under such circumstances as justifies you in believing that the old gentleman was to pay him for it in some way, not necessarily in money; that may not have been the understanding, it may have been in some other way; that he has failed to pay, and, failing to do that, that his estate must now pay the money. * * * Now, under all the circumstances, and if you believe Mr. Eaton, the last witness, as to the talk with the old gentleman, do you believe that it was understood between the son and the father that the son was to be paid for those services? If he was, then he is entitled to his pay, and the question is, was the work done with that expectation? * * * It has been suggested by the testimony of Mr. Eaton that he expected, perhaps, a deed of the place, or to have it willed to him by the old gentleman, and that that may have been the understanding. If that was the understanding, then it would follow that it was understood that there was to be some compensation, which was to be the farm itself; * * * and if it did not go to him, if he did not get the pay he expected, all he is entitled to is fair pay in money."

At the close of the charge the judge added: "I am requested to give you this instruction, and the plaintiff consents: 'That the presumption is that between father and son services rendered by the latter for the former are gratuitous, and this rule applied to a son who has attained his majority as well as a minor.' At the request of the plaintiff I will add this: that the presumption is weaker after majority than before." To this qualification thus added the defendant excepted.

It is the opinion of the court that the instructions given were sufficiently favorable to the defendant, and that he was not aggrieved by the refusal to give the instruction first requested, calling for proof of an express promise.

It is an elementary principle that when valuable services are rendered by one person at the request or with the knowledge and consent of another, under circumstances not inconsistent with the relation of debtor and

creditor between the parties, a promise to pay is ordinarily said to be implied by law on the part of him who knowingly receives the benefit of them, and is enforced on grounds of justice, in order to compel the performance of a legal and moral duty. As observed by Chief Justice Marshall in *Ogden v. Saunders*, 12 Wheat. 214: "A great mass of human transactions depends upon implied contracts, which grow out of the acts of the parties. In such cases the parties are supposed to have made those stipulations which as honest, fair, and just men they ought to have made." But the word "contract" is almost universally employed "to denote an undertaking voluntarily entered into between the parties, not drawing into contemplation any creation of the law." Bish. Cont. § 191. All true contracts grow out of the mutual intention of the parties; and if in a particular instance there is evidence arising from the situation, conduct, or family relationship of the parties tending to show that the service was rendered without expectation of any payment, or without other payment than such as was received as the service progressed, it cannot be said as a matter of law that a contract is implied on the part of the defendant to pay for such services. *Cole v. Clark*, 85 Me. 338, 27 Atl. 186, and authorities cited.

In such cases, as neither the justice of the plaintiff's claim nor the moral obligation or duty of the defendant is at once apparent, the law creates no contract in favor of the plaintiff, and, aside from the ordinary burden of proof, raises no presumption against him. It simply leaves it as a question of fact to be determined by the jury upon the peculiar circumstances and conditions existing in each case. It is then incumbent upon the plaintiff to satisfy the jury that the services were rendered under circumstances consistent with contract relations between the parties, and that the defendant either expressly agreed to pay for the services, or to give certain property therefor, or that they were rendered by the plaintiff in pursuance of a mutual understanding between the parties that he was to receive payment, or in the expectation and belief that he was to receive payment, and that the circumstances of the case and the conduct of the defendant justified such expectation and belief. If it can properly be said that there is any presumption in a given case that the services rendered to a father by a son after he becomes of age are gratuitous, it is clearly a presumption of fact, and not of law. It is not a uniform and constant rule attached to fixed conditions, and applicable only generically. It is a conclusion from a process of reasoning which the mind of any intelligent person would apply under like circumstances, and it is applicable only specifically. It rests on probability, and is the effect of evidence, the result of inferences to be drawn from the facts in the case at the discretion of the jury; the force of it varying according to circumstances. 2 Whart.

Ev. §§ 1226-1237; Best, Ev. §§ 303-326. As said by Chief Justice Peters in *Inhabitants of Belmont v. Inhabitants of Vinahaven*, 82 Me. 531, 20 Atl. 91: "Most presumptions are mixed of law and fact, or are presumptions of fact which the law may allow the jury to find."

In accordance with this view were the remarks of Chief Justice Shaw in *Guild v. Guild*, 15 Pick. 130: "Those who think that the law raises no implied promise of pecuniary compensation from the mere performance of useful and valuable services, under the circumstances supposed, are nevertheless of opinion that it would be quite competent for the jury to infer a promise from all the circumstances of the case; and that, although the burden of proof is upon the plaintiff, as in other cases, to show an implied promise, the jury ought to be instructed that if, under all the circumstances, the services were of such a nature as to lead to a reasonable belief that it was the understanding of the parties that pecuniary compensation should be made for them, then the jury should find an implied promise. * * * The conclusion that the question is of less practical importance than might at first appear is founded upon the obvious consideration that it is scarcely possible that a case can be left to stand upon the mere naked presumption. * * * There must, of necessity, be a great diversity of circumstances distinguishing one case essentially from another."

So, in *Spring v. Hulett*, 104 Mass. 591, the court say: "The law implies a promise to pay for reasonable value of benefits received, only when there is no evidence that they were conferred upon other grounds than that of contract. When the relations between the parties are such as to warrant the inference that the benefit was bestowed gratuitously, by way of hospitality, or by reason of any obligation, legal or moral, it becomes a question of fact to be submitted to the jury to determine whether it was in reality gratuitous or upon the basis of contract." Substantially the same doctrine is laid down in *Fitch v. Peckham*, 16 Vt. 151, where the court say: "It is incumbent on the plaintiff to show that she performed the services which were the foundation of her claim, expecting at the time to be paid therefor, and that the testator so understood it, or that he had sufficient reason to believe that she expected to make him her debtor for such services." And this language is quoted with approval in *Andrews v. Foster*, 17 Vt. 556. Yet the two last-named cases were cited in *Unay v. Vantyne*, 40 Vt. 501, in support of the statement that an "express promise must be proved" under such circumstances. It is evident that this apparent contrariety of expression has arisen from a failure to distinguish between a contract which is created by law, and is said to be "implied by law," or implied "as a matter of law" on the ground of justice and legal obligation, and a contract which is implied as a

matter of fact,—that is to say, a contract which is found to have an existence in fact by inference from the circumstances and conditions proved. But, in order to compel the discharge of a legal and moral duty, as has been seen, a contract is often "implied by law" which never had an existence in fact. It is doubtless true that in the latter class of cases "it is only by a fiction that a contract or promise is implied. * * *" But "in the present state of the law it is necessary for the sake of legal conformity to adopt this phraseology." Metc. Cont. 9. "A contract," says Mr. Bishop, "which as a question of fact, not at law, is implied, does not differ from an express one except in form of proof." Bish. Cont. § 257.

With the exception of the requested instruction in regard to the presumption of gratuity as between father and son, which was too favorable to the defendant, the instructions given to the jury in the case at bar were in entire harmony with the principles above stated.

It is also well-settled law that when a person renders service to another under an agreement within the statute of frauds which the other party refuses to perform, an action will lie against the party so refusing to recover the fair value of the services rendered. *Dix v. Marcy*, 116 Mass. 416, and cases cited.

With reference to the motion, the evidence before the court has been carefully examined. It is not questioned that the plaintiff rendered laborious service on his father's farm during the four years and a half from the time he attained his majority until his father's death; that during a large part of the time, when his father was absent attending to other business, the plaintiff practically had sole charge of the farm, laboring with more than ordinary diligence and fidelity. There is also credible testimony that in reply to an intimation from one of the neighbors that "he was working Fred too hard" the father said he intended Fred to have what he had. The plaintiff himself was excluded by the statute from giving testimony in relation to what took place before his father's death, and, as usually happens in this class of cases, the evidence in support of the plaintiff's contention is not as definite and complete as could be desired. It is not shown that the plaintiff ever presented or asserted any claim for compensation from the time of his father's death, in 1881, until the formal demand on the administratrix, in 1894; and it is strongly urged in the argument of the learned counsel for the defense that this fact, together with his silence respecting his claim at the time he left the place, in 1892, should be deemed a strong circumstance tending to show that he did not then consider himself entitled to any compensation. But it appears that the plaintiff, after the death of his father, continued to carry on the farm, living there with his mother during all that time; and it might readily be suggested, in explanation of his silence

and delay, that he was unwilling to deprive his mother of a home, and that he continued to cherish the hope that the arrangement with his father would be recognized by the voluntary action of the heirs. The jury undoubtedly found as a fact that there was a mutual understanding that the plaintiff was to have the property at the decease of the father, and that the services in question were rendered by the plaintiff in the expectation and belief that he was to receive compensation in that form, and that the conduct of the father, the situation of the family, and all the circumstances existing in the case justified such expectation and belief; and it is the opinion of the court that this conclusion of the jury is not so unmistakably wrong as to justify the court in setting the verdict aside.

Exceptions and motion overruled.

(30 Me. 296)

NICKERSON v. CHASE.

(Supreme Judicial Court of Maine. May 28, 1897.)

DECEDENTS' ESTATES—CLAIMS—WAIVER OF SECURITY.

1. In an action of replevin the plaintiff held a chattel mortgage given to him by the defendant's intestate, whose estate has been adjudged insolvent. He could have adopted either of three methods of procedure: First, by foreclosure; second, by proving the balance of his debt before the commissioners, after deducting the value of his security; and, third, by a surrender or waiver of his security, and proving his whole debt before the commissioners. The plaintiff chose the third method. He presented his whole claim to the commissioners on oath, declaring that it was justly due him, and that he had no security therefor.

Held, that by this procedure the plaintiff has waived and surrendered all his security. A creditor cannot receive a dividend on his whole claim and hold his security at the same time. By voluntarily proving his whole debt, the creditor necessarily waives his security.

2. *Held*, that in this case the proof of the whole debt was deliberate, and on oath that the creditor held no security. In such cases the court proceeds upon equitable principles long since established.

(Official.)

Report from supreme judicial court, Somerset county.

Replevin by Hanover S. Nickerson against Maggie Chase. Submitted on report. Judgment for defendant.

E. F. Webb, for plaintiff. F. W. Hovey, for defendant.

HASKELL, J. Assuming that the plaintiff in replevin held a mortgage, either legal or equitable, upon the chattels of the intestate to secure liabilities incurred for him in his lifetime, three methods of procedure were open to the mortgagee when the estate was adjudged insolvent:

(1) He might foreclose his mortgage, and look to his security.

(2) He might prove the balance of his debt before the commissioners, after deducting the value of his security, to be ascertained by the

methods provided by statute. Rev. St. c. 66, § 7.

(3) He might surrender or waive his security, and prove his whole debt before the commissioners.

In this case the third method was chosen. The plaintiff in replevin presented his whole claim to the commissioners on oath, declaring that it was justly due him, and that he had no security therefor. The commissioners allowed and reported his whole claim to the probate court, and their report was there accepted. By this procedure all security was waived and surrendered, for the creditor could not receive a dividend on his whole claim and hold his security as well. So long as he retains the security, he cannot prove his whole debt. If he voluntarily proves his whole debt, he thereby necessarily waives his security; but waiver arises from the voluntary act of the creditor. The commissioners, of their own motion, could not allow the whole debt, and thereby work a waiver of the security in favor of all the creditors. In such case the error could be corrected. But in the case at bar the proof of the whole debt was deliberate, and on oath that the creditor held no security. In these cases "the court proceeds upon equitable principles long since established." *Amory v. Francis*, 16 Mass. 308; *Hooker v. Olmstead*, 6 Pick. 480; *Towle v. Bannister*, 16 Pick. 255; *Trustee v. Cronin*, 4 Allen, 141; *Farnum v. Boutelle*, 13 Metc. (Mass.) 159; *Franklin Co. Nat. Bank v. First Nat. Bank of Greenfield*, 138 Mass. 515-522; *Nichols v. Smith*, 143 Mass. 455, 9 N. E. 810.

The plaintiff's title having failed, his action of replevin must fail, and a return should be ordered.

Judgment for defendant in replevin, with return.

(30 Me. 276)

FOREN v. RODICK et al.

(Supreme Judicial Court of Maine. May 21, 1897.)

NEGLECT—PUBLIC BUILDINGS—DANGEROUS ENTRANCES.

The plaintiff sustained severe personal injuries by falling into the cellar of Rodick Block, in Bar Harbor. The first floor of the block is divided into stores, and the second floor into rooms, which are leased for offices. The main entrance to the stairway leading to the second floor is about midway of the length of the building, and is closed by double doors opening inward to a short landing at the foot of the staircase. Twenty-two and one-half inches from these doors, and at the same height from the sidewalk, is a single door opening from the sidewalk inward to the cellar. There is no staircase by which to enter the cellar, and no other landing than the top of the cellar wall. A crude ladder, leading from the doorway to the bottom of the cellar, afforded the means of descent. This cellar door was unfastened on the evening of the accident, and when the door was open there was no railing or other safeguard to prevent a person from stepping over the cellar wall and falling into the cellar.

One set of offices on the second floor was occupied at the time in question by a practicing physician, and his sign was affixed to the outside of the building between the cellar door and the

main entrance. On the evening of the accident the plaintiff was passing along on the sidewalk, intending to go up to the physician's office. She was not familiar with the premises, but, seeing the doctor's sign, and supposing that it indicated the cellar door as the place of entrance, she opened the door, stepped over the wall, and fell to the bottom of the cellar.

Held, that the conditions connected with the approach to the main entrance of the building were misleading and dangerous; that in this respect the building was improperly constructed, and negligently maintained; and that the plaintiff was on the premises by the implied invitation of the defendants, on legitimate business, in the exercise of such care and caution as persons of reasonable prudence and discretion usually exercise under such circumstances.

(Official.)

Report from supreme judicial court, Hancock county.

Action by Mary H. Foren against Fountain Rodick and another. Submitted on report. Judgment for plaintiff.

L. B. Deasy and A. W. King, for plaintiff. John A. Peters, Jr., and Chas. H. Wood, for defendants.

WHITEHOUSE, J. On the 15th day of August, 1895, the plaintiff sustained severe personal injuries by falling into the cellar of Rodick Block, owned by the defendants, and situated at the corner of Main and Cottage streets, in Bar Harbor. It is claimed in this action that the defendants are liable in damages by reason of the improper construction and careless management of the cellar door adjacent to the passageway leading to the second story of the building. The evidence is reported for the consideration of the law court; and by virtue of an agreement between the parties, if judgment is rendered for the plaintiff, it shall be for the sum of \$800.

On Cottage street Rodick Block stands substantially on the line of the street, the wall of the building being flush with the sidewalk. The block is devoted entirely to business purposes. The first floor is divided into stores, and the second floor into rooms which are leased for offices. The main entrance to the stairway leading to the second floor is from Cottage street, about midway of the length of the building. It is about four feet in width, and is closed by double doors opening inward to a short landing at the foot of the staircase. Twenty-two and one-half inches at the left of these doors, as one faces the building, and at the same height from the sidewalk, is a single door opening from the sidewalk inward to the cellar. There is no staircase by which to enter the cellar, and no other landing than the top of the cellar wall. The cellar was eight feet and four inches deep, and the descent was ordinarily made by a crude ladder leading from the doorway to the bottom of the cellar. This cellar door appears to have been unfastened a great portion of the time, and frequently ajar, during the summer of 1895. It was unfastened on the evening of the 15th of August, when the accident happened. When this door was open, there was no rail-

ing or other safeguard, and no warning sign of any kind to prevent a person from stepping over the cellar wall, and falling to the bottom of the cellar.

The block was built under the personal direction and supervision of the defendants. At the time of the accident all the stores on the first floor, and all the offices on the second floor with a single exception, were occupied by the defendants' tenants, to whom they had been leased. It is not controverted that the defendants retained the control which the landlord usually has and exercises over the building and its appurtenances, and had charge of the general approaches, entrances, stairways, and halls. The cellar had not been leased to any tenant exclusively, but the defendants themselves occasionally used it; and it satisfactorily appears that they had the same control over the cellar door and the entrance to the cellar as over the main entrance and stairway leading to the second floor. By a reservation in one of the leases, the defendants also had the exclusive use of a fire-proof vault in one of the stores on the first floor, and one of them went there nearly every day.

One set of offices on the second floor was occupied at the time in question by George R. Hagerty, a practicing physician, and the sign bearing the name "G. R. Hagerty, M. D.," was affixed to the outside of the building, a few feet above the sidewalk, one end being fastened to the casing on the right-hand side of the cellar door and the other end to the casing on the left hand of the main entrance door.

About 9 o'clock on the evening in question the plaintiff and a lady friend were returning from a mission meeting, and walked along on Cottage street by the side of Rodick Block, the plaintiff intending to visit Dr. Hagerty's office, to consult him professionally. Being engaged in conversation, they passed beyond the main entrance, and turned to retrace their steps. What then happened is thus described in the plaintiff's testimony: "I was looking for the doctor's sign,—Doctor George Hagerty. I saw that sign on the right side of the cellar door, on the casing. I said to Mrs. Lewis, 'Here's the door now.' I opened the door with my right hand. I took hold of the knob of the door. I stepped with my left foot forward, and fell. Then I remember of hearing, as it were in the distance, a rumbling noise. Then everything was a blank. * * * When I opened the door, I did not look for anything, because I was so sure of a footing. I opened the door and went right in. * * * I had never been to Dr. Hagerty's office before. I had never been on the second floor of the Rodick Block before. * * * Before opening the door leading into the cellar, I did not see the other door, the entrance into the hallway that goes up. The door that I opened was not fastened in any way. When I saw the doctor's sign on the door I did not think I had to look after any further door than that one.

* * * I supposed that the door led to the entry way that went to the doctor's office, as the doctor's sign was on the door."

Under these circumstances, upon well-settled and familiar rules of law, all persons having occasion to visit any of the offices on the second floor on legitimate business with any of the defendants' tenants had an implied invitation from the defendants to use the common entrance and passageway for that purpose; and the defendants owed a duty to all such persons which carried with it an obligation to exercise reasonable care and prudence to provide a safe and suitable entrance to such offices, and to have the approaches thereto so constructed and maintained that visitors would not be liable to step into dangerous pitfalls by reason of misleading doors and deceptive landings. *Stratton v. Staples*, 50 Me. 94; *Campbell v. Sugar Co.*, 62 Me. 552; *Sawyer v. McGillicuddy*, 81 Me. 313, 17 Atl. 124; *Shipley v. Associates*, 101 Mass. 251; *Readman v. Conway*, 126 Mass. 374; *Looney v. McLean*, 129 Mass. 33; *Learoyd v. Godfrey*, 138 Mass. 315; *Gordon v. Cummings*, 152 Mass. 513, 25 N. E. 978; *Hayward v. Miller*, 94 Ill. 349; *Camp v. Wood*, 76 N. Y. 92; *Gillvon v. Reilly*, 50 N. J. Law, 26, 11 Atl. 481.

In *Sawyer v. McGillicuddy*, 81 Me. 313, 17 Atl. 124, the defendant was the owner of the building in question, including a common stairway provided for the accommodation of the different tenants in the upper part of the building. The plaintiff was injured by reason of a defect in the landing at the foot of the stairway, and the court say: "The defendant preferred to make one passageway for all, rather than one for each. This was an invitation and inducement for all who needed such accommodation to come and pass over this passageway. It was a way provided for them to pass over, precisely as a man provides a way for his customers to get to his place of business, and the same implied covenant to keep in safe and convenient repair must exist as much in the one case as in the other."

In *Stratton v. Staples*, 50 Me. 94, the facts bear an instructive analogy to the present case. The defendant was the owner of the block of four stores nearly opposite the court house in Augusta. The entrance to the south store, occupied by the defendant's tenant as a drug store, was up four narrow steps, immediately north of which was a descending rollway leading to the basement of the block. In front of the stores, north of the rollway, was a continuous platform extending from the rollway of the block to the north end of the block. The rollway was unprovided with railing or other safeguard except a buttress rising nine inches above the level of the platform. The plaintiff went upon the premises in the evening, for the purpose of having a business interview with the defendant, and, not knowing which one of the stores was occupied by him, she went upon the platform

near the north end of the building, and looked at the doors as she walked along, to ascertain. Seeing a light in the drug store at the south end, she decided to go in there, and inquire for him, and, not knowing of the existence of the rollway, but supposing that the platform continued past the entrance to the drug store at the south end, she walked directly on, stumbled over the northerly buttress, and fell into the rollway. Mr. Justice Cutting, presiding, instructed the jury that "for all persons who had occasion to go upon the platform in order to enter either of the stores on legitimate business, he would be liable for all damages occasioned by these erections, provided they were unsafe or dangerous."

In *Gordon v. Cummings*, 152 Mass. 513, 25 N. E. 978, which more closely resembles the case at bar, the plaintiff was injured by falling into an elevator well which communicated directly with the street by an opening provided with a sliding door and a chain to guard it. Separated from the opening by a granite post a foot wide was an open doorway of about the same size and construction, and on the same level from the street, which led to the common entry of the building. At the time of the accident the elevator opening was not protected by the chain, and the plaintiff mistook it for the open doorway. In the opinion the court say: "He had a right to suppose that, when seeking to enter where he had a right to go, he would not be exposed to this danger, and that an entrance by its side, easily to be mistaken for it, would not be left open and uninclosed by any barrier at a time when it was not in use. * * * If the defendants had induced, or invited, through their tenants, the plaintiff to enter at No. 619 Albany street, so far as the access thereto was under their own control, it was their duty to see that this access was not endangered by their negligence in the management of the other parts of their building, in order that a person rightfully seeking to enter should not be exposed to the liability of a fall into an opening so constructed that it might well be mistaken for the proper entrance."

So, in *Hayward v. Miller*, 94 Ill. 349, the plaintiff was a guest at an hotel kept by the defendant, and was assigned to room 38 on the second floor. Adjoining that room on the same side of the hall was a door resembling the door of the room, only 2½ feet distant, communicating with an elevator well.

The door of the plaintiff's room and of the elevator well were numbered 38 and 40, respectively, and had knobs exactly alike. The plaintiff proceeded, as he supposed, to room 38, but by mistake opened the door numbered 40, and, stepping in, fell to the basement through the opening. The court say: "The proprietor of an hotel to which he invites the public to come, that he may gain thereby, has no right to permit the existence of such an opening as this one was, unless suitably guarded, that the slightest mistake on the part of the guest might not prove fatal. Had the

plaintiff been intent on observing the numbers on the doors, he might have discovered the room he wished to enter, but by merest accident he opened the next door, and this slight inattention was the cause of his severe injuries. The opening ought to have been better protected than it was, and the omission to do so under the circumstances proven may well be attributed to the defendant as gross negligence.

The conclusion is irresistible in the case at bar that the maintenance of the unfastened door and unguarded entrance to the cellar, in close proximity to the main entrance to the second floor of the building, without any sign or warning to distinguish the one from the other, and the attachment of the professional sign of a tenant to the building in such a position between the two doors as to leave it uncertain to which entrance it was designed to give direction, rendered the conditions connected with the approach to the main entrance of the building misleading and dangerous. In this respect the building was improperly constructed and negligently maintained. There is testimony in behalf of the defendants, it is true, that Dr. Hagerty's sign was put up without their knowledge; but one of them made daily visits to the premises, and if he was not aware of the position of the sign he might have become so by the exercise of reasonable and ordinary care and attention.

But it is earnestly contended by the learned counsel for the defendants that, even if they failed to discharge the obligations resting upon them respecting the construction and management of the building and its approaches, the plaintiff is not entitled to recover by reason of her own contributory negligence at the time of the accident.

Whether the plaintiff was in the exercise of due care and caution is a question involving more difficulty than that of the defendants' negligence. She had lived in Bar Harbor for more than three years, and there is evidence tending to show that she had visited Dr. Hagerty's office before. She had frequently passed the block, and had visited some of the stores several times. The double doors of the main entrance were open; the street and sidewalk, and to some extent the landing at the entrance, were lighted by electric lights; and the cellar was well provided with windows. If she had observed the situation more attentively, and exercised greater caution, she undoubtedly might have discovered, on opening the cellar door, that there was no stairway there leading to the second floor, and that there was a cellar way without stairs below. In answer to the question by defendants' counsel, "Did you take pains to know where you were stepping?" the plaintiff herself says: "No, sir. If I had, I should not have gone down there." In other words, if she had not felt satisfied that the door she opened led to the second floor, she would not have opened it. Being so satisfied, she did not feel the necessity of further examination. She was confi-

dent that she would step onto the landing at the foot of the main stairway. Even if she had been upstairs before, she was not familiar with the premises or their approaches. She was not aware that the doors of the main entrance were usually open.

She saw a door having the outward indication of a safe and regular entrance, opening directly from the sidewalk, with the doctor's sign on the casing, apparently inviting her to enter. She turned the knob, and the door readily yielded "about the same as any door." She says it was dark when she opened the door. There was nothing to suggest a "yawning abyss." The existing condition was not instantly manifest, but, suspecting no danger, she naturally stepped over the threshold simultaneously with the inward swing of the door. She was seeking to enter the building by the implied invitation of the defendants. She had a right to expect reasonable safety and convenience in the approaches. She was not required to use extraordinary precaution, but only such ordinary care and caution as persons of reasonable prudence, care, and discretion usually and ordinarily exercise under such circumstances. And, while the question is not free from doubt, it is the opinion of the court, after carefully weighing all of the evidence, that there is a preponderance in support of the proposition that the plaintiff was not guilty of contributory negligence, but may fairly be deemed to have been in the exercise of ordinary care.

Judgment for plaintiff.

(55 N. J. E. 705)

MORSE et al. v. NICHOLSON et al.

(Court of Chancery of New Jersey. Sept. 4, 1897.)

EQUITY JURISDICTION—REMEDY AT LAW.

A bill seeking relief against a sale obtained to be made by a fraud is not demurrable because there is an adequate remedy at law, where it appears that the procedure in equity can afford the complainant more efficient modes of relief than are attainable at law.

(Syllabus by the Court.)

Bill by William T. Morse and others against Mary A. Nicholson and John H. Cook to rescind a sale for fraud. On demurrer to the bill. Overruled.

F. P. McDermott, for complainants. Hawkins & Durand, for demurrants.

GREY, V. C. The bill shows that the complainants were New York merchants. The defendant Nicholson kept a store at Asbury Park, N. J. On September 30, 1895, she requested them to sell her a bill of goods on credit. In response to their requirement she gave them a statement of her assets and liabilities, showing (assets) stock on hand, \$4,500; real estate, \$5,000,—and an indebtedness, not yet due, of but \$1,300 for merchandise, and no other liabilities whatsoever. She further certified that she had concealed no fact which would impair her credit, etc. On the faith of these state-

ments, the complainants sold and delivered goods to her on credit to amount of \$330.60. The complainants have since found that this statement on which she obtained credit was false; that the value of her stock was not above \$2,000, and her interest in real estate not over \$1,000; that she owed on merchandise account over \$2,000, and on notes, etc., about \$1,500. The complainants aver that because of these false and fraudulent statements, whereby these goods were obtained, they are entitled to, and they do, disaffirm the sale, and declare it to be void, although the goods were delivered to the defendant Nicholson. The complainants also allege that the defendant John H. Cook actively aided the defendant Nicholson in perpetrating this fraud, and to further it on December 9, 1895, took from her a chattel mortgage on all the goods in her store at Asbury Park to secure the payment of \$2,872.60 in installments. This chattel mortgage was recorded on the day of its date. This mortgage the complainants charge to have been given in bad faith, and without valuable consideration; to have been accepted by Cook to oblige the defendant Nicholson, and aid in defrauding her creditors. On December 19, 1895, the complainants brought replevin in the Monmouth circuit court, and the goods were thus delivered to them; but the defendants, Nicholson and Cook, have made a defense, and claim that the goods belong to the defendant Nicholson. The complainants pray that the sale and delivery of the goods may be decreed to be void because of the recited fraud, and that the goods may be decreed to be the property of the complainants; that the chattel mortgage may be annulled as to the goods sold by the complainants, and decreed to be no lien thereon; and for further relief, etc. The defendants jointly demur to the bill, and state as their sole ground of demurrer that the complainants have a complete remedy at law in the replevin suit. By their joint demurrer the defendants admit the fraud in obtaining the goods, and rest their sole defense upon the claim that the pending replevin suit affords a complete remedy for the wrong done. The jurisdiction of a court of equity over cases of fraud is not challenged, but it is insisted that the bill shows that the complainants have a full remedy at law, which they have elected to pursue, and that this court will not, in such a case, entertain another suit. If the remedy at law is as full and adequate as that attainable in this court, it would appear to be merely vexatious to permit the complainants, having selected a court of law as the forum in which they desired to prosecute their claim, to begin another suit for the same claim in this court. The jurisdiction of the courts of law and of equity for the redress of such frauds as those admitted by this demurrer is concurrent. Where the jurisdiction is concurrent, and the action of a court of law has been invoked, if the same remedial justice can be administered in each court, a court of equity will decline to

entertain the suit. 2 Story, Eq. Jur. par. 599. But, if adequate relief cannot be obtained in the existing action at law, the court of equity should entertain the cause, and determine it upon its merits. *Sweeny v. Williams*, 38 N. J. Eq. 630. In the suit at law pending in this matter there has been a delivery of the goods in question by the sheriff to the complainants; but the defendants deny the fraud, and are defending the suit, claiming the ownership of the goods. If the complainants are successful in the replevin suit, in so showing the fraud that the sale is declared to be void, they will retain the possession of the goods delivered to them by the sheriff. If, however, they are unsuccessful, they have obligated themselves, by their bond, to return the goods to the defendant. The defense in the suit at law may show that the title to the goods is rightfully in the defendant Nicholson, by reason that the sale to her was obtained to be made without fraud, or they may show, if the pleadings raise the issue (or by amended pleadings, if the present files do not raise that issue), that, although the sale may have been obtained to be made to the defendant Nicholson by fraud, yet the chattel mortgage taken by the defendant Cook was received by him bona fide, in ignorance of the fraud, and for a valuable, presently passing consideration, and that as against him, being a bona fide mortgagee in possession of the goods sold, there could be no recovery. In this court the complainants seek a decree declaring the sale and chattel mortgage to be void, which is, in effect, the same relief attainable in the suit at law; but their incidental remedies in this court are much more applicable and complete than those which can be afforded in the court at law. The complainants, if they establish their case in this court, as to the fraudulent sale and the connivance of the chattel mortgagee, may have the list of goods fraudulently mortgaged stricken from the mortgage, and the record of the fraudulent mortgage adjudged to be a nullity as to those goods. They may have a restraint against the transfer of the mortgage until the decree is obeyed. If they succeed in showing the fraud on the part of the defendant Nicholson, but fail in proving the participation or knowledge of the mortgagee, Cook, they may still require the mortgagee to make his money in the first place, if possible, from the goods mortgaged to him other than those which the mortgagor fraudulently obtained from them. They may, if the circumstances justify it, have a receiver appointed to carry such a decree into effect. The wide reach of these various modes of procedure affords to the complainants in this court opportunities for relief in the premises which the more rigid rules of the courts of law cannot give. I think the complainants are entitled to the benefit of the more adjustable and complete remedies which the exercise of the jurisdiction of this court affords them, and I will therefore advise that the demurrer should be overruled, with costs.

(60 N. J. L. 384)

STATE (SMITH et al., Prosecutors) v. HOWELL, Clerk.

(Supreme Court of New Jersey. Aug. 5, 1897.)

STATUTES—SUBJECT AND TITLE—AMENDMENT—CONSTRUCTION—POWER OF TAXATION—POLITICAL DIVISIONS—ELECTIONS—CONDUCT.

1. A statute that is invalid because its enactment is not for the entire class mentioned in its title may be cured by an amendment that extends the operation of the act to the whole of the titular class.

2. A district composed of all or part of a township, with its inhabitants, set off for the purpose of lighting its public streets, is a political division in the exercise of a governmental function, to which the power to raise money by a general tax may be granted by the legislature.

3. The phrase "at any time" means "from time to time," when required by the context.

4. The fact that the officers empowered to hold a special election were not sworn will not invalidate the result, if neither fraud nor other harm be shown.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of David T. Smith and others, against A. T. D. Howell, clerk of the township of Middle, to review a resolution of the township committee of Middle. Dismissed.

Argued at February term, 1897, before GUMMERE and GARRISON, JJ.

J. B. Hoffman, for prosecutors. James E. Hays, for defendant.

GARRISON, J. This writ removes to this court a resolution of a township committee defining the boundaries of "a street-lighting district," pursuant to "an act authorizing the division of townships into street-lighting districts and the erection and maintenance of street lights therein, and the election of street-light commissioners in said district," approved May 25, 1894 (P. L. 1894, p. 540), and a supplement thereto (P. L. 1896, p. 132). The return also brings up the result of an election held under the supposed authority of these statutes, and the certificate of the sum voted at said election to be raised by taxation, together with the notice thereof to the assessor to include the same in the duplicate to be delivered to the collector. The general scheme of the legislation in question is that the legal voters of a district set off by the township committee may hold an election once in each year to elect three street-lighting commissioners, and to determine how much money shall be expended by them in lighting the streets of the district. The sum so determined is to be raised as other taxes are, and to be paid over to the commissioners for the purpose indicated by the title of their office.

The reasons filed upon the return of this writ attack the constitutionality of this legislation; also, the legality of the manner in which the township committee acted under it, and the validity of the election held pursuant to its terms.

In the first place, it is said that the title of the act does not express the object of the law, in that the word "townships" is used in the title,

whereas the body of the act deals with townships in second and third class counties alone. *Beverly v. Waln*, 57 N. J. Law, 143, 30 Atl. 545, is cited as a perfectly apposite decision. Under the authority of that case, there can be no question that the variance alluded to was fatal to the statute. In 1896, however, the legislature amended the act by a supplement, general in its character, that remedied the variance in question by making the amended enactment as broad as its title. It is not perceived that there is any legal impediment to this course. It does not even rest upon the doctrine so vigorously debated in this court in the case of *Bumsted v. Govern*, viz. that a statute otherwise special is not under the constitutional ban if its effect be to produce uniformity in existing legislation. 47 N. J. Law, 368, 1 Atl. 835, affirmed 48 N. J. Law, 612, 9 Atl. 577. Here the amending act is general, both in form and substance, and comes, as it seems to me, clearly within the reasoning and decision of this court in the case of *Iron Co. v. Yard*, 42 N. J. Law, 357.

A more serious question is presented by the charge that the power of taxation granted by the act is unlawful, in that the districts created under this legislation are not political divisions of the state. If well founded, this is fatal to the entire scheme. *Kean v. Drainage Co.*, 45 N. J. Law, 91; *Reid v. Wiley*, 46 N. J. Law, 473. The subject is one that has been much discussed in this court, as well as elsewhere. If the question has been passed upon by our court of last resort, I have not been able to find the decision. The state of authority in this court is concisely put in the syllabus of the opinion delivered by Mr. Justice Dixon in *Lydecker v. Englewood Tp.*, 41 N. J. Law, 154 (presumably abstracted by the justice who formulated that decision), viz.: "A political division, to whose boundaries a general tax may be confined, is a division of the state, with its inhabitants, organized for the public advantage, and not in the interest of particular individuals or classes, the chief design of which is the exercise of governmental functions, and to the electors residing within which is, to some extent, committed the power of local government."

Judged by this criterion, and by the reasoning by which it is sustained, the districts contemplated by the legislation under review are political divisions of the state, to which the power of taxation may lawfully be committed, even though but a single governmental function be parceled out.

In a later case (*Auryansen v. Commission*, 45 N. J. Law, 113), Mr. Justice Reed points out the features that militate against the political character of a nongovernmental body, none of which, however, appear in the case now before us. The power to raise by a general tax the sum determined by the legal voters of a district established under the acts before us may be safely rested upon these decided cases.

It is further queried whether the provision by

which the township committee is authorized to set off a street-lighting district is not an unlawful delegation of a legislative function that must be performed directly by the legislature itself. This point is not raised by any reason filed in the cause, and is put in the brief of counsel for the prosecutor as a mere interrogation, and without argument. Counsel for the defendant challenges the right of the prosecutor to raise this question upon the grounds above stated, and then, through abundant caution, proceeds to argue the merits of the controversy; directing attention to the immemorial usage in the matter of road and school districts, and to the appointment of commissioners for many similar purposes. The constitutional prohibition illustrated and enforced in the case of *In re Ridgesfield Park*, 54 N. J. Law, 288, 23 Atl. 674, is not presented on this record, for the township committee is not either the executive or judicial department, within the meaning of the organic law. A controlling authority would seem to be *McLaughlin v. City of Newark*, 57 N. J. Law, 298, 30 Atl. 543, affirmed by the court of errors in 58 N. J. Law, 203, 34 Atl. 13, unless it be successfully contended that the precise point was not raised by any of the reasons filed, in which event it is authority for the propriety of refusing to consider the question at all. This latter course seems to me to be the one most in consonance with the rights of the parties, even though the objector have fully argued the matter in his supplemental brief.

The point mainly argued on behalf of the prosecutor, and the one that has given me the most difficulty, arises from the contention that the power given to the township committee to divide the township into districts is a single power, to be executed all at one time, and once for all. If this be the true interpretation of the statute, it is fatal to all of the proceedings now drawn under review; for, at the time the committee set off district No. 1, it did not make any division of the remaining territory of the township. The whole argument rests upon the assumption that the language, "may at any time set off and divide the said townships into districts," expresses a legislative purpose that said division should affect every portion of the township at one and the same time. But the words "at any time" do not of necessity, and in all contexts, have this rigid meaning. They may be controlled by other words, or by the spirit and reason of the scheme in which they are employed. A tract of land to be "at any time set off and divided" into lots of a size suitable to the needs of settlers would not mean that no lot could be set off until all the land was needed for occupation, or that land for which there was no applicant must be set off into lots as soon as the first actual settler had to be provided for.

In the present instance the scheme for lighting streets indicates a purpose that is reasonably applicable only in localities that have assumed something of an urban character, and would be totally unfitted to one whose nearest

approach to streets was a network of country roads traversing a sparsely settled or even an uninhabited territory. No reason is perceived why the necessities of one locality should not be regarded because a like necessity does not exist elsewhere in the township, or why, in ministering to the wants of a village or thickly-settled area, the expense of holding a futile election should be imposed upon a more rural population. The act itself, moreover, speaks of the area to be set off in the singular number, and expressly provides that "said district, when so designated shall be a body corporate * * * and shall possess * * * all of the corporate power necessary for the carrying out the powers hereinafter conferred." The conclusion to which I have come is that the words "at any time" were used in the same sense that the phrase "from time to time" was used in the same section when speaking of the power to alter the boundaries of districts. Thus interpreted, the ultimate scope of the committee's authority is co-extensive with its township, but the time for the actual setting off of an election and taxing district rests in sound discretion.

The last objection is that the officers who held the election were not sworn according to law. I shall not amplify upon this point, beyond a reference to the cases cited in 6 Am. & Eng. Enc. Law, p. 302 et seq., and the expression of my adherence to the views of those tribunals that treat such provisions as directory merely where the issue raised is the disfranchisement of the voter, and no fraud or other harm is shown or charged.

Finding no invalidity in any part of the proceeding returned to us, the writ of certiorari is dismissed, but without costs.

(60 N. J. L. 392)

STATE (STANLEY et al., Prosecutors) v.
BOARD OF CHOSEN FREEHOLDERS
OF PASSAIC COUNTY et al.

(Supreme Court of New Jersey. Aug. 10, 1897.)

BIDS FOR PUBLIC WORKS—REJECTION—NOTICE.

A party whose rights are to be directly affected by official action which is judicial in its character is entitled to have an opportunity afforded him of being heard in relation thereto before such action is taken.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Richard Stanley and another, against the board of chosen freeholders of Passaic county, to review a resolution of said board. Proceedings set aside.

Argued February term, 1897, before GARRISON and GUMMERE, JJ.

William Nelson, for prosecutors. De Witt C. Bolton and John W. Harding, for defendants.

GUMMERE, J. The board of chosen freeholders of Passaic county, having advertised for proposals for the doing of the mason work upon a bridge which they were about to construct over the Passaic river at Hilary street,

in the city of Paterson, awarded the contract for the same to the prosecutors, Stanley and Shire, the lowest bidders therefor. The resolution awarding the contract was passed on the 13th of May, 1890, and contained a proviso that the prosecutors should furnish a bond satisfactory to the director of the board. On the 2d of June, 1896, the board passed another resolution, which, after reciting that Stanley and Shire had failed to sign the contract awarded to them and to furnish a satisfactory bond, awarded the contract for the mason work on the bridge to one Adam Wentink, who was the next lowest bidder. This latter resolution was adopted with a proviso that it should be operative only in case the counsel of the board should consider the proposed action legal. Subsequently, and with the approval of the counsel of the board, the resolution was acted upon, and a contract was entered into with Mr. Wentink for the doing of the proposed work. The prosecutors now seek to review the action of the board, depriving them of their contract and awarding it to another, on the ground that such action was taken without notice to them, and without affording them an opportunity to be heard in the matter, and is for this reason illegal.

It is urged on behalf of the board of freeholders that they were justified in pursuing the course adopted by them because the prosecutors, although afforded ample time for doing so, as is alleged, failed to give a satisfactory bond as required by the resolution awarding the contract to them, and failed also to sign the contract which was presented to them for their signatures. It is also insisted that the board had the legal right to take such action without notice to the prosecutors, and without giving them an opportunity to be heard in relation thereto. It cannot be denied that failure on the part of the prosecutors to give a satisfactory bond or to sign the contract within a reasonable time, unless a valid excuse for such failure existed, would have warranted the board in rescinding the resolution awarding the contract to the prosecutors, and in awarding it to Wentink, but we cannot agree to the proposition that it had the legal right to do so without first affording the prosecutors an opportunity to be heard. Unless by their conduct they had lost their rights, they were entitled to do the mason work on the bridge, and to the profits arising therefrom. Whether or not they had forfeited their rights was a question which could be determined by the board only by the exercise of a quasi judicial function. That a party whose rights are to be directly affected by official action is entitled to have an opportunity afforded him of being heard in relation thereto before action is taken, whenever such action is judicial in its character, is entirely settled in this court. *Vanatta v. Mayor, etc.*, of Morristown, 34 N. J. Law, 445; *Traction Co. v. Board of Public Works*, 56 N. J. Law, 431, 29 Atl. 163; *Connolly v. Board of Freeholders*, 57 N. J. Law, 286, 30 Atl. 548. Our conclusion is that because the

action of the board of freeholders was taken without notice to the prosecutors, and without an opportunity to be heard with regard to their alleged laches in signing the contract and in giving a satisfactory bond for its performance, the proceedings brought up for review should be set aside.

McINNES v. McINNES BRICK MANUF'G CO. et al.

(Court of Chancery of New Jersey. Aug. 18, 1897.)

MORTGAGES—CONSTRUCTION—PREFERENTIAL PAYMENTS—SATISFACTION—EQUITY—INTERFERENCE IN LEGAL PROCEEDINGS—MOTIVE—CHATTEL MORTGAGES—VALIDITY.

1. B. held a due mortgage on corporate property. The company was unable to pay it, and B. threatened foreclosure. With the assent of the company's officers and the consent of the mortgagee, M. advanced one-third of the amount named in the mortgage, upon an agreement that he should be protected, by assignment or otherwise, and thus prevented foreclosure. Subsequently the mortgage was assigned to the wife of M., upon her payment of the other two-thirds, and her agreement to protect M. to the amount of his previous payment. *Held*, that the first payment by M. should not be credited in part satisfaction of the mortgage, at the instance either of the mortgagor or of a subsequent mortgagee, neither of whom contributed, in any way, to pay the money sought to be credited.

2. Where it is declared by a similar clause inserted in two several mortgages "that each shall be paid proportionately out of any proceeds from sale, judicial or otherwise, of the said premises," the contract of concurrency is limited to the equal sharing of the things mortgaged, and does not intend to require the several debts secured to be equally paid from other sources than the mortgaged property. If payments be voluntarily made to one mortgagee, which do not appear to have been raised from the mortgaged property, the other cannot maintain a claim to be allowed out of that property a preferential payment, to equalize proportionately the debts secured.

3. So long as the complainant in a suit acts in a lawful manner in the assertion of her legal rights, it is no defense that she was actuated by evil motives in her proceedings.

4. To induce this court to interfere with a litigation which is lawful in itself, it must be alleged in the pleadings and maintained by the proofs that some fraudulent or wrongful use is being made of such a proceeding.

5. Where the mortgagor, after giving a chattel mortgage, retains possession of the goods, and the mortgage is not recorded for more than three years after it is given, it is void as to the creditors of the mortgagor.

(Syllabus by the Court.)

Bill by Rebecca McInnes against the McInnes Brick Manufacturing Company and others to foreclose a mortgage, in which a cross bill was filed by defendant Alfred H. Faber. Heard on bill, answer, cross bill, etc.

The bill is filed to foreclose a mortgage for \$3,000, dated May 2, 1890, recorded May 5, 1890, payable in five years from date, with interest at 5 per cent., made by Smith W. Clark and wife to Amanda and Ann S. Buxby, assigned June 25, 1896, to Rebecca McInnes, complainant. The mortgaged premises are situate in Burlington county, and consist of 60 ²³/₁₀₀ acres of land on Rancocas creek. The

property was conveyed, subject to this mortgage, to the McInnes Brick Manufacturing Company, one of the defendants, November 15, 1890, by Hugh McInnes and Charles F. Van Horn, who had foreclosed from the mortgagor. On November 22, 1892, the McInnes Brick Manufacturing Company, which will hereafter be called the "Company," made two mortgages, one to the complainant, Rebecca McInnes, to secure the payment of \$31,000 in three years, with lawful interest, the other to Maggie M. Van Horn, to secure the payment of \$3,476.68, with like interest in the same time. This latter mortgage has been assigned to the defendant Faber. These two mortgages are expressed to be given upon the mortgaged lands, and the "engine, boilers, machinery, shafting, etc., and personal property now or hereafter to be put therein, or attached to the said premises," and each mortgage contained a clause, hereinafter quoted, making them concurrent liens upon the property mortgaged. Both mortgages were recorded as real-estate mortgages on January 19, 1893, and the Van Horn mortgage as a chattel mortgage on July 16, 1896. The complainant alleges that on the Van Horn mortgage interest has been paid to November 22, 1895, but on the complainant's mortgage no interest has been paid; and the complainant insists that, by force of the above concurrent clause, the interest on her mortgage should be first paid out of the proceeds of the sale up to the same date as it has been paid on the Van Horn or Faber mortgage, before distribution of any proceeds of sale under the concurrent clause. On January 6, 1894, the Company made another mortgage to the complainant, to secure the payment of \$11,000 in three years, with interest, upon the mortgaged premises and personal property, which was recorded on January 22, 1894, as a real-estate mortgage. On May 28, 1895, the Van Horn mortgage was assigned, as stated, to the defendant Alfred H. Faber.

The defendants Mr. and Mrs. Van Horn and Mr. Faber answer the bill jointly. They deny that Charles F. Van Horn claims to have any interest in either the mortgaged premises or the mortgages thereon, and they state that the defendant Maggie Van Horn has assigned her interest in her mortgage to the defendant Faber. After these statements, the answer is still so phrased that all three of these defendants continue to make answer. By the statements of their answer they deny that the whole principal money (\$3,000) remains due on the first, or Buzby, mortgage, and say that \$1,000 was paid on account of that mortgage before it was purchased by the complainant. They admit the indebtedness to the complainant on the second, or \$31,000, mortgage, as to the principal, but they deny that no interest has been paid, and say that interest is due, not from the date of the mortgage, November 22, 1892, but only from a year thereafter, November 22, 1893. They deny that interest has been paid on the Van Horn-Faber mortgage

up to November 22, 1895, and say it has been paid only to May 22, 1895, and not since that date. They also deny that the complainant is entitled to have the interest on her concurrent mortgage paid up to the date that it has been paid on the Van Horn-Faber concurrent mortgage. The defendants admit the making of the complainant's \$11,000 mortgage, and its record and nonpayment. They allege that on August 6, 1896, the complainant recovered a judgment against the Company for \$4,080.03, levied on a portion of the property conveyed by the Faber mortgage, consisting of raw material and manufactured bricks, and sundry other articles of personal property, which was purchased by the complainant, and removed by her, which the defendants say should be accounted for by her, and be charged as if a payment on account of her \$31,000 mortgage. They join in a prayer that the real and personal property be sold, but they pray, also, that the complainant be charged with the value of the property covered by the mortgage, sold under the judgment recovered by her, and that the moneys realized by the sale, and charged against the complainant, be distributed as follows: First. To pay cost and charges of this suit. Second. To pay \$2,000 balance due on complainant's first mortgage, with interest. Third. Pro rata to pay the concurrent mortgages. Fourth. To pay complainant's \$11,000 mortgage, with interest. The defendant Alfred H. Faber subsequently filed a cross bill, making the complainant sole defendant. In this cross bill the defendant Faber alleges that he demanded payment of his mortgage on June 20, 1896; that on an unnamed day in that month the complainant and her husband (who is president of the defendant Company) came to see him (Faber) at his office, and told him that, if he would not accept less than the principal and interest due on his mortgage, they would purchase the first mortgage, and foreclose, and thus his mortgage would be devested; that they afterwards did so purchase the first mortgage, paying only \$2,000 therefor, and immediately proceeded to foreclose in this case. He also states the entry of the judgment by the complainant to have been without his knowledge; that execution was issued, and the sheriff told to levy and sell a portion of the property known by the complainant to be covered by the lien of the Faber mortgage; that notices of the sale were not posted in the neighborhood of the Company's premises; that on August 8, 1896, the sheriff sold a considerable part of the property covered by the Faber mortgage to the complainant for \$1,290 (naming the items); that other property was purchased by the complainant, and removed by her, for which she should account; that on July 1, 1896, the Company stopped work, and Faber charges that this was in pursuance of a scheme to obtain possession of the plant for a small sum, without paying the defendant's mortgage; that the Company was not indebted at the time, save to the complainant and to him (Faber).

He states the remarks of "a man who was working on the premises" that the husband of the complainant had said the manufacture of bricks "would be again proceeded with as soon as they got things in their own hands." He further charges that the whole transaction of the complainant is a fraudulent scheme for acquiring the land and premises, goods, etc., without paying his mortgage, and that the sale under the judgment was made to render the plant valueless when sold under the foreclosure suit; that, because the sale was not properly advertised, it brought a grossly inadequate price. Answer is prayed under oath, and that the complainant, Rebecca McInnes, may be decreed to have purchased the first or Buzby mortgage, obtained the judgment, and made sale of the goods, etc., fraudulently as against Faber, and may be decreed to be a trustee for Faber, and to deliver the goods up to him in part satisfaction of his mortgage, and that she may be decreed to pay his mortgage, with interest, and be enjoined from prosecuting this suit, and from disposing of the goods, etc., she purchased at the sheriff's sale.

In accordance with the invitation of Mr. Faber, Mrs. McInnes, the complainant in the original bill and sole defendant in the cross bill, has filed her answer under oath. She admits calling on Mr. Faber, but denies she made the statements alleged in the cross bill. She answers that she recovered her judgment against the Company in good faith for money loaned to the Company. She admits the sale, but denies that it was insufficiently advertised, and states that a large number of notices of sale were posted, some of them on or in immediate vicinity of the premises of the Company. She admits she bought the goods named for \$1,290, denies they were worth \$5,000, and says the sale came off in the presence of a number of brick manufacturers, who would have bid on the property if the price bid by her had been inadequate. She denies that she has removed the goods, except \$4.20 worth of bricks. She denies specifically and generally every allegation of purposed or acted fraud on the defendant Faber, and disputes the equity of the cross bill, claiming the same benefit as if she had demurred thereto. As to the purpose and occasion of the purchase of the Buzby mortgage, she answers that the whole amount (\$3,000) was due. The Buzbys wanted their money, and threatened to foreclose. The Company could not pay it. That Hugh McInnes, the husband of the complainant, and his family, owned all the stock of the Company, except five shares owned by Van Horn. That the Company also owed McInnes over \$7,000 for money loaned. That the \$1,000 was advanced to the Buzbys, not out of the Company funds, but by McInnes, out of his private funds, upon a previous understanding with the president of the Company that he (McInnes) should be protected and subrogated to the extent of the \$1,000 right of the Buzby mortgagees under their mortgage. The complainant subsequently received an assignment of the Buzby mort-

gage, upon her agreement to hold it to the extent of \$1,000, for her husband's benefit. She declares that the defendant threatened to foreclose his mortgage unless consent was given that it should precede the concurrent mortgage. That the purchase of the Buzby mortgage was made, and its foreclosure begun, to secure the payment of \$1,000, advanced at the Company's request, and to make a perfect title to the property, and get a better price for it, for the benefit of all interested. She states that on July 2, 1896 (which was more than a month before she entered judgment), Faber entered judgment against the Company, and levied on its property and book accounts, and that, because of this proceeding, the Company could not carry on its business, and stopped on that day. That afterwards, on July 21, 1896, Faber issued an attachment in Philadelphia against the Company, and seized its property, book accounts, and bank balance. That thereupon, to protect herself, the complainant recovered and entered her judgment, and caused the goods and chattels to be sold by the sheriff for as fair and adequate price as they would bring at a public sale for cash. She denies that any of the goods sold were covered by the lien of the mortgages. She charges that the Faber mortgage was not proved and recorded as a chattel mortgage when executed. That the mortgagor, the Company, retained possession of the goods until after the sheriff sold them in August, 1896, and that the complainant is a creditor whose indebtedness accrued prior to July, 1896, so that the Faber mortgage is, as a chattel mortgage, void as to her. She therefore claims that she has acquired title to the goods bought at sheriff's sale free from any lien under the Faber mortgage, and that she is not required to account.

Lewis Starr, for complainant. A. H. Ganger, for defendants.

GREY, V. C. (after stating the facts). The points raised and discussed in this case are: First. Should the payment of \$1,000, receipted on the Buzby mortgage, made out of his own funds by Hugh McInnes, be credited on that mortgage for the benefit of the Company? Second. Should the \$31,000, concurrent mortgage of the complainant, be allowed out of the proceeds of sale, before payment of both the concurrent mortgages, a special credit of interest up to the date to which interest has been voluntarily paid by the Company on the other concurrent mortgage held by Faber? Third. Has the defendant Faber, complainant in the cross bill, sustained his claim that the complainant, Rebecca McInnes, acted fraudulently in procuring and foreclosing the Buzby mortgage, and entering her judgment and making sale of the Company's property? Fourth. Is the defendant Faber entitled to any relief against the complainant under his claim that his mortgage has been proven and recorded as a chattel mortgage?

First. As to the payment of the \$1,000 on the Buzby mortgage. The Company is shown to have been in extreme financial distress at the time of this payment. Mr. McInnes paid this money to the mortgagees out of his individual funds when the Buzbys had demanded payment, in consequence of a conversation with the president of the Company, at which it was stated by McInnes that the Company had no money, "and that I would have to advance it out of my personal funds, and have it assigned to me; and I said to him, 'You had better give me a form of receipt that I could enter upon the mortgage, so as to show it is my transaction.'" McInnes paid the money upon this agreement, the Company contributing nothing. The receipt specifies that it was paid by McInnes. The Buzbys accepted it on this understanding, and signed the receipts, showing the money was paid by McInnes. That the \$1,000 was paid by him for the purpose of preventing a foreclosure, upon the assurances given him by the executive officers of the mortgagor Company that he should be protected by an assignment of the mortgage, or holding of it to the extent of the payment for his use, and this, also, with the assent of the mortgagee, is sufficiently proven. The subsequent assignment by the Buzbys to Mrs. McInnes, on payment of the balance due, was a ratification of the original arrangement. To either of these payments neither the mortgagor, the defendant Faber, nor the antecedent holder of his mortgage, Mrs. Van Horn, contributed anything; but Faber now claims that he should have the full benefit of the payment, and that the agreement under which the money was advanced should be repudiated. This contention is based upon the idea that the claim for the payment of this \$1,000 can be sustained only by the complainant showing a right to be subrogated to the position of the mortgagee, to whom the money was paid. I think the contention of the defendant is wholly inequitable. The mortgagor, by its officers, induced the payment and accepted the benefits upon an agreement that it should not be a discharge pro tanto of the mortgage. The mortgagee received the payment on this understanding. The transaction was, in effect, and was treated by all the parties as, a partial payment for the purchase of the mortgage. The subsequent payment of the balance resulted in the assignment to the complainant. This arrangement might lawfully have been effected without the consent of the mortgagor Company, or its creditors, or in despite of their protest, as they had no right whatever to control or limit the action of the holders of the mortgage in disposing of it. When it was made with the assent of the mortgagor Company, which by it got the benefit to be derived from preventing a foreclosure, it does not lie with another creditor to claim a right to repudiate the agreement. Faber is wholly unaffected by this agreement. His security is not diminished. He has recourse to the same property for the payment

of his debt which was originally mortgaged to him, but he is not permitted to enforce for his own benefit, as a payment, in part satisfaction of a previous lien, an advance of moneys made neither by him, nor by his debtor, which was never intended by the party paying, or the party receiving, it, to be a partial satisfaction. I think, irrespective of the application of the doctrine of subrogation, the agreement of the parties was that this advance of \$1,000 was not to be deemed to be a payment in part satisfaction of the Buzby mortgage, and that it should be so decreed.

Second. The complainant contends that she is entitled, by reason of the hereinafter recited clause, making her \$31,000 mortgage and that of the defendant Faber concurrent liens, to have the interest on her mortgage paid out of the proceeds of sale to the same date that the interest on the Faber mortgage has been voluntarily paid by the mortgagor Company, before any payment be made pro rata upon the concurrent mortgages. No interest has been paid the complainant on her \$31,000 mortgage, and the defendant has been paid the interest on his up to May 22, 1895. The complainant claims payment to the same date from the date of the concurrent mortgages, November 22, 1892. This at 6 per cent. would require her to have a preferential payment of \$4,650 for back interest. There is no other basis than the concurrent clause for this contention. A careful reading of that clause will show that it nowhere declares that the debts secured to be paid are concurrent, or to be equally paid, in any other way than by the application of the property mortgaged. They are, in fact, several debts, each represented by a separate bond, held separately by each creditor. The declaration of the contract that they shall be concurrent is limited to the statement that the mortgages "shall stand in the same position precisely as to their lien or incumbrances of the said premises, etc., hereby mortgaged, neither taking precedence of the other, but that each shall be paid proportionately out of any proceeds from sale, judicial or otherwise, of said premises." They are in the same position as to lien on the things mortgaged, but as to any other ways and means of payment there is no agreement for equality. The complainant, to entitle herself to the privilege claimed, must show that the defendant Faber has received payment of his interest from some realization, by sale or other disposition, of the property mortgaged. No such proof was made. The complainant's counsel argues that by the payment of the interest to Mrs. Van Horn, the antecedent holder of the Faber mortgage, "the assets out of which the interest on the mortgage was ultimately to be collected were diminished to that extent." But of this assertion there is no proof. The interest payments to Mrs. Van Horn may have been made from the proceeds of sales of bricks manufactured (which the learned counsel on another point in this case forcefully argues were not lawfully mortgaged), or from the general

profits of the business, or from any other source than the realization of the property mortgaged. As above stated, no proof whatever has been submitted that the payments were made from the latter source, and it is payments derived from that source only which were to be equal. The complainant, who claims this relief, must carry the burden of the proof necessary to support it. As she has failed to carry it, the relief sought must be in this particular denied. I am referred to the case of *Stevens v. Railroad Co.*, 13 Blatchf. 412, Fed. Cas. No. 13,406, as authority for the proposition that the back interest on Mrs. McInnes' concurrent mortgage, up to the date that the interest has been voluntarily paid to Mr. Faber on his concurrent mortgage, should be preferentially paid to her from the proceeds of sale of the mortgaged premises, before making any pro rata dividend between both concurrent mortgages. That case is not so reported as fully to disclose the original contract under which the preferential payment of interest was claimed. Nothing in the case, in my view, supports the complainant's contention that where the concurrency of two mortgages is limited to a lien on the property mortgaged, a voluntary payment to one of the mortgagees, not shown to have been made from the property mortgaged, should entitle the other mortgagee to an equalizing preference out of the mortgaged property. The contract of concurrency in the case now under consideration extended only to the equal sharing of the proceeds of the things mortgaged, not to the equal payment of both debts from whatever source the mortgagor might choose to pay. The mortgagor was at liberty wholly to discharge one of the concurrent mortgages, and to leave the other wholly unpaid, provided it did this from other sources than the mortgaged property.

Third. The defendant Faber, by the cross bill, charges that the complainant defrauded him, by purchasing the previous Buzby mortgage, and foreclosing it, for the purpose of divesting the lien of his subsequent mortgage, and by entering her judgment against the Company without his knowledge. So far as these allegations impute an improper and fraudulent motive to the complainant in purchasing and foreclosing her mortgage, or in entering her judgment, they are not only denied by the complainant in her invited sworn answer, responsive as to her good faith in these proceedings, but, from the very nature of the case, these matters cannot be set up either as a defense, or as a ground for relief under the cross bill. The purchase of the first mortgage and its foreclosure by the complainant and her suit in the supreme court were each and all of them assertions of her legal rights, which she was entitled to secure by those courses of procedure. There is in this case no indication that she ever had in view any purpose to do any more than obtain such a sale of the property as would secure payment of her claims, and as its ac-

cumulation of debt made desirable. But, however bad her motives may have been, so long as she acted in a lawful manner in the assertion of her legal rights, that she was actuated by evil motives constituted no defense to this suit to foreclose her mortgages. This has been finally settled, if it ever was questionable, in *McFadden v. Railroad Co.*, 49 N. J. Eq. 176, 22 Atl. 932, and *Davis v. Flagg*, 35 N. J. Eq. 491. The other allegations of fraudulent conduct against the complainant, set up in the cross bill, are that she entered judgment against the defendant Company without the knowledge of Mr. Faber, and caused its property to be levied on and sold by the sheriff, including, as part thereof, some of the property known by Mrs. McInnes to be covered by Mr. Faber's mortgage; that no notice of the sale was posted on the premises; that Mrs. McInnes bought at an inadequate price, and has removed the property, to the impairment of Mr. Faber's mortgage security; and that the whole transaction, on the part of Mrs. McInnes, was the development of a fraudulent scheme to acquire the defendant company's property without paying Mr. Faber's mortgage. In order to understand the significance of these accusations, it is necessary that the relations of the parties should be stated. The defendant Company was engaged in the brick-making business, with a plant (the mortgaged premises) in Burlington county, and making sales largely in Philadelphia. Mr. Faber held the smaller one of the mortgages, which were concurrent liens on the property of the Company. Mrs. McInnes held the other and larger concurrent mortgage, an additional mortgage for \$11,000, and also some unsecured loans. The debtor Company was in arrears for interest on its mortgages, and could not pay even its current debts. It plainly appeared that the threatened insolvency of the debtor Company was known to both the complainant and the defendant. A conference was held between them, to ascertain whether they could agree to arrange their claims. They could not, and almost immediately each took steps to bring suit against the Company, and the subsequent proceedings of each were the struggle for priority in fastening their debts on the property of their debtor. On July 2, 1896, the defendant Faber entered a judgment against the Company on his bond, and levied on the Company's stock of bricks in Philadelphia, its books, and its bank account. On the same day the complainant filed her bill to foreclose. On July 6, 1896, the complainant brought suit against the Company in New Jersey supreme court. On July 21, 1896, the defendant Faber issued an attachment in Philadelphia against the Company. The conference between these parties, and the rapidity of these subsequent proceedings, taken by each of them separately for the protection of their several and respective claims against the Company, satisfy me that they were dealing with each other as antagonists, at arm's length,

each warned of that fact, and neither entitled to any disclosure or notice of the other's proceedings in the course of the struggle. There was no pretense of any relation of trust, agency, or other priority which cast upon the complainant any duty to inform the defendant Mr. Faber of her proceedings against the Company. They were both creditors, striving for the recovery of their debts from a common debtor, each with actual notice of the purpose of the other to collect the debt. Mr. Faber did not prove that he informed Mrs. McInnes of his very summary proceedings against the Company in Pennsylvania, nor did she inform him of her action in New Jersey, begun a little while afterwards; nor was there any requirement, in law or equity, that either of them should have given such notice. Neither of them relied on it, nor expected it, and either would justly have been surprised had it been given by the other. The charge that property previously mortgaged to Mr. Faber was levied on and sold by the sheriff is discussed hereafter, but, if true, it is of little weight, as it was undisputedly shown that none of the property, except of the trifling value of \$4.20, was removed; and *Woodside v. Adams*, 40 N. J. Law, 418, is authority that such a mere levy and sale of the equity of redemption of the mortgagor is, of itself, no injury to the mortgagee. To injure him, there must be such dispersion or other disposal of the chattels that he is deprived of his remedy. The allegation that no notice of the sheriff's sale was posted on the premises is not stated to have been in any way contrived by the complainant. There is no legal requirement that such a notice shall be posted on the premises, nor do I recall that it was proven that in this case it was not done, and the proof was clear that the sale was well attended by men engaged in the brick business, and others. The evidence does not show that Mrs. McInnes purchased at an inadequate price. Articles less advantageously salable than the fittings and belongings of a brickyard, and bricks in the various stages of preparation for market, can scarcely be imagined. The purchaser has cast upon him the further burdens of completion, handling, delivery, and final sale to the consumer. He must pay cash to the sheriff for the goods, and take his chances for their final profitable disposal. These are inherent qualities which necessarily attend upon any judicial sale of such articles, and seriously reduce the prices which may be obtained. That they brought a much less price than the same goods would have brought had they been finished and delivered is very probable, but this does not prove that the price obtained by the sheriff in their unfinished condition, and at such a distance from the market, is inadequate. The statement that the goods mortgaged had been removed, to the impairment of Mr. Faber's security, if it was primarily proven, was conclusively refuted, as the evidence shows that the only remov-

als were some of the goods of the value of \$4.20. So the general allegation that all the actions of Mrs. McInnes were parts of a fraudulent scheme to acquire the defendant Company's property without paying Mr. Faber's mortgage is not sustained by the proofs. Each of the acts specified has either been denied and disproved, or shown to have been within the lawful rights exercisable by the complainant. The complainant having refuted each of the instances of fraudulent action set up, it cannot be that the sum of them all constitutes a fraud.

The defendant Faber insists that the cases of *Tomkins v. Tomkins*, 11 N. J. Eq. 514, and *Mechanics' Nat. Bank v. H. C. Burnet Manuf'g Co.*, 33 N. J. Eq. 486, support his claim that the complainant has been guilty of a fraud upon him, because they lay down the doctrine that the court of chancery will grant an injured party relief against the fraudulent use of a bona fide judgment. No one disputes this principle, but this case under consideration does not call for its application. In the *Tomkins* Case the court stated the very instance on which the defendant here relies. "If," it says, "by any artifice or unconscionable contrivance, the plaintiff has become himself the purchaser of the defendant's property at a grossly inadequate price, this court will grant relief, by holding him a trustee, and will compel him to account for the property at its fair value, or subject it to another sale." It is not because the judgment is bona fide, and that it injures some other party, that this court interferes. Every judgment which precedes another judgment has that effect, to some extent, on the subsequent judgment. It is because of the artifice, trick, unfair advantage, or breach of some fiduciary duty, on the part of the holder of the judgment, or the protection of the debtor from the claims of other creditors, that this court takes jurisdiction, and prevents the success of fraud. The other case (*Mechanics' Nat. Bank v. H. C. Burnet Manuf'g Co.*) is of the same character. The judgments appeared to have been honestly entered, but they were used by the plaintiff to enable the defendant to cheat the other creditors, and this court set aside the sale by which this fraud was perpetrated. In the case in hand, the two parties were creditors, striving to secure their several debts, asking, expecting, and entitled to no favors from each other. One, by proceeding in the state where lay the burden of the debtor's property, and by legal methods, secured a prior lien. The other, who was seeking by the same means in another state to attain the same end, thereupon declares this is a fraud, and asks a decree against his competitor. There is nothing shown which will sustain the cross bill. All that is alleged which has any significance has failed of proof, and what was offered to be proven under the claim of significance was either not alleged in the plead-

ings, or was inadmissible in the evidence. Nothing has been proven which indicated any purpose or act on the part of the complainant to aid the defendant Company to avoid the application of its assets to the payment of its debts. She took her proceedings for the purpose of securing, from the property of her debtor, the debts admitted to be honestly due to her. If in doing this she was more diligent or better advised as to her remedy than another creditor, that was her lawful right, and no ground for complaint.

Fourth. The remaining contention on the part of the defendant Faber, by his cross bill, is that the stock of raw material, the brick manufactured and in process of manufacture, the tools and equipment of the brickyard, and other personal property sold by the sheriff under Mrs. McInnes' levy, are all subject to the lien of Faber's concurrent mortgage, recorded July 16, 1896, as a chattel mortgage. The words of that mortgage which it is claimed included these articles are: "Together with the buildings and improvements of whatsoever kind now on the same erected, and the engine, boilers, machinery, shafting, etc., and personal property now or hereafter to be put therein, or attached to the said premises." The defendant insists that these words include within the lien of his mortgage all personal property of every character which at any time was put in or attached to the mortgaged premises. The complainant contends that the special mention of the boiler, engine, machinery, shafting, etc., indicates the class of personal property which should be subject to the mortgage, and it was such personal property as was of this permanent character which was to be included; that the whole object of the business was to make, sell, and deliver bricks, and that to have included this product within the lien of the mortgage would have prevented the transaction of all business by the Company. The complainant further suggests that the defendant Faber construed the meaning of his own mortgage not to include bricks and all other personal property, when he issued an attachment and levied on the bricks of the Company. The clause in question relating to personal property is so drawn that its precise meaning is not without doubt. This point it is, however, not necessary to pass upon, because of the interpretation of the chattel mortgage act by the court of errors in *Roe v. Meding*, 53 N. J. Eq. 350, 33 Atl. 394. In that case a chattel mortgage had been given by the mortgagor, who retained the possession of the goods mortgaged. The chattel mortgage was not recorded for 10 weeks. It was held to be void against creditors of the mortgagor, under the fourth section of the chattel mortgage act (2 Gen. St.

p. 2113); citing *Williamson v. Railroad Co.*, 29 N. J. Eq. 336. In this case Mr. Faber received his mortgage at least as early as its record as a real-estate mortgage, January 19, 1893. He did not record it as a chattel mortgage until July 16, 1896, more than three years after. Meanwhile the mortgagor had continued to retain possession of the goods mortgaged. Mrs. McInnes, in respect to her loans to the mortgagor Company, made during 1895 and 1896, became such a creditor of the mortgagor as is protected by the fourth section, above cited. She afterwards recovered judgment against the mortgagor Company, and by levy thereunder sold its personal property. If Mr. Faber's chattel mortgage should be so construed as to include the goods which were sold under Mrs. McInnes' levy, he would still have no remedy against her, because his mortgage, so far as it is a chattel mortgage, was void as to her. In *Roe v. Meding*, *ubi supra*, it was declared that the terms of section 4 of the chattel mortgage act require that the chattel mortgage, where the mortgagor continues in possession, must be recorded "as soon as may be, by reasonable dispatch, under the circumstances of the case," for the obvious reason that all creditors may, as soon as possible, be advised of the actual financial status of their debtor in respect to personal property, which, save for the record, he would appear to own without charge. When a chattel mortgage is recorded, creditors already having claims may, with knowledge of that fact, elect whether they will extend the time of their payment, or proceed at once to collect them. Those who are invited to become creditors will not be misled by the apparent financial responsibility of the mortgagor, because of his possession of valuable personal property. The terms of the statute are held to be absolute in making a chattel mortgage, where possession remains in the mortgagor, void as to creditors unless it be recorded with diligence; and knowledge on the part of the creditor of the existence of the chattel mortgage will not preclude him from treating the mortgage as void. Mr. Faber's concurrent mortgage is, within these rulings, void as a chattel mortgage against Mrs. McInnes as a creditor in respect to her unsecured loans, and he is entitled to no relief against her, based on his claims of a mortgage lien on the chattels of the Company. If the goods were in fact mortgaged as chattels to Mr. Faber, and his mortgage were valid as against Mrs. McInnes, I am fully satisfied, from the evidence, that there has been no such disposition of the goods levied on and sold as, under *Woodside v. Adams*, *ubi supra*, is necessary to give to a chattel mortgagee a right of action against a purchaser of the equity of redemption by sale under a subsequent judgment.

(5 N. J. E. 691)

BONEY v. WILLIAMS et al.

(Court of Chancery of New Jersey. Aug. 10, 1897.)

CORPORATIONS—STOCK—RIGHTS OF CREDITORS—
MORTGAGES—AGREEMENTS TO SHARE IN
SECURITY—CONSIDERATION.

1. An agreement that payments of part of the amount of subscriptions to the capital stock of a corporation shall be secured by mortgage is void as against the creditors of the corporation, and cannot be the basis for relief on a cross bill seeking to enforce the agreement.

2. Where a person has loaned money to a mortgagor, and claims an equitable right to share in the security of the mortgage, to which he is not a party, he must establish, by the weight of the evidence, that all the persons interested as mortgagors and mortgagees agreed that he also should be secured by the mortgage.

3. This agreement must precede or coincide in point of time with the advancement of the money loaned. A promise made to the loaner, after he has advanced the money, that he may share in the security of the mortgage, is voluntary and without consideration, and cannot be enforced.

(Syllabus by the Court.)

Bill by Morris Boney against John H. Williams and others to foreclose a mortgage, in which a cross bill was filed by defendant O. K. Landis. Heard on bill to foreclose, etc.

This is a bill to foreclose a mortgage made by the defendant John H. Williams to John J. O'Neill and George H. Becker to secure the payment of a bond made by Williams to O'Neill and Becker, conditioned for the payment of \$35,000 within five years from the date thereof, with interest payable half-yearly at the rate of 6 per cent. per annum. The mortgage was given on a lot of ground, and hotel thereon erected, situated in the borough of Sea Isle City, Cape May county, N. J. The mortgage is dated September 6, 1888, and was recorded September 8, 1888, in the Cape May county clerk's office. On December 1, 1892, O'Neill and Becker's administratrix (Becker having in the meanwhile died intestate) assigned the bond and mortgage to the complainant, Morris Boney. Afterwards, on June 29, 1893, Boney assigned the mortgage to the Sea Isle City Lot & Building Association No. 3, a corporation of the state of New Jersey. Afterwards, on June 30, 1893, the Sea Isle City Lot & Building Association No. 3 assigned the mortgage to the complainant as collateral security for the payment of eight promissory notes, each for the payment of \$1,522.50, making in all \$12,180. The notes were from time to time renewed, the bond and mortgage still standing as security for their payment, and on the 2d day of July, 1894, they still remained unpaid; and the sum of \$12,180 was due on them, with interest thereon from the last-named date. On September 6, 1888, Williams executed a mortgage on the mortgaged premises to James P. McGuigan for \$8,740, which the complainant admits to be prior to his mortgage, but which he claims has been reduced by payments on account made to McGuigan, or to other persons for him. The complainant also makes defendants

certain named judgment creditors, whose rights in the premises have been concluded by a decree in this suit. The bill further states that the defendant Charles K. Landis recovered a judgment on July 10, 1893, against the Sea Isle City Hotel Company, in the Cape May circuit court, and issued thereon an execution, and levied upon the rights of the Sea Isle City Hotel Company in the mortgaged premises, which he caused to be sold, and himself became the purchaser by a deed from the sheriff of the county of Cape May dated May 16, 1896; that, under this deed, Landis claims some lien or estate in the mortgaged premises, which the complainant charges is subject to the lien of the complainant's mortgage. The bill further states that Williams is reputed to have made a declaration of trust, that he holds the title in trust for the Sea Isle City Hotel Company; and it charges that, if he has made any such declaration, it was executed subsequently to the complainant's mortgage, and is subject to its charge and lien. The prayer of the bill is for answer without oath, and for foreclosure and sale of the mortgaged premises. The defendant Landis is the only contestant in the case. He files an answer admitting the allegations of the bill to be true. He also files his cross bill alleging: That the Sea Isle Lot & Building Association No. 2 was the owner of the mortgaged premises, and entered into an agreement to sell the same to the Sea Isle City Hotel Company. That the hotel company entered into possession of the premises, and built a large hotel thereon at a cost of \$60,000, and has continued in possession until the complainant recently entered under his mortgage. That the hotel company, being in need of money, solicited a loan from the defendant Landis, and "upon its promise to secure his repayment by mortgage, the same as Third Syndicate" (a phrase indicating the Sea Isle City Lot & Building Association No. 3), Landis paid to the Sea Isle City Hotel Company, in cash, on July 3, 1888, \$1,538.87; July 31, 1888, \$1,506.41; August 27, 1888, \$1,410.30. That this indebtedness was the basis upon which the defendant Landis obtained his judgment at law in the Cape May county circuit court, set forth in the bill, and caused the hotel property in question to be sold, which he purchased at the sheriff's sale, as above stated. The defendant, in his cross bill, further states that the Sea Isle City Lot & Building Association No. 2, about September 6th, conveyed its lands to the defendant John H. Williams, and thereupon executed the mortgage to James P. McGuigan set forth in the bill, in trust for the Sea Isle City Lot & Building Association No. 2, which mortgage the defendant states was given to secure the price for the purchase of the land by the said Sea Isle City Hotel Company,—Williams acting in the transaction as a trustee, and having no interest in it whatever. That Williams thereupon executed to Becker and O'Neill the mortgage set forth in the bill of complaint, now held by the complainant.

The defendant in his cross bill then sets forth his equity as follows: "The whole consideration of the bond it [the mortgage to Becker and O'Neill] was so given to secure, also mentioned and described in the said bill of complaint, being the debt of the said Sea Isle City Hotel Company to this defendant for the said moneys loaned by him as aforesaid, and to the said Third Syndicate for moneys loaned, and which they might thereafter loan, to the said company; the said John H. Williams, John J. O'Neill, and George H. Becker acting in the transaction as trustees, and having no other right nor interest therein. That the said complainant and the said Sea Isle City Lot & Building Association No. 3, at the several times when the said deed of mortgage was assigned, transferred, and set over to them, respectively, as stated in the said bill of complaint, and at all times since the said mortgage was made and executed as aforesaid, each well knew the premises, and all the matters and things thereinabove set forth, and accepted the said deed of mortgage by the said assignments, transfers, and settings over, and particularly the said complainant, by the said assignment, transfer, and setting over of the same by virtue of which he seeks relief in this suit, took, received, and accepted the said deed of mortgage with full and particular knowledge and notice of the same, of the rights and equities of this defendant, in the said deed of mortgage, and of the trust for this defendant with which the same was charged when it came to his hands." By special replication the complainant, Boney, admits that Mr. Landis made the loans claimed to have been made by him; but he denies that these moneys advanced by Mr. Landis formed any part of the consideration of the mortgage now being foreclosed, and denies that the holders of that mortgage were trustees for Mr. Landis. He further denies that the Sea Isle City Lot & Building Association No. 3 had any knowledge of Landis' claim, denies that he (Boney) had any knowledge, and denies that Landis ever had any right or equity in the mortgage.

O. K. Landis, Jr., for complainant in cross bill, C. K. Landis. J. Willard Morgan and S. W. Beldon, for defendant in cross bill, Morris Boney.

GREY, V. C. (after stating the facts). It will be observed that the defendant Landis, who is the complainant in the cross bill, admits all of the allegations set forth in the original bill of complaint. He sets up by his cross bill his claim to an equitable right to share in the security of the mortgage which is being foreclosed. This equity he alleges he has because his loans and those of the association, or Syndicate No. 3, made or to be made, formed the whole consideration of the bond which the mortgage was given to secure. That Mr. Landis did make the loans, and that he made them to the Sea Isle City Hotel Company, and that they amounted to the sums before named,

and were made at dates mentioned, is not disputed. The sole question in dispute between the parties arises from the assertion on the part of Mr. Landis of his right to share in the security of this mortgage, and its denial on the part of Mr. Boney, the complainant in the original bill. The burden is therefore upon Mr. Landis affirmatively to establish his right by the proofs. There is no evidence in writing which expresses any contract or agreement on the part, even of the Sea Isle City Hotel Company, that Mr. Landis should share in the benefits of the security of this specific mortgage. The only writing which indicates in any way that Mr. Landis was to be secured at all consists of three receipts given to him at the time when he made the loan, which are in these words:

"Office of Sea Isle City Hotel Company, 116 North Third Street, Philadelphia, July 3, 1888. Received of Mr. Charles K. Landis \$1,536.87, being part of the amount for stock subscribed to the Sea Isle City Hotel Company, to be secured by mortgage upon same terms as Third Syndicate. S. W. Goodman, Sec'y."

"Office of Sea Isle City Hotel Co., 402 Locust Street, Philadelphia, July 31, 1888. Received of Charles K. Landis \$1,505.41, being part of amount for stock subscription to the Sea Isle City Hotel Company, to be secured by mortgage upon same terms as Third Syndicate. \$1,505.41. S. W. Goodman, Secretary."

"Philadelphia, August 27, 1888. Received of Mr. Charles K. Landis the sum of \$1,410.30, being part of amount for stock subscribed to the Sea Isle City Company, to be secured by mortgage upon same terms as Third Syndicate. S. W. Goodman, Secretary."

Interpreting these receipts by the words used, they indicate that the party receiving the money declares that the payments made were parts of the amount subscribed for stock of the Sea Isle City Hotel Company, and that the money paid was to be secured by mortgage upon the same terms as were given to the Third Syndicate. The phrase providing that the amount paid was to be secured upon "the same terms" does not state that Mr. Landis should, on his subscription for stock, have the same security as Syndicate No. 3 had for money loaned. The payments would not, in such case, "be secured by mortgage on the same terms," because Mr. Landis would thereby have not only the stock for which he subscribed, but also the security of a mortgage for the repayment of his subscription, while Syndicate No. 3 would have only the mortgage, without the stock. Mr. Landis would thus be secured for his payments, not on the same, but on much more favorable terms than the Third Syndicate. To secure them by mortgage upon the same terms, the declaration must be construed to mean that the terms to each should be the same; that is that Mr. Landis and Syndicate No. 3, for their subscriptions to the stock of the hotel company, would be secured by mortgage to be

given, which should equally secure both. No particular mortgage is indicated. The mortgage in foreclosure in this suit has been undisputedly shown to have been given, so far as Syndicate No. 3 is concerned, solely to secure moneys loaned, none of which were paid as subscriptions to stock. It is quite evident, therefore, if these receipts are to be deemed to mean what they say, and to point to the giving to Landis of a mortgage securing his payments "upon the same terms" as the Third Syndicate, that this mortgage given solely to secure moneys loaned by the Third Syndicate, and not subscribed for stock, is not the one in which Mr. Landis was to share. Mr. Landis, however, does not accept the receipts as expressing with precision the terms upon which he claims to share in the security of the complainant's mortgage. He testifies that the agreement of loan gave him an assurance of security in the mortgage, and the relation which the payments had to the stock was not that of a subscription, but of an option to receive stock, if he chose to exercise it, and that there was no specified time when he should exercise it. An examination of the circumstances preceding the giving and acceptance of these receipts will, I think, throw some light upon their intended meaning. The Sea Isle City Hotel Company was a corporation of the state of New Jersey. In the spring and summer of 1888 it was engaged in the construction of its hotel at Sea Isle City. The hotel company was short of funds. Mr. Landis, before any of the loans were made to him, was a subscriber for shares of the stock of the hotel company. In May, 1888, as appears by the deposition of the secretary of the company, the secretary was instructed to communicate with Mr. Landis as to his promise to subscribe for two hundred additional shares of stock. In the minutes the entry appeared in these words, under date of the meeting of May 7, 1888: "The secretary was instructed to communicate with Mr. Landis as to the promise made by him to subscribe to 200 additional shares of stock." The secretary testifies that he acted in accordance with the instructions of the minute, and that it was some time after this that the loans were made on which the receipts were given to Mr. Landis. The first loan was made by Mr. Landis on July 3, 1888. The memorandum in the minutes and the testimony of the secretary certainly justify the inference that in May, 1888, the hotel company understood that Mr. Landis had promised to subscribe for 200 additional shares of its stock, and that it had notified Mr. Landis of this understanding. Mr. Landis, when examined in this case after this testimony was before the court, gave neither denial of such a promise nor of the notice from the secretary, though he testified as to both the secretary's statements and the minutes upon other points. I think I am bound to believe that in May, 1888, Mr. Landis knew that the hotel company understood that he had promised to subscribe for 200 additional shares of its stock. Short-

ly after this notice, to carry into effect his promise to subscribe, Mr. Landis, in July and August, 1888, paid these moneys, and accepted without protest these separate receipts, each of which stated that he had made partial payments for stock subscribed to the hotel company. Nothing on the face of these receipts indicates an option, and nothing is proven, except by the testimony of Mr. Landis, as to any mention of an option, and by him only in the most general terms, without statement of the time when, place where, or person with whom, he agreed for an option. The secretary, Mr. Goodman, swears that, as he understood it at the time the receipts were given, the words, "being part of amount for stock subscribed," etc., accurately stated the fact. Mr. Landis has himself, so late as December, 1892, indicated the same view of the contract on which he advanced these moneys. In his letter to the hotel company of that date he states that he paid the money "under conditions mentioned in the receipts for the same, as a subscription to certain stock" of the hotel company. He thus, four years after the event, joins Mr. Goodman in asserting the accuracy of the definition of the nature of the payments as stated in the receipts. These three separate written memoranda, made at the time the moneys were paid, the statements of the witness who drew two and signed all of them, and the letter of the man who paid the money, and without objection accepted all three of the receipts, all agree that the receipts were given for part of the subscription to stock. On the other side is indefinite and unsupported testimony, given nine years after the transactions happened, vitally changing the expressed declaration from a payment of subscription to an agreement for an option to subscribe. I think the weight of the testimony shows that the receipts, when taken, meant what they expressed, and that Mr. Landis paid these moneys as part of subscriptions for hotel stock, on the understanding that he was to be secured by mortgage upon the same terms as the third syndicate.

The counsel for the defendant, on the assumption that the evidence establishes the fact that the payments were loans, with an option to subscribe for stock, cites the cases of *Totten v. Tison*, 54 Ga. 139, and *Burt v. Rattle*, 31 Ohio St. 116, as authority that a corporation may borrow money and guaranty its payment with an option to the loaner to become a stockholder. In both these cases the transactions passed upon depended upon the construction of statutes peculiar to those states, so that the decisions are of little value in the case under consideration. In each case, however, the court held that the transaction between the corporation and the other party was a loan, and not a subscription to stock, while in the case in hand the proven payment was made on account of a subscription to stock, with a provision that the payment should be secured by mortgage. There has been no showing of any authority in the hotel company to issue

even preferred stock, with the statutory privileges allowed by our corporation act; and, of course, no authority can be claimed for the proposition that a payment on account of the capital stock of a corporation can be secured by the mortgage of its property to the subscriber. By such a method all subscriptions to capital stock might be secured, and the creditor of the corporation, who can, under ordinary circumstances, look only to the capital stock, would be deprived of all remedy. No evidence has been submitted to show under what statute of New Jersey the hotel company was incorporated, but no statute justifies such an inequitable procedure. It is clearly such a diversion of the capital of the corporation as is in derogation of the rights of the creditors of the corporation, of which the Third Syndicate was one. See principles laid down in *Wilkinson v. Bauerle*, 41 N. J. Eq. 644, 7 Atl. 514. This illegal course is, by the weight of the evidence, shown to have been taken; and the affirmative relief sought by the cross bill should, on this ground, be refused.

If there were any doubt of the illegality of the transaction sought to be enforced, I cannot find that Mr. Landis has so carried the burden of proof of his case that his right to share in the complainant's mortgage has been established. He nowhere, even in his own testimony, shows that the hotel company agreed that he should share in this particular mortgage. That is left to be inferred from the fact that the receipts stated that his payments were to be secured by mortgage on the same terms as the Third Syndicate, and, as this mortgage was given to the Third Syndicate, it is insisted that this security must be that intended. No action to bind the hotel company is shown, save by the receipts, and, as it is claimed, by conversations between Mr. Landis and "some of the stockholders of the hotel," who came to him and explained its financial embarrassments. "I was informed," he says, "that there was a committee appointed, of five, and that the other people would take just exactly the same as myself." "I don't know how the committee was appointed, —whether it was from the Third Syndicate, exactly, or from the hotel company; but I told them I would be willing to advance enough to lay the floor and do the plumbing, as my share, with the understanding that the other parties would take care of the furnishings, and I would take a receipt which would explain the matter, and secure me in the way of a loan. I was told that this committee consisted of George H. Becker, Michael J. Kelly, Mr. Boney, Mr. Class, and Mr. Foederer, making some five people." Mr. Landis further testifies that he had conversations with Mr. Boney touching the matter of the security to be given, but he was unable to name any time or place when or where any such conversation occurred. He testifies that he could not recall particularly what the conversations were, save that he had asked Mr. Boney what he thought the security would be, and Mr. Boney said it

would be ample, and said it would be the same as the other. He did not designate them by name, but that was understood by Boney and himself. The witness was unable to identify this conversation, or to relate it to any particular occasion. The nearest that I can find from the testimony of Mr. Landis that he defines his claim is his statement, "When I loaned that money, Mr. Boney and every one of these men gave me a great deal of encouragement to loan it, and I was to be thoroughly well secured, the same as the Third Syndicate." On the other hand, Mr. Boney, in his testimony, denies that he had any such conversations with Mr. Landis, and denies that he ever had any information that Mr. Landis claimed to have any interest or right to participate in the security of the mortgage. No proof is offered of any corporate action by the board of directors or stockholders of the hotel company. The nearest is the reply of the secretary, made over eight years after the event happened, who, when asked by whom it was likely he was instructed to draw the receipts, answered, "No doubt, by its president, or members of the board." The evidence is too uncertain to establish as a fact that the hotel company itself ever arranged to secure Mr. Landis by allowing him to share in the security of the complainant's mortgage. But, if this is doubtful, there is an entire lack of proof that the Third Syndicate ever agreed to share their security with Mr. Landis. It was necessary, in order that he should have this benefit, that all three of the parties—Mr. Landis, the hotel company, and the Third Syndicate—should agree. No one or two of them could bind the other. Mr. Landis and the hotel company could not contract that the Third Syndicate should allow Landis to share in the mortgage security, unless the syndicate joined in the contract, and this assent of the Third Syndicate must have been a part of the original agreement on which Landis parted with his money; for a consent by the Third Syndicate that Landis should share in the mortgage, given after both had made their payments, would have been a mere naked promise to confer a benefit, not capable of enforcement. There is no evidence, even of Mr. Landis himself, which proves that the Third Syndicate agreed to allow him to have the benefit of their security, and thus subject itself to the risk that the mortgaged premises might not be sufficient to pay its own claim; and to the acceptance of a compulsory pro rata dividend with Mr. Landis of the insufficient proceeds. The latter testifies that he conversed with individuals, and with a committee, but he does not show that either had, or claimed to have, authority from the Third Syndicate to agree that he should share in this mortgage; nor, as I understand his testimony, does he declare that the Third Syndicate ever did so agree. While on the stand, under cross-examination, Mr. Landis was quite restive when it was sought to induce him to define the times and places when he had the conversations upon which he bases

his claim; and at one point his counsel interrupted to say, "The witness don't state that he had any particular conversation with anybody in particular which induced him to give the money which he did on the receipts. There were operations conducted by a number of gentlemen, and others were conversations with all of them." This exposition of the testimony of this witness is a fair summary of the evidence which he gave. The obligation sought to be imposed upon the holders of the complainant's mortgage is not defined to have arisen upon any agreement entered into by the owners of the mortgage, or by persons shown to have been at the time authorized to act for those interested; but general conversations on the general subject, held at various unnamed times and places with various persons, some of whom held at some undefined time offices in the corporation interested, are appealed to for the purpose of establishing a right to share in this particular security. The conversations related, even if unexplained, do not support so definite and violent a conclusion. So the claim that the mortgage was made for the sum of \$35,000, which is in excess of the sum actually advanced by the Third Syndicate, in order to secure Mr. Landis, is fully met by the proof that it was expected, when the mortgage was drawn, that the Third Syndicate would advance the whole amount; and the cessation of its payments when it had advanced \$19,200 is also explained by the fact that at that stage of the payments the doubts as to the priority of the mortgage over the hostile claims of lienholders alarmed the Third Syndicate, and prevented the making of further advances. Mr. Gorman, who directed the drawing of the mortgage, and Mr. Kohn, who had been a member of the association, or Syndicate No. 3, almost from its origin, are explicit that the mortgage was made to secure the Third Syndicate only, and that Mr. Landis' loans were not to be secured by it. Mr. Gorman explains that the mortgage was made to Messrs. Becker and O'Neill, and not directly to the Third Syndicate, because of the embarrassments threatened by the claims of the lienholders, which have since been settled. It was given on the demand of Syndicate No. 3.

The issue presented by the cross bill is whether the consideration of the bond which this mortgage was given to secure was in part Mr. Landis' advances. He does not set up any equity claiming a right to share in the mortgage because he was induced to loan his money in that expectation, with the knowledge of the parties interested in the mortgage. He asserts by his cross bill that this mortgage was made to secure him and others, and that they now refuse him his right. Mr. Landis, as above shown, has not only failed to sustain the issue made by his cross bill, but he has not succeeded in presenting such a case as satisfies me that the association, or Third Syndicate, knew of the general assurances given to Mr. Landis, and with such knowledge permitted him to make the ad-

vancements, relying on the security promised by the hotel company's receipts, without warning him that he could not have it. Such knowledge, to establish an equity in favor of Mr. Landis, must have been brought home to the association before, or at the time, Mr. Landis acted; for if the latter, without knowledge of the association, relying on the assurance of the hotel company's officers, paid out his money, and these facts afterwards came to the knowledge of the association, they would, as above stated, create no equity in favor of Mr. Landis. The essence of such an equity is that the party to be charged knew of the reliance of the party wronged at or before the time when the payment was made or the position changed, and, so knowing, gave no denial of the right to rely. It is in such a case that the trite maxim applies, "Having been silent when they should have spoken, they may not now speak when they should be silent." The "when" and the "now" are the potent factors in the maxim. But nowhere in the testimony is there any proof of such knowledge on the part of the Third Syndicate at the time Mr. Landis acted, and its standing by, permitting him, without warning, to act in reliance on sharing in the association's security. Some years after the mortgage had been made an application was made by Mr. Gorman to Association No. 3, that Mr. Landis be permitted to participate in the mortgage. Mr. Kohn testifies, "The answer of the association was that when we made the loan to the hotel company there was no such question asked, and why should we at a later date allow any one else to participate in that mortgage, which we received for due consideration?" He further says the mortgage was given on the demand of his association (No. 3), and that the association's attorney had it in his custody, and the association several times assigned it, and used it as its own property. Mr. Gorman, in his testimony, when asked, "When did you first know Mr. Landis' claim to be entitled to participate in that mortgage?" answered, "It was some time after the preparation of the mortgage and its recording,—my best recollection would be, may be it was a year or two afterwards." Mr. Gorman further states that the purpose of the bond and mortgage was "to secure \$35,000, which the No. 3 had agreed to loan to the hotel company." Mr. Boney states that up to the time of the filing of the cross bill in this suit, which was in 1896, he had no information that Mr. Landis claimed any interest in, or right to participate in, the mortgage. In view of the merely suggestive character of the evidence submitted by Mr. Landis, and explicit denials of any knowledge of his claim by the Third Syndicate by the testimony of those who acted for it, I must hold that he has not shown any equitable claim to share in the complainant's mortgage. I will advise a decree that the complainant in the original bill is entitled to the relief prayed for, and that the cross bill should be dismissed with costs.

(56 N. J. B. 56)

H. C. TACK CO. v. AYERS et al.

(Court of Chancery of New Jersey. Aug. 12, 1897.)

DEEDS—FAILURE TO RECORD—IMPLIED NOTICE—JUDGMENT CREDITORS—PARTITION.

1. A partition of land held by three brothers as tenants in common was made by mutual release deeds. The deed releasing the interest of one of the tenants in the land divided and set off to his two brothers were not recorded within 15 days, as required by 1 Gen. St. p. 855, § 14, to make them valid against a subsequent judgment creditor of the transferor. *Held*, that no equity arose in favor of the grantees, as against the judgment creditor, to have any further conveyance from the judgment debtor.

2. A chain of title to land, showing the title in a father, and a devise by him to three sons as tenants in common, and release deeds from two of the sons to the third, conveying their title in a divided one-third of the land, is not sufficient to charge a purchaser making an examination thereof with notice that the land has been partitioned among the three sons by mutual release deeds.

3. 1 Gen. St. p. 855, § 14, provides that "every deed or conveyance of land which shall not be recorded within fifteen days after its execution and delivery shall be void and of no effect against a subsequent judgment creditor or bona fide purchaser, or mortgagee for a valuable consideration not having notice thereof." *Held*, that whatever is sufficient to charge a purchaser with notice is sufficient to charge a judgment creditor.

Bill by the H. C. Tack Company against Melancthon S. Ayers and others to foreclose a mortgage. Heard on bill, answer, and proofs. Decree for defendants.

George P. Rust and John B. Humphreys, for complainant P. W. Stagg, for defendants.

PITNEY, V. C. The only contested question in the cause is as to the order of priority between the complainant's mortgage and a judgment held by the defendant Ayers, who, as he claims, has a lien upon an undivided portion of the mortgaged premises. The premises in question consist of a lot of about one acre of unimproved and unoccupied land devised by a father, David Wilson, to three brothers, Henry A., George L., and Charles B., Wilson. On April 26, 1882, the three brothers made a partition of the premises into three equal plots by three several deeds, all bearing date April 26, 1882, each expressed to be made in consideration of one dollar, in each of which two of the brothers released to the third the plot intended to be allotted to him, the result of which was that each brother became seised in severalty of an equal divided one-third part or plot of the acre. The deed to Charles Wilson was recorded on the 14th of March, 1883; and on the 20th of May, 1890, he conveyed his plot to his two brothers, Henry and George, by deed expressed to be in consideration of \$900, which was duly recorded on the 23d of May, 1890. The result of these conveyances was to vest the title to the whole original lot in Henry and George; that is, they were tenants in common of Charles' plot, and each held in severalty one of the other

plots. In that condition of things, Henry and George made the mortgage set out in the bill, dated and recorded in September, 1893, conveying the whole plot to the complainant to secure promissory notes given by them to the complainant. The two deeds, however, from Charles and George to Henry, and Charles and Henry to George, of the two plots set apart to each of them in the original partition, were not recorded until the 26th of March, 1894, leaving the apparent title of those two plots still in the three brothers. In the meantime, to wit, on the 19th of February, 1894, one McComb recovered a judgment against Charles for \$486.49 in the Bergen county circuit court, which was afterwards assigned to the defendant Ayers. Under that judgment Ayers claims a lien superior to the complainant's mortgage upon one equal undivided third part of the two several plots set off to Henry and George. His claim is based upon the fourteenth section of the act respecting conveyances (1 Gen. St. p. 855), which declares "that every deed or conveyance of land which shall not be recorded within fifteen days after its execution and delivery shall be void and of no effect against a subsequent judgment creditor or bona fide purchaser or mortgagee for a valuable consideration not having notice thereof." Counsel for complainant seeks to evade the literal effect of this statute in several ways. First, he says that by the will under which the three brothers claim this land the legal title was not vested in them at the time the judgment was recovered, and therefore no lien was acquired. Without setting out the will at length, I think that point cannot be sustained. His next point is that the legal title having been conveyed away, and the title absolutely vested in the mortgagors before judgment, there was nothing left for the judgment against Charles to fasten upon, and that the general rule is that a judgment creditor is not a bona fide purchaser for value, and cannot be classed with a person who has parted with anything of value on the strength of apparent title; citing in that behalf the cases of *Harney v. Bank*, 52 N. J. Eq. 697, 29 Atl. 221, and *Cressee v. Improvement Co.* (N. J. Ch.) 35 Atl. 451, at page 455, and other cases there cited. The general principle, undoubtedly, is that a mere judgment creditor is not entitled to the vantage ground of a bona fide purchaser or mortgagee who has parted with value on the strength of an apparent title; but the difficulty in the way of counsel's present argument is that the statute in question, as was pointed out in the cases just cited, places a judgment creditor on a higher plane in this respect than either a purchaser or mortgagee, and it is impossible to avoid the effect of that language. The unrecorded deeds from Charles to Henry and George must be held absolutely void, against the judgment creditor, unless he had actual or implied notice of them, and the complainant's mortgage must fall with them. Some evidence was offered as to the possession of this lot by the mortgagors, from which

it was faintly argued that a judgment creditor was bound to take notice that they were the exclusive owners; but the proof in that respect failed, and the case must stand unaided by any implied notice arising from possession. In fact, there was no actual, exclusive occupation.

But counsel for complainant placed his case on higher ground, and made a further argument, which may be divided as follows: First, he says that the chain of title of the premises indicated clearly to the judgment creditor that there must have been a partition. The interest upon which he claims a lien is, as we have seen, an equal undivided one-third part of the equal divided two-thirds of the whole, viz. the two plots set off to Henry and George; and, in order to show any title to that two-thirds part, defendant is obliged to resort to the title of the three brothers under the will of their father, and, back of that, to the deed to the father on record. He cannot rely upon mere possession in his judgment debtor, for he had no other or greater possession than his brothers had, and in point of fact there was no actual possession. This chain of title charges him with notice that his debtor held as tenant in common with his brothers. He then finds the two brothers giving a conveyance to the judgment debtor for a nominal consideration of a distinct portion of the premises, which, when plotted, shows that it was exactly or nearly a one-third portion; and later the record shows the debtor reconveying to the brothers, for a full consideration, this one-third part. The contention of counsel of complainant is that these conveyances, in connection with the title to the whole land in the father, and the devise to the three sons, clearly indicate that there had been a conventional partition carried through by the execution of mutual releases. The precise line of argument is this: That the judgment creditor, or the sheriff as his agent, in looking for landed property upon which to levy, would have found none whatever indicated by any actual possession; that his next resort, in the ordinary course of business, would have been to search the record of deeds in the name of the debtor as grantee, which would have led him, necessarily, to the conveyance by his two brothers to him, for a nominal consideration, of a distinct plot of land not marked on the ground by any metes and bounds, and a reconveyance of the same by the debtor, for a valuable consideration, to the two brothers. Further searching, he would have learned, as a matter in pais, that the judgment debtor was the son of a certain man, who was deceased. Looking then in the name of that man as grantee, he would have found a deed to the father of a block of land, which, when plotted and placed by its calls on the ground, he would have found included in its metes and bounds the small plot previously conveyed by the two brothers to the debtor, and by the debtor back to the two brothers, and that the small plot was just one-third in size of the whole. He would then

have found that the father had devised that land to the three brothers, and in that way he would have found the title to the whole lot in the three brothers as tenants in common. Then he would have again met the two conveyances from the two brothers to the debtor, and back to the debtor by the two brothers, of a distinct portion equal in quantity, as plotted, to one-third of the plot devised. And this discovery, counsel argues, was enough to put him upon inquiry as to whether or not there had been a partition and joint releases executed, and that, if he had inquired of the two brothers, he would have at once ascertained the true facts. The question is whether such discovery of the situation of the title would have been sufficient notice to him to put him upon inquiry of the two brothers. It is undoubtedly the rule that the judgment creditor is bound by the contents and recitals in the deeds composing the chain of title of his debtor. And it must also be admitted, for present purposes, that, if the facts are sufficient to put him upon inquiry, it was inquiry of the two brothers, which must, in the ordinary course of business, have led him to a discovery of the unrecorded conveyances. This consideration frees the case from some of the embarrassing circumstances found in many of the decided cases, and confines the discussion to the narrow question as to whether the judgment creditor was put upon inquiry. The circumstances which have been held sufficient to put a party upon inquiry are not such as might excite the suspicion of an unusually cautious or curious person, but such as would arrest the attention of a person of average, cautious temperament, and ordinary intelligence, and familiarity with the work of looking into titles. The rule has been stated in a case cited by complainant (*Knapp v. Bailey*, 79 Me. 204, 9 Atl. 124) as follows: "The doctrine of actual notice implied by circumstances supports the rule that if a party has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further inquiries, and he avoids inquiry, he is chargeable with notice of the facts which by ordinary diligence he would have ascertained. * * * As to what would be a sufficiency of facts to excite inquiry is too difficult of definition to admit of any definite rule, each case depending on its peculiar facts." The question is one of implied notice, as distinguished from constructive notice. There is no difficulty as to the character of the general inquiry into the chain of title. It is such as a proposed purchaser or mortgagee would make. For although a careful examination of the chain of title is not usual, and is generally unnecessary, in making levies under judgments, yet the legislature, in this regard, has placed judgment creditors and purchasers and mortgagees on the same footing, and whatever will charge purchasers and mortgagees with notice will charge judgment creditors. Besides, in this case, as we have seen, no levy could have been made without exam-

ining the records, which would have produced the information above stated. The only question, then, is whether the circumstances above stated were sufficient to put a proposed purchaser for value upon notice; and I come, with some regret, to the conclusion that they are not sufficient. It is not worth while to recite the authorities. I have examined all the cases in this state, and many of those cited in the notes to *Le Neve v. Le Neve*, 2 White & T. Lead. Cas. Eq. 109, and also in 16 Am. & Eng. Enc. Law, tit. "Notice," and I find none, nor has the industry of the counsel of complainant been able to point out one, that goes so far as I am asked to go here. *Insurance Co. v. Halsey*, 4 Sandf. 565, on appeal 8 N. Y. 271, may be cited as an extreme case, but it fails to reach the case in hand.

The next point made by counsel is this: Granting that the contract for partition rested merely in parol, yet that it was executed on the part of Henry and George by their conveyance to Charles, and hence an equity arose in their favor to have conveyances from Charles for the shares allotted to them severally; that this equity was not discharged by the subsequent conveyances from Charles to them, and that it still exists; and that under the rule acted upon in *Harney v. Bank*, 52 N. J. Eq. 697, 29 Atl. 221, it is superior to the judgment. The simple and complete answer to this contention is that the contract for partition was fully executed and fulfilled by the execution and delivery of the deeds by each and all of the parties. This leaves the brothers Henry and George without any equity against Charles in respect of the land in question. I am unable to perceive upon what principle they could call upon him for a further conveyance or conveyances. Their failure to record their deeds was the result of their own neglect, and raised no equity against Charles. To adopt the reasoning of the counsel of complainant on this point would be to repeal the recording act, so far as judgments are concerned. I will advise a decree in accordance with the foregoing views.

(55 N. J. H. 615)

MERSELIS v. VAN RIPER et al.

(Court of Chancery of New Jersey. Aug. 21, 1897.)

MORTGAGES—DOWER—REDEMPTION BY DOWRESS —APPORTIONMENT OF DEBT—SALE ON FORECLOSURE.

1. A widow in possession as dowress, under her right of quarantine, of premises which had been mortgaged by her husband while single, is entitled to protect her estate therein by redeeming from such mortgage.

2. A dowress, in redeeming from a mortgage in order to protect her estate, should, as between herself and the devisee of the fee, pay a proportionate amount of such debt, to be ascertained by apportionment on the basis of the present value of her life estate.

3. On foreclosure of a mortgage against the widow and the devisee of the mortgagor, where the widow is entitled to dower, which has not been assigned, the proportion of the debt to be borne by each, respectively, must be ascertained

according to the life tables, and the premises sold, subject to the dower, to pay the amount fixed as belonging to the devisee to pay, and the widow's right to be sold to pay the other portion.

Bill by Margaret D. Merselis against Thomas C. Van Riper and others to foreclose a mortgage. The widow of the mortgagor, Mary E. Van Riper, answered, claiming dower and other relief. Heard on exceptions to a master's report. Exceptions sustained.

This is an ordinary bill to foreclose a mortgage made by a man, while single, upon a house and lot in the city of Paterson. He afterwards married the defendant, Mary E. Van Riper, and died, leaving one child, the defendant Mrs. Van Iderstein; having devised the premises to his sister, Mrs. Merselis, the complainant, and two others, in trust for the use of Mrs. Van Iderstein for life, and at her death to go to her children. The complainant, Mrs. Merselis, became the owner of the mortgage, by assignment, before the death of her brother. To this bill the widow alone made answer, and therein set up that at and before the death of her husband the premises were occupied in part by her and her husband, and in part by tenants of her husband, and that she remained in possession, by right of quarantine, of that part of the premises which had been occupied by herself and her husband, and that no dower had been assigned to her. She alleges by her answer that there is no practical difficulty in assigning dower to her, and that she is willing to unite with the trustees of Mrs. Van Iderstein in the expense of putting and keeping the premises in order so that she can enjoy her dower, and the trustees have the benefit of a good rent for the balance of the premises. She prays that her dower may be set off to her before any decree of foreclosure be made, and that the mortgage debt may be apportioned between that part of the premises to be set off to her as dower and the remainder, and that she may have an opportunity to redeem her estate of dower upon equitable terms, if such redemption is necessary, or that the incumbrance of the mortgage may be first satisfied from the remainder of the premises, and that her legal and equitable rights may be ascertained with respect to the mortgaged premises and the incumbrance thereon, and, if the mortgaged premises shall be decreed to be sold without first setting off dower, that the same may be offered for sale in the first place subject to her dower,—she being willing in such case to bid for the premises the amount due to the complainant, with costs of suit and sheriff's fees,—and that her right as dowress may in all other respects be protected by the decree of the court. A motion to strike out that answer was refused by one vice chancellor; and then, on an application to another vice chancellor, an order of reference was made to a mas-

ter, on the ground that the answer did not set up any defense or present any question except such as was the appropriate subject of reference to a master. The order is special,—not only to ascertain and report the amount due to the complainant for principal and interest on her mortgage, but also to report upon “the other questions raised by the bill and answer filed herein.” When the matter came before the master the widow, by her counsel, attended and submitted an argumentative proposition to him in the presence of the counsel of complainant, which admitted that the complainant was entitled to a sale of the premises in such manner as to insure her getting her money, but that the foreclosure should not be so managed as to cut off the widow’s dower and convert the property into money, if such course could be avoided without risk to the complainant; that the mortgage debt should be apportioned between the estate in fee and the estate for life of the widow, and that each estate should be sold for its proportionate share,—that is to say, that the whole property should be sold, and sold subject to the dower right, to raise one share of the debt, and then the dower right should be sold to raise the other portion. If the total realized from both sales is not sufficient to pay the complainant’s debt, then the superior right of the complainant should come in, and have the whole estate offered for sale, as the most advantageous mode of sale in order to raise the complainant’s money. In other words, the proposition was to ascertain the share of the mortgage debt properly payable by the widow, and to sell the fee, subject to the estate for life in the widow, to pay the balance, so as to enable the widow to protect her interest by either paying the amount due by her, or buying it in. And the widow offered to give a bond, if required, with security, to secure the raising of the entire amount due the complainant, with interest and costs of suit, upon the two separate sales. She also offered before the master, and at the hearing of the exceptions, to pay at once to complainant the amount of the mortgage debt, with interest and costs, and take an assignment of the mortgage and decree; the decree being made in accordance with her insistence of her rights. The master declined to adopt this view, and reported the amount due, and then, with regard to “all the other questions raised by said bill and answer,” he reported the condition and size of the curtilage; that the value was ample security for the amount of the complainant’s mortgage, and that the premises are so situated that one-third thereof could not be set off without great injury to the value of the remainder, if at all; and that, as a matter of law, in his opinion, the premises should be sold in one parcel to raise and pay the amount of the complainant’s mortgage, and free of dower. The exceptions are to this finding.

Eugene Stevenson, for exceptant. Henry Traphagen, for respondents.

PITNEY, V. C. (after stating the facts). The question of fact as to the value and situation of the premises was reported on the master’s personal knowledge. No evidence was given on the subject of their being so situate that dower could or could not be assigned, except that of Mrs. Van Riper; and her evidence was to the effect that it was practicable to assign dower to her, and this evidence appears to have been undisputed. Her age, also, was given. The master, however, it is to be observed, does not find that it was impracticable to assign dower by metes and bounds, but, in effect, that such assignment would greatly injure the value of the remainder of the premises. The right of the widow to have her estate in dower protected in the mode proposed by her seems to be indisputable. 2 Jones, *Mortg.* § 1067; *Opdyke v. Bartles*, 11 N. J. Eq. 133. The widow is in possession of a defined portion of the premises as dower, under her right of quarantine. Her possession is a freehold estate. It may continue for her life, and can be reduced in extent only by an actual assignment of dower. She is entitled to have this estate protected by redeeming this mortgage. As between her and the complainant, she is bound to pay the whole. As between her and the owner of the fee, the amount she should pay is to be apportioned upon the basis of the present value of her life estate. And, if the owner of the fee in this case had paid off this mortgage, she would be obliged to pay an amount to be ascertained in the same manner as her share in the proceeds of the sale of the whole premises would be ascertained. This mode of dealing with the widow’s right of dower in such case was adopted by Chancellor Kent in *Swaine v. Perine*, 5 Johns. Ch. 482, at page 493, and in this state by Chancellor Green in *Chiswell v. Morris*, 14 N. J. Eq. 101. 2 Scrib. *Dower* (2d Ed.) p. 696; *Bell v. Mayor*, etc., 10 Paige, 49; *Foster v. Hilliard*, 1 Story, 77, Fed. Cas. No. 4,972. I am unable to see any reason why the widow should not be entitled to redeem this mortgage for the protection of her life estate in the premises while she is in possession of a specific portion under quarantine, and before dower is assigned her, precisely as would a grantee by the husband of a portion of the mortgaged premises, subject to a just proportion of the mortgage debt. In such case the practice is well settled in New Jersey to sell the property in parcels, if the complainant is not prejudiced thereby. And the right of a party owning a portion of the mortgaged premises to stop a sale by paying a proper share of the amount due is well settled. *Stillman v. Stillman*, 21 N. J. Eq. 126; *Hoy v. Bramhall*, 19 N. J. Eq. 563; *Mickle v. Rambo*, 1 N. J. Eq. 501; 2 Jones, *Mortg.* §§ 1063, 1067; *Pearce v. Morris* (1870) 5 Ch. App. p. 227 (where the subject is fully dis-

cussed); *Howard v. Harris*, 1 Vern. 33; *Palmer v. Danby*, Prec. Ch. 137 (where it was held that a dowress redeeming had a right to hold the mortgage against the heir). And see 1 Pow. Mortg. *311 et seq., and notes; *Saville v. Saville*, 2 Atk. 463; *Howard v. Queen's Trustees*, etc., 2 Mod. 174; *Coote, Mortg.* *517, *526. By strict right, the complainant must not be hindered or delayed in his foreclosure by any questions arising between the defendants out of dealings with the premises subsequent to the mortgage. But this is a right on the part of the complainant that is seldom used in this state to prevent the defendants from appearing before the master, and having him arrange the sale in parcels, provided such a sale does not affect the value of the premises in such manner as to prevent their bringing enough to pay the whole amount due; the time occupied in settling the rights of the defendants inter sese not usually causing such a delay as to seriously interfere with the complainant's rights.

Strict practice requires that the conflicting rights of the several defendants, which arise subsequent to the giving of the mortgage, should be administered and settled upon cross bills; but it has not been the practice in this state to drive parties to that expense, but a well-settled practice has arisen of settling such rights before the master. At first I was inclined to think that there should have been a cross bill in this case, but the complainant herself is one of the trustees under the will of the mortgagor and husband of the widow, and as such is the legal owner of the premises, subject to the dower right of the widow; and there is not the least room to suspect that the rights of the cestui que trust are being prejudiced for want of her having a day in court. The result is that the exceptions must be sustained. The proportion of the debt to be borne by the dowress and devisee, respectively, must be ascertained according to the life tables, and the premises sold, subject to the dower, to pay the amount fixed as belonging to the devisee to pay, and the widow's right to be sold to pay the other. The costs to be borne in the same proportion. It will probably not be necessary to make a reference in order to make this ascertainment. The details of the decree will be settled upon notice.

(56 N. J. B. 43)

COOPER v. COOPER et al.

(Court of Chancery of New Jersey. Aug. 11, 1897.)

WILLS—CONSTRUCTION OF DEVISE—LIFE ESTATE—DOWER—ELECTION BY WIDOW—ESTOPPEL.

1. Under a devise of specific real property to testator's executors, "in trust, for the term of one year (providing my wife is still living and remaining my widow), to hold the same, receive all the rents, issues, and profits, * * * and paying all the demands against said premises, and the profits * * * to go into and become a part of the residue of my estate, and, at the end of the said one year after my death (my

wife still living and remaining my widow), then I order and direct my said executors * * * to turn the said premises over to her, to have full care and charge of said premises, paying all taxes and demands against said premises, during the term of her natural life, or so long as she remains my widow; she also to receive all collectible back rents due on said premises, and at the death of my said wife, or she again marrying," etc.,—the gift to the widow is an estate for life, operative, in the absence of dissent, to bar her dower.

2. Where testator, after having devised a life estate in certain real property to his widow, specifically devised the residue thereof "absolutely and in fee," the widow cannot have both such life estate and dower, but must elect.

3. A power and direction to executors to sell and convey, giving a "good and sufficient deed," implies a conveyance by them free of dower, so that the widow would be required to elect.

4. The fact that testator, who had charged his entire estate with an annuity for his widow, provided by a codicil that his daughter should have the proceeds of certain property free from such charge, shows that he did not intend that the widow should have dower in his estate.

5. A widow is not estopped to make her election to take dower, instead of benefits under the will, by having accepted certain payments on account of an annuity provided, and certain articles of personalty bequeathed to her, by the will of her deceased husband.

Bill by Catherine L. Cooper against William J. Cooper and others for dower. Heard on pleadings and proofs. Bill dismissed.

The complainant by her bill asks to be endowed of all the real estate whereof her husband, John Cooper, late of the county of Camden, died seised. He died on the 18th of April, 1894, testate of a will executed on the 25th of October, 1893, with a codicil executed on the 21st of March, 1894. His estate consisted of both real and personal property, of the value of nearly \$100,000 each. He left three children—two sons and a daughter—by a former marriage, who are the defendants herein. By the first item of his will he made the usual direction for the payment of his debts. By the second item he gave to his wife, the complainant, all his household goods, lumber, garden tools, chickens, etc., about his house and premises on Cooper street, Camden, being his homestead; also all the silverware, books, etc., that he might own at the time of his death. He also gave his wife full possession of his Cooper street residence for the term of one year (she remaining his widow) after his death, free from any taxes whatever, except water rents, which she must pay, and his executors to keep the taxes and necessary repairs to the premises paid, and keep it in good, tenantable condition; and at the end of one year he directed his executors to sell and dispose of the Cooper street premises, "and give to the purchaser or purchasers thereof good and sufficient deed or deeds in the law, * * * and the proceeds thereof to go into, and become a part of, the residue of my estate." The third clause is as follows: "I give and bequeath to my executors hereinafter named, or the successor or successors of them, my three-story frame house and grounds situate

on Broadway, in the said city and county of Camden and state of New Jersey, in trust for the term of one year (providing my wife is still living and remaining my widow), to hold the same, receive all the rents, issues, and profits from the said Broadway premises, and paying all the demands against said premises, and the profits from said Broadway premises, to go into and become a part of the residue of my estate; and, at the end of the said one year after my death (my wife still living and remaining my widow), then I order and direct my said executors herein-after named, or the successor or successors of them, to turn the said Broadway premises over to her, to have full care and charge of the said premises, paying all taxes and demands against said premises during the term of her natural life, or so long as she remains my widow; she also to receive all collectible back rents due on the said premises; and at the death of my said wife, or she again remarrying," etc. By the fourth clause he ordered and directed his executors to set aside certain of his securities, or other good, paying investments, in order to create a sum sufficient to pay his wife the sum of \$2,700 yearly, payable semiannually for and during the term of her natural life, or so long as she remains his widow. By the eighth clause he gave, bequeathed, and devised to his two sons, H. M. C. and W. J. C., the undivided half part of the farm known as the "Cooperfield Farm," situate in Gloucester county, to be divided between them share and share alike, "absolutely and in fee." By the eleventh paragraph he ordered and directed his executors to sell his three houses situate on North Nineteenth street, in the city of Philadelphia, as soon as practicable, and give "good and sufficient deed or deeds in the law to the purchaser or purchasers thereof," and divide the proceeds among his three children. By the twelfth item he gave, bequeathed, and devised the equity that he owned in the premises known as "311 North Front Street," in the city of Camden, to his two sons, H. M. C., and W. J. C., "absolutely and in fee." By the thirteenth item he gave, bequeathed, and devised to his son H. M. C., "absolutely and in fee," the premises on Chestnut street, above Seventh street, in the city of Camden. By the fourteenth clause he gave and bequeathed to his daughter, S. K. J., the house and store situate at the corner of Fifth and Stevens streets, and the house and lot on Sycamore street, during the term of her natural life, and at her death the premises to go to her children. By the fifteenth item, using the same language, he devised a farm known as "Crystal Run Farm" to his daughter, S. K. J. By the seventeenth section he gave, bequeathed, and devised to his son W. J. C., "absolutely," the premises he owned on Wood street, Philadelphia, Pa. By the nineteenth clause he gave to his executors full power and authority to sell and convert

into cash all the rest, residue, and remainder of his estate, real, personal, and mixed, "and give good deed or deeds in the law"; and the proceeds arising therefrom he ordered to be divided into three equal shares among his three children, "first being careful that there is a sufficient sum set aside in my estate to carry out the provisions in the fourth item" of his will. By the twentieth item he declares that he wishes it distinctly understood, and orders and directs, "that all the bequests in this, my said will, is subject to a bequest of \$2,700 per annum to my wife, Catherine L. Cooper, in the fourth item of this, my will, during the term of her natural life, or so long as she remains my widow; and at her death, or she again remarrying, the aforesaid bequests to be free of the incumbrance made in the fourth item of this, my will." By the last item of his will he appointed his two sons executors, and gave them power "to give good and sufficient deed or deeds in the law for any property they may dispose of for the best interests of my estate." By a codicil he revoked the devise contained in the fourteenth item of his will, of a house and store in Camden to his daughter, S. K. J., and ordered that the executors named in his will should sell the house and lot, and give good deed or deeds in law to the purchaser or purchasers thereof, and that the purchase money thereof is not to be subject to any legacy or claim of his wife, Catherine L. Cooper. Under the second item of the will the widow remained in the mansion house, free of rent, for one year, and still remains therein. The executors, however, informed her that, if she remained after the expiration of the year, she would be obliged to pay rent. The first six months' annuity was paid to her in four different payments, beginning in May and ending in October, 1894. At the end of the first year (April 18, 1895), when the second six months' payment of the annuity became due, it was tendered to her, and she declined to accept it, and three months later (July, 1895), this bill was filed. The house in Broadway, which the executors were directed to turn over to her, was occupied by a tenant; and the executors directed the tenant to pay the rents to her that were due, and all that accrued after the 18th of April, 1895. The daughter of the tenant called on the complainant for the purpose of paying her the rent, but she declined to receive it. She did not file any dissent under the sixteenth section of the dower act. The executors delivered to her all the silverware of the testator, the same being on deposit in a safety vault.

S. H. Grey, Atty. Gen., and Henry I. Budd, Jr., for complainant. Howard M. Cooper, for defendants.

PITNEY, V. C. (after stating the facts). Three points are made by the defendants in opposition to this bill for dower: First, that by the third section of the will a devise for

life, or during widowhood, was made to the complainant of the Broadway premises, which bars her dower, under the sixteenth section of the dower act, unless she dissented therefrom within six months after the probate of the will, which she has not done; second, that the claim of dower is inconsistent with the terms of the will, and will disturb the disposition thereby made, and hence that the widow is put to her election between benefits under the will, and her dower at the common law; and, third, that she has already made such election, by accepting bequests of personalty under the will, and six months' payment of her annuity.

The first question depends upon the true construction of the third clause of the will. The complainant contends that there is no devise to her of any estate at law, either for life or during widowhood, in the Broadway premises, but that they are either devised in trust to the executors, and hence within the rule in *Van Arsdale v. Van Arsdale*, 26 N. J. Law, 404, or that the benefit taken by the widow is a mere duty of care and management of the estate, for which she is to have the net proceeds of its income. I cannot adopt this view. The gift to the executors is expressly in trust for the term of one year, "to hold the same, receive all the rents, issues, and profits, and paying all the demands against the said premises, and the profits to go into, and become a part of, the residue" of his estate. Now, it seems to me that that language limits the gift in trust to his executors for the term of one year. Then follows this clause: "At the end of the said one year after my death (my wife still living and remaining my widow), then I order and direct my said executors hereinafter named to turn the said Broadway premises over to her, to have full care and charge of said premises during the term of her natural life, or so long as she remains my widow; she also to receive all collectible back rents due on the said premises." Then follow an order and direction to his executors to sell the same, and the proceeds to go into, and become a part of, the residue of his estate. The language, "to have full care and charge of said premises," confirms the idea that the trust ceased at the end of one year; and it is to be observed that a continuance of the trust is not at all necessary to the power of sale. It was admitted by the counsel of complainant that the result of the bequest was to give to the wife the beneficial use of the premises, but it was earnestly argued that such provision did not result in giving her a legal estate. In my opinion, the direction to his executors "to turn the said Broadway premises over to her [his wife], to have full care and charge of said premises," etc., was, in effect, a gift of the premises to her for life. It put her in possession, and gave her the right to the possession and use during her natural life. And such a gift, according to all the authorities, is an estate for life. The fact that it is limited to her widowhood does not prevent it from op-

erating as a bar, in the absence of dissent. Such was clearly the decision of Chancellor Vroom in *Stark v. Hunton*, 1 N. J. Eq. 216 (a leading case on this topic); *Manners v. Manners*, 20 N. J. Law, 142; *Hance v. West*, 32 N. J. Law, 233; *Morgan v. Titus*, 3 N. J. Eq. 201; *White v. White*, 16 N. J. Law, 202 (where the provision was, as here, for life or widowhood); *Thompson v. Egbert*, 17 N. J. Law, 459; *Thomas v. Thomas*, 17 N. J. Eq. 356; *Wooster v. Cooper*, 53 N. J. Eq. 682, 33 Atl. 1050; *Kearney v. Kearney*, 17 N. J. Eq. 59. I have no doubt that the complainant can maintain ejectment for the premises in question. This result is, of course, fatal to the complainant's claim.

2. I think, also,—though it may not be necessary to express any opinion upon it,—that the second point must be resolved against the complainant, and that, if I am wrong in my first position, she should be put to her election between benefits under the will and her claim for dower, and that she cannot have both, on the plain ground that the assertion of her right of dower will interfere and be inconsistent with the disposition the testator has made of his property. The testator, in point of fact, disposed of all his real estate, most of it by specific devises, and where there was no specific devise he disposed of it by the direction and power of sale in his disposition of the residue of his estate; and in every instance it is plain, where there is a direct, specific devise, that the testator intended that the devisee should take an absolute and full estate. He uses the word "absolute" in two or three cases. By the term "absolute" I think he intended a full and complete estate. Then, when he directs a sale, he directs his executors to give "good and sufficient deeds." Now, I think that by that language the testator intended to direct his executors to give good and sufficient title. The will was not prepared by a skilled draftsman, and, in common parlance, to give a "good and sufficient deed" means to give a good and sufficient title, and I think that was the force of the language here used. Some of the older English cases, and perhaps a few in this country, have held that a direction to executors to sell and convey real estate did not necessarily indicate that they were to sell free and clear of the dower of the widow. But the modern decisions, which, in my judgment, are more in accordance with common sense, tend to hold that a power and direction to sell and convey necessarily includes the idea of conveying the title free and clear of dower. Except sales of real estate by the sheriff on common-law judgments, the cases where a sale of real estate is made by a husband without his wife joining him are very rare indeed. Ordinary purchasers will not accept a title with an outstanding inchoate dower upon it,—much less, one that has dower fastened upon it by the death of the husband. Such a title is not marketable, in the ordinary sense of that word. On this subject I refer to the cases already cited, and to *Colgate v. Col-*

gate, 28 N. J. Eq. 372, and the cases there cited; to *Stewart v. Stewart*, 31 N. J. Eq. 399; *Norris v. Clark*, 10 N. J. Eq. 51; *Griggs v. Veghte*, 47 N. J. Eq. 179, 19 Atl. 867. The provision in the codicil that his daughter shall have the proceeds of the sale of a certain house free from any legacy or claim of the widow is made to except this bequest from the effect of the general charge in the widow's favor found in the twentieth item. This provision in the twentieth item covers his whole estate, and, of itself, shows that the testator did not intend that his widow should have any other claim upon it. The proofs show that the provision by the will is much larger than would be her right as dowress, so that it is not probable that she would choose the latter.

On the third question submitted, laying out of view the failure to file her dissent, I do not think the widow has made any such election as will prevent her from making her election to take dower, instead of benefits under the will. I will advise that the bill be dismissed, with costs.

(55 N. J. E. 670)

EIBEL et al. v. VON FELL et al.

(Court of Chancery of New Jersey. July 30, 1897.)

VENDOR AND PURCHASER—FRAUD BY MISREPRESENTATION — RESCISSION OF CONTRACT—RATIFICATION BY CONDUCT—LACHES.

1. Where vendees purchased in reliance on the vendors' representation that the house in question was "a perfectly new house," or was "as good as new," when it was in fact an old building in part, which had been put in repair by the vendors, and some of the floor beams and weatherboards of which were rotten, the transaction may be rescinded at law, if such misrepresentation was made with knowledge of its falsity.

2. Such contract may be rescinded in equity, though such misrepresentation was innocently made.

3. Complainants purchased certain real estate, paying part cash, assuming the payment of an existing mortgage, and securing the remainder of the price by a mortgage to the vendors, and about 3½ years thereafter brought suit to rescind such sale on the ground that the house had been represented to be "a perfectly new house, in absolutely good condition," but was in fact "an old building, and had been put in repair and fixed up for the purpose of selling it as a new building." Though they knew of the falsity of such representations within two months after such purchase, complainants paid off their mortgage to the vendors before it was due, and also repaired the property on divers occasions, and collected the rents. The house was originally one story high, and defendants had raised it and put another story under it. They denied having represented it as a new house, and claimed that they explained to complainants what had been done, and told them merely that it was "as good as new." It was not clearly proved that the repairs made were necessitated by faulty construction, except the replacing of some of the old floor beams and weatherboards, which were found to be rotten, with new ones. *Held*, that complainants had ratified such purchase.

Bill by Mary Eibel and another against Auguste Von Fell and others to rescind a sale of real estate. Bill dismissed.

Warren Dixon, for complainants. George C. McEwan, for defendants.

STEVENS, V. C. On October 5, 1892, Auguste Von Fell and her husband, the defendants, sold and conveyed to Mary and Jacob Eibel, the complainants, a house and lot in Griffith street, Jersey City, for \$3,500. Of the consideration, \$1,000 was paid in cash at or before the delivery of the deed, \$2,000 was represented by a mortgage then on the property, payment of which was assumed by the vendees, and the balance (\$500) by a mortgage given by the vendees to the vendors. In March, 1896, the complainants commenced this suit to rescind the sale, the bill alleging that it was represented to complainants at the time they purchased that the house was "a perfectly new house, in absolutely good condition," and that they afterwards learned that it was "an old building, and had been put in repairs and fixed up for the purpose of selling it as a new building." The bill does not show when complainants first became aware of the falsity of the representation, but at the trial it was admitted that they knew of it within two months after the sale. Notwithstanding this knowledge, they paid to the defendants, in installments, before the money was due, the whole of the principal and interest secured by the \$500 mortgage, and in addition they repaired the property and collected the rents. They did not offer to reconvey until over three years after they had knowledge of the fact. It was admitted that the house, as originally built, was one story high, and that Mr. Von Fell, after he became the owner, raised it and put another story under it. At the trial he denied having represented it as a new house. He said that he fully explained to complainants what he had done, and that he told them merely that it was "as good as new." The evidence showed that after complainants took possession they were obliged, on different occasions, to make repairs. About a year after the purchase it was found necessary to replace some of the old floor beams and weatherboards, which were found to be rotten, with new ones. The carpenter work cost \$38, and there was some painting, the cost of which does not definitely appear. With this exception, it is not clearly proved that the repairs were necessitated by faulty construction. The plaintiffs now ask that the transaction be rescinded.

The rule of equity applicable to this subject is well settled. So far as applicable to the facts of this case, it may be stated thus: A court of equity will rescind a transaction entered into upon the faith of a material representation, false in fact, if the person to whom it was made relied upon it, and in consequence suffered injury. There is this distinction between the rule of equity and the rule of law: At law, moral fraud must be shown to have been present in the misrepresentation. *Cowley v. Smyth*, 46 N. J. Law, 382. In equity, the plaintiff may succeed, although the misrepresentation was innocent. *Arkwright v. Newbold*, 17 Ch. Div. 320; *Redgrave v. Hurd*, 20 Ch. Div. 1. Under these rules, if the representation was as the plaintiffs claim it

was, viz. that the house was a new house, they would, supposing there was no obstacle arising out of their own conduct, be entitled to succeed both at law and in equity, because the statement must have been false, to the knowledge of the defendant making it. If the representation was as defendants claim it was, viz. that the house was as good as new, then I think that the plaintiffs would still be entitled to succeed in equity, because the assertion, in this form, was false in fact, even if we assume that defendant, who seems to have personally superintended the work of reconstruction, did not know that the building contained the rotten timbers. It is true that it was the assertion of an opinion, but, as it seems to me, it was the assertion of an opinion which contained within it the assertion of a fact, viz. that the materials used in rebuilding were not rotten. Opinions of this kind may afford ground for an action. *Smith v. Corporation*, 28 Ch. Div. 15. Although the cost of replacing this rotten material did not probably exceed, if it amounted to, \$100, I cannot say that the defect was trivial. Had the real condition of the building been known to the complainants, I doubt very much whether they would have purchased for the price agreed upon.

There is, however, an objection to the complainants' recovery which seems to be insuperable. They both admit that, within two months after they purchased, they knew the house was not a new house. They say that they were almost immediately obliged to repair, because of the condition in which they found it. They had the rotten timbers replaced about a year after they bought. Notwithstanding this, they continued to pay the interest on both mortgages, and to pay the principal of one of them. They continued, moreover, to lease the different floors of the property to tenants, to collect the rents, and in all respects to deal with the property as their own. They kept on doing this for nearly three years and a half after they first discovered, as they say, the falsity of the representation, and for nearly two years and a half after they had replaced the rotten timbers. I think that by this conduct and these acts they ratified the transaction. *Pom. Eq. Jur.* § 916. It is said that the payments of principal and interest on the \$500 mortgage were made ignorantly, and under an apprehension that, if not promptly made, the mortgagees would foreclose, and thus forfeit their interest. But it appears that the payments of principal were made before they were due, and no reasonable explanation is given of those other acts, indicating an intention to affirm, to which I have alluded. The true explanation of their conduct appears to be found in the fact—not seriously controverted at the trial—that the property was really worth about what complainants paid for it; that it, for the greater part of the time, rented well, and yielded a fair return for the money invested; and that not until rents fell did complainants seriously enter-

tain the idea of questioning the transaction. Says Mr. Justice Depue in *Williamson v. Railroad Co.*, 29 N. J. Eq. 320: "The vendor may rescind the contract of sale and reclaim the property, until, with a knowledge of the fraud, he elects to ratify and confirm the sale. * * * Delay in exercising the power of rescission is evidence of an election to treat the sale as valid, of more or less weight according to the circumstances of the case, but of itself does not operate as an estoppel unless in the meantime superior rights of third persons have intervened." In that case the vendor, the car company, got nothing of value in return for the cars which it delivered, and did no acts in respect of the worthless bonds which it received in payment indicating an intention to ratify the sale after it became aware of the fraud. In the case in hand the vendees, long after they discovered the facts, continued to treat and deal with the property as their own. Both their acts, and their delay in exercising the power of rescission, seem to me to be strong evidence of an election to treat the sale as valid. I come to this conclusion the more readily because, if the plaintiffs' contention be well founded, they may still resort to an action of deceit, in which they will recover an exact equivalent for the injury which they claim to have suffered at the hands of the defendants. The justice of this case after so much delay will be far better subserved by such a recovery than by a rescission.

(55 N. J. E. 595)

DALY v. NEW YORK & G. L. RY. CO. et al.
(Court of Chancery of New Jersey. Aug. 21, 1897.)

MORTGAGES—ASSIGNMENT—RECORDING—PRIORITY OF LIENS—AFTER-ACQUIRED PROPERTY.

1. The transfer of a bond and mortgage belonging to an estate, when made, in pursuance of an order of court, by the executor removed by the court to a new executor appointed in his place, is sufficient to convey the equitable title thereto, although the transfer was a mere delivery, without formal assignment.

2. A mortgage on land given by the purchaser to secure the price conveys a legal title, superior to the interest acquired through previous mortgages given by the purchaser, and covering after-acquired property.

3. This superiority is not lost by neglect to record the purchase-money mortgage, for the statute requiring recording is for the protection of subsequent mortgagees only.

Foreclosure suit by Eugene F. Daly against the New York & Greenwood Lake Railway Company and others. Heard on pleadings and proofs. Decree for complainant.

The object of the bill is to foreclose a mortgage on land, given by Henry C. Spaulding to John Sands Howell, dated June 17, 1872, to secure the sum of \$4,650 in four years, and further secured by the bond of the mortgagor. The complainant claims to be the assignee of this bond and mortgage. They were given as part of the consideration money of the conveyance by Howell, the mortgagee, and others, to Spaulding, of the tract covered

by the mortgage, containing 10.25 acres of land, situate at Secaucus, in Hudson county. By deed of the same date (June 17, 1872), Spaulding conveyed .904 of an acre, part of the premises, to the Montclair Railway Company. This was a narrow strip, upon which it was proposed to build, and upon which a section of the railway of that company was afterwards built. The deed to Spaulding was acknowledged by a part of the grantors on the 17th of June, by another part on the 19th, and by another part on the 21st of June, 1872. The mortgage was acknowledged by Spaulding on the 25th of June, and the deed for the strip to the railway was acknowledged on the same day. The two deeds were recorded on the 2d of July, 1872. The mortgage from Spaulding to Howell, sought to be foreclosed, was not recorded until the 10th of July,—eight days after the record of the deed from Spaulding to the railway company. Spaulding was one of the directors of the railway company, was its superintendent and purchasing agent, and in the purchase acted entirely as the agent and trustee of the railway company. He held the title to the nine acres and a fraction of the whole tract not conveyed to the railway company in trust for it. The whole transaction was carried through with the full knowledge and consent, previously obtained, of all the officers of the railway company, so that the railway company had full and complete notice of the mortgage to Howell for part of the consideration money. At the time of this transaction the railway was under a first mortgage to Marcus L. Ward and Abram S. Hewitt, as trustee for certain bondholders. That mortgage was dated the 1st of September, 1870, and recorded on the 2d of September, 1870, in the book of deeds for Hudson county. The description of the premises covered by it is as follows: "All and singular, the line of railway known and to be known as the 'Montclair Railway,' as the same is being and shall be constructed from the line of the state of New York, at or near Greenwood Lake, to the Hudson river, also the branches thereof, * * * including all the railways, ways, rights of way, and depot grounds, or other lands, all tracks, bridges, viaducts, culverts, fences, and other structures," etc. " * * and all real and personal property held or acquired, or hereafter to be held or acquired, by the said company, its successors or assigns, for use in connection with the aforesaid railway and branches of the party of the first part, or with any part thereof, or with the business of the same, * * * and also all franchises connected with or relating to the aforesaid railway and branches, or to the construction, maintenance, or use of the same." A second mortgage was given by the railway company to Mr. Hewitt alone, as trustee, using the same description of the premises as above set out, on the 1st of November, 1871, and recorded on the 15th of January, 1872, to secure another issue of bonds. The

second mortgage was duly foreclosed, and the property purchased by and conveyed to Mr. Hewitt, as trustee, by master's deed dated January 7, 1875. The first mortgage was duly foreclosed and conveyed by master's deed to Marcus L. Ward and Abram S. Hewitt, trustees, September 27, 1875. Ward and Hewitt conveyed, by deed dated November 29, 1875, to the Montclair & Greenwood Lake Railway Company, a new organization; and this second railway company mortgaged to George Walker and Amzi Dodd, trustees, by deed of trust dated December 1, 1875, all its lands and property of every kind. This mortgage was foreclosed, and the property purchased by and conveyed to Abram S. Hewitt, Cyrus W. Field, and John B. Dumont by master's deed dated October 5, 1878, and Hewitt, Field, and Dumont conveyed by deed dated November 5, 1878, to the New York & Greenwood Lake Railway Company, the defendant herein. Neither Howell nor his personal representatives were made parties to either of these foreclosure proceedings. Receivers were also appointed of this railway company after the conveyance of Spaulding to it, and before the first foreclosure, and they also conveyed to Hewitt as trustee, but their conveyance did not cover any land in Hudson county; and counsel for the railway company relied entirely upon the mortgages of 1870 and 1871. The principal question is whether the foreclosure of the mortgages of 1870 and 1871 had the effect of divesting the lien of the complainant's mortgage upon the strip of .904 acre constituting a part of the railroad bed. Another question was raised as to the standing of the complainant Daly, in this court. Howell, the mortgagee, died not long after the giving of this mortgage, leaving a will, which was offered and admitted to probate in the city of New York on the 28th of January, 1873. Letters testamentary were issued by the surrogate of New York City to Henry K. Van Siclen and William Joyce, executors named therein, both of the state of New York. Subsequently, in 1879, proceedings were had to remove both these executors, with the result that both executors were removed by decree of the surrogate dated October 13, 1879, and their letters testamentary were superseded. Subsequently an order was made in the supreme court of the city and state of New York on the 17th of October, 1879, appointing Edward C. Sheehy trustee under the will of Howell, in the place and stead of Van Siclen and Joyce; and it was ordered that, upon service of a copy of the order upon Van Siclen and Joyce, they should pay over, assign, transfer, and deliver to Sheehy all the money, securities, assets, and property of every kind and description in their hands or possession belonging to the estate of Howell. Under that order, demand was made by Sheehy upon Van Siclen and Joyce for the assets of the Howell estate, and, as a part of these assets, Van

Siclen and Joyce handed to Sheehy the bond and mortgage here in question, but did not execute any formal assignment of it. Sheehy then duly assigned the mortgage to the complainant, Daly.

Joseph Anderson, for complainant. Cortlandt Parker, Jr., for defendant New York & G. L. Ry. Co.

PITNEY, V. C. (after stating the facts). The first question is as to whether the complainant has standing in equity as the owner of this bond and mortgage. There can be no doubt that the interest in and control of them by the original executors of the mortgages were divested and ended by the decree of the surrogate of New York superseding them. And it is equally clear that Mr. Sheehy, the new trustee, was entitled to the possession and control and vested with the equitable interest in them in trust for the beneficiaries under the will, by the decree of the New York supreme court. And it seems to be well settled at this day in New Jersey—in fact, familiar and common learning—that a mere delivery of a bond and mortgage, with intention to pass the title, upon a proper consideration, will vest the equitable interest in the person to whom it is so delivered. This is the substance of the ruling by Mr. Justice Drake, speaking for the supreme court, in the case of *Hutchings v. Low*, 13 N. J. Law, 246; and in the same direction is what was said by Master Wilson in *Canal Co. v. Fisher*, 9 N. J. Eq. 667, at page 686. The same doctrine was declared by Chancellor Runyon in *Kamena v. Huelbig*, 23 N. J. Eq. 78, at page 80, where he says, "This assignment was in writing, but, had it been by the mere handing over of the bond and mortgage, it would have been sufficient." And Master Weart, in *Galway v. Fullerton*, 17 N. J. Eq. 389, at page 394, states the same doctrine, citing authorities from New York and elsewhere. Chancellor Runyon reiterates it in *Harris v. Cook*, 28 N. J. Eq. 345, and again in *Denton v. Cole*, 30 N. J. Eq. 244, citing with approval *Galway v. Fullerton*, *supra*. It has always been held that a mortgage will, in equity, follow the debt which it was given to secure, wherever that debt is well assigned or transferred, without any formal assignment of the mortgage. *Green v. Hart*, 1 Johns. 580, on appeal from the chancellor. I think the equitable title of the complainant in the bond and mortgage here in question is fully established.

The next question is as to whether or not the present railway company's claim of title under mortgages prior in date to that of the complainant gives it the better standing in this court. It is to be observed that at the time the two mortgages under which the railway company claims, to wit, in 1870 and 1871, were executed and recorded, the title in this land had not been vested in the railway company, and it must claim under the

description of land "thereafter to be acquired." There can be no doubt that under that clause a title in equity, of greater or less value, was made to the purchasing trustees, and by them to the present defendant corporation, of this after-acquired property. The question is whether the railway company took it free and clear of the incumbrance of complainant's mortgage. That the mortgagor, the original Montclair Railway Company, took the property with full notice of complainant's mortgage, there can be no doubt. As between complainant and the first railway company, the complainant's right is indisputable. Notwithstanding that the first railway company had notice of the complainant's mortgage, it was competent for it, under our recording acts, to give a title to the premises free and clear of complainant's mortgage. As to that portion of it (.904 of an acre) which was actually conveyed by Spaulding to the railway company by deed recorded prior to the recording of complainant's mortgage, no conveyance was made by that railway company subsequent to the making of complainant's mortgage. Such conveyance was made by mortgages prior to the date of the complainant's mortgage. Now, the language of the recording act then and still in force, which applies to the present case, is as follows: "Every deed of mortgage," etc., "which shall have been made and executed after the first day of January, 1821, or shall hereafter be made and executed, shall be void and of no effect against a subsequent judgment creditor, or bona fide purchaser or mortgagee for a valuable consideration, not having notice thereof, unless such mortgage shall be acknowledged and proved according to law," etc., "and recorded or lodged for that purpose with the clerk of the county," etc. It thus appears that the recording act operates entirely in favor of subsequent mortgagees and bona fide purchasers. The case abundantly shows that the mortgages under which the defendants claim were given before the railroad was built, and presumably before all of the money was advanced upon the bonds secured by those mortgages. The case does not show how much, if any, money was so advanced prior to the conveyance by Spaulding to the railway company, but it may be presumed that some of the bonds were negotiated prior to that time.

Counsel for complainant contended with much ingenuity and strength that his mortgage must be a subsisting lien, for the simple reason that the prior mortgages were not within the terms of the recording act, and that there were no conveyances by the railway company, grantees of Spaulding, after the conveyance to it, and so there was not, and could not be, any person occupying the position, as against him, of a bona fide purchaser for value without notice. But, without relying upon that point alone, I think that, according to the first principles of justice as administered in a court of equity,

the complainant's mortgage must be accorded priority over the Hewitt mortgages. The general rule seems to be that the holder of a mortgage, who claims by its terms that it is a lien upon after-acquired property, takes such property subject to all liens upon it between the parties. This was distinctly decided by the supreme court of the United States in the case of *U. S. v. New Orleans & O. R. Co.*, 12 Wall. 362, where Mr. Justice Bradley, speaking for the court, uses this language: "This, we apprehend, is an erroneous view of the doctrine by which after-acquired property is made to serve the uses of a mortgage. That doctrine is intended to subserve the purposes of justice, and not injustice. Such an application of it as is sought by the appellants would often result in gross injustice. A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquired; and, if he purchase property and give a mortgage for the purchase money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage or judgment or recognizance, can displace such mortgage for purchase money. And in such cases a failure to register the mortgage for purchase money makes no difference. It does not come within the reason of the registry laws. These laws are intended for the protection of subsequent, not prior, purchasers and creditors." The doctrine of this case was adopted and applied by the court of errors and appeals in *Williamson v. Railroad Co.*, 29 N. J. Eq. 311, at page 317, where the case last cited was cited with approval. Both of these cases I deem to be in point. In the case in 12 Wallace the railroad company had made a mortgage which covered all the company's property of every kind, with a stipulation to include all future-acquired property, and had purchased a lot of rolling stock subsequent to the date of the mortgage, and given back a consideration mortgage for it to the vendor, which had not been recorded, and the fact of its existence was unknown to the bondholders under the first mortgage. In deciding it, Mr. Justice Bradley calls attention to the distinction between that case and *Railroad Co. v. Cowdrey*, 11 Wall. 459, much relied upon by defendant's counsel in this cause. In *Williamson v. Railroad Co.*, lands came to a railway company, which were subject to a mechanic's lien which had not yet been filed or recorded, so that the title of the mortgagees intervened between the time when the occurrences out of which the mechanic's lien arose took place and the time that the lien itself was filed and perfected; and it was held that the mechanic's lien prevailed over the mortgage. The legal title to these premises has never been dealt with, and never passed to the present rail-

way company. It is familiar learning, found in all the cases, that a mortgage upon after-acquired property cannot rise higher than a contract to convey the title to that property when acquired; and a suit for its enforcement is, in effect, a suit for the specific performance of a contract. *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Pennock v. Coe*, 23 How. 117; *Smithurst v. Edmunds*, 14 N. J. Eq. 408, which is the leading case in New Jersey on that subject, and has been followed in numerous cases since, including *Williamson v. Railroad Co.*, supra. The title, then, of the railway company in this case is purely an equitable one. The title of the complainant herein is a legal title. It was an actual reconveyance of the property to Mr. Howell. That legal title was not disturbed by the prior record of the conveyance by Spaulding to the Montclair Railway Company, because its officers had notice of it, and that company was really itself the mortgagor, being in equity a purchaser from Howell and his co-grantors. *Graves v. Coutant*, 31 N. J. Eq. 763. Howell, then, not only held the legal title, but his equity was prior in point of time to that of the railway company, and, on plain principles, must prevail. I will advise a decree accordingly.

(55 N. J. E. 604)

PATTBERG et al. v. LEWIS PATTBERG & BROS.

(Court of Chancery of New Jersey. Aug. 12, 1897.)

CLAIMS IN INSOLVENCY—NOTICE TO PRESENT—RIGHTS OF SECURED BONDHOLDERS.

1. Certain secured bondholders of an insolvent corporation were not notified by mail, with the other creditors, of the time limited for the admission of claims against the corporation, although the order of limitation was published. The time expired, and the bondholders found their security insufficient to pay them in full, and applied to be admitted as creditors for the balance. Applicants had paid value for their bonds. *Held*, that the application should be granted.

2. They were also entitled to a preferential dividend to put them on equality with the other creditors, who had already received a dividend on their claims.

3. A creditor of an insolvent corporation, who holds as collateral secured bonds of the corporation, the security for which is insufficient to pay in full either the bonds or the debt, cannot be admitted as a creditor for the balance due on the bonds as well as for the debt.

Bill by Lewis Pattberg and others against Lewis Pattberg & Bros., a corporation, in which a receiver was appointed. On application of Charles Pfeiff and Louisa Austin to be admitted as creditors of the corporation. Granted.

William H. Corbin, for applicants. Joseph A. McCreery, for respondent.

PITNEY, V. C. The situation of the affairs of the corporation is, briefly, as follows: A receiver was appointed by this court, and it was declared insolvent, on the 31st day of December, 1894. The assets consisted in part of personal property consisting of merchandise,

machinery, and fixtures, and accounts and bills receivable, and in part of real estate subject to a mortgage of \$75,000. The personal property was sold, and the accounts and bills receivable collected, and produced a considerable sum of money, part of which has been distributed among the creditors who presented their claims within the time limited by the order. A considerable sum of money still remains to be divided. The usual rule limiting creditors was made and published, and has long since expired. Charles Pfeiff and Louisa Austin now apply to be admitted as creditors. The mortgage of \$75,000 on the real estate was given to trustees to secure 75 \$1,000 bonds. Thirty of these are held by the applicant Charles Pfeiff, 20 by the applicant Louisa Austin, and 25 are held by George Borgfeldt & Co., a corporation, as collateral to a claim against the insolvent corporation for 58,000 and odd dollars, which latter it has duly proven and received a dividend upon. No sworn claim was presented on any of these bonds to the receiver, but their existence and ownership were known, and the receiver early applied for an order to pay the interest due on those held by Pfeiff and Austin out of funds in his hands. This was done either on the supposition that the mortgaged property was worth more than the amount of the bonds, or because the receiver was using the mortgaged property—a factory—in finishing goods and closing up the business. Subsequently the real estate was sold, by an order of this court, free of the mortgage, and produced only about \$11,000, which was distributed among the bondholders, and of course fell far short of paying their debt. Pfeiff and Austin now apply to be admitted as creditors for the balance due upon their bonds. This application is opposed by Borgfeldt & Co., which is the principal creditor of the corporation, on the ground that the claim was not presented within the time limited by the order of the court. With regard to this part of the case, I find, annexed to the affidavit of the service of the order limiting creditors by mailing, a list of the creditors to whom it was mailed; and Pfeiff and Austin are not among them, although their names are on the list of creditors to whom the order to show cause why the temporary receiver should not be made permanent was mailed. This affidavit was made on January 21, 1895, and the order limiting creditors was made January 28, 1895. Why the names of Pfeiff and Austin as creditors were dropped from the earlier list does not appear, unless it was by reason of the supposition that the mortgaged property was sufficient to pay their bonds. Suffice it to say that their names are not on the list of creditors to whom notice of the rule limiting creditors was sent, and they both swear that they received no notice and had no knowledge of such an order being made. It is well known that, although these orders in these insolvent corporation cases are published in the newspapers, little or no reliance is had upon that publica-

tion, but the court is particular to see to it that they are all mailed to the creditors of the corporation, so far as they can be ascertained, and reliance is had principally upon the mailing of the notices. The general rule is that failure to make application within the time limited by the order, in these cases of insolvent corporations, is not conclusive against creditors. This was so held distinctly by Chancellor Green in *Grinnell v. Insurance Co.*, 16 N. J. Eq. 283. He there declared that those creditors who do present within the time do not thereby obtain a vested right to a certain dividend, to the exclusion of others. In fact, this court had no power, except by implication, previous to the corporation revision taking effect July 4, 1896, to make any order absolutely barring creditors. In that case the applicant was circumstanced somewhat as are these applicants. He was an officer of the insolvent corporation, held a bond and mortgage as security for certain moneys which he advanced for it, and supposed that it was sufficient to pay him; but a foreclosure resulted in a deficiency, and it was for this deficiency that he asked to be admitted as a creditor after the time limited. The fundamental equity at the bottom of the chancellor's decision was that equality is equity. Applying that doctrine here, I think the applicants should be admitted.

It is further claimed that they should be admitted upon the same basis as the creditors already admitted, and have a preferential dividend out of the assets in hand, to such an extent as will put them on an equality with the other creditors, provided there is enough for that purpose. I think, considering that no notice was mailed to them, and that they are not guilty of any laches whatever, that they are so entitled, as the logical result of the equitable principle just stated. There is no dispute but that their bonds represent a real indebtedness of the company.

Borgfeldt & Co. also presents a claim to be admitted as a creditor on the 25 bonds of \$1,000 each which it received from the company directly, and holds as collateral to its claim, provided Pfeiff and Austin are admitted. Borgfeldt & Co. has already had a share of the proceeds of the sale of the real estate. But, beyond a share in the proceeds of the sale of the mortgaged premises, I think that it cannot be admitted as a creditor by reason of its holding these bonds as collateral. To do so would be to increase the debts of the insolvent corporation beyond what they actually are. The only effect of giving Borgfeldt & Co. the bonds as collateral to its debt was to give it a specific lien to that extent upon the real estate, in common with the other holders of the bonds secured by the trust mortgage, and it must be content with the proceeds of that lien. So far as regards the personal obligation of the corporation, the bonds in question had no validity, and their delivery to Borgfeldt & Co. did not increase the indebtedness of the insolvent corporation. The attempt by

a debtor to increase, in case of insolvency, the security of his creditor, by giving him his own personal obligation as collateral, is simply absurd. The case cited by the counsel of Borgfeldt & Co. in support of his application, viz. *Duncomb v. Railroad Co.*, 84 N. Y. 190, is clearly distinguishable. There a party, upon loaning \$81,000 to the railroad, received \$810,000 of their mortgage bonds as collateral, and the question was whether he should have a dividend in the proceeds of the sale of the mortgaged premises upon the whole sum of \$810,000, or whether he should have it only on the sum of \$81,000; and it was held that he was entitled to a dividend upon the whole \$810,000, provided the dividend did not exceed the whole amount of the actual debt. The distinction between that case and this is apparent at once. There the question was as to a share in a particular fund, and not in the general estate, and it is to be observed that the claimant was not allowed a dividend upon both the \$810,000 of bonds and the \$81,000 of actual debt. Here Borgfeldt & Co. claims a dividend upon both out of the general fund. The case cited is an authority against their claim, rather than for it. I will advise an order in accordance with these views.

(67 N. H. 593)

HAYDOCK v. SALVAGE.

(Supreme Court of New Hampshire. Carroll.
March 16, 1894.)

APPEAL—SUFFICIENCY OF EVIDENCE—TIME FOR OBJECTION.

In an action to try title to land, the objection that the title under which plaintiff claims is not sufficiently proved by evidence cannot be first urged on exceptions.

Exceptions from Carroll county.

Writ of entry by John J. Haydock against John Salvage. Case reserved upon exceptions by defendant to verdict for plaintiff. Exceptions overruled.

Facts found by the court: "By a mortgage deed dated June 23, 1885, containing full covenants of warranty, James Brown conveyed to Alfred Davis the demanded premises, to secure the payment of a promissory note of the same date for nine hundred dollars, signed by Brown, and payable to Davis or order in two years from date, with interest semiannually. May 15, 1889, Davis assigned to Sarah Whittier, and February 18, 1891, Sarah Whittier assigned to the plaintiff, said mortgage deed, the real estate thereby conveyed, and the note and claim thereby secured, by deeds duly executed. The note is also indorsed by Davis, without recourse. There was no direct evidence that the signature of the indorsement was made by Davis, but it is found to be his from its resemblance to the signature upon the assignment, which was proved by an attesting witness to be his. It did not appear when the indorsement was made. The assignments purport to be in con-

sideration of 'one dollar and other valuable considerations.' It did not appear what consideration, if any, was in fact given for either of them. The note, mortgage, and assignments were produced by the plaintiff. August 14, 1891, the plaintiff, with two witnesses, entered the dwelling house on the demanded premises, and declared that he took possession of the premises for condition broken, and for the purpose of foreclosing the right of James Brown and all claiming under him to redeem the premises from said mortgage. He and the witnesses made affidavits concerning the entry, which were published three weeks, successively, in the *Carroll County Pioneer*,—the last publication being September 4, 1891,—and, together with an affidavit showing such publication, were recorded in the Carroll county registry of deeds March 1, 1892. The proceedings were in accordance with the provisions of the statutes for the foreclosure of a mortgage, by peaceable entry. A special tax was assessed by order of the court upon the premises, as nonresident property, in the year 1888. The collector of taxes sold the premises to the defendant for this tax at a public auction held July 12, 1889, and conveyed the same, by a collector's deed in the usual form, July 17, 1890. The number of acres in the premises is not stated in the assessment, or in the list of taxes committed to the collector, or in any of his proceedings for the sale. The tax was for this reason void, and the defendant did not acquire a valid title to the premises by the collector's deed. *Weeks v. Waldron*, 64 N. H. 149, 5 Atl. 660. The defendant also put in evidence a quitclaim deed of the demanded premises from Alfonso Nickerson and wife to him, dated March 1, 1892. No title or possession was shown in Nickerson or his wife. In June, 1891, John H. Moore entered into possession of the premises as tenant of the defendant, and was in possession when the plaintiff's entry above mentioned was made. The plaintiff on the day of his entry gave Moore notice to quit, which Moore accordingly did in six or seven days after. In the meantime he acknowledged the plaintiff's entry and possession, but did not otherwise become his tenant. The night before Moore left the premises the defendant moved in, and has remained in possession ever since. The defendant put in evidence, subject to the plaintiff's exception, an office copy of a quitclaim deed, dated August 29, 1889, from Sarah Whittier and husband to William S. Stubbs, of all her right, title, and interest in the demanded premises. The defendant claimed that the plaintiff was estopped by the covenants of this deed from asserting title under his mortgage. The defendant did not show any title under this deed. The court holds there is no estoppel. The foregoing states all the title and possession shown at the trial by the parties and those under whom they claim. The original deeds and affidavits above referred to, or office copies of them, may be treated as parts of the findings. Upon the foregoing facts, it is

found that the defendant did disseise the plaintiff in manner and form as the plaintiff has declared against the defendant, and that the plaintiff is entitled to judgment for possession of the demanded premises. The plaintiff rested after he had proved the note, mortgage, and assignments. The defendant moved for a nonsuit. Motion denied. Defendant excepted.

"The defendant moved to set aside the verdict, and for judgment in his favor, for the following reasons: (1) The defendant excepts to the ruling upon the facts found that James Brown conveyed to Alfred Davis the demanded premises by a valid mortgage title to secure the payment of the promissory note described. (2) The defendant excepts to the ruling upon the facts found that valid assignments were legally proved as stated from Alfred Davis to Sarah Whittier, and from Sarah Whittier to the plaintiff. (3) The defendant excepts to the ruling upon the facts found that as matter of law it was legally proved by competent evidence that the signature of Alfred Davis upon the back of the mortgage note was written by him. (4) The defendant excepts to the holdings upon the facts found that he disseised the plaintiff as claimed, and that the plaintiff is entitled to judgment for possession of the demanded premises, because it did not appear that the alleged indorsement of said mortgage note by Mr. Davis was made at the time of the said assignments, and before the commencement of the plaintiff's action, and because no consideration for the said assignments and note was in fact proved, and no perfected transfer or delivery of said assignments and note was shown by said Alfred Davis to said Sarah Whittier, the plaintiff's assignor, nor from said Sarah Whittier to the plaintiff, upon the facts stated, and competent facts do not warrant the conclusion that the plaintiff owned said note. (5) The defendant excepts to the ruling that the foreclosure proceedings stated were in accordance with the provisions of the statutes for foreclosure of a mortgage by peaceable entry. (6) The defendant excepts to the ruling that the plaintiff took or acquired in any way any lawful possession or title of the said premises, as matter of law, under said mortgage from Brown to Davis. (7) The defendant excepts to the ruling that the deed of the demanded premises from Sarah Whittier to William S. Stubbs, under date of August 29, 1889, did not estop her, and the plaintiff, claiming under her by assignment, from asserting title to the said premises through said mortgage. (8) The defendant excepts to the rulings that the special tax assessed upon the premises in the year 1888 by order of the supreme court was void, and that the defendant did not acquire a valid title to the premises by the collector's deed of the same, for the reason stated. (9) Because the motion for a nonsuit was denied. (10) The defendant excepts to the ruling that it was legally proved by competent evidence that the plaintiff owned said note."

J. C. L. Wood, for plaintiff. J. H. Hobbs, for defendant.

BLODGETT, J. The objection in the defendant's brief to want of evidence of Brown's title, not having been taken at the trial, when it might have been obviated by proof, comes too late, and cannot now be considered. *Baldwin v. Wentworth* (March, 1893) 36 Atl. 365. As to the numerous other exceptions taken at the trial, nothing can be profitably said, except that they are groundless. Exceptions overruled.

CHASE, J., did not sit. The others concurred.

(68 N. H. 477)

WHEELER v. TOWN OF ALTON.

(Supreme Court of New Hampshire. Belknap. July 31, 1896.)

TOWNS—LIABILITY FOR TEACHER'S WAGES—TOWN AND SCHOOL BOARD—RESPECTIVE CONTROL OF FUNDS.

1. As towns are not liable for the board or wages of district school teachers, they are not made liable therefor by a vote of the town to raise the money for that purpose.

2. The right to appropriate to specific uses all moneys raised by a town for school purposes is by statute vested exclusively in the school board.

Assumpsit by Darwin E. Wheeler against the town of Alton. Judgment for defendant.

In 1888 the plaintiff was one of the school board of the school district of Alton, coterminous with the limits of the town of Alton. He examined the teacher, gave her a certificate of qualification, employed her to teach the school, furnished her with board during the school term, and paid her for her services. She was not examined by either of the other two members of the school board, and had no certificate of examination from either of them. In a suit brought by the plaintiff against the school district upon the same cause of action, judgment was rendered in 1891 for the defendants. 68 N. H. 540, 23 Atl. 89. At the annual district meeting in 1894, upon a proper article in the warrant, the school district voted to pay the plaintiff the amount he paid the teacher. At the annual town meeting in 1895 the town, upon a sufficient article in the warrant, voted to raise money to pay the plaintiff's bill, "as per vote of the school district last spring."

J. Ryan, Jr., for plaintiff. Cogswell & Blackstone and M. A. & C. B. Hibbard, for defendants.

CARPENTER, C. J. In his suit against the district the plaintiff failed because school districts are not liable for wages paid or for board furnished to teachers. *Wheeler v. School Dist.*, 68 N. H. 540, 23 Atl. 89. This action is against the town, which, though coterminous with the school district, is a distinct and separate organization. *Sargent v. School Dist.*, 63 N. H. 528, 2 Atl. 641. The plaintiff does not claim that his action can be maintained

unless the defendants, the town of Alton, are made liable by virtue of their vote in 1895 to raise money to pay the plaintiff's demand. A town cannot by vote make itself liable to an action on a demand which it is neither equitably nor legally bound to satisfy. *Bowles v. Landaff*, 59 N. H. 164; *Cole v. Bedford*, 97 Mass. 323, note; *Usher v. Colchester*, 33 Conn. 567. All moneys raised by a town for school purposes must be paid over to the school board, who are alone responsible, under a heavy penalty, for its lawful expenditure. Pub. St. c. 83, §§ 1-4, 7. Towns have no power to require that money raised by them for schools shall be applied to any special purpose. The appropriation of the school money rests exclusively with the school board. *Id.* c. 83, §§ 2, 7, 12; *Id.* c. 90, § 12; *Id.* c. 92, §§ 1-14. The utmost effect that can be given to the vote of the defendants in 1895 is to authorize the selectmen to assess, collect, and pay over to the school board, in addition to the amount required by law, a sum equal to the amount paid by the plaintiff to the teacher. Judgment for the defendants.

PARSONS, J., did not sit. The others concurred.

(63 N. H. 454)

FOLSOM v. CONCORD & M. R. R.

(Supreme Court of New Hampshire. Rockingham. July 31, 1896.)

CONTRIBUTORY NEGLIGENCE—PROVINCE OF JURY—EVIDENCE—OPINIONS.

1. Intestate was driving west on a street running almost parallel to a railroad track, and finally crossing it at an acute angle. The portion of the street available for driving was narrow, by reason of snow banks, so that turning around would have been difficult. The horse was somewhat afraid of moving trains, especially when they came abreast of him, and especially also when they approached from the rear. When intestate was 100 or 120 feet from the crossing he became aware of a train about 600 feet from the crossing, also moving west, at the rate of 30 or 35 miles an hour. He whipped up his horse, and had almost cleared the crossing when the back of his sleigh was struck by the train, and he received fatal injuries. *Held*, that the question of contributory negligence was for the jury.

2. The evidence introduced as to the liability of the horse to take fright under the circumstances was material on the question of contributory negligence.

3. There was no flagman at the crossing, and the train proceeded with undiminished speed after the perilous situation of intestate was discovered. *Held* that the question of negligence of the railroad company was also for the jury.

4. Evidence of the conduct of horses in general in the presence of moving trains is competent to show how a particular horse would act in a similar situation.

5. The conduct of horses in the presence of moving trains is a proper subject for opinion evidence.

Exceptions from Rockingham county.

Action on the case by John Folsom, administrator of the estate of George F. McMurphy, deceased, against the Concord & Montreal Railroad for damages. There was a verdict for

plaintiff, and defendant excepts. Exceptions overruled.

February 13, 1891, McMurphy, while riding in a sleigh drawn by one horse, was struck by the defendants' locomotive engine at the Massabesic street crossing in East Manchester, and so injured that he died. The crossing is in the compact part of the city. At the crossing, and for a long distance easterly of it, both the railroad and the street run nearly east and west, making with each other at their intersection on the crossing an acute angle. Opposite the crossing, and abutting upon it, Cypress street opens, leading southerly. A large shoe factory building stands on the easterly corner of that street and Massabesic street. The defendants have a side track extending along by the building, and between it and Massabesic street. At the time of the accident the street was icy. The snow had been plowed out of the traveled path to the width of 8 or 10 feet, and shoveled up from the road towards the side track, and from the side track towards the road, making a hard ridge or bank between the street and the side track. A flat car and a box car stood on the side track,—one near each end of the factory building. There was a depression in the street at the crossing, caused by removing the snow from the track. At a point 593 feet easterly of the crossing there was a pile of sleepers by the side of the railroad. Jewett street, leading southerly, intersects with Massabesic street at a point 393 feet easterly of the crossing. From the crossing nearly to Jewett street there was a bank wall between the railroad track and the street. McMurphy and the defendants' train were both going westerly towards the crossing. At the whistling post, 80 rods distant from the crossing (at which point the train was, by reason of a curve, out of McMurphy's sight), the whistle was properly sounded, and thence to the crossing the bell was continuously rung. There was no flagman at the crossing. The plaintiff's evidence tended to show that the train was running 30 to 35 miles an hour (44 to 51 feet a second), and did not slacken its speed until McMurphy was struck; that McMurphy's horse was somewhat afraid of the cars, requiring considerable effort to control him when near them, though he never became wholly unmanageable; that a train coming from the rear was more likely to frighten him than one approaching in front, and that he was likely to be most frightened when the train was directly opposite or abreast of him; that when the train reached the pile of sleepers an alarm was blown upon the whistle; that this was the first intimation McMurphy had of the approaching train; that until this time he had been driving at the rate of 5 or 6 miles an hour (7 to 9 feet a second); that he was then nearly opposite the easterly end of the factory building, and some 100 to 120 feet from the crossing; that the traveled path of the street was at this point 12 to 15 feet from the railroad track; that, at the sound of the alarm, McMurphy turned his head, appeared to see the train, swung his whip, urged his horse to greater speed, and drove di-

rectly upon the crossing; that the engine struck the back of the sleigh about 6 inches from the left-hand corner; that the horse exhibited no signs of fright till he reached the crossing, and was not then at all unmanageable; that, on account of the cars on the side track and the ridge or bank of snow, it was not possible for McMurphy to turn into Cypress street without going upon the crossing. The defendants' motion for a nonsuit was denied, and they excepted. A witness for the plaintiff (found by the court to be qualified for the purpose) was permitted to testify, subject to the defendants' exception, that a train coming from the rear would be more likely to frighten a horse than one approaching him in front, and that the horse would be likely to manifest more fright when the train was opposite him. The court declined to instruct the jury that, "If the jury find that McMurphy consciously drove in front of the approaching train, his administrator cannot recover of the defendants, unless the defendants, after discovering McMurphy's danger, might have prevented the accident by the use of ordinary care," and the defendants excepted. They also excepted to instructions given as follows: "If you find McMurphy was put in sudden peril in consequence of the negligence of the defendants, or for any reason for which he was not responsible, and adopted a course which in ordinary circumstances a prudent person would not have adopted, he is not necessarily chargeable with negligence; but the test is, would an ordinarily prudent person, under the same circumstances, have done as he did?"

G. K. Bartlett and E. G. Eastman, for plaintiff. F. S. Streeter, J. W. Fellows, and J. S. H. Frink, for defendants.

CARPENTER, C. J. The motion for a nonsuit was properly denied. The speed of the train, the failure to diminish it after McMurphy's situation was discovered, and the absence of a flagman were evidence upon which, under proper instructions, the jury might find a want of ordinary care on the part of the defendants.

It was competent for the jury to find that McMurphy was not in fault. Without any misconduct on his part, he suddenly found himself in a situation of danger, whatever action he might take. Several alternatives were offered him. He might stop the horse, get out, and take him by the bit, and abide the consequences of his fright when the train passed him. He might possibly turn about in the narrow pathway, at the risk of upsetting. He might perhaps drive the horse over the ridge or bank, and upon the side track, at a like risk. He could jump out, and abandon the horse and sleigh to such fate as might befall them. It is plain now that any one of these courses would have been better for him than the one he adopted. With no time to deliberate, compelled to act upon the instant, he concluded that he could get over the crossing before the engine reached it. He erred by the fraction of a second. If the train had been the

tenth of a second later, or the speed of the horse by the least tittle greater, he would have passed the crossing in safety. A mere error of judgment is not necessarily negligence. *Jones v. Boyce*, 1 Starkie, 493; *Ingalls v. Bills*, 9 Metc. (Mass.) 1; *Eckert v. Railroad Co.*, 43 N. Y. 502, 505, 506. The question was whether a person of average prudence, situated as McMurphy was, possessed of the same knowledge and means of knowledge that he had of the surrounding circumstances, including his impending danger, and means of avoiding it, would or might have done as he did. It was a question of fact for the jury, to be determined by them in view of their experience in the affairs of life, their knowledge of the motives that govern human action, and of the conduct of reasonably prudent men in similar exigencies. To warrant its withdrawal from their consideration, it would not be enough, were such the fact, that the judge at the trial term or the judges at the law term would, if the question were submitted to him or them, find on the evidence that McMurphy was in fault. To justify a nonsuit the court must be able to say that no reasonable and impartial man could find otherwise. The distinction is broad. "Judges may be able reasonably to say frequently that although they would not, upon the facts, have come to the same conclusion to which the jury have come, yet they * * * cannot say but that reasonable and fair men might agree with the conclusion of the jury; or, in other words, that, although they would not have arrived at the same conclusion, it is not contrary to reason to arrive at it." *Bridges v. Railway Co.*, L. R. 7 H. L. 213, 233. The view taken by the jury of McMurphy's conduct cannot be declared contrary to reason.

The instructions requested were properly refused. If the defendants, by their negligence in not providing a flagman or otherwise, created the dangerous situation from which McMurphy by due care was unable to escape, they were liable, although after discovering McMurphy's peril they could not prevent the accident. The exception to the instructions given raises substantially the same question as the motion for a nonsuit. It rests upon the defendants' erroneous position that the driving by McMurphy "consciously" upon the crossing in front of the approaching train was conclusive evidence of negligence on his part.

The liability of McMurphy's horse to take fright at the approaching train, and to become more frightened when it reached a point directly abreast of him, was material on the question whether he exercised ordinary care. The testimony of the witness relative to the behavior of horses when in near proximity to a moving train of cars appears to be the statement of a fact within his personal knowledge derived from experience (*Barron v. Cobleigh*, 11 N. H. 557, 566, 567; *Hale v. Handy*, 26 N. H. 206, 216), rather than an expression of opinion. In either aspect it was competent. For the purpose of proving the probable behavior of a horse under particular circumstances, the con-

duct of other horses in the same or a similar situation may be shown. *Darling v. Westmoreland*, 52 N. H. 401. It cannot be presumed that all men are so familiar with the conduct of horses when in the vicinity of and in different relative positions from a moving train that they can derive no information on the subject from the opinion of a witness expert in the use and management of horses in such situations. *Barnes v. Heath*, 58 N. H. 196; *Donnelly v. Fitch*, 136 Mass. 558; *Clinton v. Howard*, 42 Conn. 295. Exceptions overruled.

PARSONS, J., did not sit. The others concurred.

(68 N. H. 486)

CARPENTER v. FISHER et al.

(Supreme Court of New Hampshire. Merrimack. July 31, 1896.)

INJUNCTIONS—DAMAGES—ACTION ON BOND.

1. A prevailing defendant cannot prosecute an action on a preliminary injunction bond before the damages to which he is entitled have been determined in the injunction suit, where there is no reason for sending the question of damages to a jury.

2. An action against sureties on an injunction bond will be continued until the amount of damages has been determined in the suit where the bond was filed, and it appears that plaintiff cannot collect such damages of the principal.

Debt by Frank O. Carpenter against Horace N. Fisher and others on an injunction bond. Facts agreed. The bond was given under the thirty-sixth rule in chancery in a suit in equity brought by Fisher against Carpenter in the supreme court for Grafton county. It was executed by Fisher as principal and by the defendants Hill and Chandler as his sureties. The sureties are citizens of this state. The writ was served upon them, and they appear by counsel. Fisher is a citizen of Massachusetts, and since 1876 has been, and now is, the consul of the republic of Chili in Boston, and has been officially recognized as such by the president of the United States. At the date of the writ he had attachable real and personal property in this state, but the writ was not served upon him, and no attachment of his property was made. He appears specially for the purpose of moving, or joining with the defendants in moving, that the action be dismissed for want of jurisdiction. Case discharged.

E. A. & C. B. Hibbard, for plaintiff. Burleigh & Adams and Thomas H. Talbot, for defendants.

CARPENTER, C. J. As a general rule, equity, having acquired jurisdiction of a cause, disposes of all questions the decision of which is necessary to its final determination. *Eastman v. Bank*, 58 N. H. 421; *Moody v. Lucier*, 62 N. H. 584, 587, 588. The question of the amount of damages caused to a prevailing defendant by a preliminary injunction is incidental to the principal issues. It is to be determined upon equitable principles, in view of

all the circumstances of the case. In an investigation of the merits, all or nearly all the evidence affecting the damages is heard and considered. Neither party has a right to a trial of the question by the jury. Such a trial might, and in many cases would, involve a retrial of the entire cause. The parties should not be subjected to this needless expense. Although, in a few instances, the question of the amount of the damages has been submitted to the jury, or otherwise determined in an action at law on the bond, it has been for the reason that neither party objected, and the attention of the court was not called to the subject. *Bank v. Heath*, 45 N. H. 524; *Towle v. Towle*, 46 N. H. 431; *Solomon v. Chesley*, 59 N. H. 24; *Jackman v. Eastman*, 62 N. H. 273; *Gage v. Porter*, 64 N. H. 619, 15 Atl. 147. Generally, the court that hears the principal cause has, if requested, determined the question. It is the proper practice. In an action at law on the bond the parties are entitled to trial by jury if the damages claimed exceed \$100. Trials by jury are expensive to the public. One object of the amendment of the constitution adopted in 1877 depriving parties in civil actions of the right of trial by jury "in cases in which the value in controversy does not exceed one hundred dollars, and the title to real estate is not concerned" (Bill of Rights, art. 20), was to save the public expense of such trials in that class of cases. Since that time jury trials in those cases have not been allowed, though desired and moved for by both parties, except for special and extraordinary reasons. It does not appear that there is any reason for sending the question of damages in the present case to a jury. Upon the motion of either party the court that heard the cause would have determined what, if anything, Fisher should pay to Carpenter to indemnify him for the injury caused to him by the injunction. If, to obtain satisfaction of the amount adjudged due, an action on the bond should be necessary, no question, in the absence of fraud, would be open to the defendants, except that of its execution. Upon the motion of either party the original action may be brought forward, the question of Carpenter's damages determined by the court, and execution for the sum found his due be issued against Fisher. It does not follow that the present action was improvidently brought. It may be necessary to secure the payment of the judgment that may be rendered against Fisher. It will stand continued until the amount Fisher ought to pay is determined, and an execution for that sum is returned unsatisfied, or until it is otherwise made apparent that the plaintiff must rely for indemnity upon the obligation of the sureties. If any judgment that may be obtained against Fisher is satisfied, the question of the jurisdiction of the court in this action will not arise. Until it does arise, it need not be considered. To this suit Fisher is not a party. Whether, being interested in the result, and perhaps concluded, as between him and the defendants, by a judgment against

them, he has a legal right to appear, and raise the question of jurisdiction, or join with the defendants in raising it, or whether he may be lawfully refused permission to appear for that purpose (*Reynolds v. Damrell*, 19 N. H. 394; *Kimball v. Wellington*, 20 N. H. 439; *Levy v. Woodcock*, 63 N. H. 413; *Martin v. Wiggins*, 67 N. H. —, 29 Atl. 450), may or may not prove to be material questions. However that may be, the plaintiff has leave to strike his name out of the writ. Case discharged. All concurred.

(69 Conn. 544)

PARKER v. SELDEN et al.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

SALES—DELIVERY—CONSTRUCTION OF CONTRACT—ASSUMPSIT—PLEADING AND PROOF.

1. Where there is no time fixed for delivery of timber that a seller is to deliver "over the rail of a vessel," other than that it should be ready for "spring shipment," the purchaser is not bound to have a vessel ready until after reasonable notice from the seller.

2. A seller agreeing to deliver timber "over the rail of a vessel" must stand the loss of timber washed away by the tide, when deposited at the dock, where the purchaser was not remiss in sending a vessel.

3. "Spring shipment," within said contract, cannot extend beyond July 1st, as a matter of law.

4. Plaintiff, suing on a written contract for the delivery of timber "for spring shipment," cannot prove that the parties by their conduct extended the period of spring shipment, as it would be a parol contract different from the one alleged.

Hamersley, J., dissenting.

Appeal from superior court, New Haven county; John M. Thayer, Judge.

Action by Ralph L. Parker against John H. Selden & Son to recover damages for a breach of contract to purchase certain wood and timber. Tried to the court, facts found, and judgment rendered for defendants, and appeal by plaintiff for alleged errors in the rulings of the court. No error.

Henry G. Newton, and Clifford Gilbert, for appellant. Edward H. Rogers and John M. Murdoch, for appellees.

ANDREWS, O. J. The plaintiff's cause of action was founded on the order contained in a letter from the defendants, as follows:

"Cobalt, Dec. 21, 1893.

"R. L. Parker, Esq.—Dear Sir: Please cut out and have ready for spring shipment the following order:

"3,000 horse R. R. ties, hewed 7 ft. long, 5 in. thick, and 5 in. face, at 14 each, to be $\frac{3}{8}$ chestnut and $\frac{1}{8}$ oak.

"1,500 8 ft. chestnut posts at 8 cts.

"2,000 10 ft. chestnut posts at 10 cts.

"1,500 12 ft. chestnut posts at 15 cts.

"These to be of live timber, and to be from 4 to 6 in. at top end.

"400 cords clear oak wood at 3.75.

"100 cords chestnut wood at \$2.50.

"3,000 ft. 8 ft. 4x4 chestnut.

"3,000 ft. 10 ft. 4x4 chestnut.

"4,000 ft. 12 ft. 4x4 chestnut at 18.00.

"All of the above order to be delivered over the rail of a vessel.

"Yours, truly, John Selden & Son."

The complaint, after mentioning the order, and alleging that the plaintiff received and accepted it, says: "(3) Defendants did not take said wood and timber as agreed, but neglected and refused to take or pay for the same, except as is hereinafter stated. (4) Defendants did not take any of said timber or wood until a long time after the same was ordered to be ready, and what they have taken has been taken in small quantities and at long intervals between July, 1894, and July, 1895. (5) The following wood mentioned in said order has never been taken or paid for by the defendants, to wit: 1,200 horse R. R. ties, 300 cords of oak wood, 100 cords of chestnut wood, 4,000 feet of 4x4 chestnut sticks. (6) Plaintiff has been to great trouble and expense in cutting and carting said wood, and a large amount of horse ties and oak wood which had been placed on the dock at the request of the defendants, ready for shipment, was, in consequence of the neglect of the defendants to send a vessel for the same for several months thereafter, carried away by the high tides and wholly lost; and defendants have called for the shipment of the different loads of wood taken by them at inconvenient times, many months after they should have taken the same, and thereby caused great expense to the plaintiff." The answer of the defendants admits the sending the said order and its acceptance by the plaintiff, and then goes on to say: "(3) As to paragraphs third and fourth, the defendants answer and say that they did not refuse to take the wood and timber as agreed, and that they took all thereof that the plaintiff had ready for spring shipment in compliance with said order, and paid the plaintiff therefor, but that the plaintiff failed to have ready for spring shipment a large quantity of the wood and timber called for in said order. (4) As to paragraph fifth, the defendants answer and say that they did not take any of the wood therein mentioned because the plaintiff did not have it ready for shipment as called for in said order. (5) Paragraph six is denied." These pleadings reduced the controversy of the parties substantially to this: What period of time was included within the expression "spring shipment?" The court found the issue for the defendants, and the plaintiff appeals.

The finding of facts is as follows: "(1) Immediately after the acceptance of the order (Exhibit A of the complaint) by the plaintiff, he began to cut the wood and timber therein mentioned, and before spring opened had a large quantity of the posts, ties, and wood piled upon the wharf at Guilford, so as to be ready for delivery upon boats when sent for the same. (2) On April 2, 1894, the defendants sent the plaintiff two letters of that date, copies of which are annexed hereto as Exhibits B and C. The posts and 4x4 chestnut therein mentioned were part of the lumber called

for in said Exhibit A. The white oak was not. (3) The defendants sent the boat as stated in said letters, but on the voyage to Gullford she came in collision with a tugboat, and was damaged so that repairs were necessary; and she was taken into New London for such repairs, and could not and did not reach Gullford 'until May 11, 1894. The defendants in the meantime sent no other boat to Gullford, though immediately notified of the collision and damage aforesaid. (4) About April 11, 1894, the wharf at Gullford where the plaintiff had deposited his posts, ties, and lumber as aforesaid was submerged by an unusually high tide, and a large quantity of said ties, posts, and lumber was washed away and became lost. The exact number of posts and ties which had been placed upon the wharf at this time did not appear upon the trial, nor did it appear just how many were lost. But a sufficient number of neither to fill the order had been placed on the wharf. From the estimates of witnesses, I find that one thousand of each, approximately, were washed away and lost. (5) All the posts remaining upon the wharf on May 11, 1894, were delivered to the defendants on that day by the plaintiff, and taken away on said boat. (6) In consequence of the loss of ties, posts, and other lumber by said tide, and from other causes, the plaintiff at this time (May 11th) had ready for shipment none other of the articles called for by said Exhibit A, except about five hundred ties; and he did not during the spring of 1894 have ready for shipment the ties, posts, and other articles called for therein, and did not tender or offer to deliver said articles to the defendants, or notify them that he was ready to do so. (7) Said five hundred ties and some other articles of lumber the defendants received from the plaintiff in June, 1894. For all lumber mentioned in Exhibit A which the plaintiff delivered to the defendants they paid him in full the price mentioned therein. (8) Upon the trial the plaintiff claimed that by 'spring shipment,' in the contract (Exhibit A) was meant a period extending through the summer of 1894, and he offered evidence to prove that he had all the articles called for in the contract ready for shipment before the end of that period. To this evidence the defendants objected. The court sustained the objection, but stated to counsel that the evidence would be admitted if it should be shown that in this business the words had the meaning claimed, or that the defendant used them with that meaning. The plaintiff, in reply to a question by his counsel, said that he did not know that the words had the meaning claimed when used in the business, and could not say that the defendants had used them in that sense. The plaintiff duly excepted to the exclusion of the evidence as aforesaid. (9) The plaintiff claimed throughout the trial that he was entitled to show that after the summer of 1894 the defendant had, by letter, ordered from him lumber and wood of the same description as that in Exhibit A, for which they

had paid him the price therein agreed to be paid for similar articles, and that he had filled these orders from the stock which he had on hand in the summer of 1894, and that he was entitled to prove and recover as his damage from the defendants' failure to come for the lumber when ready the interest on the money which should have been paid when the lumber was ready for shipment, the expense and loss caused to him by the defendants taking the wood at inconvenient times, the value of the wood and ties which floated away, and the difference in value of the wood not taken at the commencement of this action and in the spring of 1894. The court did not so rule, but overruled these claims, and upon objection excluded a great number of questions asked for the purpose of proving said facts and such elements of damages. To all these rulings the plaintiff's counsel duly excepted. (10) The court found the issue for the defendants, and rendered judgment in their favor, as on file."

The order fixed no time or times when the wood and timber were to be delivered to the defendants and paid for by them. They were therefore deliverable over the rail of such vessel as the defendants, on reasonable notice, should send to receive them. The title therefore remained, so long as it was on the dock, in the plaintiff, and so the loss of that which was carried away by the tide fell on him. This happened about the 11th day of April, 1894. There is no averment in the complaint that the defendants were remiss in sending a vessel at that time. Every other item in respect to which the plaintiff claimed to recover damages was for something which happened after July 1, 1894. If the period for "spring shipment" named in the order did not extend beyond the 1st day of July, 1894, the defendants could not be made liable for these items under the order. It was for this reason that the plaintiff claimed that by "spring shipment," in the order, was meant a period extending through the summer of 1894. This expression might be held to mean just what the calendar names as the spring months, viz. March, April, and May, or there might be given to it a somewhat more popular meaning, as the period when vegetation began to put forth, and extending in this latitude from about the middle of March to about the middle of June. But there is no meaning which can be given to it which, as matter of law, could make it extend beyond the 1st of July. It was undoubtedly competent for the plaintiff to show by evidence that this expression had in this business the meaning which he claimed for it (*Smith v. Phipps*, 65 Conn. 302, 32 Atl. 367), or that it was used by the parties in this contract with that meaning (*In re Curtis & Castle Arbitration*, 64 Conn. 501, 30 Atl. 769). The plaintiff offered no evidence to prove either of these conditions, and offered no evidence to show that it had such meaning. The plaintiff did offer evidence which he claimed would prove that the parties (defendants and plaintiff) had by their conduct extended the pe-

riod of spring shipment so as to include the whole season of 1894. This evidence was objected to and ruled out. We think this ruling was correct. It sought to prove a contract different from the one alleged. The contract alleged was in writing. This was an attempt to prove a parol one. The contract alleged could not extend beyond the 1st of July, 1894. The one sought to be proved extended from July, 1894, to July, 1895. It appears, then, that for all the wood and timber which the plaintiff furnished to the defendants pursuant to the contract he has alleged he has been paid. There is no error. The other judges concur, except HAMERSLEY, J., who dissents.

HAMERSLEY, J. (dissenting). The complaint alleges that the defendant did not take and pay for certain articles which by the terms of the contract he had agreed to take and pay for. This allegation is admitted by the answer, and the fact so admitted was a fact in the case, as if it had been found upon the issue joined. The defense is that the plaintiff first violated the contract, by not having the goods mentioned in the order ready for spring shipment, and involves a construction of the written contract. It will hardly be questioned that the contract required the defendants to send a vessel or vessels for the goods within a reasonable time after the arrival of the time when they could be shipped in the spring, and to give the plaintiff reasonable notice of the time when such vessel would be at the dock in Guilford to accept delivery, and that the plaintiff did not violate the contract so long as he was ready to meet and did meet the obligation to so "deliver over the rail of a vessel." It seems to me that the finding shows with sufficient clearness that the trial court did not so construe the contract, but did construe it as requiring the plaintiff to have all the goods on the dock during the months of March, April, and May, and to notify the defendants that they were so ready for delivery, although the defendants neglected to give the plaintiff notice when they would send a vessel to receive the goods; that this error in law induced the finding, essential to the judgment, that the plaintiff had violated the contract, and induced the exclusion of sundry relevant evidence; and that this error is assigned in the appeal. There was therefore a mistrial, and a new trial should be granted.

(69 Conn. 503)

**HOGBEN v. METROPOLITAN LIFE
INS. CO.**

(Supreme Court of Errors of Connecticut. July 13, 1897.)

**INSURANCE—CONTRACT—PAYMENT OF PREMIUMS—
RECOVERY—PROVINCE OF JURY.**

1. Where one who has signed an application for an insurance policy refuses to accept the policy when executed and tendered, and pays no premium, there is no completed contract of insurance.

2. A person induced by mistake and false repre-

sentations to pay premiums on a life insurance policy void at its inception may recover them back, on repudiating the policy, though the insurer may by its conduct be estopped from denying the validity of the policy.

3. Questions of fact upon which there is evidence sufficient to support a verdict must be submitted to a jury.

Appeal from superior court, New Haven county; John M. Thayer, Judge.

Action by Mary A. Hogben against the Metropolitan Life Insurance Company to recover the aggregate amount of premiums paid by the plaintiff to the defendant under a claimed mistake of law and fact. Verdict and judgment for the defendant, and appeal by the plaintiff for alleged errors in the charge of the court. Error, and new trial granted.

It appears that on May 8, 1887, one Ellen K. Cannon signed an application to the defendant insurance company for insurance on her life for the benefit of her son John M. Cannon. The insurance applied for was that known as "industrial insurance." The amount was \$912, and the weekly premium \$1.20. The defendant on May 30, 1887, duly executed a policy of insurance in pursuance of said application, in which the agreement of the defendant is expressed to be "in consideration of the payment to said company on or before the date hereof of the premium mentioned in said schedule, and of a weekly premium to be paid on or before each and every Monday subsequent to said date during the life of the person insured." This policy was tendered to Mrs. Cannon, and within two or three months came into the possession of the plaintiff, who paid the weekly premiums until August 19, 1894. The plaintiff's action is brought to recover the premiums so paid. The complaint alleges that the premiums were paid under a mistake; that Mrs. Cannon had refused to accept the policy, had refused to pay premiums, and the policy had no legal existence as a valid policy; that the plaintiff had no interest in the life of the insured; that the defendant represented that, if the plaintiff would pay the premiums, said policy would be good in her hands, and she would be entitled to the amount due thereon in case of loss; that defendant knew such representations to be untrue; that the plaintiff believed the statements, and, acting on such belief, paid the premiums; that defendant has retained said sums, and refused to return them; that plaintiff has demanded the return of said premiums, and has returned said policy to the defendant, and defendant repudiates all liability under said policy. The answer contains two defenses. The first denies all the allegations of the complaint except that alleging the plaintiff had no interest in the life insured, which is admitted. The second defense alleges that the plaintiff, for the purpose of gambling upon the life of Ellen K. Cannon, fraudulently claimed and pretended to the defendant that plaintiff had an insurable interest in said policy and in the life of said Cannon, and also fraudulently claimed and pretended to defendant that the plaintiff had, by

agreement with said Cannon and all others interested in said policy except the defendant, been substituted for and had become the beneficiary under said policy; that these claims were false, and known to the plaintiff to be false; and that all the payments mentioned in the complaint were made in reference to said wagering contract of insurance, with knowledge that she had no legal interest in said life, or under said policy.

The court (Thayer, J.) charged the jury as follows: "The plaintiff in this action sues to recover from the defendant money paid as premiums on the Cannon policy, which is in evidence, under the mistaken belief, as she says, that the policy was valid and binding on the defendant, when in fact, as she alleges, it had no legal existence as a valid policy. The claim is based upon the proposition of law that the insurance premium paid to an insurance company is a compensation for the risk run upon the insurance policy, and that if a policy is invalid at its inception, or had no real existence, the company renders no equivalent for the premiums paid, and has no right to receive the same, and, even if received, it is its duty to return them to the person paying. This is a correct statement of the law, as is also the further proposition of the plaintiff that, while the law does not allow a person to take out an insurance upon the life of another if he has no interest in that life, it is yet perfectly lawful and proper for a person to take out an insurance on his own life, and make such insurance payable to a third party, whether that party has an interest in his life or not, and this may be done as act of gratitude, or as a mere gratuity to the beneficiary. He may also take out such insurance, and have it assigned, if he sees fit, to a third party; and it is perfectly proper for such third party, under these circumstances, to pay the premiums and keep the insurance alive. The plaintiff claims that she had a perfect right to become the beneficiary under the policy of Mrs. Cannon, or the assignees of that policy from Mrs. Cannon, provided it was a valid policy legally issued to Mrs. Cannon upon her application, and had the right to pay the premiums and keep the policy alive for her own benefit. And this is true, provided the transaction was entered into in good faith, and not as a cover for a wagering or speculative contract, which the law condemns. The plaintiff claims that she was led by the defendant to believe that the Cannon policy was a valid policy, and in good faith, in that belief, paid the premiums sued for, and that she was in fact mistaken in this belief, and that the policy never had a legal existence and validity. It becomes a question, therefore, whether the Cannon policy ever took effect as a binding contract, or whether, as the plaintiff alleges, it had no legal existence as a valid policy. If the policy took effect as a valid policy, so that the defendant became liable for the risk, the plaintiff cannot recover in this action. In that case the defendant, having sustained the risk, may retain the

premiums as the compensation for it. Whether the policy took effect as a valid policy is a question of law, depending upon the facts; but as the facts bearing upon this part of the case, as proved by the plaintiff, are undisputed, it becomes practically a case for the court to decide, and the jury will be relieved from any serious consideration of the evidence in the case. The evidence is uncontradicted that Ellen Cannon duly applied for the policy of insurance here in question, and that the application was duly received by the defendant, and the policy made or issued by it. It would seem from the application that the first premium of one dollar and twenty cents was advanced by Mrs. Cannon at the time the application was made; but, however that may be, it is proved and not denied that the policy was tendered to Mrs. Cannon, and that the premiums were all paid up to the time that the plaintiff attempted to surrender the policy; that two or three years prior to such attempted surrender the plaintiff or her husband wrote the letter Exhibit E, or sent it to the defendant's president; that he received the same; and that thereafter the defendant continued to receive premiums from the plaintiff on account of this policy. These facts being proved and uncontradicted, the defendant was bound by the policy; and the plaintiff, though she acted in entire good faith in taking the policy and in advancing the premiums, which the defendant denies, cannot recover in this action. This being the case, the question whether Mrs. Hogben acted in good faith in taking the policy, or took it as a mere speculation upon the life of Mrs. Cannon, becomes unimportant to be considered. This question, which would have been a question within the province of the jury to determine, had it not become unimportant, being eliminated from the case, it becomes your duty to render a verdict for the defendant. You may therefore retire and prepare such verdict, and return it to court." The jury, not returning a verdict, were recalled by the court, and further instructed as follows: "It was the intention of the court to make it clear that, on the admitted facts in this case, that the plaintiff could not recover, whatever the facts might be with reference to the great issue that was contested here,—most of the examination of the witness was occupied in attempting to prove or disprove. That being so, it became the duty of the court to instruct the jury that their verdict should be for the defendant; and, of course, it became the duty of the jury, under those circumstances, to return such a verdict. I therefore ask you to retire again, and return the verdict directed." The appeal assigns error in the court's direction to the jury to return a verdict for the defendant.

Talcott H. Russell, for appellant. Henry Stoddard and Roger S. Baldwin, for appellee.

HAMERSLEY, J. (after stating the facts). The undisputed facts do not necessarily estab-

lish a valid contract of insurance between the defendant and Ellen K. Cannon. It is not enough for such purpose that the defendant signed a policy of insurance in pursuance of Mrs. Cannon's application, and tendered it to her. The testimony tends to prove, if it does not clearly show, that after signing the application Mrs. Cannon changed her mind; that she refused to accept the policy when tendered, and never received it; that neither she nor the beneficiary named in the policy paid the first premium, or any premium, or authorized payment of the same. In such a state of evidence, it would be error in the court to hold that the undisputed facts, viz. the signing of an application, with the execution and tender of the policy, necessarily prove a completed contract of insurance between the defendant and Mrs. Cannon. *Rogers v. Insurance Co.*, 41 Conn. 97; *Whiting v. Insurance Co.*, 129 Mass. 240. This question is not definitely passed upon in the charge. The court, however, couples the facts of the application, the execution of the policy, and the tender, with other undisputed facts, viz.: The plaintiff paid the premiums up to the time she attempted to surrender the policy; two or three years prior to such attempted surrender she wrote the defendant that she held the policy on Mrs. Cannon's life, telling how she claimed to have come by it, and offering to surrender it on return of the premiums paid, if the transaction were not straightforward; the defendant received this letter, and thereafter continued to receive premiums from the plaintiff on account of the policy,—and thereupon the court tells the jury that: "These facts being proved and uncontradicted, the defendant was bound by the policy; and the plaintiff, though she acted in entire good faith in taking the policy and in advancing the premiums, which the defendant denies, cannot recover in this action." If this statement of the law applicable to the facts recited is incorrect, it was error for the court, on such ground, to direct the jury to return a verdict for the defendant. It is plainly impossible for the defendant to be bound by a contract which never existed. If Mrs. Cannon had died before the surrender of the policy, it may be that the defendant, through an application of the doctrine of estoppel, might have been compelled to pay the amount of insurance to the plaintiff. But that does not make the contract valid. It does not affect the liability of the defendant to return money paid under an honest mistake induced by its false representations. When the plaintiff discovered her mistake she returned the policy and demanded the return of the premiums. This she had the right to do, if she had acted in good faith. Her money had been paid in reliance on a valid contract, and not on the chance of an estoppel. She could not be compelled to keep up these payments because the defendant, in the event of the death of the insured, might be estopped from denying the truth of its representations. Nor was the defendant entitled to retain the premiums as com-

pensation for the risk sustained. Whatever the risk may have been, it was not sustained as the result of a contract between the parties, but was incurred wholly through the defendant's own wrong. If, indeed, death had occurred, and the plaintiff had received the amount of insurance, she would then by her own act be estopped from claiming a return of the premium; but she cannot be prevented from reclaiming her money, paid under a mistake, because the defendant, if it had retained the money, might be estopped from taking the advantage of its own wrong in causing the mistake. We see no ground on which this part of the charge can be sustained; none was suggested in argument. We cannot consider whether the evidence on the question really tried to the jury, i. e. the good faith of the plaintiff, is so conclusive that the plaintiff cannot be said to have been injured by the error in the charge. The conclusion is one to be drawn from conflicting testimony, and one of fact, which the jury were not permitted to pass upon. The control a trial court may properly exercise is very large, both before and after a verdict; but questions of fact in issue, and material to a judgment upon which there is evidence sufficient to support a verdict, must be submitted to a jury. *Occum Co. v. A. W. Sprague Manuf'g Co.*, 34 Conn. 529, 538; *Cook v. Morris*, 66 Conn. 196, 211, 33 Atl. 994. Upon the testimony reported, the jury might be justified in finding that the payments were in fact and intention made by the plaintiff in the execution of a wagering contract on the life of Mrs. Cannon, which the law holds to be both immoral and illegal. The charge does not state the law applicable to such a state of facts, either in respect to the effect of an honest belief on the part of the plaintiff, induced by the defendant, that the transaction was legal, or as to the position of the payments while held by the defendant pending the termination of the life which is the subject of the wager. In the view taken by the court, this was unnecessary. So these questions, while evidently in the case, are not presented by this record. There is error in the judgment of the superior court, and a new trial is granted. The other judges concur.

(69 Conn. 476)

O'DONNELL v. SARGENT et al.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

APPEAL AND ERROR—WHEN LIES—MASTER AND SERVANT—NEGLIGENCE—PLEADING.

1. Inasmuch as an appeal lies whenever a writ of error could be sustained, an appeal in which the only error assigned is the overruling of a general demurrer to the complaint is proper, though defendant declined to avail himself of his right to plead over, under Gen. St. 1888, § 1014.

2. A complaint alleged that plaintiff was in the employ of defendant on a certain day, and had been so employed previously; that on that day, in pursuance of his regular duty, as instructed by defendant, he mounted a ladder, furnished by defendant for the purpose, to oil a certain shaft; that the ladder previous to that day had been

furnished with spikes to prevent its slipping on the floor; that "the agents, servants, and employes of the defendant, and the defendant, had carelessly and wantonly removed" said spikes since plaintiff had last used the ladder, and he had not been notified thereof; and that by reason of such removal the ladder slipped, and plaintiff was thrown to the floor and injured, without fault or negligence on his part. *Held*, that the overruling of a general demurrer to the complaint was not error, since it was defendant's duty to notify plaintiff of the removal of the spikes, and defendant could not avoid liability for a breach of such duty on the ground that plaintiff assumed the risk, or was negligent in not inspecting the ladder before he used it.

Appeal from superior court, New Haven county; Milton A. Shumway, Judge.

Action by Thomas O'Donnell against Sargent & Co. to recover damages for personal injuries. Upon the overruling of defendant's demurrer to the complaint, they refused to plead over, and judgment was rendered for plaintiff for nominal damages. Defendants appeal. Affirmed.

The complaint set forth the following facts: "(1) On and prior to January 16, 1894, the defendant was engaged in carrying on a manufacturing business in the city of New Haven, in said town of New Haven, and, for the purpose of propelling its machinery, owned, controlled, managed, and ran a large steam engine, connected with which was a line of heavy shafting, in the upper part and near the ceiling of the room in which said engine was located; and said line of shafting was situated about twenty feet from the flooring of said engine room, and was accessible and could be reached only by a ladder, with one end thereof resting on the floor of said room, and the other end against said shafting; and, in order to keep said shafting in running order, it was necessary to oil the same at least twice every twenty-four hours, and said oiling could be done only by climbing up upon said ladder placed as aforesaid; and the defendant had the exclusive control and management of said engine and shafting, and provided the ladder to be placed as aforesaid for the purpose of oiling said line of shafting, and it was the defendant's duty to provide a suitable ladder, so made that the same would be safe to climb upon, and with the lower end of it so provided with sharp points or spikes that the same would not and could not slip when placed on the floor of said engine room as aforesaid. (2) On said 16th day of January, 1894, the plaintiff was employed by the defendant as fireman to attend said engine, and as a part of his work as such fireman he was directed and ordered by the defendant to oil said line of shafting at its bearings every morning just before 7 o'clock, and every noon between the hours of 12 and 1 o'clock in the afternoon, and to oil the same by placing the ladder provided by the defendant upon the floor of said engine room, with the top of said ladder resting against said line of shafting and against the wooden beam just under said shafting, according as the

bearings to be oiled could be made most accessible; and the defendant supplied the ladder on which the plaintiff had to climb to do said oiling. (3) On said 16th day of January, 1894, the said ladder provided by the defendant was unsafe, unsuitable, and unfit to climb upon to oil said line of shafting as aforesaid, in that it was not provided with any sharp points, spikes, prods, or any other suitable means to prevent its slipping on the floor of said engine room when placed in position to oil said line of shafting, and in that the agents, servants, and employes of the defendant, and the defendant, had carelessly and wantonly removed, broken, cut off, and taken away the spikes and prods which had formerly been in the lower end of said ladder; and the floor of said engine room was hard, and worn smooth, so that the ladder provided by the defendant could not stand safely upon said floor unless properly provided with prods and spikes in the lower end thereof to keep said ladder from slipping. (4) On said 16th day of January, 1894, the plaintiff, while under orders as aforesaid to oil said line of shafting, climbed upon said ladder while placed in the ordinary position necessary and convenient to do said work, and without any fault or negligence on the part of the plaintiff, and while using ordinary and reasonable care, the foot or lower end of said ladder suddenly slipped and moved outwards upon said floor, thereby pulling the upper end off its resting and bearing, and thereby causing said ladder to fall flat upon said floor while the plaintiff was on the upper part of the same, engaged in oiling said shafting; and thereby the plaintiff fell and was thrown upon the floor of said engine room, a distance of about eighteen feet. (5) By reason of said fall the plaintiff hit his left foot upon the floor of said engine room with great force, and thereby bruised, strained, wrenched, twisted, and severely injured his left ankle and foot, and the cords and muscles thereof, so that the said ankle became weak, lame, and swollen, and very painful to the plaintiff, and the plaintiff was weak, sick, and lame for a long time thereafter, to wit, for the period of seven months, and unable to walk, stand, or attend to any of his ordinary business; and said injury is permanent and incurable, and the plaintiff has suffered and still does suffer great pain from the same; and the plaintiff has expended large sums of money in endeavoring to cure himself of said injuries, to wit, the sum of \$200. (6) The plaintiff at the time of said injury was a fireman, and capable of earning the sum of \$11 per week, and ever since said injury the plaintiff has been unable to perform any of the duties or do any of the work of a fireman, and on account of said injuries now is, and will always remain, unable to do or to perform any of the work or duties of a fireman. The plaintiff claims \$5,000 damages."

The defendant demurred to this complaint because: "(1) The alleged supposed defects

in the ladder, and the alleged condition of the floor of the engine room, all as described in the third paragraph of the complaint, were obvious to the plaintiff at the time of the injury complained of, and he knew of the same, or ought to have known of the same, and he had equal and the same means of knowledge with the defendant of any danger arising from such supposed defect; and he was bound to judge for himself of the danger of climbing the ladder at the time of said injury, and took upon himself whatever risks were incurred in the use of said ladder. (2) Upon the facts stated in the complaint, the plaintiff was guilty of negligence materially contributing to the injury. (3) It being alleged in the third paragraph of said complaint that the agents, servants, and employes of the defendant had carelessly and wantonly removed, broken, cut off, and taken away the spikes and prods which had formerly been in the lower end of said ladder, it appears that the injury of the plaintiff was caused by the negligence of the fellow servants of the plaintiff; and in so far as it is alleged that such spikes and prods were removed, broken, cut off, and taken away by the defendant, the defendant had the right to judge for itself what sort of ladders, as well as floors, it would use in its business; and the plaintiff had full knowledge, or means of knowledge, of the circumstances and facts about such ladder and floor; and in entering the employ of the defendant, and undertaking to oil said line of shafting by the use of said ladder described in the complaint, the plaintiff assumed all the risks of such service arising from the supposed defects (but obvious, if so) in said ladder and floor described in the complaint. (4) Upon the facts stated in the complaint, the plaintiff has no right of action against the defendant, and is not entitled to the relief sought for in said complaint."

The judgment of the trial court is in the following language: "This action, by writ and complaint dated August 7, 1894, claiming \$5,000 damages, as on file, was duly served on the defendant, as appears by the officer's return indorsed thereon, and came to this court on the first Tuesday of September, 1894, when the parties appeared, and the defendant filed its demurrer, as on file, and thence by continuance to the 15th day of February, 1895, when the parties appeared; and the court, having heard the parties, overruled said demurrer; and said case came thence to the 30th day of January, 1897, when the parties appeared, and were heard as to the damages to be assessed in said case. The court, having heard the parties, finds that the plaintiff has sustained damages, as alleged in his complaint, to the amount of twenty-five dollars; said amount being nominal damages. Whereupon it is adjudged that the plaintiff recover of the defendant twenty-five dollars damages, and his costs, taxed at \$——."

The defendant appealed from this judgment,

alleging that the trial court erred in "overruling the demurrer of the defendant to the complaint of the plaintiff, and in overruling the several causes of the demurrer therein alleged. It therefore prays for such relief as is provided by law in the premises."

John W. Alling and James E. Wheeler, for appellants. Charles S. Hamilton, for appellee.

ANDREWS, C. J. The appeal is properly here. The only error assigned is that the court erred in overruling the defendant's demurrer to the complaint. At the common law, upon the overruling of a demurrer to a complaint judgment in chief went against the defendant. 1 Swift, Dig. 639; 1 Ohit. Pl. 701. In such a case, very clearly, a writ of error would lie from the judgment on the demurrer. According to our present practice, an appeal will lie wherever a writ of error could be sustained. Our statute (Gen. St. 1888, § 1014) allows a defendant, after the overruling of a demurrer, to plead over, if he desires to do so. In this case the defendant declined to plead over, and final judgment was rendered against it. But the refusal to plead did not take away the right to claim error in the ruling on the demurrer.

There is no error in the ruling of the superior court unless the complaint is so defective that under its averments a valid judgment in favor of the plaintiff could not be proved consistently with the rules governing the admission of evidence. The defendant's assignment of error assumes, as also its argument contends, that the complaint is defective and insufficient to that extent. It is not very difficult to test this. Suppose the complaint, just as it is, to be denied; could a good cause of action be proved? Evidence to prove all the facts put in issue would be admissible, also to prove all relevant facts, and all facts necessary to introduce or explain the facts in issue, or the relevant facts. It would then be competent to prove, under the averments in the complaint, that the plaintiff was in the employ of the defendant on the day named; that he had been so employed for some time previous to that day; that a part of his employment was to oil the shafting, as set forth; that the ladder he had used for that purpose at all times previous to that day had been supplied with spikes or prods at its lower end, and so as to prevent its slipping; that "the agents, servants, and employes of the defendant, and the defendant, had carelessly and wantonly removed, broken, cut off, and taken away the spikes and prods which had formerly been in the lower end of said ladder"; and that this had been done since the plaintiff had last used the said ladder, and without giving him any notice of such removal,—because it is alleged that the plaintiff was without fault or negligence on his part,—and that by reason of such removal the ladder slipped, and plaintiff fell and was injured. These facts would establish a good cause of action in favor of the

plaintiff. If the defendant itself removed the prods, it was in duty bound to notify the plaintiff of that fact, and without such notice he was justified in believing that the ladder was in the same condition as when he had last used it. He had no occasion to examine it that morning before he went up on it to oil the machinery. An employer is bound to furnish his servant with a reasonably safe place in which to do his work. He is bound to provide tools and appliances which are free from secret defects. If he does this, he is not liable to the servant. If he does not do this, or if he does not point out the defects, and injury ensue to the servant, then the employer is liable; and much more so if the employer has himself created the danger which causes the injury. There is no error. The other judges concur.

(69 Conn. 416)

CROSGROVE v. CROSGROVE et al.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

WILLS—CONSTRUCTION—DESIGNATION OF BENEFICIARIES—DESCRIPTION OF PROPERTY—NATURE OF ESTATE—ALIENS—DISABILITY—MORTGAGES—VALIDITY.

1. Testator made 17 tersely expressed bequests to his brother and sisters, nephews and nieces, most of whom were married and had children. In the bequests to the brother who had a wife, and to those of the sisters who had husbands, the gifts were to both husband and wife. In the cases where the nieces or nephews were married, either with or without children, the bequest in each case was to the relative, either niece or nephew, "and family." *Held*, that these bequests to a relative "and family" were to be equally divided between the relative named, the wife or husband, and the children, if any, living at the time of the testator's decease.

2. In a devise of real property for life, with remainder to the heirs of testator, consisting of one brother and one sister, both resident citizens, and two nonresident alien sisters, not citizens, or wives of citizens, of France (Gen. St. § 15), the remainder vests only in the resident brother and sister.

3. Aliens may acquire personal property by bequest.

4. Where the language used in a devise covers an interest greater than that held by the deviser in the property, the devise is not thereby defeated, but is effectual as to such interest as the deviser had.

5. In a suit for the construction of a will devising testator's interest in land of which he was mortgagee, the validity of the mortgage debt cannot be inquired into.

6. A bequest was made to the Second Congregational Church. The church, as such, was an unincorporated body, incapable of holding property; but the equivalent incorporated body, the Second Congregational Society, held all its property for the exclusive use of the church. *Held*, that the bequest was payable to the Second Congregational Society.

7. A bequest to a church of money to be put at usury, or to the best interests of the church, is an absolute gift to the church.

Case reserved from superior court, New London county; William T. Elmer, Judge.

Suit by George L. Crosgrove, executor, against Thomas Crosgrove and others, to obtain the construction of a will. Reserved by

the superior court for consideration of the supreme court of errors.

The facts are as follows: (1) On the 19th day of June, 1893, Hugh Crosgrove, of Norwich, in New London county, in the state of Connecticut, died, leaving his last will and testament, dated June 7, 1893, a copy of which is hereto annexed, and marked "Exhibit A," and made a part of this complaint. Said will was on the 30th day of June, 1893, duly probated in the court of probate for the district of Norwich; and the plaintiff was duly appointed and qualified, and continues to be, the executor of said will. John Bennett, of Rye, N. Y., who was appointed in said will co-executor with the petitioner, refused to accept the executorship. (2) At the time of the death of the said Hugh Crosgrove the following were his next of kin, to wit: Thomas Crosgrove, a brother, of Norwich, Conn.; and Eliza C. Atchison, a sister, of Montville, Conn., and wife of Alexander Atchison, of said Montville; Ann C. Bennett, a sister, of Rathfarnham, in Ireland; and Sarah Brownlee, a sister, of Belfast, in Ireland. (3) Since the death of the testator, Hugh Crosgrove, the said Ann C. Bennett has died in Ireland, leaving the following children, to wit: The said Mary J. Kelly, Margaret Hughes, John Bennett, Eliza White, Hugh Bennett, Annie Sheldow, George Bennett, and Fanny Whitney,—and leaving a last will, of which the said Hugh Bennett and William Hughes are the executors. Since the death of said Ann C. Bennett the said Mary J. Kelly has died in Ireland, leaving her husband, the said Robert Kelly, Sr., and her said children, William Kelly, Margaret Kelly, and Robert Kelly, Jr., in Ireland, her surviving, and leaving a last will, of which said husband is the executor. The said William Crosgrove, of Chicago, mentioned in said will, is a nephew of the testator; and at the time of the testator's death his family consisted of his wife, Minnie Crosgrove, and a minor child, Georgia M. Crosgrove. Since the death of the testator two other children have been born to said William Crosgrove, to wit, the said Harry Crosgrove and Clara M. Crosgrove; and the family of this William Crosgrove now consists of him, his said wife, and said three children. The said Margaret Hughes, of Rathfarnham, Ireland, mentioned in said will, is a niece of the testator; and at the time of the testator's death her family consisted of her husband, said William Hughes, Sr., and the following named children: William Hughes, Jr., of age; George Hughes, a minor; James Hughes, a minor; Ann Jane Hughes, a minor; Frances Hughes, a minor; and Margaret E. Hughes, a minor. The said John Bennett, of Park Ridge, mentioned in said will, is a nephew of the testator; and at the time of the testator's death his family consisted of his wife, Anne J. Bennett, and their children, to wit: William J. Bennett, of age; Mary J. Bennett, of age; George C. Bennett, a minor; Eliza McC. Bennett, a minor; Matilda Bennett, a minor; and Mar-

garet E. Bennett, a minor. The said Eliza White, of Massachusetts, mentioned in said will, is a niece of the testator, and at his death had three sons, William H. White, then aged 18 years; George F. White, then aged 17 years; and James W. White, then aged 14 years. The said Hugh Bennett, of Ireland, mentioned in said will, is a nephew of the testator; and at the time of the testator's death his family consisted only of himself and his wife, Ellen Bennett. The said Annie Sheldow, of Ireland, mentioned in said will, is a niece of the testator; and at the time of the testator's death her family consisted of her husband, Thomas Sheldow, and their minor children, Archibald N. B. Sheldow, Frances B. Sheldow, Mabel A. Sheldow, and Thomas G. Sheldow. Since the death of the testator one other child has been born to Annie Sheldow, to wit, Violet E. Sheldow; and the family of said Annie Sheldow now consists of her, her husband, and said five children. The said George Bennett, of Ireland, mentioned in said will, is a nephew of the testator; and at the time of the testator's death his family consisted of himself and his wife, Mary E. Bennett. The said Fannie Whitney, of Ireland, mentioned in said will, is a niece of the testator; and at the time of the testator's death her family consisted of her husband, James Whitney, and their minor children, Harriet T. Whitney, George A. Whitney, Arthur J. Whitney, Matilda Whitney, Lucy M. Whitney, and John F. Whitney. The said James Brownlee, of New York, mentioned in said will, is a nephew of the testator; and at the time of the testator's death his family consisted of his wife, Amelia S. McD. Brownlee, and their minor child, Esther E. Brownlee. Since the death of the testator one other child has been born to James Brownlee, to wit, — Brownlee; and the family now consists of James Brownlee, his wife, and said two children. In said Norwich there is no corporation of the name the "Second Congregational Church," but there is in Norwich a corporation named the "Second Congregational Society," having the control of a church edifice in said Norwich, commonly called the "Second Congregational Church," in which church the testator was a regular attendant and pewholder. The house No. 30 Baltic street, in Norwich, has always been owned by the brother of the testator, Thomas Crosgrove, who in October, 1860, mortgaged the same to the testator to secure his note then due the testator, for \$450, payable on demand, with yearly interest. No part of the principal and no interest was ever paid by Thomas Crosgrove, or demanded by the testator, on said note and mortgage. The note and mortgage were in possession of the testator at his death, uncancelled. And from the time said note and mortgage were given there was no acknowledgment of the same as an existing indebtedness by said Thomas Crosgrove, nor promise by him to pay the same to the testator or to his executor. At the testator's death there was on the farm devised to sister Eliza and husband

one horse and — cows owned by the testator.

The following is the will of the testator:

"Be it known to all Persons: That I Hugh Crosgrove of the town of Norwich in the County of New London in the State of Connecticut being of lawful age, of sound and disposing mind, memory and judgment and under no improper influence or restraint do hereby make publish and declare this to be my last will and testament hereby revoking all previous wills and codicils by me made. I give devise and bequeath my estate and property real and personal as follows: that is to say: to mi Brother Thomas Crosgrove and wife The House on Baltic Stree 30 and the Rent of House 86 Chestnut street to be capt in Reper and return to mi Ers and to mi sister Mrs. George bennett i Boquath five hundred dollars. and i Bequath to mi sister Sarah five Hundred dollars and i Bequeth mi nefu Thomas H. Crosgrove seventeen hundred & twenty sex dollars that I lent Him in 1883 with int sinc & i Bequeath to mi nefu G. L. Crosgrove seventeen Hundred Dollars. & i Bequath to mi nefu William Crosgrove & fomly twelve hundred dollars & i Bequeath to sister Elize and husband five Hundred and use of farm and Stok at deth Return to mi hers & i Bequeath to mi nefu Mary Jane Kelly ten Hundred dollars & i Bequeath to mi nefu Margaret Hughs and famly ten Hundred dollars & i Beqeath to mi nefu John Bennett and famley Seventeen Hundred dollars & i Bequeath to mi nefu Eliza White and boys ten Hundred dollars & i Bequeath to mi nefu Hugh Bennett and famley twelve Hundred dollars. & i Bequath to mi nefu Anne Shldow and famley ten Hundred dollars & i Boquath to mi nefu George Bennett and famley twelve Hundred dollars & i Boquath to mi nefu Faney Whitney and famely ten Hundred allers & i Boquath to mi nefu James Brownle and famley ten Hundred dollars & i Boquath to mi nefu sam Brownille ten Hundred dollars and i boquath mi friend Hugh King for favours received fifty dollars & i Boquath to the second Congregational church five Hundred dollars to be put ausery or the best interests of the church I appoint G. L. Crosgrove of Norwich Conn. & John Bennett of the town of Rye Westchester county and state of New York executors of this my last will and testament

"In witness whereof I have signed sealed published and declared this instrument as my last will and testament at said Norwich on the 7th day of June A. D. 1893."

The questions as to which an adjudication of the court is asked are as follows: "(1) In each of the several instances in said will of a bequest to a person named and "family," does the husband or wife (as the case may be) of the person named share in the bequest? Do children born to said person named since the testator's death share in the said bequests, and among whom, in each

of said instances, and in what proportion, shall said bequests be distributed? (2) In whom does the remainder in the Chestnut street house and the farm and the live stock on said farm vest, and can the two alien sisters of the testator be heirs thereof? (3) To whom should the bequest to the Second Congregational Church be paid, and is the title an absolute one in the legatee, or restricted; and, if so, to what extent? (4) Is the said mortgage on the Baltic street house a valid asset of said estate; and, if so, what effect, if any, has the devise in said will of said Baltic street house thereon?"

William H. Shields, for Thomas Crosgrove and wife. Charles F. Thayer, for Alex. C. Atchison and others. Solomon Lucas, for Second Congregational Society.

HAMERSLEY, J. The word "family" is one of variable meaning; and, when used in a will as descriptive of the beneficiaries of a legacy, its legal import will be determined by the intention of the testator expressed in the language of the whole instrument read in the light of relevant circumstances existing at the time of execution. *Smith v. Wildman*, 37 Conn. 384; *Wood v. Wood*, 63 Conn. 327, 28 Atl. 520; *St. John v. Dann*, 66 Conn. 401, 405, 34 Atl. 110. This will, evidently the product of an intelligent, although quite unlettered, person, contains 19 briefly expressed bequests, of which all but two are to the brother and sisters, nephews and nieces, of the testator. His next of kin were one brother and three sisters. His gift to the brother is "to my brother and wife"; to the sister who had a husband, "to my sister and husband"; to the two sisters whose husbands do not appear to have been living, the gift is "to my sister"; to three nephews and one niece, who do not appear to have had any family, the gift is "to my nephew"; to one niece whose husband is not living, the gift is "to Eliza White and boys"; to five nephews and three nieces who have families, the gift is "to my nephew and family." Of these eight nephews and nieces, two had a wife and no children, and the others a wife or husband and one or more children. In the case of one niece, one of six children was of age; and, in the case of one nephew, two of six children were of age; all the other children were minors. It does not appear whether the children of age continued to live with their parents, or whether they were of age at the time the will was made, three years before the testator's death. These gifts "to my nephew and family" range in amount from \$1,000 to \$1,700. The primary meaning of "family" is the assembly of persons under the rule of the head of one household, including wife, children, and slaves or servants; but the word is frequently used in common speech without reference to an established household, and merely for the purpose of indicating the individuals related as husband and wife, or parents and children. We

think it clear that the testator used the word in the latter sense, and intended each gift "to my nephew and family" to be divided equally between the individuals of the family,—husband, wife, and children. Nothing appears to except these legacies from the general rule that a will speaks from the death of the testator. Therefore the children who were unborn at that time do not share in the legacies. *Gold v. Judson*, 21 Conn. 616, 623; *Jones' Appeal*, 48 Conn. 60, 67.

The sisters of the testator who were citizens of Great Britain do not come within any provision of the statute enabling an alien to inherit real estate. Gen. St. § 15 et seq. Therefore the remainders in the Chestnut street house and the farm given by the will to the testator's heirs vest in the brother and sister who are citizens of this state. 1 Swift, Dig. 157; *Evans' Appeal*, 51 Conn. 435. The stock, however, is personal estate, and the alien sisters can share in this gift.

The devise to his brother Thomas and wife, of the house No. 30 Baltic street, is effectual to transfer any interest the testator had in the land and mortgage debt. Such was his plain intention, and it is not defeated because expressed in language that covers a greater interest than he had to give. The validity of the debt cannot be determined on this application.

The bequest of \$500 to the Second Congregational Church is an absolute gift, and the description in connection with the facts found is sufficient to identify the Second Congregational Society, of Norwich, as the legatee. *Bristol v. Asylum*, 60 Conn. 472, 22 Atl. 848.

The superior court is advised to render judgment settling the construction of the will in respect to the questions asked as follows: (1) Each bequest to a person named and "family" is shared equally by the members of the family (i. e. husband, wife, and children), if any, living at the time of the testator's death. (2) The remainders in the Chestnut street house and the farm vest in the brother Thomas Crosgrove and the sister Eliza C. Atchison. The stock, after the termination of the life use, goes to the brother and three sisters. (3) The bequest to the Second Congregational Church vests an absolute title in the Second Congregational Society, of Norwich. (4) The devise of the Baltic street house transfers to Thomas Crosgrove and wife any interest the testator may have had in the land and mortgage debt. The other judges concur.

(90 Me. 296)

HUSSEY et al. v. SOUTHARD et al.

(Supreme Judicial Court of Maine. May 29, 1897.)

PROBATE JUDGE—APPOINTMENT OF ADMINISTRATOR.

A judge of probate who is appointed by a testator executor of a will is not qualified or authorized, even before probate of such will, to appoint a special administrator on another estate to which the estate represented by him as executor is largely indebted; and such appointment of a special ad-

ministrator is void, and the person assuming to act thereunder may be enjoined from so doing by this court sitting as the court of equity.

(Official.)

Bill by Harriet F. Hussey and others against Charles H. T. Southard and others. Bill sustained, and injunction ordered.

O. D. Baker and S. L. Larrabee, for plaintiffs. L. C. Cornish, for defendants.

PER CURIAM. Bill sustained. Injunction ordered.

(90 Me. 315)

BROOKS et al. v. CITY OF BELFAST et al.
(Supreme Judicial Court of Maine. May 29, 1897.)

WILLS—LAPSED BEQUESTS—PERPETUITIES—CHARITIES—CY PRES.

1. The residuary clause of the will of Mary E. Simpson Southworth requiring a judicial construction is as follows: "All the rest, residue, and remainder of my estate, and of which I may die possessed, I give, bequeath, and devise to the Central school district of said Belfast, for the purpose following: 1st. The amount of this bequest shall be invested or put at interest so that an income may accrue, and so kept until a sufficient sum shall be accumulated by increase from interest or profit, by subsequent bequests or gifts, or in some other way, to provide for the erection of a school house within said district suitable to accommodate at least four of the schools. 2d. When the sum becomes sufficient for the above purpose, the money shall be used for the building such a school house as is indicated above."

The testatrix executed this will December 17, 1889, and died July 21, 1895. At the date of the will there were 16 school districts in the city of Belfast, including the one named in the will, and which comprised the city proper. Each of these districts was then a body corporate, capable to take and hold property by bequest or devise; but before the death of the testatrix the school districts in all towns in the state were abolished by the statute of 1893 (chapter 216), and on March 1, 1894, Central school district ceased to have a corporate existence for the purpose of taking property by bequest or devise.

Held that, the Central school district having ceased to exist, there is neither trustee nor beneficiary capable of taking the fund; and by the abolition of the district the residuary bequest to that corporation lapsed to the estate of the testatrix, and descended to her heirs as intestate property.

2. Also, that this bequest was not an unqualified and unrestricted gift of a fund to be used for any and all purposes to which the district might appropriate it. It was limited to the specific purpose of erecting a school house within said district, suitable to accommodate at least four of the schools. The school district was at once the trustee and the beneficiary.

3. Also that, the Central district having ceased to exist, there is neither trustee nor beneficiary capable of taking the fund; and if the taxpayers and scholars within the limits of that district should be deemed the true beneficiaries, and it were practicable or possible by substitution of other trustees to secure and restrict the benefit of the fund to the taxpayers of that district alone, such beneficiaries would not be a body corporate capable of receiving and holding the fund, but the title would be held and continued in the hands of the trustees; and the objection arising from the rule against perpetuities thus be obviated.

4. Also, that the case is not one in which the intention of the testatrix may be effectuated by

an application of the doctrine of cy pres, and the gift applied "as nearly as possible" in conformity with the presumed intention of the donor, although the particular form or manner specified in the bequest cannot be followed.

(Official.)

Report from supreme judicial court, Waldo county.

Bill in equity by John G. Brooks and others, executors of the will of Mary E. S. Southworth, deceased, against the city of Belfast and others, to obtain a construction of the residuary clause of the will. The case was heard upon bill, answer, and the additional fact that at the date of the will there were 16 school districts in the city of Belfast, inclusive of the "Central District," so called, named in the will as one of the objects of testatrix's bounty. Submitted on report.

W. P. Thompson, for plaintiffs. N. Wardwell, City Sol., for defendant city of Belfast.

WHITEHOUSE, J. In this bill in equity the plaintiffs seek to obtain a judicial construction of the residuary clause of the last will and testament of Mary E. Simpson Southworth. The will is as follows:

"I, Mary Emeline Simpson, of Belfast, in the county of Waldo, and state of Maine, make this, my last will and testament.

"I give and bequeath to Dana B. Southworth, of said Belfast, the sum of thirty thousand dollars.

"I give and bequeath to Elizabeth Chapman, daughter of Mrs. Mary E. Merrill, of Toledo, Ohio, the sum of one thousand dollars.

"I give and bequeath to the First Parish (Unitarian) Society of said Belfast the sum of three thousand dollars.

"I give and bequeath to the city of Belfast, in trust forever, the sum of five hundred dollars for the purpose following: The income and accrued interest thereon to be used to keep the Josiah Simpson lot in Grove Cemetery in good order and condition by having the grass properly cut in the summer, the monument and stones kept upright and free from moss, and by doing such other things as are necessary to be done for accomplishing the purpose specified above.

"All the rest, residue, and remainder of my estate and of which I may die possessed I give, bequeath, and devise to the Central school district of said Belfast, for the purpose following:

"1st. The amount of this bequest shall be invested, or put at interest, so that an income may accrue and so kept until a sufficient sum shall be accumulated by increase from interest or profit, by subsequent bequests or gifts, or in some other way, to provide for the erection of a school house within said district suitable to accommodate at least four of the schools.

"2d. When the sum becomes sufficient for the above purpose, the money shall be used for the building such a school house as is indicated above.

"I hereby appoint Dana B. Southworth and John G. Brooks executors of this, my last will and testament."

The testatrix executed this will on the 17th of December, 1889, subsequently married Dana B. Southworth, and died on the 21st day of July, 1895. At the date of the will there were 16 school districts in the city of Belfast, including Central school district, named in the will, which comprised the city proper. Each of these districts was then a body corporate, competent to take and hold property by bequest or devise. But before the decease of the testatrix, by section 1 of chapter 216 of the Public Laws of 1893, the school districts in all towns in this state were abolished, and on the 1st day of March, 1894, when the act took effect, Central school district in Belfast ceased to have a corporate existence for the purpose of taking property by bequest or devise.

It is provided in section 2 of the same act that: "Immediately after this act shall become a law, towns shall take possession of all schoolhouses, lands, apparatus and other property owned and used by the school districts hereby abolished, which districts may lawfully sell and convey. The property so taken shall forthwith be appraised by the assessors of said towns, and at the first annual assessment thereafter a tax shall be levied upon the whole town, or such part thereof as is included within the districts abolished, equal to the whole of said appraisal, and there shall be remitted to the tax payers of each said districts the said appraisal value of its property so taken." Section 4 declares that: "The corporate powers of every school district shall continue under this act so far as the same may be necessary for the meeting of its liabilities and the enforcing of its rights; and any property held in trust by any school district, shall continue to be held and used according to the terms thereof."

The heirs of Mrs. Southworth claim that the bequest to Central school district, in the residuary clause of the will, was an absolute gift to that body corporate; and, inasmuch as the district was abolished and ceased to have a corporate existence before the death of the testatrix, the legacy must be held to have lapsed, and the residue of her estate should now be distributed among her heirs as intestate property. On the other hand, it is contended that the clause of the will in question evinces a charitable purpose on the part of the testatrix to aid in the erection of a school house on the territory comprised within the limits of Central district, that the district was only named as the instrument—a trustee—for the carrying out that intention, and that the city of Belfast, which, under the act of 1893, succeeded to the rights and obligations of the district respecting the erection of school houses and the maintenance of schools, should now become the beneficial recipient of the bequest.

1. Whether the bequest be denominated an

"absolute gift" or a gift in trust for a definite purpose is of little or no practical importance with respect to the decision of the question here presented. It has been seen, however, from the language of the residuary clause, that the bequest to the Central district was not an unqualified and unrestricted gift of a fund to be used for any and all purposes to which the district might elect to appropriate it. The purposes of the gift were clearly specified by the terms of the will, and were not co-extensive with the general purposes and full authority of the district. The fund could in no event be made available for the payment of teachers' salaries or other ordinary expenses involved in the support of the public schools in the district. It was limited to the specific purpose of "erecting a school house within said district, suitable to accommodate at least four of the schools." And it would seem to be entirely appropriate to say that it was left to the district in trust for that purpose. The school district was at once the trustee and the beneficiary.

Thereupon it is contended in behalf of the heirs that it is manifest from the terms of the trust directing an accumulation of the fund for an uncertain and indefinite time, that the bequest might not become available for the purpose designed within a life or lives in being and 21 years, and hence would become obnoxious to the rule against perpetuities.

2. The general rule against perpetuities is undoubtedly "imperative, and perfectly well established. * * * The limitation, in order to be valid, must be so made that the estate, or whatever is devised or bequeathed, not only may, but must necessarily, vest within the prescribed period. If by any possibility the vesting may be postponed beyond this period, the limitation over will be void." *Fosdick v. Fosdick*, 6 Allen, 41; *Brattle Square Church v. Grant*, 3 Gray, 142. But the rule against perpetuities concerns itself only with the vesting or the commencements of estates, and not at all with their termination. It makes no difference when such an estate terminates. *Pulitzer v. Livingston*, 89 Me. 359, 36 Atl. 635.

It is suggested in reply, however, that trusts for public charitable purposes are upheld under circumstances under which private trusts would fail (*Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. 327); and the statement is often found in the books that the law against perpetuities does not apply to public charities. But the statement is misleading. It is undoubtedly true that the principle of public policy, which declares that estates shall not be indefinitely inalienable in the hands of individuals, is held inapplicable to public charities. *Odell v. Odell*, 10 Allen, 1. But it must be remembered that the rule against perpetuities, in its proper legal sense, has relation only to the time of the vesting of an estate, and in no way affects its continuance after it is once vested. The perpetual duration of a charitable trust, after it has become vested, is one of its distinctive characteristics. It is the

possibility that the estate left in trust for a charitable purpose may not vest or begin within the limits of a life or lives in being and 21 years that offends against the rule of "perpetuity" or "remoteness." In this respect a gift in trust for charity is "subject to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition * * * is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails ab initio." *Chamberlayne v. Brockett*, 8 Ch. App. 206. It is well settled, for instance, that if a gift is made in the first place to an individual and then over to a charity upon a contingency which may not happen within the prescribed limit, the gift to the charity is void. *Merritt v. Bucknam*, 77 Me. 253; *Perry, Trusts*, § 736, and cases cited.

But in the case at bar it is conceded by the learned counsel for the heirs that, if Central school district had been in existence as a corporate body at the death of the testatrix, the legacy would have vested in the district for a charitable purpose, and thus been removed from the operation of the rule against perpetuities, and sustained as a valid gift, even if the directions in the bequest for an indefinite accumulation could not be allowed. *Odell v. Odell*, supra.

In the case cited, the will contained the following bequest: "I give to the trustees of the Salem Savings Bank, in trust, one hundred dollars annually for fifty years, to be paid to them by my executors, to be safely invested by said trustees, the interest to be added to the principal by them semiannually. At the expiration of fifty years, the sum which shall have accumulated shall be appropriated by a society of ladies from all the Protestant religious societies in Salem, to provide and sustain a home for respectable, destitute, aged, native-born American men and women. The above annual payment shall be made from the income of my real estate, which shall be held in trust by my executors until the last payment shall have been made to the trustees of the Salem Savings Bank. Then my real estate shall be divided equally among the grandchildren of my late brother James." After an exhaustive examination of the authorities, and a critical analysis of the principles relating to questions of accumulations and the rule against perpetuities, the court say with reference to the claim in the will above quoted, and the contention that no title, legal or equitable, would vest in the charity until the expiration of 50 years: "We think such is not the true construction of the will. * * * Here are no words of transfer of title, and the ladies mentioned are not a corporation capable of taking the legal estate. The more reasonable interpretation is that the testator intended to continue the title of the fund in the hands of the trustees to whom he gave it in the first instance, and to clothe the proposed society of ladies with visitatorial powers

as managers of the charity." The bequest was accordingly held valid.

So in the case before us. The Central school district having ceased to exist, there is neither trustee nor beneficiary capable of taking the fund; and, if the taxpayers and scholars within the limits of that district should be deemed the true beneficiaries, and it were practicable or possible by the substitution of other trustees to secure and restrict the benefit of the fund to the taxpayers of that district alone, such beneficiaries would not be a body corporate capable of receiving and holding the fund, but the title would be held and continued in the hands of the trustees, and the objection arising from the rule against perpetuities thus be obviated.

3. It is finally contended, in behalf of the city, that there was a general charitable purpose on the part of the testatrix to provide for the health and comfort of the scholars in that district, and that this intention may be effectuated by an application of the doctrine of cy pres, and the gift applied as "nearly as possible" in conformity with the presumed intention of the donor, although the particular form or manner specified in the bequest cannot be followed.

It will be seen, however, that in one aspect the bequest under consideration was not for general charitable purposes, but was to one designated corporation and for a clearly described and limited purpose. It was bequeathed to the Central school district in trust for the erection of a "school house within said district suitable to accommodate at least four of the schools," and the practical result was to benefit the taxpayers of a particular district.

In 2 Pom. Eq. Jur. § 1027, the author says: "The true doctrine of cy pres should not be confounded, as is sometimes done, with the more general principle which leads courts of equity to sustain and enforce charitable gifts where the trustee, object, and beneficiaries are simply uncertain. * * * In the great majority of the American states the courts have utterly rejected the peculiar doctrine of cy pres as inconsistent with our institutions and modes of public administration. A few of the states have accepted it in a partial and modified form." And in reviewing the decisions in this country relating to this question and the subject of charitable trusts, Mr. Pomeroy arranged the different states according to three general types. "The second class," he says, "includes the larger portion of the states, in which charitable trusts exist under a somewhat modified form. * * * Such trusts are upheld when the property is given to a person sufficiently certain, and for an object sufficiently definite. * * * The doctrine of cy pres is generally rejected." In this group he places the state of Maine. The third class "includes a very few states which have accepted the doctrine in its full extent. The states composing this group have not even totally rejected the doctrine of cy pres, although they do

not apply it so fully and under such circumstances as would be done in England." In this group the author places the two states of Massachusetts and Kentucky. Id. § 1029.

In section 1027, Mr. Pomeroy makes this further important statement respecting the doctrine of *cy pres*: "A limitation upon the generality of the doctrine seems to be settled by the recent decisions, that where the donor has not expressed his charitable intention generally, but only by providing for one specific particular object, and this object cannot be carried out, or the charity provided for ceases to exist before the gift takes effect, then the court will not execute the trust. It wholly fails." Among the English cases cited in support of this statement is *Fisk v. Attorney General*, L. R. 4 Eq. 521. In that case a legacy was given to the Ladies' Benevolent Society at L. as part of its ordinary funds, and before the testator's death the society ceased to exist. The vice chancellor said: "It has been expressly decided by *Clark v. Taylor*, 1 Drew. 642, and *Russell v. Kellett*, 3 Smale & G. 264, that when a gift was made by will to a charity which has expired it was as much a lapse as a gift to an individual who had expired."

In 2 *Perry on Trusts* (section 726) the author says: "So, if it appears, from the construction of the whole instrument, that the gift was for a particular purpose only, and that there was no general charitable intention, the court cannot, by construction, apply the gift *cy pres* the original purpose. If, therefore, it appears that the testator had but one particular object in mind, as to build a church at W., and his purpose cannot be carried out, the gift must go to the next of kin. And if the gift cannot vest in the first instance in the donees, for the reason that no such donees can be found, or because a corporation is dissolved, the court cannot appoint other donees *cy pres*." See, also, *In re Ovey*, *Broadbent v. Barrow*, 20 Ch. Div. 676, 8 App. Cas. 812; *White's Trusts*, 33 Ch. Div. 449; *Langford v. Gowland*, 3 Giff. 617.

In *Doyle v. Whalen*, 87 Me. 426, 32 Atl. 1026, the court say: "If it appears that the gift was for a particular purpose only, and that there was no general charitable intention, the court cannot, by construction, apply it *cy pres* the original purpose."

The "limitations upon the generality of the doctrine," mentioned by Mr. Pomeroy, are also distinctly recognized in the leading case of *Jackson v. Phillips*, 14 Allen, 539, in which the whole subject is exhaustively treated. In reviewing the decisions, the court say: "In all the cases cited at the argument in which a charitable bequest, which might have been lawfully carried out under the circumstances existing at the death of the testator, has been held, upon a change of circumstances, to result to the heirs at law or residuary legatees, the gift was distinctly limited to particular persons or establishments."

So in *Jarman on Wills* (6th Ed. *209) the author says: "The general test at the present

day seems accordingly to be whether the scope and terms of the will, or that part of it which relates to charitable disposition, indicates an intention to benefit charities, or a class of charities, generally, treating the particular named objects of gift as mere instruments for carrying out such general intention; or to benefit the particular institutions specified which the testator has singled out on their own merits as worthy of encouragement. If, then, the gift fails, by reason of a named institution coming to an end in the testator's lifetime or otherwise, in the former case the charity will be executed according to the doctrine of *cy pres*, but in the latter case the gift will lapse, unless the particular charity existed at the testator's death, in which case the legacy will be applied for other similar charitable purposes."

It will be perceived that the second restriction placed by Mr. Pomeroy upon the exercise of this doctrine is here distinctly recognized, viz. that it has no application to a trust which was not legally capable of vesting as a charity at the time of the testator's death.

In this important particular, among others, the case of *Attorney General v. Briggs*, 164 Mass. 561, 42 N. E. 118, cited in behalf of the city, is widely distinguished from the case before us. Here both the fund and its income are to be used in the erection of a school house, thus making a permanent addition to the property in a certain district; but the district was abolished nearly a year and a half before the death of the testatrix, and the fund never vested. There the income of the fund was to be appropriated for the support of a school in a certain district, and the fund had vested in the trustees, and the income actually been used for 14 years, towards the support of the school, before the district was abolished. It was by reason of the change of circumstances resulting from this and other conditions created after the death of the testator, and after the fund had vested in the trustees, and used as stated, that the doctrine of *cy pres* was exercised to the extent of allowing scholars outside as well as those inside of the limits of the district to enjoy the benefit of the fund. And this decision was rendered in a state where, according to Mr. Pomeroy, the doctrine of *cy pres* has been carried to the extreme limit found in any of the courts of the United States.

On the other hand, the recent and important case of *Merrill v. Hayden*, in our own state (86 Me. 133, 29 Atl. 949), is in harmony with the views hereinbefore expressed, and strongly supports the contention of the heirs. In that case the testator made a residuary bequest to the "Maine Free Baptist Home Missionary Society," a corporation capable of taking the devise at the date of the will, and organized "for the purpose of aiding Free Baptist churches in this state in need of assistance." But under subsequent acts of the legislature another distinct society was incorporated by the name of the "Maine Free Bap-

tist Association," "for religious, missionary, and educational purposes." All the property and rights of the old society were transferred to the new association, to be used for the purposes named in its charter, and the old one thus became extinct two years before the death of the testator. It will be observed that, although the purposes of the two societies were not coincident, those of the new one embraced all that was contemplated in the old one. Funds used in "aiding Free Baptist churches in need of assistance" would be devoted to "religious and missionary purposes," and the bequest for such purposes would clearly be a public, and not a private, charity. "Private trusts," says Mr. Pomeroy, "are for the benefit of certain and designated individuals, in which the cestui que trust is a known person or class of persons. Public, or, as they are frequently termed, charitable, trusts are those created for the benefit of an unascertained, uncertain and sometimes fluctuating body of individuals in which the cestui que trustment may be a portion or class of a public community; as, for example, the poor or the children of a particular town or parish." 2 Pom. Eq. Jur. § 987; 1 Perry, Trusts, § 384; Bangor v. Masonic Lodge, 73 Me. 428; Doyle v. Whalen, 87 Me. 425, 32 Atl. 1028. A bequest for the support of churches and ministers of the gospel of any Christian denomination has uniformly been held to be for public and charitable purposes. 2 Redf. Wills, 501, and cases cited. If the old society had continued to exist until after the death of the testator, and the bequest had actually vested in it before the change of circumstances created by the extinguishment of the old society and the incorporation of the new one, then, under the doctrine of *cy pres*, as applied in Massachusetts, the new association might have been permitted to take and hold the property bequeathed, although some portion of the fund might thus have been incidentally expended for the distinct "educational purpose" not specified in the old charter. But as the new association was incorporated 11 years after the date of the will, and the fund had never vested in the old society, it was properly held by our court that the legacy lapsed to the estate of the testator, and descended to his heirs. In the opinion the court say: "He precisely designated, by its correct legal name, a then existing corporation capable of receiving his proposed bounty. He as precisely expressed his intent to bequeath the residue of his estate to that particular corporation. The claimant association was not in the testator's mind, nor within the purview of his bounty, for it did not exist. * * * We cannot find that the testator intended to make any bequest to the claimant association, the Maine Free Baptist Association, or that he had it in mind to aid in the purposes for which it was incorporated, or to make it the successor to his bounty in case of the extinction of the legatee he selected."

The purposes of the new association in the case cited are not more clearly and widely distinguishable from those of the old society than are the purposes and functions of the city of Belfast from those of Central school district, in the case at bar, even if those of the city are considered solely with reference to the maintenance of schools. In the case of the legacy to the Free Baptist churches the immediate beneficiaries were the church organizations and the ministers of the gospel; the true beneficiaries contemplated by the pious testator were the unascertained and fluctuating mass of the people who would derive profit from the Christian teachings of the church. So the immediate cestui que trust of the bequest to aid in the erection of a new school house was the Central school district therein named, which is declared by the statute to be a "corporation with power to hold and apply real and personal estate for the support of schools therein, and to sue and be sued." Rev. St. c. 11, § 40. The cause of public education, it is true, might be advanced by erecting a new school house, and thus promoting the health, and comfort of the children of the district. While this gift, as well as that to the Free Baptist churches, is, therefore, a bequest for a charitable purpose, an important distinction must not be overlooked. With respect to education the statutes of the state impose upon the taxpayers of the district the public duty to provide all suitable buildings necessary for the accommodation of the scholars. Hence the true beneficiaries of the trust may well be deemed the taxpayers of the district; and when the school districts were abolished this obligation was devolved upon the city or town. If the testatrix's gift could have been vested in the school district, and been administered as intended, the taxpayers of that district would have been relieved of a public duty to the extent of the fund in question available for the erection of the school house. But the taxpayers of no other district would have been thus relieved by the gift. If now any proper authority existed in the court to substitute the city of Belfast for the Central district as the object of the donor's bounty, no scheme could be devised whereby the taxpayers residing on the territory comprised within the limits of Central school district could enjoy the exclusive benefit of the gift. All other taxpayers in the city would necessarily receive their ratable share of the fund in common with those of Central district.

It has been seen, too, from the statute of 1893, abolishing school districts, that if the testatrix had died before Central district became extinct, this legacy could not have vested in the city, since the corporate powers of the district would have continued for the purpose of holding the fund and executing the trust, and the school house, when built, would have been the property of the Central district. And if the district had existed after the death of the testatrix, and the school house

had actually been erected, with the aid of the fund in question, before the district was abolished, the law would have required the city, on taking possession of the property, to remit to the taxpayers of the district the appraised value of the building.

It would seem incongruous to hold that the city of Belfast can now derive more benefit from the property than it could have done if the testatrix had died before the district was abolished. Yet such would be the result if the city's contention is sustained.

In the exercise of a spirit of benevolence, mingled with a laudable desire to have her name associated with a public improvement in the place of her residence, the testatrix was willing to relieve the taxpayers of Central school district of a portion of the public burden. Non constat, that she was willing to extend this bounty to 15 other districts. She "precisely designated by its correct legal name a then existing corporation capable of receiving the proposed bounty." She presumptively had knowledge that this corporation ceased to exist a year and a half before her death, but no codicil is added to her will designating the city of Belfast in the place of Central district. The court is not properly authorized to substitute its arbitrary conjecture for the clearly expressed will of the testatrix, which thus remained unchanged after full knowledge of a change of circumstances. It is not the duty of the court to be "curious and subtle" in devising schemes to aid testators in disinheriting their next of kin under circumstances like these.

By the abolition of Central school district the residuary bequest to that corporation lapsed to the estate of the testatrix, and descended to her heirs as intestate property.

Decree accordingly. Reasonable fees to be allowed out of the fund to the counsel for the defendants.

(90 Me. 308)

HARE et al. v. DEAN.

(Supreme Judicial Court of Maine. May 29, 1897.)

MINORS—CUSTODY—ENTICEMENT—RIGHT OF ACTION—PLEADING—AMENDMENT—COSTS.

1. By the statute of this state (Pub. Laws 1895, c. 43) it is provided that "fathers and mothers shall jointly have the care and custody of the person of their minor children." *Held*, that both parents of a minor are properly joined as plaintiffs in an action for enticing and persuading a minor child from their custody.

2. The criterion of the parents' right of action for a wrongful enticing and persuading their minor child from their custody is not the will of the child, but the will of its parents; and it is immaterial that at the time of the wrongful act the child was not actually a member of the parents' household, provided they had a right to recall her to their custody and service.

3. The defendant filed a general demurrer at the first term to the plaintiffs' writ and declaration, which was duly joined, and the demurrer was sustained. The plaintiffs then moved to amend their writ by inserting an ad damnum of \$1,000, none having been stated before, which

amendment was allowed. The defendant excepted to the allowance of the amendment. After this amendment the defendant again filed a general demurrer to the declaration, which demurrer was joined and overruled. To this ruling the defendant excepted.

Held, that the proposed amendment by inserting the ad damnum, which had been inadvertently omitted, was clearly allowable.

4. The statute requiring payment of costs as a condition to the amendment of defective declarations (Rev. St. c. 82, § 25) does not apply to this case until after a decision of the defendant's exceptions by the law court. In contemplation of law, the plaintiffs have not amended their writ, and cannot do so until the exceptions are overruled, and it has been finally decided that the proposed amendment is allowable.

5. The right of the defendant to the costs named in the statute is postponed until the action comes on for trial, when they will be fully protected.

6. *Held*, that the objection that there is no definite averment of the time when, as the plaintiffs allege, the "defendant enticed and persuaded their said daughter to disobey her parents and remain with said defendant" is not open to the defendant on general demurrer. Such omission, it being matter of form, can only be taken advantage of on special demurrer.

(Official.)

Exceptions from supreme judicial court, Knox county.

Action on the case by Dennis Hare and another against Mary A. Dean. A demurrer to the declaration was overruled, and defendant excepts. Overruled.

T. P. Pierce, for plaintiffs. D. N. Mortland and M. A. Johnson, for defendant.

WHITEHOUSE, J. This is an action on the case for enticing the plaintiffs' daughter to leave their home and service. The case comes to the law court on exceptions based on the following record, viz.: "At the return term the defendant filed a general demurrer to the writ and declaration, which was duly joined, and the demurrer was sustained. Plaintiffs then moved to amend their writ by inserting an ad damnum of one thousand dollars at the end of their declaration where none had been inserted before, which amendment was allowed. To this allowance of the amendment the defendant excepted. After the amendment was made, the defendant again filed a general demurrer to the declaration, which demurrer was joined and overruled. To this ruling the defendant excepts."

The proposed amendment of the writ by inserting the ad damnum, which had been inadvertently omitted, was clearly allowable. Rev. St. c. 82, § 10. In *McLellan v. Crofton*, 6 Me. 307, such an amendment was allowed after verdict, and Mellen, C. J., said: "It would be a matter of regret, if not reproach to our laws and to the administration of them, if such a motion could not be sustained. We entertain no doubt on the point." So in *Cragin v. Warfield*, 13 Metc. (Mass.) 215, a similar amendment was held allowable, the case of *McLellan v. Crofton*, supra, being cited as authority. The ruling of the presiding judge upon this point was undoubtedly correct.

The learned counsel for the defendant, how-

ever, interposes the further objection, in support of his exceptions, that there was no compliance with the statute requiring the payment of costs as the condition of an amendment when the declaration is adjudged defective on demurrer. Rev. St. c. 82, § 25. But the defendant took exceptions to the ruling of the court that the amendment was allowable, and it has not been determined, and will not be until this opinion is announced, that that ruling was correct. Pending the decision of that question, the amendment which may have been filed, and which is declared to have been "allowed," could not legally become a part of the writ and declaration. The statute says "the plaintiff may amend upon the payment of costs from the time when the demurrer was filed." But in contemplation of law the plaintiffs in this case have not yet amended their writ. They could not legally amend it until the exceptions were overruled, and it was finally declared that the amendment proposed was allowable. When that question has been determined in favor of the plaintiffs in this case, the declaration as amended has been adjudged sufficient, and the case remanded for trial, the plaintiffs can then avail themselves of the benefit of the amendment which they have finally been allowed to make, upon payment of the costs named in the statute, and not otherwise. They could not reasonably be required to pay the costs until the amendment had been legally made. When so made, the statute is imperative that the costs shall be paid. In such a case the recovery of costs by the defendant necessarily follows, whether specified in the order allowing the amendment or not, precisely as costs would follow the entry of a judgment for damages by the presiding justice in any civil action, though costs were not specified. Indeed, it is not probable that the defendant insisted upon the payment of costs pending the exceptions, and it does not appear that the question of costs was considered or suggested in any manner whatever. But the rights of the defendant will be fully protected when the action comes on for trial.

In support of the second general demurrer to the declaration as amended, the defendant insists that the declaration should still be adjudged defective—First, because there is no definite averment of the time when, as the plaintiffs allege, the "defendant enticed and persuaded their said daughter to disobey her parents, and remain with said defendant"; second, because the service of the daughter was not due to the plaintiffs jointly, but to the father alone; and, finally, because, if it was the intention of the pleader to charge that the defendant enticed and persuaded the plaintiffs' daughter and servant away from their service and employment, he has failed to set out in unambiguous terms, and in a precise and orderly manner, the facts requisite to constitute such a cause of action.

It is undoubtedly a general rule of pleading in personal actions that every traversable fact must be alleged to have taken place on some

particular day. *Cole v. Babcock*, 78 Me. 41, 2 Atl. 545. In the case at bar it is definitely alleged that the plaintiffs moved from the defendant's house "on March 7, A. D. 1895," and, inasmuch as the subsequent allegation that defendant "enticed and persuaded" the daughter to remain with her has no necessary or logical connection with the intermediate clause, the specific date of March 7th might, by relation, be held applicable to the allegation of enticing and persuading. If not, it is alleged beyond question to have occurred after that date, and within the statute of limitations. As the precise date would not be an essential element in the cause of action, it would not be a traversable fact in this case, but a matter of form only, and, as such, the omission can only be taken advantage of on special demurrer. It is not open to the defendant on general demurrer. *Inhabitants of Wellington v. Small*, 89 Me. 154, 36 Atl. 107.

It is also the opinion of the court that the parents of the minor were properly joined as plaintiffs in the action. It is provided by section 1 of chapter 43 of the Public Laws of 1895 that "fathers and mothers shall jointly have the care and custody of the person of their minor children." The act of "enticing and persuading" a child from the joint custody of its parents is, therefore, an infringement of a joint right.

For the apparent purpose of giving a connected history of the relations of the parties to the minor in question, the pleader introduced several immaterial averments of what transpired between them after March, 1895; but the principal allegation that "said defendant enticed and persuaded their said daughter to disobey her parents, and remain with said defendant, using every means in her power to so entice and persuade," construed in the light of the circumstances alleged to have existed at the time, would seem to state a cause of action. In *Cooley on Torts* (2d Ed., p. 270), the author says: "Whatever induces the child to leave the parent, or, after leaving, to remain away from him, may, in law, constitute enticement; but to receive and shelter a child from parental abuse may sometimes be a moral duty, and therefore justifiable. In New Hampshire it has been said that if one give protection and shelter to a child, with a view or intent of enabling or encouraging him to keep away from his father, * * * this would be wrongful and actionable conduct,"—citing *Sargent v. Mathewson*, 38 N. H. 54. To same effect, see, also, *Butterfield v. Ashley*, 6 Cush. 249, and *Martin v. Payne*, 9 Johns. 387. The criterion of the parents' right of action is not the will of the child, but the will of the parents; and it is immaterial that at the time of the alleged wrongful act of the defendant the child was not actually a member of the parents' household, provided they had a right to recall her to their custody and service. *Cooley, Torts* (2d Ed.) pp. 271, 272, and cases cited; *Bigelow, Torts*, 291.

Exceptions overruled.

(30 Me. 338)

BRADFORD v. CLARK et al.

(Supreme Judicial Court of Maine. May 29, 1897.)

SLANDER—PRIVILEGED COMMUNICATIONS—WHAT CONSTITUTES.

1. No action for slander will lie when the words alleged to be defamatory are privileged communications.

2. The plaintiff, a supervisor of schools, was present at the annual town meeting, when a proposition was pending for an appropriation of money for the purchase of more school books, and the defendants, who were voters and taxpayers, declared that "the school books had been burned" by him; one of them adding, "I can prove it," and the other, addressing the plaintiff, stated, "You, the superintendent of schools, have thrown the text-books into the stove in presence of children."

It appearing that in making the imputed statements, the defendants had reasonable grounds for believing they were true; that they made them in good faith, in an honest belief that they were true; that they desired definite information in regard to the charges against the plaintiff, when an explanation from him might have been entirely satisfactory; and that they were speaking to the fellow citizens, who had a corresponding interest with themselves:

Held, that the occasion was privileged.

3. Whether a joint action will lie in this case, *quære*.

(Official.)

Exceptions from supreme judicial court, Lincoln county.

Action by George F. Bradford against William M. Clark and Austin S. Thompson for slander. There was a verdict for plaintiff, and defendants move for new trial, and take exceptions. Motion sustained.

T. P. Pierce and J. W. Brackett, for plaintiff. W. H. Hilton, for defendants.

WHITEHOUSE, J. In an action for slander brought against the two defendants jointly the plaintiff recovered a verdict for \$31.47. The case comes to the law court on exceptions and motion for a new trial.

It is alleged in the declaration that the plaintiff was supervisor of schools in the town of Bristol in March, 1896, and in that capacity had the care and custody of the school books belonging to the town; that in pursuance of a conspiracy between the defendants to "defame and injure the plaintiff, and especially to deprive him of service in his said office," they declared "that the school books had been burned" (by said Clark spoken of and concerning said complainant), adding, "I can prove it." Thereupon the said Austin S. Thompson replied, personally addressing complainant, "You, the superintendent of schools, have thrown the text-books into the stove in presence of children."

In the brief statement of defense it is claimed that the slanderous words imputed to the defendants respectively "were privileged, and uttered without malice, and in good faith, in the exercise of their respective rights as

citizens of the town of Bristol, at the annual meeting of said town held on the 2d day of March, 1896, while article 7 of the warrant for said meeting, to wit, 'To see what sum of money the town would vote to raise for the purchase of school text-books,' was being considered in said meeting."

It appears from the plaintiff's testimony and other evidence, which is substantially uncontroverted, that when, in the course of the deliberations at this meeting, article 7 in the warrant was reached, the defendant Clark said: "Mr. Moderator, I move that the article be dismissed. The town cannot afford to raise money to buy books to be used for kindling wood. The town books have been burned during the last year, and I can prove it."

Thereupon the plaintiff, who was sitting on the platform, touched the moderator, and said, "Mr. Moderator, I understand the gentleman to say the books had been burned in town." The moderator replied, "Yes, that is his statement." The plaintiff then said, "I demand proof of the statement, that the guilty party may be brought to justice, as I am the supervisor and custodian of the books." After a short speech by Mr. Brackett in favor of an appropriation under the article in question, the moderator stated, in substance, that if there was any person in the hall who knew anything in regard to the destruction of school books, he wished he would make it known. In response to this request the defendant Thompson came forward, and said: "Mr. Moderator, I suppose I am the man. During the year, in district No. 5, where my children have attended school, the supervisor, Mr. Bradford, threw school books into the stove, and I can prove it by them." In his testimony Mr. Thompson says: "I had three children that was attending that school, and they said there had been books put into that stove. I was a taxpayer of the town of Bristol, and if I was paying taxes to buy books to be used as kindling I wanted an explanation then and there." Mr. Clark testifies that he had been informed by his son, a "reputable citizen," 30 years of age, that school books had been put into the stove. It also appears in evidence that missing books had been advertised in a newspaper, and that the "air was full of rumors" in regard to the loss and destruction of the school books of the town.

The plaintiff himself admits in his testimony that in clearing out the closets in the school house on some occasions he had found school books that were torn and soiled and worn, and had thrown such "remnants" into the stove.

These are the principal facts and circumstances upon which the plaintiff's action is founded.

In defense the counsel first sets up the legal objection that a joint action cannot be maintained against two persons for oral defama-

tion or slander. Such was formerly the law in England. 1 Chit. Pl. (16th Ed.) 97; Gould, Pl. 195, and cases cited. But under the rules of practice now established in England a joint action can be maintained against two or more persons for slander. Odgers, Sland. & L. 371. The old English rule that a joint action could not be maintained, has generally been assumed to be the law in this country. In Cooley, Torts (2d Ed.) 142, speaking of wrongs which are in their nature necessarily individual, the author says: "The case of the oral utterance of defamatory words is an instance. This is an individual act, because there can be no joint utterance. He alone can be liable who spoke the words; and, if two or more utter the same slander at the same time, still the utterance of each is individual, and must be the subject of a separate proceeding for redress."

But whether, under conceivable circumstances, there might be such a conspiracy between two or more to defame another, or such a union of thought and purpose and concert of action between them, in the utterance of the same slander, as to render a joint action against them maintainable, it is unnecessary to determine in this case, for it is entirely clear from the evidence that the defamatory words alleged to have been uttered by the defendants on the occasion in question were privileged communications.

It was a New England town meeting, held for the annual election of officers, for the necessary appropriation of money, and to consult upon the common good. The plaintiff was a public officer. His fidelity or efficiency in the discharge of his trust had been brought in question with reference to the preservation of school books. A proposition was pending for the appropriation of money for the purchase of more books. The defendants were voters and taxpayers in the town, having an interest in the subject-matter. They had a right to know how the money raised by taxation was being expended. In making the statements imputed to them, they were speaking to their fellow citizens, who had a corresponding interest with themselves. It was a privileged occasion. They had reasonable grounds to believe their statements to be true. They made them in good faith, in the honest belief that they were true. They had no actual malice against the plaintiff. They desired definite information in regard to the charges against him. An explanation from the plaintiff himself might have been entirely satisfactory. He seems to have preferred a law suit to an explanation, and he must abide the result. The statements made by the defendants were privileged.

Smith v. Higgins, 16 Gray, 251; Gott v. Pulsifer, 122 Mass. 235; Bearce v. Bass, 88 Me. 521, 34 Atl. 411; Odgers, Sland. & L. 234.

Motion sustained.

REDDING v. REDDING'S ESTATE.

(Supreme Court of Vermont. Franklin. Aug. 26, 1897.)

HANDWRITING—OPINION EVIDENCE—STANDARDS OF COMPARISON—COMPETENCY OF WITNESSES—CROSS-EXAMINATION—PROMISSORY NOTES—CONSIDERATION—TRIAL—EVIDENCE—RELEVANCY—REBUTTAL—INSTRUCTIONS—REVIEW ON APPEAL.

1. The opinion of one acquainted with the handwriting of a person is admissible to prove that such person executed notes sued upon.

2. One is deemed to be acquainted with the handwriting of another person when he has seen him write, though but once, and then only his name; or when he has received letters or other documents purporting to be written by that person in answer to letters or other documents written by the witness, or under his authority, and addressed to him; or when he has seen letters or other documents purporting to be that person's handwriting, and has afterwards personally communicated with him concerning their contents, or has acted upon them as his, he knowing thereof and acquiescing therein; or when the witness has so adopted them into business transactions as to induce a reasonable presumption and belief of their genuineness; or when, in the ordinary course of business, documents purporting to be written or signed by that person have been habitually submitted to the witness.

3. Notes sued upon may be admitted in evidence though there be no proof of consideration, other than the words "for value received" on their face.

4. The facts that a man felt friendly towards a divorced wife, and had stated that he intended to make provision for her, and that she deserved \$5,000, because she had earned it, do not tend to show consideration for notes executed by him to her, but do tend to show that they were a mere gratuity.

5. After a man feeling friendly towards a divorced wife had executed notes to her, he stated to a witness, "I have settled that matter." Held, that there was nothing in the word "settled" suggestive of a consideration.

6. Defendant introduced no evidence in support of a defense that notes sued upon were given without consideration. The court gave instructions as though plaintiff had made proof of consideration, in addition to what was imported on the faces of the notes, whereas in fact he had not done so. Held error, where plaintiff, with a view of proving further consideration, introduced other evidence, which the jury had no right to consider.

7. A charge that the passing or not passing of something between the maker and payee of notes would or would not tend to show consideration is misleading, where the evidence does not show that anything passed but the notes themselves.

8. A court may, in its discretion, allow rebuttal evidence out of time.

9. In the supreme court a party excepting to the admission of evidence is confined to the precise objection made below.

10. Declarations of a testator that he intended to provide for plaintiff by giving her notes of a certain amount, and afterwards that he had given the notes, without stating the amount, are admissible to show that he gave her the notes in suit, which were for a different amount than that first named.

11. Where a divorced wife sues the executor of her former husband on notes executed by him after the divorce was granted, a witness' conversation with the wife and husband at the time of the divorce proceedings, by which he learned that the cause assigned was the wife's adultery with one B., who admitted his guilt, is immaterial.

12. So, also, whether or not the wife declared B. was a fool for making such an admission.

13. A cross-examiner cannot contradict the witness on an immaterial matter.

14. Where defendant alleges that plaintiff forged the notes sued upon, evidence of other forgeries by plaintiff is inadmissible.

15. Evidence that witness saw the notes sued upon in plaintiff's hands soon after their date is admissible on the question of their earlier existence.

16. Where the execution of notes is denied, plaintiff may introduce in evidence, as standards of comparison, signatures of the maker executed two years prior to execution of the notes, though it is shown that the maker's handwriting had materially changed in the meantime.

17. Signatures bearing no date were properly used as standards of comparison with a signature claimed to be forged, where it does not appear that there was nothing to show when they were written.

18. Where the execution of notes is denied, writing of the maker, though not signed, may be used as a standard of comparison, especially where it is contended that the bodies of the notes were written by him.

Exceptions from Franklin county court; Start, Judge.

Action by Abbie L. Redding against the estate of Moses W. Redding, deceased, on appeal from probate. Declaration in assumpsit, with specification of two notes, each for \$1,200, and dated December 11, 1891. Plea, the general issue, with notice denying the execution of the notes and the genuineness of the signatures. From a verdict and judgment for plaintiff, defendant brings exceptions. Reversed.

The answers to direct interrogatories 12 and 13 in Roe's deposition, to the admission of which the defendant excepted, were, in substance, that the testator at different times expressed to the witness his intention to provide for the plaintiff by giving her his notes to the amount of \$2,000, \$2,500, or \$3,000, and afterwards informed the witness that he had given her the notes, without stating their amount. The answers to cross interrogatories 8 and 15 in the same deposition were to the effect that the witness learned from conversation with the plaintiff and the testator at the time of the divorce proceedings in New York that the cause assigned was the plaintiff's adultery with one Bigelow, and that Bigelow admitted his guilt. In his answer to cross interrogatory 16 the witness denied hearing the plaintiff say that Bigelow was a fool to admit it, and his answer to cross interrogatory 17 denied having stated otherwise, to his knowledge, in an affidavit used in the New York litigation. To the exclusion of these answers the defendant excepted.

Farrington & Post, H. A. Burt, Ballard & Burleson, and D. W. Steele, for plaintiff. C. G. Auston and Wilson & Hall, for defendant.

ROWELL, J. The question being whether the notes in suit were signed by the testator, the opinion of one acquainted with his handwriting that they were signed by him was relevant. One is deemed to be acquainted with the handwriting of another person when he has seen him write, though but once, and then only his name; or when he has received letters or other documents purporting to be written by

that person in answer to letters or other documents written by the witness, or under his authority, and addressed to him; or when he has seen letters or other documents purporting to be that person's handwriting, and has afterwards personally communicated with him concerning their contents, or has acted upon them as his, he knowing thereof and acquiescing therein; or when the witness has so adopted them into business transactions as to induce a reasonable presumption and belief of their genuineness; or when, in the ordinary course of business, documents purporting to be written or signed by that person have been habitually submitted to the witness. *Steph. Dig. Ev. art. 51; 1 Greenl. Ev. § 577; 1 Whart. Ev. § 708; Patterson, J., in Doe v. Suckermore, 5 Adol. & E. 703.* The testimony brought the witness Stranahan fully within this rule. Therefore the court properly found therefrom that he was sufficiently acquainted with the handwriting of the testator to render him competent to testify his opinion of whether or not the notes in suit were signed by him.

The notes were properly admitted in evidence, notwithstanding the objection that there was no evidence in the case to show that they were given for a consideration; for, as the court held, the words "for value received," therein contained, were themselves such evidence, if the notes were found to be genuine. *Stevenson v. Gunning's Estate, 64 Vt. 601, 614, 25 Atl. 697.*

If there was any other evidence before the jury tending to show consideration, it is contained only in this: The plaintiff was once the wife of the testator. After living together eight years in New York City, he there obtained a divorce from her on the ground of adultery. Two years thereafter, in 1888, he married another woman, with whom he lived till his death, in 1892. Soon after this marriage the plaintiff commenced proceedings against him in New York to annul and set aside said decree of divorce, for that it was obtained by fraud and perjury and without her knowledge, and prayed that a divorce be granted to her, and for alimony. At about the same time she brought a bill in chancery against him in Franklin county, in this state, setting forth her proceedings in New York, and praying that he be enjoined from disposing of his property here pending the litigation there, and that the same be ultimately decreed to her; and an injunction was granted accordingly. The litigation in New York was vigorously prosecuted, and terminated disastrously to the plaintiff in the summer or fall of 1891; and the bill in chancery in Franklin county was dismissed by agreement, with costs, which the plaintiff paid, by her attorneys, on December 8, 1891, three days before the notes in suit bear date. After the granting of the divorce, in 1886, the plaintiff returned to Vermont, her former home, and resided with her parents on a farm in Highgate owned by the testator, who continued his business in New York, but spent his summers in Vermont. He returned to New York in the

'atter part of November, 1891, and remained there till the next spring, when he returned to Vermont, where he soon died. The testimony on the part of the plaintiff tended to show that she went to New York on or about November 28, 1891, and that on the 11th day of December following the testator executed and delivered to her the notes in suit. She introduced one Rawson as a witness, who testified that on said last-mentioned day he accompanied the testator, at his request, to a café in New York, where he found the plaintiff sitting at a table; that the testator left him two or three tables away, and went and sat at her table, where he remained 15 or 20 minutes, and where the witness saw him write and deliver to the plaintiff the notes in suit, but saw nothing else pass; that thereupon he and the testator left the café together, and when upon the street the testator said, "I have settled that matter. Now that woman is taken care off;" that in response to an inquiry by the witness he further said: "Well, I didn't give her what I promised you. I could not afford it. I made her two notes of twelve hundred dollars each, for one year and two years." The witness further testified that the testator had previously told him that the plaintiff deserved at least \$5,000, because she had earned it. The plaintiff introduced other testimony tending to show that often, from the time of the divorce to his death, the testator manifested a friendly regard for her, and frequently said that he intended to make provision for her, as she had been his wife and was kind to him, that she should not come to want, and talked about different ways of making such provision. There is absolutely nothing in all this that tends to show consideration; but, on the contrary, its tendency is to show that these notes were a mere gratuity, executed for the purpose of satisfying what the testator seemed to regard as a moral obligation resting upon him to make provision for the woman who had been his wife, and for whom, in spite of her faults as judicially determined, he still had a tender feeling and a lingering regard. There is nothing in the word "settled," found in the testator's statement to Rawson, "I have settled that matter," that is, in the circumstances, suggestive of a consideration; for it is manifest that the word was not used in the sense of "paid," but only in the sense of having brought the matter to a conclusion. This is all the more manifestly so when we consider, as we must, that there is nothing in the case to show that the testator was under any legal obligation to the plaintiff at any time after the divorce. Indeed, the plaintiff's counsel do not claim in their brief that there was any evidence to show consideration, except the notes themselves. They did, it is true, suggest in argument that the dismissal of the bill in chancery may have constituted a consideration. But this is mere conjecture, and not very well founded at that, seeing that suit could no longer serve the plaintiff, and that she paid the costs.

But the plaintiff's answer to the defendant's exception to the charge on the subject of consideration is that, although the defendant claimed on trial that there was no consideration, it introduced no testimony tending to support its claim; wherefore the court might well have told the jury that, if it found that the notes were genuine, as upon their face they imported a consideration, and as there was no testimony to contradict that import, the plaintiff was entitled to recover, and that, therefore, if the court did err in charging that the jury might consider certain other evidence on the question of consideration, it was harmless. But the trouble is, there was no other evidence that tended to show consideration, whereas the court submitted the case just as though there was, which was error, and manifestly not harmless, and that was the point of the defendant's exception. Thus, the court told the jury what, in law, constitutes a valuable consideration, namely, a right, an interest, a profit, or a benefit to one party, or a forbearance, loss, or responsibility given or suffered by the other party, and then went on to say that while the notes, on their face, purported to have been given for a valuable consideration, yet that was not conclusive, but the jury must consider all the evidence in the case bearing on the question of consideration,—that tending to show consideration as well as that tending to show no consideration,—and must consider, not only the notes themselves, but the testimony of what the testator said about his relations with the plaintiff and what he intended to do for her; must consider whether there was any obligation existing on his part to give her anything, and what was done at and about the time the notes were executed, and also the testimony upon the subject of what seemed to pass between them, or the want of anything passing between them, on that occasion. This was misleading. The jury might have understood from it, and most likely did understand, that if the testator's relations with the plaintiff were friendly, and he had frequently said he was going to make provision for her, both of which the testimony on her part tended to show, there was evidence tending to show an obligation on his part, and consideration, which was not such evidence, in the circumstances, as we have said. Then as to what the court said about the jury's considering the testimony on the subject of what seemed to pass between the plaintiff and the testator, or the want of anything passing between them, when the notes were given. If this means, as we construe it to mean, inasmuch as the court was then addressing itself solely to the question of consideration, that the passing or not passing of that something would tend to show or not to show consideration, as the fact was found to be, it was misleading; for the testimony does not show that anything then passed but the notes themselves, and the only witness who testifies to what took place on that occasion says that he saw nothing else pass.

Against the objection of the defendant on the sole ground that it was out of time, the court, as matter of discretion, allowed the plaintiff to show in rebuttal that the testator had frequently said he intended to make pecuniary provision for her. The discretionary action of the court nullified that objection, but it is now objected that the testimony was not relevant to show consideration. This is kicking "against the goad," for it has been decided over and over that in this court the party excepting to the admission of evidence is confined to the precise objection made below.

The answers to direct interrogatories 12 and 13 in Roe's deposition were properly admitted, as they tended to show that the testator gave the notes. Direct interrogatory 23 elicited nothing but the repetition of an admissible statement made in answer to interrogatory 12.

Cross interrogatories 8, 15, and 16, and the answers thereto, were properly excluded, as they concern immaterial matters. Cross interrogatory 17 and the answer thereto were also properly excluded, as it was an attempt to contradict the deponent in respect of said immaterial matters, which the cross-examiner could not do.

When the nature of an offense is such that its commission carries with it an implication of criminal intent, proof of other similar offenses by the accused is not admissible for the purpose of showing that he committed the offense in question. *Strong v. State*, 86 Ind. 208; *State v. Lapage*, 57 N. H. 245; *Com. v. Jackson*, 132 Mass. 16. Forgery is of such a nature, and therefore the court rightly excluded cross interrogatories 42 and 43, and recross interrogatories 1, 2, 3, and 4, as they related to forgeries by the plaintiff other than of the notes in suit.

Cross interrogatory 44 sets out in full a long affidavit given by the deponent for use in the proceedings to set aside the decree of divorce, and the defendant claims that it has a direct tendency to contradict and impeach the deponent; but as counsel point out nothing as having such tendency, and as we see nothing having it as to anything material, we hold that there was no error in excluding the question.

The testimony of Jennison that he saw the notes in the hands of the plaintiff soon after their date was relevant, as bearing on the question of their earlier existence, and therefore corroborative of the plaintiff's claim in that behalf.

The exceptions to the exclusion of questions to Rawson concerning articles in certain New York newspapers and an article in the *St. Albans Messenger* have not sufficient substance to merit discussion. The question to Rawson about his advising the testator, in the latter's office, not to see the plaintiff, who was in the city, was irrelevant, and properly excluded.

The evidence tended to show that from 1889 the testator's health was poor, and that his handwriting materially changed. The plaintiff offered divers exhibits in evidence as standards of comparison of hands. To some

the defendant objected that they bore no date; to some, that they were written before 1889; to some, that there was nothing to show when they were written; and to some, without stating the ground, as far as appears. The court found that they were all written or signed by the testator, and admitted them, in which no error is apparent. The fact that the testator's hand materially changed from 1889 went only to the weight of the standards written or signed before that time, not to their competency. That some bore no date did not render them inadmissible, and it does not appear that there was nothing to show when they were written. Nor was it a valid objection that some bore no signature, as they were written by the testator; for that made them competent standards, especially as plaintiff claimed that the bodies of the notes in suit were written by him. The petition for a new trial on the ground of surprise and newly-discovered evidence is not sustained. Judgment reversed, said petition dismissed, with costs, and cause remanded.

(80 Vt. 477)

WHITCOMB v. ROBBINS et al.
(Supreme Court of Vermont. Chittenden. July 27, 1897.)

INSOLVENCY LAW—FOREIGN CORPORATIONS.

By R. L. § 1879, the insolvency act is extended to corporations "created under the laws of this state." By Acts 1884, No. 128, § 2, this section was amended by striking out the quoted words. V. S. § 2166. *Held*, it being apparent, by V. S. §§ 2151-2153, that the insolvency law was limited to natural persons who are inhabitants of the state, that section 1879, as amended, did not render the law applicable to a foreign corporation having no office within the state, but merely using the state as a market for goods manufactured elsewhere.

Petition by Edward S. Whitcomb, administrator, for a writ of prohibition, to be directed against Thomas C. Robbins, as judge of the court of insolvency for the district of Rutland, George E. Lawrence, attorney for the Walter A. Wood Mowing & Reaping Machine Company, and John D. Miller, as assignee in insolvency of the same company. The defendants answered, evidence was taken, and a stipulation filed, upon which the case was heard. Granted.

Powell & Powell and W. L. Burnap, for petitioner.

The court of insolvency is purely statutory, and its jurisdiction is limited. It has no powers not conferred expressly, or by necessary implication. Its action must be confined to the particular matters and parties over which the law creating it has authorized it to act. *Rhode Island v. Massachusetts*, 12 Pet. 657; *Collamer v. Page*, 85 Vt. 869.

George E. Lawrence and Joel C. Baker, for the defendants.

TYLER, J. It appears by the agreed statement of facts that the Wood Mowing & Reaping Machine Company was a corporation cre-

ated and existing under the laws of the state of New York, and having its manufactory and home office at Hoosick Falls, in that state, where its manufacturing was solely done. It had agents in each county in this state to whom it sent its machines for sale, and whose sole duty was to sell, collect, pay for, and remit to the company. Its product was disposed of in the same manner in nearly all the other states. It never had agents in this state, other than those above described. In December, 1895, it had a large number of machines, and proceeds of sales of machines to a considerable amount, in the hands of its agents in Rutland and other counties in this state. The complainant, who resided in Chittenden county, had for a long time been a creditor of the company, and on December 26, 1895, brought a suit against it in that county, attached a large number of machines, and summoned its agents as trustees. The company was then in the hands of receivers in the state of New York. In January, 1896, an officer of the company, who was also a receiver, consulted George E. Lawrence, a lawyer of Rutland, about the complainant's suit and the rights of the parties, and said Lawrence advised the institution of insolvency proceedings in the district of Rutland. One Parris became a petitioning creditor. The petition was served upon Lawrence, who, pursuant to his employment, appeared for the company, submitted to the jurisdiction, and consented to the adjudication. The complainant had no knowledge of the proceedings until he was notified to appear and prove his claim. The submission and consent of the corporation to the insolvency proceedings cured all defects in respect to service of process upon it, but the question is whether, upon the facts reported, the corporation could be brought within the jurisdiction of one of our insolvency courts. If the court had jurisdiction, it follows that the writ of prohibition prayed for will not issue. The defendant's counsel contend that the facts that this corporation had established business in this state through its agents, sent its machines here for sale, and contracted debts here in the transaction of its business, gave our courts jurisdiction so far as to adjudicate all matters between itself and its local creditors, and that our courts were open to our citizens to bring any proceedings under our laws for the collection of debts; that, as foreign corporations may sue and be sued in this state, they are amenable to all of our laws that were enacted to facilitate the collection of debts. On the other hand, the complainant insists that the insolvency law was not originally framed, nor has it since been enlarged, to include within its provisions nonresident persons and corporations. The law was passed in the year 1876, and its provisions were extended only to inhabitants of this state, and to corporations created by the authority of our own laws. See Laws 1876, p. 6, §§15, 91, 98. The same provisions are found in R. L. § 1790, "An inhabitant of this state owing

debts * * * may apply by petition," etc.; and by section 1870, "A person residing in this state" may have committed certain acts of insolvency, and his creditors may petition; and by section 1879 the provisions of the act are extended to corporations "created under the laws of this state," except railroad and banking corporations. This limitation in the operation of the law continued until 1884, when, by No. 138, § 2, of the acts of that session, the Revised Laws were amended by striking out the words "created under the laws of this state," and R. L. § 1879, as thus amended, is section 2166, V. S. The jurisdiction and powers of the insolvency courts are only such as are conferred by statute, and it is not claimed that there was jurisdiction in this case, unless obtained by the amendment of 1884. The words, "a person residing in this state," which occur in R. L. § 1870, are omitted in section 2151, yet it is apparent that sections 2151-2153 relate to persons who reside or have resided here, and have committed certain acts. Without the aid of sections 2152 and 2153 a person who had resided and committed acts of insolvency in this state could not, after he had changed his residence to another state, be amenable to our insolvent law, though he had creditors and property here. By virtue of these sections of the statute he may be brought within the jurisdiction of our courts for the period of 90 days after the acts of insolvency were committed. The sections last cited show a legislative intent to limit the operation of the insolvency law to residents, inhabitants of the state, and for a short period to persons who have moved from this into other jurisdictions. We do not construe the amendment of 1884 to have been made to remove the limitation and confer the benefits of the law upon foreign corporations that merely send their manufactured goods into this state for sale, but that corporations established in this state, and having their principal office and transacting their business here, may be amenable to our law, though they were created by the laws of other states. Such corporations manifestly should not be exempt from the operation of our laws. This is the natural and reasonable construction of the statute. It could hardly be contended that the corporation in question could avail itself of our insolvency law by voluntary petition. If so, what district of the state would have jurisdiction? This construction is fully sustained by the authorities cited upon the complainant's brief. The Massachusetts cases arising under a statute like ours are decided upon the ground of residence. In *Judd v. Lawrence*, 1 Cush. 531, it was held that an alien resident was entitled to the benefit of the act; and in *McConnell v. Kelley*, 138 Mass. 372, that the jurisdiction of the court depended upon the facts that the petitioner was an inhabitant of the state, and owed debts contracted while such inhabitant. Petition granted, and a writ of prohibition directed to be issued in accordance therewith.

(88 Vt. 549)

**GARFIELD et al. v. RUTLAND INS. CO.
et al.**

(Supreme Court of Vermont. Windham. July 19, 1897.)

TRUSTEE PROCESS—STATUTE OF FRAUDS—COLLATERAL AGREEMENT—INSURANCE AGENTS—COMMISSIONS ON PREMIUMS.

1. A trustee cannot reduce his liability under trustee process by pleading payments made for his creditor under contracts which were unenforceable because within the statute of frauds.

2. An oral contract by an agent of an insurance company, upon issuing a policy, guarantying the solvency of the company and a return of unearned premiums upon cancellation of the policy, is a collateral agreement to answer for the debt or default of the company, and is unenforceable, by the statute of frauds, unless the company places funds in the agent's hands to meet the obligation.

3. An extra commission to the agent, in consideration of which the guaranty was made, will not be considered as a fund placed in his hands to meet the obligation.

4. A commission to agents of 20 per cent. of the moneys received on account of premiums actually paid will be computed on the total amount so received, regardless of any subsequent return of portions thereof in consequence of cancellations.

Taft, J., doubting.

Exceptions from Windham county court; Start, Judge.

Action by O. R. Garfield, administrator, and others, against the Rutland Insurance Company, in which process was issued against certain persons as trustees of the defendant. From a judgment for plaintiffs the trustees bring exceptions. Affirmed.

Waterman, Martin & Hitt, for plaintiffs.
Clarke C. Fitts, for trustees.

MUNSON, J. The trustees were the agents of the defendant company, with power to receive proposals for insurance, to fix rates of premiums, to receive moneys, and to issue policies and consent to their transfer. The policy used by the company contained provisions for its cancellation, and for a return of the unearned portion of the premium. In the transaction of their business the agents sometimes found it necessary to guaranty the solvency of the company, and the repayment of premiums in the event of cancellation. In view of this situation the company agreed to give the agents a commission of 20 per cent. in place of the 15 per cent. before allowed. Subsequent to this the trustees, in consideration that certain parties would take policies in the defendant company, "guaranteed with each, by parol, the solvency of said company, and to refund to them the amount of unearned premiums" if the company should cancel their policies. The trustees seek to retain from the moneys in their hands the amount paid by them under these agreements. The plaintiffs claim that these promises were collateral undertakings, and not enforceable, and that the payments made upon them cannot be considered in determining the amount for which the

trustees are chargeable. It is held in this state that a trustee cannot be allowed amounts which he has paid out or become chargeable for on agreements not binding upon him because of the statute of frauds. *Hazeltine v. Page*, 4 Vt. 49; *Strong v. Mitchell*, 19 Vt. 644. So it becomes necessary to determine whether these promises were original or collateral undertakings. It has recently been said, upon a review of the cases involving this question, that both the English and American authorities are hopelessly in conflict, and that it can scarcely be said that any construction of the statutory provision on which the question arises is settled law. *Packer v. Benton*, 95 Am. Dec. 251, note. This being the condition of the law, there is little inducement to depart from the decisions of our own state. It is clear that there were two promises in this case, and that the second was not made original by an abandonment of the first. The liability of the company was contemplated by the arrangement, and its promise was tendered and taken with that of the agents. It is doubtless true that the main purpose of the agents was not to procure a benefit for the company, but to subserve a business interest of their own. In some jurisdictions this might be deemed sufficient to give the promise the character of an original undertaking. But we cannot give it that effect without ignoring the doctrine of *Fullam v. Adams*, 37 Vt. 391. It was held in that case that, when the agreement is one which leaves the original obligation in force, it is to be regarded as collateral, unless the promisor receives something from the debtor to be applied upon the obligation, so that it becomes the duty of the promisor, as between him and the debtor, to make the payment. It is clear that, as between the company and the trustees, it remained primarily the duty of the company to refund the unearned premiums. There was nothing placed in the hands of the promisors as a provision for the payment. The extra commission was merely to compensate the agents for the risks of a guaranty, and did not put them under an obligation to make the payment in discharge of the company. So the trustees can retain nothing on account of payments made in fulfillment of these promises.

A question is raised as to what the trustees are entitled to retain on account of their services. They were to have 20 per cent. of the moneys received by them on account of premiums actually paid. We think this refers to the money received in regular course, and not to a balance determined by future cancellations. This view seems to be supported by the use of the same phrase in the cancellation clause of the policy, which refers to the contingency of cancellation, "the premiums having been actually paid." Judgment affirmed.

TAFT, J., doubting.

(89 Vt. 555)

SEYMOUR v. CENTRAL VERMONT R. CO.
(Supreme Court of Vermont. Chittenden. July 20, 1897.)

**RAILROADS—INJURIES TO PERSONS ON TRACK—
NEGLECT—PLEADING.**

1. Where plaintiff, while walking, in the exercise of ordinary care, on a portion of defendant's railway track, which had been for many years in constant use by the public as a passageway with the knowledge and implied consent of defendant, was injured through defendant's negligence, such negligence cannot be excused by the fact that such portion of the track was not a public crossing, or that plaintiff was not using it by invitation of or agreement with defendant, or by reason of any inducement held out to him by it, or for the purpose of transacting business with defendant, nor by the fact that defendant was not willfully and recklessly negligent.

2. An allegation that defendant, by its servants, managed the train with gross negligence, in that a long rope was allowed to hang beside the train, far outside, and beyond the side, of the cars, and that such rope caught about plaintiff's arm and hand and dragged him along the ground, is capable of the construction that defendant knowingly allowed such rope to be in the position claimed, and is therefore a sufficient allegation of such fact.

Start, J., dissenting.

Exceptions from Chittenden county court; Tyler, Judge.

Case by William Seymour against the Central Vermont Railroad Company for negligence. Heard on general demurrer to the declaration. To a pro forma judgment sustaining the demurrer and adjudging the declaration insufficient, plaintiff excepts. Reversed.

The declaration alleged that the plaintiff, when he received the injury, was walking on a portion of the railroad which had been for many years in constant use by the public as a passageway with the knowledge and implied consent of the defendant.

H. F. Wolcott, for plaintiff. C. W. Witters, for defendant.

TAFT, J. We notice the questions raised by the brief of the defendant's counsel, and none other. The defendant assigns seven reasons why the declaration is insufficient to establish a cause of action. The first six raise substantially the same question, and are all based upon the claim that the plaintiff was in fact a trespasser upon the roadbed, and therefore the defendant was under no duty in respect to him. The plaintiff may establish his right of action by showing that his injury arose from the neglect of the defendant, if he was in the exercise of ordinary care at the time of the casualty, notwithstanding he was upon that part of the roadbed which was not a public crossing, and although he was not there by the invitation of the defendant, nor by any inducements held out by the defendant to him, and was there without any purpose of transacting business with the defendant. It is not necessary that he should allege that he was using the road by any agreement with the defendant. A legal duty or obligation from the defendant to the plaintiff might arise notwith-

standing the existence of the absence of any of the facts above stated, and it is unnecessary for the plaintiff to allege that the defendant was willfully or recklessly negligent. In respect to negligence, it would depend upon whether the defendant was in the exercise of ordinary care. The allegation in the declaration is that the plaintiff was upon the track with the implied consent of the defendant, in pursuance of a long-continued custom, which was known to the defendant, and permitted by it without objection, and impliedly consented thereto. Under these circumstances, the defendant cannot excuse itself from any negligence of which its servants were guilty at the time the accident occurred by showing the existence or nonexistence of any of the facts stated.

The seventh point under the demurrer is that the action cannot be sustained because it is not alleged that the defendant knew, or by the exercise of due care might have known, that the rope was in the position claimed. The allegation in that respect is "that the defendant, by its servants, managed the train with gross negligence, in this: that a long rope was allowed to hang beside the train, etc., far outside, and beyond the side, of the cars, and that the rope caught about the plaintiff's arm and hand," etc., "and so dragged him along the ground," etc. This allegation is capable of the construction that the defendant knowingly allowed the rope to hang, drag, etc. While, in a case of doubt, if the pleadings are ambiguous, or when two different meanings present themselves, that construction must be adopted which is most unfavorable to the pleader, still, if the expression is capable of two meanings, that shall be taken which will support the declaration, and not the other, which would defeat it. The allegation in the declaration can fairly bear a construction that the defendant knowingly allowed the rope to drag, hang, etc. The declaration is not subject to the criticism made in that respect. The pro forma judgment is reversed, the demurrer overruled, and the declaration adjudged sufficient, and cause remanded for further proceedings.

START, J., dissents.

(89 Vt. 509)

BARETTE v. LAURIER et al.
(Supreme Court of Vermont. Franklin. Jan. Term, 1897.)

AUDITOR'S REPORT—CONSTRUCTION.

In an action on a book account against a co-partnership, the auditor reported, allowing the whole account, but finding that some items were for goods sold to one of the partners individually, though he was unable to specify any such items; and, on a recommitment to him, he further reported that he was unable to ascertain that any item was for goods thus sold. *Held*, that the supplemental report nullified such original finding, and left the whole account to stand as for sales on joint authority.

Exceptions from Franklin county court; Start, Judge.

Action by Julius Barette against Laurier & Oulmette on a book account. Heard on report and supplemental report of auditor. To a judgment for plaintiff for the whole account, defendants except. Affirmed.

Dee & George, for plaintiff. E. A. Ashland and H. M. Mott, for defendants.

ROWELL, J. The plaintiff carried on the meat business, and the defendants were partners in the grocery business. Defendants had assignments of the wages of a number of railroad men who traded with the plaintiff on the defendants' orders and pass books. All of plaintiff's account is properly chargeable to the defendants jointly, unless some of it is for meat sold to the defendant Oulmette for his individual use. In his original report the auditor allowed the whole account, but found that some of it was for meat thus sold, but he could not tell how much, nor identify any item. But in his supplemental report he says he is unable to ascertain that any item is for meat thus sold. This nullifies his former finding on that point, and leaves his allowance for the whole account to stand, and makes it equivalent to a finding that all the items of the account are for sales to others on the defendants' joint authority. It is claimed that the auditor's finding concerning Oulmette's individual account is against the evidence, and that, therefore, the report ought to be set aside. It is also claimed that the auditor did not comply with the order of recommitment, and that, therefore, the report ought to be set aside. It is enough to say of these claims that it does not appear that the questions were raised below. The exceptions say that the case was heard on the report and supplemental report. Judgment affirmed.

(60 Vt. 515)

SOWLES et al. v. BAILEY, Judge.
(Supreme Court of Vermont. Franklin. Aug. 5, 1897.)

INSOLVENCY—PETITION FOR COMMISSIONERS—PARTIALITY—GROUNDS—STATUTE—CONSTRUCTION.

1. V. S. § 2143, provides that in cases of dispute arising in the settlement of an insolvent debtor's estate, and coming before the judge of the court of insolvency for decision, the judge, in his discretion, may, and upon petition of the assignee, or other person interested, shall, appoint three commissioners to hear and determine the disputed matter and report to the court. Held, that the direction to appoint the commissioners is mandatory, and must be obeyed, upon proper petition, although the precise question in issue is not pending before the court for decision.

2. An insolvent debtor, whose estate is before the court for settlement, and who is in dispute with the assignee thereof as to their respective rights to certain property, is a party interested, within said statute, and entitled, upon petition, to the appointment of commissioners.

3. In a proceeding to hold an insolvent debtor for contempt of court for the transfer of certain property which is claimed by the assignee as part of the estate, the question of the respective rights of the assignee and debtor thereto is a question fairly before the court for decision.

4. An application, under V. S. § 2143, for the

appointment of commissioners to determine disputed questions arising as to the ownership of property in insolvency proceedings, is sufficient if it fairly apprises the court as to the matter upon which adjudication is sought.

Petition by Albert Sowles and Jennie P. Sowles for a writ of mandamus against Myron W. Bailey, judge. Granted.

E. A. Sowles, for petitioners. Wilson & Hall, for respondent.

THOMPSON, J. This is a petition for a writ of mandamus against the petitioner, who is a judge of the court of insolvency for the district of Franklin, to compel him, as such judge, to appoint three commissioners, under V. S. § 2143. The facts necessary for the decision of this case are as follows: The relator, Albert Sowles, is an insolvent debtor, whose estate is in process of settlement in the court of insolvency for the district of Franklin. Disputes and disagreements exist between him and the assignees of his estate, and also between the relators and the assignees, in respect to the right and interest of the relators in certain real estate, debts, and claims which the assignees claim belong to the insolvent estate. As a result of such disagreement, the assignees on the 1st day of October, 1896, preferred their petition to the court of insolvency, setting forth that the relator Albert Sowles had conveyed by quitclaim deed to the relator Jennie P. Sowles a portion of said real estate in dispute, and therein praying to have him cited before said court to show cause why he should not be adjudged in contempt of court by reason of having made such conveyance, and for such other order and relief as to the court should seem meet. Thereupon the court of insolvency on the same day issued its notice to the relator Albert Sowles to appear before that court October 7, 1896, at 10 o'clock in the forenoon, to make answer to the petition, and to abide by the order of the court thereon. This notice was duly served upon the relator Albert Sowles, and he appeared before the court, and such proceedings were had in the premises that the hearing was continued to the 29th day of March, 1897, at which time the relators filed their petition in said court setting forth that they were "interested in the estate of Albert Sowles in insolvency; * * * that there were disputes and disagreements in regard to the allowance of claims or priority of amount of liens upon the estate of said debtor, or the debtor's interest in property exempt from attachment, or other matters in difference, arising from the settlement of the insolvent estate, to wit, the title, liens, or claims of ownership of the real estate alleged to have been assigned to the assignees in August, 1896, being the lands and estate and leasehold estate mortgaged to the Burlington Savings Bank, and the ownership of the claim against John E. Wright, known as 'the Wright contract,' and also the claims described in the alleged citations or motions to appear before the court, as therein fully described, to which said claims

the petitioners, one or all, lay claim, * * * and alleged as coming before * * * the above court for hearing for decision; that some or all of those matters were then pending in proceedings in the court of chancery within and for the county of Franklin, having jurisdiction over the same,"—and praying the court of insolvency to appoint three disinterested persons to act as commissioners to hear and determine the matters in dispute between the relators and the assignees, and to report to the court their findings in the premises. Such proceedings were had on this petition that on the 30th day of March, 1897, the court of insolvency refused to appoint such commissioners, and dismissed the petition. The citations referred to in the relators' petition for the appointment of commissioners were the petition of the assignees in the proceedings for contempt, and another petition filed in that court by the assignees on the 1st day of October, 1896, charging that the relator Albert Sowles, as an insolvent debtor, withheld a large amount of property from the assignees, and therein describing the same, and praying to have him cited before the court to be examined under oath touching the matters mentioned in that petition. The assignees and Albert Sowles were in fact in dispute and disagreement in respect to his right and interest in the property and claims described in both petitions of the assignees, and in regard to the property, debts, and claims mentioned in the petition of the relators to the probate court praying for the appointment of commissioners.

The petitioner contends that there was no matter in dispute that was before him for decision that justified the appointment of commissioners. He further contends that under the statute a party is not entitled to the appointment of commissioners unless the precise question to be submitted to them is pending before the court for decision at the time application is made for their appointment. Neither of these contentions can be sustained. V. S. § 2143, provides that, in cases of dispute or disagreement in regard to the allowance of a claim, or priority or amount of liens upon the estate of the debtor, or the debtor's interest in a homestead or property exempt from attachment, or other matters in difference arising in the settlement of an insolvent debtor's estate, and coming before the judge for decision, the judge, in his discretion, may, and upon petition of the assignee or a creditor who has proved his claim, or other person interested, shall, appoint three disinterested persons to act as commissioners to hear and determine the matter in dispute, and report to the court their finding in the case. V. S. § 2145, provides for an appeal from the decision of such commissioners. No provision is made for an appeal from a decision of the court of insolvency in matters embraced in section 2143, unless commissioners are appointed as therein provided. One purpose of this section is to provide for an appeal in such matters, and thus give the parties in interest an opportu-

nity to have their rights determined in the appellate courts. Under the provisions of this section, any person interested in any matter therein described, and involved in the settlement of an insolvent estate, may apply to the court of insolvency to have commissioners appointed to determine the matter in dispute, and report to the court their finding, without regard to whether the precise question in issue is then pending before such court for decision. To hold otherwise might preclude parties so interested from an opportunity to have their rights determined in the manner prescribed by this section, unless the adverse party took action in the first instance, and would delay the settlement of the estate. Again, the court of insolvency could not determine the question raised by the petition of the assignees to have the relator Albert Sowles adjudged to be in contempt of court without determining the rights and interests of the relators in the real estate in question in that proceeding. If it was found that it belonged to the relators, or either of them, and not to the assignees, he could not be adjudged to be in contempt by reason of having made the alleged conveyance. Hence a question involving the dispute and disagreement in regard to that property between the relators and the assignees was in fact pending before that court for decision at the time the relators petitioned for the appointment of commissioners.

It is contended that the relators' application for the appointment of commissioners does not contain a sufficient allegation in respect to what the questions, disputes, and disagreements were, and that it contains no allegation that either of the relators was a creditor of the insolvent estate, or an assignee of such estate. To entitle the relators to make such application, it is not necessary that they should be either creditors or assignees of the insolvent estate. It is sufficient that they are persons interested therein in respect to the matters embraced in V. S. § 2143. In the court of insolvency the certainty and precision of the common law is not required in matters of pleading. It is sufficient if the petition or application fairly apprises the court as to the matter upon which an adjudication is sought. The allegations of the relators' application were sufficient in this respect. It is the duty of the court, when such application is made, to make such an investigation as will enable it to briefly state the matter in difference submitted in the commission issued to the commissioners. From the records and evidence submitted, it is clearly apparent that the judge would have had no difficulty in so doing in this case.

When a petition for the appointment of commissioners is made by an assignee or a creditor who has proved his claim, or other person interested, the judge has no discretion in respect to making such appointment. The petitioner is entitled to have the same made as a matter of right. The statute is mandatory. On the petition of the relators, the petitioner should have appointed commissioners in ac-

cordance with the prayer of their petition. The relators must therefore prevail in this proceeding. It is ordered that a writ of mandamus issue, commanding the petitionee forthwith to appoint three disinterested persons to act as commissioners to hear and determine all the matters in dispute between the assignees of the insolvent estate of Albert Sowles and the relators, and each of them, in respect to the real estate and all other property, debts, and claims involved in the settlement of said insolvent estate, and to report to the court of insolvency their findings in respect thereto. It is further adjudged that the relators recover their costs of the petitionee.

(69 Vt. 542)

UFFORD v. WINCHESTER.

(Supreme Court of Vermont. Orleans. Aug. 5, 1897.)

SALES—TITLE—BONA FIDE PURCHASERS—PAYMENT OF PRICE.

1. Where plaintiff's grantee, having authority to dispose of a certain horse "in any way he sees fit, and at any price he sees fit," but being required to give plaintiff the proceeds thereof, transferred it fraudulently, by a sham sale, without consideration, to defendant's grantor, defendant, who purchased for value, but with knowledge of plaintiff's rights, acquired no title thereto as against plaintiff.

2. But, where such sale by plaintiff's grantee to defendant's grantor was bona fide, defendant was not bound to show, in an action against him for the conversion of such property, that the proceeds thereof were paid to plaintiff.

Exceptions from Orleans county court; Taft, Judge.

Trover by C. J. Ufford against Charles Winchester for the conversion of personal property. Plea, the general issue. To a judgment on a verdict for plaintiff, defendant excepts. Reversed.

W. W. Miles, for plaintiff. N. A. Norton and E. A. Cook, for defendant.

THOMPSON, J. January 9, 1892, the plaintiff sold to one Burton D. Piper, the horse in question, with other property, by a conditional sale, reserving a lien thereon to secure the payment of the purchase price. The lien was duly recorded, and no question was made as to its validity. November 14, 1894, the plaintiff gave said Piper consent in writing to sell this horse, which consent was as follows: "I hereby give B. D. Piper leave to dispose of the Phillips horse, on which I have a lien on, in any way he sees fit, and at any price he sees fit, and give me the proceeds, be it more or less." The evidence of the defendant tended to prove that under this license Burton D. Piper sold the horse to his brother, Alton J. Piper, and that subsequent to such sale the defendant, knowing the contents of the license to sell, bought the horse of Alton J. Piper for \$50, giving his note therefor, secured by a lien on the horse. The evidence of the plaintiff tended to prove that the alleged sale to Alton J. Piper was a sham sale, without consideration, for the purpose

of removing plaintiff's lien, and that within two weeks of the alleged purchase by the defendant the plaintiff demanded of him the amount due on his note given for the horse, and notified him not to pay the note to Piper. The defendant claimed title to the horse by virtue of his purchase thereof from Alton J. Piper.

1. The defendant excepted to the charge of the court below to the effect that, if the alleged sale to Alton J. Piper was a sham sale, it was no defense to this suit, and the plaintiff was entitled to recover. Was this instruction correct? If it was a sham sale, a sham trade, in law it was no trade, no sale, and no title to the horse passed to Alton J. Piper by virtue thereof. Under the license from the plaintiff to sell, he could only obtain title to the horse by an actual purchase. If he took him without such purchase, he held him subject to the lien of the plaintiff, and the defendant, as his vendee, would hold subject to such lien. If Alton J. Piper induced the defendant to purchase the horse by making fraudulent representations in respect to his title thereto, the defendant has his remedy against him for such fraud, but such fraud does not affect the right of the plaintiff to the horse. The defendant standing upon and defending under the title of Alton J. Piper, the instruction to the jury on this subject was correct. *Thrall v. Lathrop*, 30 Vt. 307; *Church's Adm'r v. McLeod*, 58 Vt. 541, 3 Atl. 490.

2. The court below instructed the jury that the defendant, knowing the terms of the consent to the sale, could not defend in this action without showing that the pay for the horse, when sold by Burton D. Piper, was actually paid to the plaintiff; that the burden was on him to show this. To this the defendant excepted. In support of this ruling the plaintiff relies on *White v. Langdon*, 30 Vt. 599. In that case the license was "to trade off the horse, provided the pay or avails were paid to him, the plaintiff," and consequently only conferred authority to sell, but not to receive the pay for White. The pay was to come directly from the purchaser to him. In the case at bar the authority to sell and receive the pay is unlimited. This is the only fair, reasonable construction that can be given to the writing evidencing the license to sell. Burton D. Piper having unlimited authority to sell the horse and receive the pay therefor, the defendant was not bound to show that the pay for the horse was actually paid to the plaintiff, if there was in fact a bona fide sale of it to Alton J. Piper. Hence this instruction was erroneous. The verdict being general, it does not appear whether the jury found for the plaintiff because the alleged sale to Alton J. Piper was a sham sale, or because the defendant failed to show that the plaintiff received the pay for the horse. For aught that appears, the defendant may have been injured by this instruction, and consequently the judgment must be reversed. *Wilson v. Blake*, 53 Vt. 305. Judgment reversed and cause remanded.

(99 Vt. 563)

BURDITT et al. v. HOWE, Sheriff.

(Supreme Court of Vermont. Rutland. July 20, 1897.)

CONTRACTS—PAROL EVIDENCE—SALES—PASSAGE OF TITLE.

1. Plaintiff orally agreed to ship flour to a dealer on request, the delivery of the bill of lading to be conditional on the payment of an accompanying sight draft for the price. The dealer subsequently sent a written request for the shipment of flour, referring to above conditions without setting them out, and the plaintiffs replied in writing that the shipment would be made and a sight draft sent. *Held*, that the correspondence did not constitute a complete contract, and hence evidence of the parol agreement was admissible, in connection with the correspondence, to show the whole contract.

2. When a bill of lading of goods is sent, accompanied by a sight draft to be paid before delivery of the bill, title to the goods does not pass until such payment is made.

Exceptions from Rutland county court; Tyler, Judge.

Trover by Burditt Bros. against L. C. Howe, sheriff. There was a pro forma judgment sustaining defendant's exceptions to the referee's report, and plaintiffs bring exceptions. Reversed.

The following is a summary of the report: The plaintiffs are dealers in flour in Rutland. The defendant is a sheriff, and as such took the flour in controversy from a railroad car at Ludlow, October 28, 1893, upon writs of attachment against the firm of Hubbard & Moore, in which George M. Moore was a partner. Early in October, 1893, said Moore had a talk with F. L. Bigelow, a salesman for the plaintiffs, about buying of them 50 barrels of flour. Bigelow gave Moore the price, and informed him that he could not have credit, but that payment must be made by sight draft; and it was agreed that, if Moore should send an order, there should be a sight draft, with bill of lading attached. October 21st Moore sent Bigelow a postal card as follows: "Have placed 50 bbls. E. Lt. at price mentioned, f. o. b. Ludlow. St. draft. Ans." On the same day Bigelow replied by letter, saying that he would send the 50 barrels at the price named, and make a sight draft through the Ludlow Bank at the time of shipment. The plaintiffs had sold 30 barrels of flour to Spaulding & Son, of Ludlow, and on October 24th shipped those 30 barrels and the 50 barrels ordered by Moore in the same car, marking each portion with the purchaser's name upon every barrel, and on the same day sent through the bank for collection a sight draft on Moore for the price of the 50 barrels, with bill of lading attached. Moore was duly notified, but has never paid the draft. The car arrived at Ludlow October 26th, and Moore, being notified of its arrival by Spaulding & Son, drew away 10 barrels on October 27th, and on October 28th was about to draw away the other 40 barrels, when the attachment was made. Spaulding & Son had no authority to deliver the flour to Moore. The defendant objected and excepted to the admission of parol evidence concerning

the contract, on the ground that the terms were completely shown by the correspondence between Moore and Bigelow.

G. E. Lawrence, for plaintiffs. W. W. Stickney and J. G. Sargent, for defendant.

TAFT, J. It is argued by defendant's counsel that the parol testimony covered by the exceptions to the report was not admissible, for that "the correspondence of Bigelow (the plaintiff's agent) and Moore constitute a complete contract in writing." It is evident that a part of the contract rested in parol, viz. that a bill of lading was to accompany the draft, and that the title to the flour was not to pass until the draft was paid. This made the parol testimony admissible, and the exceptions to the report are overruled. *Wing v. Chamberlin*, 32 Vt. 320; *Reynolds v. Hassam*, 56 Vt. 449. That the title would not pass was the legal effect of the draft and bill of lading. *Tilden v. Minor*, 45 Vt. 186. The title of the flour not having passed to Moore, it cannot be held on the attachment against him, and the plaintiffs are entitled to recover. The question of stoppage in transitu becomes immaterial. The pro forma judgment reversed, the defendant's exceptions to the report overruled, and judgment rendered for the plaintiffs.

(99 Vt. 564)

In re HAYNES' ESTATE.

(Supreme Court of Vermont. Franklin. July 19, 1897.)

CONTRACTS—INTERPRETATION—INTENTION—PAROL EVIDENCE.

1. P. and C., who, by a will, were to share equally as residuary legatees, signed a contract with K. that the executor might pay to K. "one-half of the balance and residue of said estate given and bequeathed to the said C., to an amount not exceeding \$3,000," and that K. should be paid from P.'s share enough to make up the \$3,000, "if the said one-half residue and remainder of C.'s share is not equal to said \$3,000." *Held* that, where one-half of the residue bequeathed to C. amounted to less than \$3,000, it was proper to take from P.'s share an amount sufficient to make up such sum.

2. Parol evidence was not admissible to show that it was the intention of the parties, during the negotiations leading up to the contract, that K. was to receive the whole of C.'s half of the residue, unless it exceeded \$3,000.

Exceptions from Franklin county court; Ross, Chief Judge.

From a decree of distribution of the estate of James M. Haynes, deceased, to certain legatees, the First Universalist Parish of St. Albans appealed to the county court, where the decree was affirmed, and appellant excepts. Affirmed.

By the will, Mary S. King was to receive \$2,000; the parish, \$10,000; Mary E. Chennette, \$2,000 and other specific legacies; and the residue of the estate was to be divided equally between Mary E. Chennette and the parish. The will was allowed in the probate court, and an appeal taken by Mrs. King. While the ap-

peal was pending in the county court a contract was signed by and between Mrs. King, Mary E. Chennette, and the parish, by which it was agreed that the will should be allowed without contest, and that the executor should pay to Mrs. King "one-half of the balance and residue of said estate given and bequeathed to the said Mary E. Chennette, to an amount not exceeding three thousand dollars," and that the executor should pay Mrs. King from the share of the parish enough to make up the sum of three thousand dollars, "if the said one-half residue and remainder of Mary E. Chennette's share is not equal to said three thousand dollars." Upon the strength of this agreement the probate court made its decree of distribution. The residue amounted to \$5,847.37, one-half of which, \$2,923.68, was by the will bequeathed to Mary E. Chennette, and the other half to the parish. The decree gave one-half of the last-named sum, namely, \$1,461.84, to Mary E. Chennette, and the other half to Mrs. King, and from the share of the parish gave to Mrs. King \$1,538.16, to make the sum of \$3,000. The parish appealed, and in the county court offered to show by parol evidence covering the negotiations that preceded the contract that the actual intention of the parties was that Mrs. King should receive the whole of Mary E. Chennette's half of the residue unless it exceeded \$3,000. The offer was excluded, and the parish excepted.

Farrington & Post, for appellant. Wilson & Hall, for appellee.

MUNSON, J. The parol evidence offered by the appellant was properly excluded. The facts covered by the offer were not such as would aid the court in considering the language of the agreement. The payments provided for were based upon the residuum of the estate, and the question raised was whether the amount for which Mary E. Chennette became liable was one-half of the entire residue, or one-half of her share thereof. The only effect of the proposed evidence would have been to indicate which of the two constructions was in accordance with what the parties really intended. But the construction of the agreement was to be in accordance with the intention of the parties as therein expressed. The case afforded no ground for an inquiry as to their actual intention. In *re McKeough's Estate*, 69 Vt. 41, 37 Atl. 275. This question of construction arises upon the stipulation of Mary E. Chennette for the payment to Mrs. King of "one-half of the balance and residue of said estate given and bequeathed to her, the said Mary E. Chennette, to an amount not exceeding three thousand dollars." The appellant would give to the words "the balance and residue of said estate" their proper meaning, and would allow to the words "given and bequeathed to her, the said Mary E. Chennette," no force inconsistent with that meaning. But we think the last expression is indicative of the manner in which the first is

used, and that the clause as a whole means one-half of that portion of the residue given to Mary E. Chennette. It is true, there is but one residuum; but, when the residuum is given in shares to several persons, it is not meaningless to speak of the residuum given to each. This view is strengthened by the terms of the stipulation on the part of the parish, which is for the payment of such sum as will make up the \$3,000 "if the said one-half residue and remainder of Mary E. Chennette's share is less than that sum." While neither stipulation is accurately expressed, we think the meaning of the agreement is sufficiently clear. Judgment affirmed.

(64 N. J. E. 480)

BLAKE v. DOMESTIC MANUF'G CO.

BLAKE et al. v. DOMESTIC SEWING-MACH. CO. et al.

(Court of Chancery of New Jersey. Sept. 2, 1897.)

APPEAL—CORPORATIONS—POWERS—AUTHORITY OF OFFICERS—GENERAL AGENTS—KNOWLEDGE OF PRINCIPAL—ESTOPPEL—ACCOMMODATION PAPER—BONA FIDE HOLDER—SECURITY—RECEIVER—RIGHTS OF BONDHOLDERS—TRANSFERS—EQUITABLE LIENS.

1. Where there is the same receiver for two corporations, one of which, as part of its assets, owns stock in the other, a creditor of the one has such interest that he may appeal from an allowance of a claim against the other.

2. A treasurer of a manufacturing corporation has no authority, by virtue of his office alone, to indorse its note for discount or sale.

3. A person delivered to a manufacturing corporation, from time to time, large quantities of its commercial paper, which, when indorsed by the secretary of the corporation, was discounted by certain banks, and the proceeds thereof applied to the credit of the corporation. No formal authority was given the secretary to indorse the paper, but his practice of so doing was known to all the directors. *Held*, that he made the indorsements by permission of the directors.

4. Prior to July, 1890, the secretary of a manufacturing corporation had exercised the authority of indorsing commercial paper, and thereby obtained discounts, whereby funds necessary to run the corporation were obtained. In July, 1890, a new treasurer was elected, and he was introduced in the banks where said discounts had been made, by said secretary, as having authority to make indorsements formerly made by him. From July, 1890, to May, 1893, he made a multitude of indorsements on paper like that formerly indorsed by said secretary, and during such period the directors of the corporation did nothing with a view to look into or manage its affairs. They claimed that when said treasurer was elected they understood he would put in sufficient money to do away with the need of indorsing and discounting paper as was formerly done, but less than five months thereafter the majority of them knew that he had failed to put in additional money. They had access to the corporation's books, plainly showing his practice in making said indorsements, but they never examined them. *Held*, that though they did not know of said indorsements, they ought to have known.

5. Where the directors of a corporation acquiesce in the act of its treasurer in indorsing its paper for discount, while holding himself out to the public as having authority so to do, they thereby constitute such treasurer its general agent to make such indorsements.

6. Where a corporation's treasurer is made its general agent for the indorsement of paper by reason of the acquiescence of its directors in nu-

merous indorsements made by him while holding himself out to the public as having authority so to do, an indorsement made by him is binding on the corporation, though the indorsee had no knowledge of the previous indorsements.

7. Where a corporation's treasurer acts as its general agent in indorsing from time to time large quantities of its commercial paper, it will be bound thereby, if the directors ought to have known he was so doing.

8. A manufacturing corporation has no authority to give accommodation paper.

9. A manufacturing corporation is bound by an indorsement of paper given for accommodation only, when in the hands of a bona fide holder.

10. A trading corporation owning most of the stock of a manufacturing corporation was the agent for the sale of all the product manufactured, and received the entire proceeds of sales. It supplied the manufacturing corporation with running expenses, and to such end turned over commercial paper which the manufacturing corporation indorsed and discounted at banks, using a large amount of the cash thus obtained in meeting pay rolls, and some of it going to the credit of the trading company. *Held* that, in view of the relations of the corporations, the paper whose discount went to the credit of the trading company was not accommodation paper.

11. Even if a part of the paper was accommodation paper, the banks were bona fide holders.

12. A trading and a manufacturing corporation carried on the business of manufacturing and selling sewing machines as one entire business. The one owned most of the stock of the other, and paid an agreed dividend to the holders of the balance of said stock, and such was the only accounting had between them. The one delivered to the other large quantities of customers' and agents' notes, which were indorsed by the other, and discounted at a bank, which placed the discount to the credit of the other, which used a part of the funds for its own benefit, and also signed checks on said bank named as payee, to be paid out of said discount, for money that was applied to taking up other notes of like character previously discounted in said bank by said trading corporation, without the indorsement of said manufacturing corporation. *Held*, that none of the paper indorsed by the manufacturing corporation was accommodation paper.

13. The bank did not take such paper with knowledge of any infirmity in it, or with such suspicion, with regard to its validity, as that its conduct in taking it was fraudulent.

14. Where one corporation, by indorsing the paper of another, obtains a bank discount which is used in paying obligations due from it, but which is charged against said other corporation primarily bound to pay said obligations, there can be no escape from liability to the bank on said indorsement on the ground that it was made for accommodation only.

15. A corporation is liable on an unauthorized indorsement of notes made by its assistant treasurer, where, after such indorsement, the notes were discounted, and it received the discount, which was used in paying its employees.

16. In 1881, a sewing-machine company, to secure bonds due from it, transferred to a trustee by a deed of trust certain shares of stock in a manufacturing company. Subsequently the trustee agreed that upon the execution of certain mortgages he would transfer to the sewing-machine company said stock. The mortgages were executed, but he did not surrender the stock, and three years thereafter the sewing-machine company became insolvent before paying said bonds, and a receiver was appointed. *Held*, that said security given in 1881 was unimpaired.

17. Said receiver could not compel said trustee to convey said stock to him.

18. A transfer by an insolvent Ohio corporation of all its assets to a New Jersey corporation, assuming all indebtedness, is not void under the laws of Ohio as against bondholders of the Ohio corporation.

19. Where one corporation transfers all its assets to another assuming all indebtedness, the bondholders of the former are creditors of the latter.

20. Such bondholders, however, have no equitable lien on its assets, in preference to other creditors of the latter, whose claims arose subsequent to such transfer.

Separate bills by David Blake against the Domestic Manufacturing Company and by Eliza A. Blake and others against the Domestic Sewing-Machine Company and others to secure the payment of bonds and preserve the rights of complainants as creditors. Andrew Kirkpatrick was appointed receiver in both actions. Eliza A. Blake and others, bondholders of the Domestic Sewing-Machine Company, appealed from the determination of the receiver allowing the claims of six banks, to wit, the Phoenix National, the Garfield National, the National Broadway, the National Park, the Chemical National, and the First National, against the Domestic Manufacturing Company. Heard on bill, cross bill, answers, and replications, and on said appeals, proof being taken orally. Appeals dismissed, except that as to the claim of the First National Bank, and the rights of complainants determined.

Charles L. Corbin, S. B. Brownell, and Rush Taggart, for complainants. T. N. McCarter, Mr. Doyle, and Mr. Reeve, for National Park Bank and others. R. V. Lindabury and J. C. O'Connor, for Garfield Nat. Bank and others. J. E. Howell, for Andrew Kirkpatrick, receiver.

EMERY, V. C. The litigation in these cases arises out of the failure of two corporations of this state, the Domestic Sewing-Machine Company and the Domestic Manufacturing Company, which were declared insolvent on June 2, 1893, on separate bills, the defendant Hon. Andrew Kirkpatrick being appointed the receiver of each corporation. These two companies had been connected in the manufacture and sale of sewing machines on a large scale since the organization of the sewing-machine company in April, 1891. Previous to this date, and since the organization of the manufacturing company, in 1881, a similar business connection existed between the manufacturing company and the Domestic Sewing-Machine Company, a corporation organized in 1870, under the laws of the state of Ohio. The sewing-machine company of New Jersey was organized to take over the assets and continue the business of the Ohio company, and by deed dated April 22, 1891, the New Jersey company purchased the assets of the Ohio company, and assumed its indebtedness, and also that of the Domestic Manufacturing Company, and to carry out and fulfill all existing obligations and contracts. The deed further declared that the New Jersey company "hereby pledges all the property and assets above conveyed and transferred to it for the payment of the obligations so assumed." At the time of this transfer of its assets from the Ohio company to the New

Jersey company the Ohio company had an outstanding bonded indebtedness of about \$300,000, which remained unpaid at the failure of the company. This same bonded indebtedness also existed on the part of the Ohio company in 1881 at the time of the organization of the manufacturing company, having been created as early as 1875. The Ohio company owned 1,980 shares of the entire 2,000 shares of the capital stock of the manufacturing company, and upon the organization of the latter company, in 1881, and by deed of trust dated April 21, 1881, the Ohio company conveyed to Eli J. Blake and John Dane, Jr., as trustees, this 1,980 shares of stock to secure these bonds and other obligations specified. The disputes now to be settled arise out of a twofold claim made by the complainants, who are the holders of \$291,000 of these bonds. Their first claim is based upon the pledge of the manufacturing company stock to secure their bonds, and also upon their rights as creditors of the sewing-machine company, which is the owner of the stock, subject to the pledge for their benefit. The receiver has allowed or approved claims to the extent of about \$300,000, which have been proved against the Domestic Manufacturing Company, by six banks holding notes indorsed, or purporting to be indorsed, by the manufacturing company. The complainants, as such creditors of the sewing-machine company, appeal to this court under the statute—"Corporations," § 82 (1 Gen. St. p. 923)—from the determination of the receiver allowing these claims. The ground of appeal is that the indorsement of the manufacturing company made on these notes was an indorsement by David Blake, the treasurer of the company, without authority, and that the indorsements are not binding upon the company. So far as relates to this dispute, the formal proceeding is that of separate appeals by the complainants from the allowance of the claim of each bank.

A preliminary motion to dismiss the appeals was made upon the ground that the complainants had no interest in the allowance of the claims. This was overruled on the ground that, as the complainants were certainly creditors of the sewing-machine company, even if their claim to a lien was invalid, and the sewing-machine company, as part of its assets, owned the manufacturing company stock, the complainants were directly interested in protecting this latter company against unfounded claims; and, inasmuch as the same receiver represented both companies, and had allowed the claims, the equitable situation was one where the greatest possible latitude should be given to the other creditors of either company in contesting claims against the manufacturing company, supposed to be invalid. The other claim of the complainants is the one upon which their bill in equity is based, and, briefly stated, the nature of this claim is that at the time of the transfer by the Ohio company of its assets to the New Jersey company

the Ohio company was insolvent; that the transfer to the New Jersey company was void under the laws of Ohio, and that it was in fraud of the complainants as creditors of the Ohio company, and that complainants have a lien upon all the real and personal assets of the Ohio company existing at the time of the transfer prior to the claim of the creditors of either of the New Jersey companies. If, however, the transfer of its assets by the Ohio company to the New Jersey company should be held valid, then complainants claim that by virtue of the pledge of the existing assets made by the New Jersey company upon the transfer to pay the debts of the Ohio company the complainants, as creditors of the Ohio company, have a lien on this property in the receiver's hands superior to any claim of any creditor of the New Jersey Sewing-Machine Company. The complainants also claim that the patents and trade-marks originally belonging to the Ohio company and assigned to the New Jersey company were specially pledged to secure their bonds, and are so applicable in the receiver's hands to their claims. The bill further specially attacks the validity of the indorsement of the manufacturing company's notes by David Blake, and the allowance by the receiver of the claims of the banks founded thereon, and states that appeals are pending from these determinations, and the receiver and the banks were made defendants to the bill. The claims presented and allowed against the sewing-machine company amount to about \$1,500,000, while the claims allowed against the manufacturing company are mainly the claims on the notes held by the banks. The principal asset of the sewing-machine company in the hands of the receiver is the stock of the manufacturing company, and the main dispute between the bondholders, the receiver, and the banks, both in the equity case and on the appeals, is as to the liability of the manufacturing company on the notes indorsed by David Blake as its treasurer. The equity cases and the appeals were therefore heard together, and in the disposition of the cases I will first take up the question of the validity of notes proved against the manufacturing company, leaving certain features of the equity case, not directly connected with this main question (including the matters set up in the answer and cross bill of the receiver) for a further separate statement and conclusion after disposing of the question which is the substantial one in both proceedings.

All of the notes in question purporting to bear the indorsements of the manufacturing company are similar in character, and are notes made by persons who were selling agents of the Domestic Sewing-Machine Company (of New Jersey), and are made payable to the order of the sewing-machine company at its place of business in New York City. They are all indorsed, in the first place, by the Domestic Sewing-Machine Company, by David Blake, vice president; his authority to indorse for this company not being called in question.

They are then (with three exceptions, which will be specially noted hereafter) indorsed in the following form: "Domestic Mfg. Co., David Blake, Treas." Thus indorsed, the notes were received by five of the banks, the Phoenix National, the Garfield National, the National Broadway, the National Park, and the Chemical National, for discount to the credit of the manufacturing company in its account with these banks respectively, and the proceeds of the discounts were by these banks respectively passed to the credit of the manufacturing company. The Second National Bank of Cooperstown purchased in the open market two of the notes, similarly made and indorsed, for full value, before maturity. The First National Bank holds five of the notes (similar in form), amounting to \$29,714, as collateral to demand notes of the sewing-machine company, and these notes held by the First National Bank appear to have been so received as collateral in substitution for other notes to which the manufacturing company were not parties, and which were held as collateral to this loan made by the First National Bank to the sewing-machine company. The original loan by the First National Bank to the sewing-machine company of Ohio was made in 1890, and the notes indorsed by the manufacturing company were received by it in substitution for the other collateral in April, 1893. All of the notes held by each bank were duly protested for nonpayment. The purchase of the notes by the Cooperstown Bank in open market, and the receipt of them by the First National as collateral for the sewing-machine company's debt, involve questions not raised in reference to the notes received by the banks discounting for the credit and account of the manufacturing company; but the preliminary question in all of the cases is as to the authority of David Blake to impose the liability of indorser upon the manufacturing company, and this question will therefore be first considered.

The complainants, in their bill and by their petitions of appeal, charge that these indorsements were made without authority from the manufacturing company, and without the knowledge or consent of its board of directors, and were made for the purpose of using the credit of the manufacturing company to borrow large sums of money, in order to enable the sewing-machine company to carry on its business. The banks, in their several answers to the bill and petitions of appeal upon this question of authority, allege that the indorsements were made with the knowledge and consent of the board of directors of the manufacturing company, and in the regular course of the business of the company, with which the directors were familiar; that David Blake, the treasurer of the manufacturing company, was also its general agent and manager, and invested by its directors with the entire management and care of the business, and with the possession and collection of its assets, and the application

of their proceeds to its business; and that David Blake, as treasurer, was held out to the world, and to the creditors of the manufacturing company, as authorized to indorse these notes for discount or sale. The five banks discounting the paper further insist that the proceeds of the discounted notes actually came to the use of the manufacturing company and were received for its benefit; and it cannot, therefore, escape liability for the repayment of the money, even if the indorsement was unauthorized. The Cooperstown Bank, in its answers, also alleges that the notes held by it were commercial paper of the manufacturing company, made in the regular course of business, and that this money raised therefrom was used by David Blake, as treasurer, in the business of the company. In answer to the claim of the banks that the money procured by the discount or sale of the notes in question was in fact received by the manufacturing company, and applied to its use, and that the company is therefore liable, even if the indorsement of the treasurer was originally unauthorized, the complainants claim that with the exception of the sum of \$10,023.35 of the claim of the National Broadway Bank (to which extent liability is admitted) the entire amount raised by the discount and sale of the notes was used in the payments of debts and obligations of the sewing-machine company, and did not in fact come to the use of the manufacturing company; this application, as well as the discounts, being made without the knowledge or consent of the directors of the manufacturing company, and without their ratification. The issues raised, therefore, in reference to the notes, are as follows: First. Was David Blake, the treasurer, authorized to indorse the notes to the banks? Second. Were the notes accommodation paper of the manufacturing company, and to be so treated as invalid on that account in the hands of the banks? Third. Did the proceeds of the notes, or any of them, come to the use of the manufacturing company in such manner as to charge it with liability either for the notes or the money received thereon?

As to the authority of David Blake, as treasurer, to indorse the commercial paper of the company, it is not disputed that such authority was not directly conferred upon the treasurer, either by the by-laws of the company or by any formal resolution of the board of directors. The only provision of the by-laws relating directly to the treasurer is a section providing for his giving bond for the faithful discharge of his duties. These duties were not specified, nor was there, either from the by-laws or from any resolution of the board of directors, any direct authority to any officer of the company either to make or to indorse its commercial paper in the course of business. Counsel for the banks claim that the treasurer of a manufacturing and trading corporation of this char-

acter has the right, by virtue of his office, to indorse the business paper of the corporation, and to bind the corporation thereby, and the decisions in some states relating to the implied powers of cashiers and treasurers are cited as supporting this contention. But in my judgment, they do not reach to the extent claimed, and, in view of the general provisions of our statute laws that the business of the corporation is to be managed by the directors, and the numerous decisions of our courts that the powers of the officers of a corporation are simply the powers of agents delegated to them by the board of directors, I am of opinion that the treasurer of a manufacturing corporation is not merely by virtue of his office, and in the absence of any authority delegated to him by the directors, authorized to indorse the company's note for discount or sale. Such delegation of authority, however, may be made by the directors in other methods than by express resolution; and the claim made here by the banks is that by the entire method and course of business of the company adopted by its directors, or under their authority or permission, the treasurer was held out to the public and to the defendants as its general agent for the purpose of indorsing paper of this character, and the company are therefore bound by his indorsements. Such holding out, either to the public or to any of the banks whose claims have been allowed, is denied by the complainants, and is the main question of fact involved in this branch of the case. The evidence relating to this point involves directly the connection and course of business of both companies from the time of their organization, and the principal facts which I find to be established by the evidence are as follows:

The business of manufacturing and selling the sewing machines known as the "Domestic Sewing Machines" commenced with the organization in 1870, under the general laws of the state of Ohio, of "The Domestic Sewing-Machine Company," and this company was organized for the manufacture as well as the sale of sewing machines. Its principal office, designated by its charter, was in the state of Ohio; but the business of manufacturing machines was carried on in Newark, N. J., while the head office of the sales department was located in New York City, at the "Domestic Building," on Union Square, which was occupied under lease. The manufacture of the machines from the date of the organization in 1870 up to 1881 was carried on in or near Newark in different departments, upon property belonging to or controlled by the sewing-machine company, the legal title to the real estate being in Eli J. Blake, as trustee, and the personal property used in the manufacture, including machinery, tools, etc., belonging to the sewing-machine company. A firm—James R. Blake & Co.—leased the entire property (or a considerable portion of it), and manufactured the machines for the sewing-ma-

chine company under a contract with the company. Other departments of work connected with the machines were under the control of other persons, and in the spring of 1881 the directors of the sewing-machine company resolved upon the policy of increasing its facilities, and rendering more effective management of the various departments of manufacture connected therewith, by combining under one head or management the various manufacturing departments, and for that purpose determined to organize under the laws of New Jersey a company to be called the "Domestic Manufacturing Company," to which all machines, plant, stock, and all the personal property of the company (including the leases) were to be conveyed, subject to an existing mortgage for \$198,000, given by the sewing-machine company. The sewing-machine company was to receive of the manufacturing company stock as consideration for the purchase,—1,980 shares out of a total of 2,000 shares. The manufacturing company was accordingly organized on or about April 31, 1881, by Eli J. Blake, John Dane, Jr., Robert Blake, and James Blake, four of the five directors of the sewing-machine company. The entire capital stock was fixed at 2,000 shares of \$100 each, of which Eli J. Blake, the president of the sewing-machine company, was declared to hold 1,700 shares, and each of the other subscribers 100 shares. The business of the company was to be commenced when \$2,000 was paid in, and at a meeting of the stockholders held on April 19, 1881, this amount was paid in proportionately by the four subscribers, E. J. Blake paying \$1,700, and each of the others \$100, and a resolution was passed by the stockholders for the purchase from the sewing-machine company of all its property used in the manufacture of sewing machines in the city of Newark, and to lease its real estate and assume its leases, and the president, E. J. Blake, was authorized with the treasurer to consummate the purchase subject to ratification by the stockholders. The board of directors of the sewing-machine company, at a meeting held on April 21, 1881, attended by E. J. Blake, James Blake, and John Dane, Jr., three of the four stockholders of the manufacturing company, adopted a resolution setting out the plan and policy adopted, with the reasons therefor, as above given; and directed their president, E. J. Blake, to execute the necessary conveyances to the manufacturing company, and authorized him to receive in payment therefor 1,980 shares of the stock of the manufacturing company, which was to be issued, not to the sewing-machine company, but to Eli J. Blake and John Dane, as joint trustees. A trust deed of the stock for this purpose, executed by the sewing-machine company to the trustees, dated April 21, 1881 (being the trust deed—Schedule D—annexed to the bill of complaint), was approved by the board, and this deed conveyed the stock issued for property of the company to the trustees in order to secure

the payment of outstanding bonds of the company, and the accommodation indorsements (existing and contemplated) made by Eli J. Blake and others for the sewing-machine company. The bonds then outstanding were about \$300,000, including the \$291,000 held by complainants. The amount of Eli J. Blake's then outstanding indorsements does not appear. At a special meeting of the stockholders of the sewing-machine company, held for that purpose on May 5, 1881, at the company's office in Norwalk, Ohio, and attended in person or proxy by the holders of 1,290 of the shares, the action of the directors was approved. 1,284 shares were held by Eli J. Blake (1,050), James Blake (233), and John Dane, Jr. (1). One clause of the trust deed which was thus approved by the directors and stockholders of the sewing-machine company provided that the trustees should have no power to vote on any of the shares of stock held in trust until after one year's default in payment of principal or interest of the obligation secured by the trust deed. The resolution of the directors of the sewing-machine company approving the trust deed did so with the declaration, "It being understood that the said stock shall not be entitled to a vote at any meeting of the stockholders and directors of the company." Whether this resolution was intended to prevent the sewing-machine company itself, as well as the trustees, from voting on the stock issued for its own property, may well be doubted, but this was the construction given by the directors who were carrying out the plan, for at a meeting of the manufacturing company directors, held on April 21, 1881, a resolution was passed, which, after reciting the resolutions of the sewing-machine company appointing Eli J. Blake and John Dane, Jr., trustees of the 1,980 shares of stock in trust for the sewing-machine company and certain of its creditors, then directed that this stock so held "shall not be entitled to representation by vote while so held, but shall be deemed and held as inactive stock, as agreed by the resolution of the sewing-machine company, and the shares held by the several individual stockholders as such shall be deemed and considered as active stock, the latter only being entitled to representation by vote at the meetings of stockholders or board of directors"; and it was further resolved that the active stock only of the manufacturing company should be entitled to representation at any meeting, and that a majority thereof should be represented at any meeting of the stockholders or of the board of directors in order to transact business; and, further, that wherever the words "majority of the capital stock" occurred in the by-laws, they should be considered as referring to active stock. Of the whole 2,000 shares of the capital stock, 1,980 shares seem to have been issued to the sewing-machine company for the property purchased, to Eli J. Blake 17 shares, and to the other three directors and subscribers 1 share each, being

the amounts paid in by them at the organization and for the original subscription to the shares. The conveyance by the sewing-machine company seems to have been taken as a performance by and discharge of the subscribers. The effect of these resolutions as to active stock, therefore, seems to have been to give on the records the legal management and control of the manufacturing company to the individual stockholders, who owned only \$2,000 of its stock out of the total of \$200,000, and the virtual control to Eli J. Blake, who owned 17 out of the 20 shares of so-called "active stock," and whose presence at every board meeting was thus necessary. All of these individual owners were at that time directors of the sewing-machine company, constituted a majority of its board, and Eli J. Blake was its president, as well as the president of the manufacturing company. After the formal organization of the manufacturing company in the interest and for the purposes of the sewing-machine company, the course of business between the two companies was as follows:

The manufacturing company as well as the sewing-machine company was incorporated for both the manufacture and sale of sewing machines, and the certificate of the manufacturing company provided that its business was to be conducted in the cities of Newark and New York, in which last-named city the chief wholesale business was to be conducted. The entire business of manufacture and sale was, however, distributed between the two companies, the manufacturing company making the machines, and delivering the entire output of finished machines to the sewing-machine company, which disposed of them through its various agencies located in the principal cities of the United States. Mr. Robert Blake thinks there was originally a written contract between the companies, but none has been produced, and the precise relations of the companies must therefore be inferred from their course of business. This course of business is in its main features disclosed by the oral evidence in the cause, and by the business books of both the companies. These books, which have been put in evidence, were all kept at the one office in New York,—that of the Domestic Sewing-Machine Company,—and were kept by the same persons, who were employees of the sewing-machine company. The business of the manufacture and sale was from the time of the connection of the companies conducted on a very large scale, the average monthly shipment by the manufacturing company of finished machines (and not including other merchandise, attachments, etc., which amounted to several thousand dollars per month) amounting in 1882 to a monthly average of over \$120,000, which was still further increased in 1883 and 1884 to a monthly average of over \$125,000. These were the years of greatest output, and after this time the average monthly shipments were for 1885 about \$90,000; for 1886, \$97,500; 1887, \$100,-

000; 1888, \$92,000; 1889, \$89,000; 1890, to July, \$89,000; July to December, \$76,000; for 1891, \$71,500; 1892, \$66,500; and 1893, to June, \$55,000. The cost of manufacturing the machines, according to the books of the sewing-machine company, was about two-thirds of the entire proceeds of sale of the machines on the market. For this expense, including pay rolls, materials, rent, and other proper items, the manufacturing company would, in the absence of contract, be primarily liable, as between it and the sewing-machine company. But from the commencement of the business, the sewing-machine company, which received the entire proceeds of sale, undertook primarily, and as between the companies, the payment of the cost of manufacturing. So far as procuring materials was concerned, this was effected, speaking generally, by having the necessary materials and supplies ordered by the person who was the superintendent of the manufacturing department, on account of the sewing-machine company, on written orders, forms of which were furnished by the latter, and directing shipment to be made to the manufacturing company, the bills to be sent to the sewing-machine company. For the payments necessary for pay roll and other payments at Newark, connected with the manufacture, the sewing-machine company provided at first by sending cash and its checks to the manufacturing company, but afterwards by sending to it for discount its bills receivable, and by accepting sight drafts drawn on it by the manufacturing company in Newark, and deposited to the credit of the latter company in accounts with Newark banks. By the credit of these sight drafts and its discount of the bills receivable the manufacturing company was kept in funds at Newark by banks there in which it carried accounts. Bills receivable were thus sent for discount by the manufacturing company as early as October, 1882 (if not earlier), and the method of supplying funds by sight drafts commenced apparently in 1884. By these sight drafts the sewing-machine company obtained the slight delay of time for raising the funds necessary for the payments made by the manufacturing company from its bank accounts in Newark. The notes sent to the manufacturing company, and by it credited on its books to the sewing-machine company on its current account, were in part the notes given by the purchasers of machines at the various offices of the sewing-machine company, but were to a large extent, especially in the latter years of the business, notes of its general agents in charge of the offices of the sewing-machine company in the large cities. It was the custom of the sewing-machine company to take from these agents notes of the agents to the order of the company for an amount equal to about one-half or three-fifths of the machines or investment of the sewing-machine company at their offices. These agents' notes were, on their part, either entirely or to some extent, accommodation notes, and were payable to the sewing-machine company

at its office in New York, and were taken in order that the sewing-machine company might use them for raising funds by discount. Every month notes were received from the agents to renew the notes coming due during that month for a similar amount, and these notes were discounted by the sewing-machine company in New York banks, or indorsed over to the manufacturing company for discount on its credit in banks at Newark. The use of the credit of the manufacturing company by means of the sight drafts and discount of bills receivable increased apparently after 1885 as the production of machines diminished, and these discounts, beginning with the North Ward Bank in 1884, were also continued in other Newark banks,—the Essex County National, the National Newark Banking Company, the City National Bank. The total amount of such notes discounted by the manufacturing company in the North Ward Bank of Newark alone from November, 1884, to July, 1890, was over \$235,000, and the discounts of such notes in all the Newark banks from January 1, 1888, up to the same date, was \$839,814.04, and the amount under discount on July 10, 1890, and credited to the manufacturing company's account in the Newark banks, was over \$100,000. In its accounts with the sewing-machine company the manufacturing company credited the sewing-machine company with the drafts and notes received, crediting them generally on its accounts, and not applying the proceeds of either as specially made for any particular payments. The principal disbursements of the manufacturing company was its pay-roll account, which averaged \$10,000 to \$12,000 per week; and the amount received from discount of notes was not, during the period, equal to the amount paid out for pay roll. The statements of Mr. Lewis, complainant's expert accountant, shows that from January, 1888, to June 30, 1890, the total pay roll was over \$1,300,000, and the discounts in all of the Newark banks about \$840,000. But the payments from its bank accounts by the manufacturing company up to July, 1890, were not confined to payments for pay rolls, and included, to a large amount, other payments properly chargeable to the cost of manufacturing, including materials. Thus, of the entire deposits of over \$1,200,000 in the North Ward Bank up to July 10, 1890, nearly \$400,000 was paid out by checks on the manufacturing company account for materials, and about \$150,000 was transferred to the credit of the sewing-machine company in other banks. And of the total checks given on this account in the North Ward Bank, numbering 2,700 and upwards, over 800 have been produced, which were signed between November, 1884, and July 10, 1890, by F. A. Booth, treasurer, who was during all the time the treasurer of the sewing-machine company, and not an officer of the manufacturing company. All of these payments for materials and transfers so made by the manufacturing company were charged to the sewing-machine company, as well as the

total shipments of machines, etc., for each month, and the sewing-machine company was credited on the other hand with the drafts as cash, and with the bills receivable (less the discounts), and with the total purchases of materials for the month paid by the sewing-machine company. The balances of the account were stated monthly in the books, and the accounts carried along without any settlement or adjustment between the companies until December 31, 1885, at which time, on its own books, the manufacturing company stood debtor to the sewing-machine company in the amount of nearly \$400,000 on this current account. But, on the other hand, the merchandise, stock, and other accounts of the manufacturing company for the same period showed a profit up to this date of over \$600,000. The sewing-machine company, under whose direction the general books of both companies were kept, had on its books up to this date, December 31, 1885, treated itself as entitled to the entire profit made from the whole business of manufacture as well as of sale, and the profits were carried to the credit of its Domestic Manufacturing Company stock, and no dividends were paid on the manufacturing company stock up to this date. In point of fact \$2,000 of the manufacturing company stock was owned by Eli J. Blake and others individually, and either for this reason, or for other reasons not disclosed, the question of adjustment of the accounts of the companies was brought formally before both boards. Eli J. Blake, James Blake, Robert Blake, J. W. Blake, and John Dane, Jr., were the five directors of the manufacturing company, and Eli J. Blake and James Blake were also then members of the sewing-machine company board, and it was then agreed that the accounts between the companies should be settled and adjusted up to that date by the sewing-machine company paying to the manufacturing company (as soon as the proceeds in its possession justified) a sum equal to 10 per cent. per annum on the shares of the manufacturing company stock in full settlement to that date, and that all profits of the manufacturing company to that date be assigned to the sewing-machine company. The settlement was accordingly made of the amounts due to the individual stockholders of the manufacturing company, \$2,000 paid in cash, and the balance of the dividends for the five years ending 1885, \$98,000, as well as the entire profits of the manufacturing company appearing on its books, transferred by appropriate entries to the credit of the sewing-machine company. A similar arrangement or adjustment crediting a 10 per cent. dividend (\$20,000) was made yearly thereafter for the business of the years 1886, 1887, 1888, 1889, without any other adjustment or settlement. Of this \$20,000, \$19,800 was credited to the account of the sewing-machine company, which also received (on the books) all the profits in addition to which the manufacturing company was entitled.

The resolutions first adopted by both compa-

nies in reference to this adjustment are important as indicating the nature of the relations between the companies as then recognized by the officers and managers of each. They recite, among other things, that each company had to some extent acted as agent for the other, and to an extent that prevented a ready and convenient determination of the profits to which they were respectively entitled. The foregoing statement shows the general lines of connection between the two companies up to July, 1890, and the next subject to be noted is the course of business up to this date with special reference to the questions now involved, viz. the officers or agents of the two companies connected with the raising of money by loans, and the practical method adopted for this purpose. The date of July, 1890, is fixed as the important one, for the reason that at that time the control of the sewing-machine company passed from Eli J. Blake by sale of the stock owned or controlled by him (being a majority of all its shares) to David Blake, and one of the main issues between the parties is whether the authority in reference to indorsement for the manufacturing company, which previous to July, 1890, had been given to or exercised by Robert Blake, the secretary of the company, was after that date conferred upon or properly exercised by David Blake as treasurer. The general management of the sewing-machine company was by its by-laws conferred upon the president and directors, and from June, 1877, Mr. Eli J. Blake, owning or controlling a majority of the stock, had been the president. Previous to that time his brother David Blake, the owner of a large number (over 750) of shares, had been the president. From 1877 until 1890, Eli J. Blake and James Blake were two of the five directors of the Ohio company, and Robert Blake was its secretary from 1879 to 1883, when James Blake became secretary. John Dane, Jr., was also a member of this board from 1879 to 1882, and was treasurer of the company from June, 1879, to January, 1882, when Mr. F. A. Booth was elected, and held the office until the failure of the company. The meetings of the directors of the sewing-machine company were by their by-laws to be held monthly at the New York office, and such monthly meetings appear by the minutes to have been held quite regularly, especially after 1885. On the other hand, the directors of the manufacturing company, although also required by the by-laws to meet regularly at the New York office, appear by their minutes to have had no meetings until December 30, 1885, with the exception of the meeting on April 27, 1881, above referred to, when the active stock was provided for, and a meeting for an election of officers in March, 1885. At the meeting of December 30, 1885, the resolutions above referred to, relating to a settlement of the accounts between the companies, were passed, and then, after a meeting on January 5, 1886, at which no business seems to have been transacted, a

meeting was held in February, 1887, to adjust the accounts between the companies on the same basis, and on March 21, 1888, a meeting for the same purpose and for the election of officers. One other meeting, called "a regular monthly meeting," was held at New York office April 4, 1888, but no action was taken, and on March 18, 1889, at a stockholders' meeting, the provision of the by-laws for monthly meetings of directors was repealed, and a by-law adopted that they would meet at the call of the president (or, in his absence, of any two of the board) whenever it might be thought expedient or necessary, either at the office in Newark or at the office of the sewing-machine company in New York. From this date up to July 14, 1890, the only two meetings of the directors which are recorded on the minutes were on March 14, 1889, and March 12, 1890, for the purpose of passing resolutions relating to the settlement of the business of the previous years with the sewing-machine company.

During the whole period when Eli J. Blake was in control as president of both companies and member of both boards, the general course or policy of business at the factory was controlled at the New York office of the sewing-machine company, and by those who controlled the latter company. The general responsibility for supplying the funds to meet the expenses of manufacturing, including the purchase of materials and supplies and the pay roll, was imposed upon or assumed by the treasurer of the sewing-machine company, who also had charge of the commercial paper of the company, and of the sending of the paper to the manufacturing company for discount. He took charge in this way with the knowledge and sanction of the president, Eli J. Blake, who had general charge and supervision of the business, and was familiar with its course, and who says that this course of sending paper to the manufacturing company for discount was adopted when it was more convenient for the sewing-machine company to furnish paper than money. James Blake, also a director of the sewing-machine company at this time, says that this line of discount of the manufacturing company was to relieve the finances of the sewing-machine company, and to cancel part of the indebtedness of the latter to the former. It was always necessary for the treasurer of the sewing-machine company to provide cash in Newark for the pay roll of the manufacturing company, and from the latter office a statement of the amount necessary for the pay roll was usually sent each week to the New York office. The amount of notes sent to the manufacturing company for discount was, as above stated, considerably less than the amount required for the pay roll, but it was not sufficient usually to pay the current account. These notes, indorsed by the sewing-machine company, were sent to the manufacturing company at Newark, to Robert Blake, the superintendent or manager of the manufacturing

department, and who was also secretary of the manufacturing company, as well as one of its directors. He indorsed the notes as secretary of the manufacturing company, and had the proceeds of discount placed to their credit on the account of the Newark banks. He also, as secretary of the manufacturing company, drew checks on these accounts for the pay roll, and his name as secretary was left with the Newark banks as the person authorized to sign. The extent of these transactions in the Newark banks was very large, running into millions of dollars, during the time Robert Blake indorsed the notes. This indorsement of the notes by Robert Blake for discount was known to all the directors of the manufacturing company, as they now testify, but no formal authority was ever given to him either by the by-laws or resolution, and, so far as his agency to indorse for the manufacturing company was exercised, it was confined to an indorsement for discount in the Newark banks of the commercial paper of the sewing-machine company, received by the manufacturing company for credit to its account with that company. But while the amount of commercial paper so received by the manufacturing company was, so far as the sewing-machine company was concerned, regulated either wholly or to some extent by the requirements for the pay roll, there is nothing in the accounts of the companies between themselves or on the accounts of the manufacturing company itself to show that the amounts procured from the discounts were specially appropriated to the pay rolls, or were otherwise treated than as its general funds or assets, or to show that Robert Blake in fact indorsed and discounted paper for the sole purpose of meeting the pay roll, and that either as to the banks or the sewing-machine company his indorsements were limited to cases where the funds were so applied. As to the extent of the agency of Robert Blake for indorsement, my conclusion is that the directors of the manufacturing company permitted him to indorse for discount to its credit the paper appearing to be the regular business or commercial paper of the sewing-machine company, which was by this company, in the course of business, credited to its current account with the manufacturing company, and sent to him for discount. It also appears from the evidence, I think, that this course of transferring paper in the regular business, instead of cash, to the credit of the current account, was, up to July, 1890, adopted for the purpose of relieving the sewing-machine company from the burden of raising all the funds for manufacturing upon its own credit, and to obtain to some extent the benefit of the credit of the manufacturing company by its discounts. For some time previous to July, 1890, the financial condition of the sewing-machine company had become very much embarrassed, and at that time, in addition to its bonded indebtedness of \$300,000, and the mortgage debt of \$75,000 on the property at

Newark, it was indebted to New York banks for loans and discounts alone to the extent of \$420,000, of which amount Eli J. Blake had personally indorsed for \$100,000. The bonds which had been issued in 1875, and were due in 1875, were in 1880 held almost entirely by Eli J. Blake, who, in July, 1880, transferred them to George Chapin, his brother-in-law, as trustee for Eliza A. Blake, his wife. In 1880 the time for payment was extended to 1885, with the consent of the bondholders, and in 1884 were further extended by like consent to December 1, 1895, with the stipulation that interest should be paid quarterly, and that on 30 days' default in payment of interest the bonds should, at the option of the holders, become due and payable. Default had been made in the payment of the interest on the bonds due September 1, 1889, December 1, 1889, March 1, 1890, and July 1, 1890, so that in July, 1890, the bonds were all due and payable at the option of the bondholders. The amount due from the sewing-machine company for merchandise and other debts at this date does not appear. Litigation was also pending between David Blake and others of the minority of stockholders against Eli J. Blake and the other directors relating to the management of the company, and the urgency of the banks for the settlement of their loans made the appointment of a receiver imminent. During the spring of 1890 efforts had been made by Eli J. Blake and David Blake, acting with John D. Harrison, to dispose of the entire capital stock and property of the sewing-machine company to an English syndicate, and they gave an option to purchase, based on their ownership or control of the entire stock, for \$1,250,000. The property agreed to be conveyed, as appears by the schedule attached to the option, included as property of the sewing-machine company all of the property and assets of the manufacturing company, and the agreement contained a guaranty that those were the property of the sewing-machine company. This option was outstanding on July 7, 1890, when the paper of the sewing-machine company had gone to protest, and the banks became urgent for the settlement of their claims, and threatened application for a receiver. Under this pressure, David Blake having made, as he supposed, arrangements for financial assistance to the extent of \$200,000, in case he controlled the management of the company, and Eli J. Blake's credit being apparently exhausted, an agreement was made on July 7, 1890, between Eli J. Blake and David Blake, by which Eli J. Blake agreed to sell to David 1,141 shares of the sewing-machine company stock for \$370,825, payable by installments, with interest after January 1, 1891, \$5,000 per month till July, 1891, \$10,000 monthly till January, 1892, \$15,000 monthly till July, 1892, and from that date \$20,000 monthly until all were paid, and on 30 days' default in payment of any of the notes the whole became at once due and payable at the option of E. J. Blake. To secure

the payment of 1,500 shares of the stock were to be deposited by David Blake with Eli J. Blake as collateral security. It was also provided by the agreement that the \$301,000 bonds of the sewing-machine company should be secured by a mortgage upon the real and personal property of the manufacturing company at Newark. The bonds were in the agreement described as "the bonds (\$301,000) of the said company now held by E. J. Blake." The agreement contains no provision whatever relating to the manufacturing company stock held by Eli J. Blake individually or as joint trustee with Dane under the agreement of April 21, 1891, to secure the bonds. This may have been due to the fact that the agreement secured the bonds by a mortgage lien on the actual property of both companies, instead of a pledge on the stock of one company, which would be subject to its debts, and by this arrangement the security was much improved. It was further provided that, in case David Blake should be unable to carry out the purchase, there should be no responsibility for loss on his part, other than the forfeiture of the collateral stock. This scheme of purchase was, in the then situation, dependent on the attitude of the banks, and on July 9, 1890, another agreement was made, to which the parties were: First, Eli J. Blake, individually and as trustee of the sewing-machine company, holding title to its lands in Newark; second, David Blake; third, the sewing-machine company; fourth, the manufacturing company; and, fifth, the Third National Bank of New York, a creditor to the extent of \$260,000, being the principal bank creditor. This agreement embraced a general scheme for the extension and security of the outstanding bonded and loan indebtedness of the sewing-machine company, and a provision for the future conduct of the business and financial affairs of both companies. In addition to being executed by all of the parties named, it was also consented to by stockholders of the sewing-machine company representing 1,635 out of the total of 1,850 shares outstanding, and by 1,998 out of the total 2,000 shares of the manufacturing company. John Dane, Jr., and Eli J. Blake, signed as trustees and holders of the 1,980 shares of the manufacturing company stock, and Eli J. Blake as owning 17 shares, and John Dane 1 share. This agreement of July 9, 1890, recited the agreement of July 7, 1890, between Eli J. and David Blake; the indebtedness of the sewing-machine company to the banks of \$420,000, of which Eli J. Blake had indorsed \$100,000; the indebtedness to George Chapin, trustee, of \$50,000, which Eli J. Blake had also indorsed; the inability of the sewing-machine company to pay its indebtedness as it matured, and that in the interest of all parties an extension was desirable; and in reference to the relations between the two companies it further recited that the property belonging to the manufacturing company was in reality held by it as trustee for the benefit

of the sewing-machine company, and consisted of machinery and other personal property connected with real estate held by Eli J. Blake in his name as trustee for the sewing-machine company. As to the extension and security of the debts, the agreement then provided that the sewing-machine company should give its note for \$150,000, payable January 15, 1891, to one John W. Sterling as trustee, in exchange of notes for the same amount to be surrendered by the Third National Bank, the payment of this note to be secured by a mortgage on the real estate held by Eli J. Blake as trustee, subject to an existing \$75,000 mortgage. Provisions for extension of this note for six months further were made, and that the note and mortgage were to be held by the bank as additional security for the indebtedness of the sewing-machine company. As to the bonds and the indorsements of Eli J. Blake, it was provided that the manufacturing company should execute a mortgage to Eli J. Blake, John W. Sterling, and a third person to be nominated by Sterling, as trustees for their payment, and that as additional security for these Eli J. Blake should execute a further mortgage on the real estate subject to the \$75,000 and \$150,000 mortgages, and it was agreed that upon the execution and delivery of the said chattel and real-estate mortgages the 1,980 shares of manufacturing company stock should be transferred by the trustees or their successors to the sewing-machine company, and the agreement of July 7, 1890, as to the mortgage to be given, was to be considered modified; this modification being that, instead of being a prior mortgage on the property of both companies, it was the prior lien only on the personal property of the manufacturing company, and a subsequent lien on the real estate of the sewing-machine company.

The pressing indebtedness being thus provided for, the future conduct of the financial affairs of both the companies was arranged as follows: It was agreed that the "financial affairs of the two companies shall be subject to the supervision and control of an advisory committee," to be appointed one by each of three banks named, "which committee shall have power to supervise and control all the financial operations and transactions of the said two Domestic Companies," and that "the said committee shall generally direct and control the financial policy of each of the said companies." To insure the consent of the stockholders to this arrangement, it was provided that all of the stock issued to David Blake pursuant to the agreement between him and Eli J. Blake, should be issued subject to this agreement, and that a note thereof should be issued upon all certificates thereafter issued by either company, and that the holders of the certificates should, as often as required during the continuance of the agreement, vote for such persons as directors of the said companies as the advisory committee might nominate. For the protection of stock-

holders during this control of the advisory committee it was provided that any stockholder or creditor of either of the companies might call the attention of such committee to any supposed irregularities or mismanagement, and the committee should thereupon have full power to direct the action of such company in relation thereto, and any action or line of conduct in relation to any such matters should be carried out by such company. And a further special clause was added (section 5) that Eli J. Blake should have full and free access to the books and factories of the two companies for the purpose of obtaining any reasonable information which might be necessary to protect his interests as a creditor of the said companies, or either of them. At a special meeting of the stockholders of the sewing-machine company held on July 11, 1890, at which were present either in person or by proxy all the shareholders of the company, the existing board of directors, including Eli J. Blake and James Blake, retired, and a new board, consisting of nine members, was elected, including David Blake, John Dane, Jr., and John D. Harrison. The by-laws of the company were amended so as to constitute the president and three other members of the board, together representing a majority of the stock, to be selected by the president as an executive committee, whose duty it should be to conduct all the affairs of the company, and control the action of all its officers and employees, and they were authorized to vacate the offices, and fill the same in their discretion. At the meeting of the new board, John Dane, Jr., was elected president, James Blake secretary, and David Blake treasurer; the agreement of July 9, 1890, was ratified and approved; and David Blake, John D. Harrison, and H. A. V. Post were appointed members of the executive committee. There was no formal meeting of the stockholders of the manufacturing company held to carry out the agreement, but on July 14, 1890, a meeting of the directors was held, at which all of the directors were present, including James Blake, Robert Blake, and James W. Blake, who had not signed the consent to the agreement of July 9th, as well as Eli J. Blake and John Dane, Jr., who had signed. At this meeting the execution of the chattel mortgage upon the property of the company, dated July 10, 1890, and which was drawn to carry out the agreement, was ratified by all the stockholders of the company. E. J. Blake resigned as president, John Dane as treasurer, and John Dane was elected president, and David Blake treasurer, being the same offices to which they had been elected in the sewing-machine company. No change was made at this time in the board of directors of the manufacturing company, nor until its annual meeting in March, 1891. The principal object of the meeting seems to have been to retire Eli J. Blake as president, and to elect David Blake as treasurer; and David Blake says that by the agreement with Eli J. Blake, made in or-

der to carry out the agreements of July 7th and July 9th, he (David) was to be elected treasurer of the manufacturing company in order to carry its accounts at the banks. Eli J. Blake denies this to have been the object, but states, however, that the election as treasurer was made at David's request. The other directors (except Robert, who does not recall anything about it) also understood that this election of David Blake was at the latter's request, and they all state that with the change in the ownership of the stock of the sewing-machine company it was expected that the active connection of all the other brothers (Robert, James, and James W.) with the companies would cease, and their salaried positions would be vacated. David's statement as to the object of his election as treasurer of the manufacturing company is further supplemented by his statement that immediately after his election he made an appointment with Robert Blake, who had been carrying the accounts as secretary of the company, to visit the Newark banks for the purpose of being introduced by him (Robert) as the treasurer, who was to carry the accounts in future; and that within a day or two he did so visit the Newark banks with Robert, was so introduced by him, and left his signature as treasurer of the company with the banks, to take the place of Robert Blake's as secretary. Robert Blake says he has no recollection of making any such arrangement with David, or of going to the banks with him; but David's statement is corroborated by Mr. Rockwood, the cashier of the Newark Banking Company, one of the banks in which an account had been running since 1887, and who on July 15, 1890, made a memorandum in the signature book that David Blake, as treasurer, was introduced by Robert Blake as the officer to sign for the manufacturing company. In the Essex County National Bank, where the account has been running since 1887, Robert Blake, secretary, indorsing, the signature of David Blake was left before July 29, 1890, but the circumstances are not shown. At the North Ward Bank, in which the account ran from 1884, David Blake, as treasurer, was substituted for Robert Blake; but the officer who had charge of the entries in 1890 is dead, and the circumstances of the change are not proved. These seem to be the banks in which the accounts of the manufacturing company were then standing, and from this date all the notes discounted in these banks for the credit of these accounts were indorsed by David Blake as treasurer, and none by Robert Blake as secretary. Robert was taken ill a few days after July 14, 1890, and never afterwards was employed in the manufacturing company, his previous position as superintendent of the factory being taken by Mr. Davis, who had been his assistant. The general direction of the business of both companies hereafter, so far as related to the manufacturing as well as the sale of the machines, was directed by the sewing-machine company

board or officers, David having the immediate practical management under the executive committee, who met regularly, and to whom he reported. In relation to the financial control or supervision, which had been provided for by the management of July 11, 1890, an advisory committee was appointed, which, from November, 1890, was composed of John W. Sterling, Henry V. A. Post, and Caleb B. Knevals, all of the members, however, being practically nominated by the Third National Bank, or in its interest. The two latter named members (Post and Knevals) were elected members of the board of the sewing-machine company at about the same time. The mortgage for \$150,000 to Sterling as trustee for the Third National Bank was duly executed and recorded, but the other mortgages, although executed, were not recorded. This failure to record was in pursuance of an agreement made between the parties at the time, in order that the credit of the companies might not be impaired, David Blake stating that he would not be able to carry through the transaction if these mortgages were recorded; and it was agreed that they should be retained from record until necessary in order to protect the debts they were given to secure, of which necessity it was understood that notice should be given. And Eli J. Blake, who held the actual custody of the 1,980 shares of manufacturing company stock, did not, at the time of the execution of the mortgages, surrender this stock, but continued to hold it, and still holds it. David Blake failed to procure financial assistance to the extent anticipated, and reported this failure to the board of the sewing-machine company in the fall of 1890; and the fact that he had not put in new capital was also known by this time to Eli J. Blake and to John Dane, Jr., the president of both companies, two of the members of the manufacturing company board. James Blake and J. Woodruff Blake, two additional members of the board, also heard (probably from E. J. Blake) of this failure of David to put in any new capital, and John D. Harrison, who, together with these four, constituted from March, 1891, the manufacturing company board of directors, also knew that no new capital had been put in. From the time of the change in management the raising of funds to carry on the business in the absence of new capital was therefore necessarily carried on as before, viz. by the discount of the paper of the sewing-machine company, representing its assets and accounts in the hands of its selling agents, this discount being on its own account in New York and also in Newark banks, and also by indorsing the notes over to the manufacturing company on account of its indebtedness or on current account as before, and charging the manufacturing company with these notes less the discount. Nor did the organization of the sewing-machine company (of New Jersey) in April, 1891, and the transfer to it by the Ohio company of all its assets at that time, make

any change in the manner of conducting the business with the manufacturing company, or any change in its books of account; for the transfer by the Ohio sewing-machine company was ratified in May, 1891, by the unanimous vote of its stockholders, and the New Jersey company, under one of the provisions of the agreement, was allowed to adopt the same name with the Ohio company for the purpose of continuing the business, and the accounts with the banks and with dealers were continued as if no change had been made. The current account of the sewing-machine company in the manufacturing company's ledger at and after this period of transfer continues on the book as the same account of the "Domestic Sewing-Machine Company." In the Newark banks the accounts of the manufacturing company were continued after the organization of the New Jersey company in 1891, until February, 1892, when the last account closed, and the total amount of discounts in these banks from July 11, 1890, when David Blake commenced indorsing as treasurer, to February, 1892, was over \$425,000. At the latter date the manufacturing company closed its last accounts in the North Ward Bank of Newark, and the Newark City Bank, and the Essex County Bank, but the sewing-machine company still retained accounts in Newark banks. The books of the manufacturing company during all this time from July 14, 1890, showed that these discounts of notes passed over by the sewing-machine company were being made. The account current, especially, balanced every month, showed these credits for the notes to the sewing-machine company, and also the counter charges for payments made to or on account of the sewing-machine company; and the examination of this single book, and any month of it, would have disclosed the continuance of the method adopted previously to July, 1890, of helping out the sewing-machine company's finances, and of fulfilling its obligation to provide money for the manufacturing company by turning over its agents' notes for discount on the credit of the manufacturing company. From March, 1892, to August, 1892, inclusive, no discounts seem to have been made, but in September, 1892, the manufacturing company opened an account with the Phoenix National Bank in New York City, and on September 20, 1892, discounted for its credit nine of these agents' notes, amounting to over \$25,000, indorsed by the sewing-machine company and by the manufacturing company, both by David Blake as treasurer. On September 22, 1892, it discounted 8 of the notes similarly indorsed, amounting to about \$26,000. At the time of this discount by the Garfield Bank, David Blake was introduced as the treasurer and officer authorized to indorse, by Mr. Knevals, who was then a member of the advisory committee of the Ohio company, originally appointed in the fall of 1890, and was also a director of the New Jersey company. These indorsements and dis-

counts were followed during the fall of 1892 by like discounts at the Phoenix Bank, October 10, 1892, of 4 notes for over \$13,000, on December 5th of 12 notes for \$38,200, and in the Garfield Bank of 10 notes on December 21st for about \$29,000; making up to January 1, 1893, a total of 53 notes. These notes and discounts were all regularly entered in the manufacturing company books, and by it credited in the current account to the sewing-machine company. On January 7, 1893, the 8 notes discounted at the Phoenix Bank in September, 1892, were paid by the proceeds of discount of 14 similar notes amounting to over \$46,000; and in January, 1893, similar payments and new discounts were made at the Garfield Bank, and the account was continued in the same manner with these banks up to the failure of the companies.

The first discount of the disputed notes made by the Broadway Bank was on April 12, 1893, at which time it discounted 4 notes for about \$11,500, and at the time of this discount the notes of this character which had been indorsed to the New York banks, and paid by new discounts, were 23 notes at the Phoenix Bank and 9 notes at the Garfield. Between April 21 and May 19, 1893, 18 other notes were discounted by the Garfield. On April 19, 1893, when the National Park Bank commenced discounting, the notes of this character which had been made to the above-named New York banks, amounted altogether to 85 notes, amounting to \$240,000, of which 32 notes, amounting to \$103,000, had been paid, mainly by the discount of other notes. The Chemical Bank was the last of the banks to discount the notes for the manufacturing company on May 1, 1893, at which time the total of like indorsements which had been made in the New York banks was 96 notes, amounting to over \$300,000, of which 87, amounting to over \$110,000, had been paid mainly, if not entirely, by other discounts. At the time of its second and last discount (May 19, 1893) 23 additional notes, amounting to \$74,000, had been previously indorsed and discounted at other banks in New York City. And when the Cooperstown Bank purchased its notes on the market on May 2, 1893, the number of such indorsed notes discounted by banks and passed to the credit of the manufacturing company was about 100, aggregating over \$310,000. These detailed statements of the situation of each bank seem to be necessary for the reason that, if a general agency to indorse paper of this character can be established by proof of a multitude of instances, in which the agency has been in fact exercised, then those of the banks whose discounts or purchases were later in time are in a position of advantage as to nature and character of proof. During all the time these discounts by David Blake's indorsement were made the entries of the notes were made in the current account of the manufacturing company, which gave the sewing-machine company credit for them, the entries generally or often stating specially the banks in which the cred-

its for the discounts were obtained. During the whole of the time from March 11, 1891, up to the failure, no meeting of the board of directors of the manufacturing company was held, nor does any one of the five directors seem to have given the slightest attention to the business of the manufacturing company as a business distinct from that of the sewing-machine company, or to have examined its books. John Dane, the president and director, and John D. Harrison, secretary and director, were both directors of the sewing-machine company (of New Jersey), and the latter was its president. The last meeting of the directors of the manufacturing company was on March 11, 1891, after their election, and the only business transacted besides the election of the officers, Dane president, David Blake treasurer, and Harrison secretary, was the adoption of a resolution requesting the directors to settle with the sewing-machine company for the payment of such dividends as might be due the active stockholders of the manufacturing company upon its business for the year 1890 upon the basis of settlements in the past years. From this date (March 11, 1891) there was no meeting either of the stockholders or directors of the company until after the appointment of a receiver, in June, 1893, when a directors' meeting was called by the president, John Dane, Jr., apparently for the sole purpose of repudiating the action of David Blake in indorsing for the manufacturing company. John D. Harrison and John Dane, Jr., two of the directors of the manufacturing company, were directors of the sewing-machine company (of New Jersey) from about the time of its organization, and had direct access to all of the books of the manufacturing company as well as of the sewing-machine company, in which these accounts appeared; and Eli J. Blake, the president of the manufacturing company, and the owner of nearly all of its "active" stock, had an office in the sewing-machine company building, and does not seem to have once examined or asked to see the accounts of the manufacturing company, either under his right as president or director of that company or under the special clause for his protection inserted in the agreement of July 7, 1890. The two other directors of the manufacturing company, James Blake and J. Woodruff Blake, paid no attention to the business of either company after David Blake's control commenced. All of the five directors now testify that they had no knowledge of David's indorsements in any capacity, either in the Newark or New York banks, until after the failure of the companies. But, accepting these statements of their actual ignorance of the indorsements as true, I think there can be no doubt, under the evidence of the cause, that as directors of the manufacturing company they ought to have known it, and might have ascertained it by examination and inquiries of the easiest and simplest character. The account current of the manufacturing company with the sewing-machine company as I have above explained,

which has always been kept between the companies, and was continued after David Blake took control, showed the sources from which the manufacturing company received the payment for its shipments, and that this was constantly received in notes which were discounted for the credit of the manufacturing company. This was notice direct that these notes of the company were being discounted for its benefit, and there could have been no difficulty in ascertaining what person or officer was the indorser and discounter. Whether directors are, in cases like this, chargeable with notices of matters appearing on their books which are not readily apparent, and could only be arrived at after thorough, and perhaps expert, examination, it is not necessary to determine; but in this case the information was easily accessible, and it was simply information, from the current account, that the business of indorsement of the paper received from the sewing-machine company on its accounts was continued after David Blake took charge in the same manner, and in entries of the same character, which had appeared on the books under the previous management. The explanation made by all of the directors for their absolute failure to look after the business of the manufacturing company is that they understood that David Blake was to put in \$200,000 new capital, and that this capital would relieve the manufacturing company from incurring any obligations of this character. David Blake denies any such agreement, but, even admitting that the directors so understood it, and therefore did not discharge their duties as directors, this excuse evidently admits the failure to look after the business, and only explains the inattention, without legally excusing it; and it does not prevent the creditors, and the company through them, from being charged with knowledge of facts, if such knowledge is to be imputed by reason of the duty of the directors to know the facts. And it should further be noticed in reference to this explanation that it appears that all the directors (or at least E. J. Blake, Harrison, and Dane) knew as early as the fall of 1890 that David Blake had not put in, up to that time, any such new capital; and from this time, which was long previous to the discount of the notes now in question, the explanation certainly could have no operation as an excuse either to the directors or the company. Eli J. Blake, moreover, had a large personal interest in allowing the management of the sewing-machine company's affairs, and with it the manufacturing company's business, to continue with as little friction and interference as possible, in order that the new management in its continuance of the business might relieve him from the \$150,000 indorsement of its notes, or perhaps a much larger indorsement (for he says it was over \$300,000), and more especially that David Blake might be able to meet his notes for the stock (\$370,000), payment of which was to commence in January, 1891, and to continue until about April, 1893, when all were to be paid.

The sewing-machine company, under the new management, although not able to secure new capital or to fund its indebtedness, as was attempted, nevertheless was able to carry the large existing indebtedness, and apparently to make profits for dividends, which were in 1891 and 1892 declared and paid over by the New Jersey company to the Ohio company (the holders of the New Jersey company stock) for division among the stockholders of the Ohio company. By an agreement made in 1875 between the Ohio company and its bondholders, the latter company could not, so long as these bonds were outstanding, declare a dividend except by consent of two-thirds of the bondholders, and on the condition that the dividends declared on David Blake's stock, which Eli J. Blake held as collateral (at first 1,500 shares and then 1,260 of the total 1,850), should be paid to Eli J. Blake on account of the notes, instead of to David Blake, a written consent to the declaration of dividends was given by Eli J. Blake and George Chapin, the trustee, who held the bonds for the complainants. These dividends were regularly paid to Eli J. Blake on account of these notes up to the dividend declared about July, 1892, after which time the dividends on David's stock seem to have been retained on the claim of David that he was not liable on the notes. No dividends, so far as appears, had been paid on the Ohio sewing-machine company stock for some time previous to the transfer. The notes of David Blake given for the purchase were paid to Eli J. Blake to the amount of \$200,000 (being the notes due up to July 1, 1892), after the change in management. The extent to which he has been relieved from the indorsements of \$150,000 outstanding in July, 1890, does not clearly appear, but from a memorandum made by him on April 9, 1891, it would seem that the amount then secured by the stock had been reduced to \$59,700. And while Eli J. Blake, who held the manufacturing company stock as trustee for these indorsements and the bonds, failed to comply with the request of David Blake and of the sewing-machine company to transfer the stock, yet he did not in any capacity oppose the reorganization of the company proposed in 1891, and professed in a letter of June 4, 1891, replying to a request to make a deed to the New Jersey company, that he desired to comply with the wishes of the managers of the proposed reorganization so far as it could be done safely. From the time of the change in management efforts were made from time to time to reorganize the sewing-machine company on a basis of paying off the existing indebtedness, including the bonds and the debts secured by Eli J. Blake's indorsements, and both Dane and Eli J. Blake knew of these efforts. Eli J. Blake, as president of the manufacturing company, had, as such officer and director, the right at any time to inspect all its books, and the sole right by its by-laws to call its directors together. He was, both individually and as trustee, holding its stock in

pledge for the benefit of his wife and family and also of himself, very largely interested in the conduct of its business; and under the whole circumstances of the case his ignorance that the credit of the manufacturing company was used in continuing its business, and, if so, by whom it was used, would seem to have been the result of gross negligence, if it was not the result of an intentional omission, to make proper inquiries.

I find, therefore, as facts in the case, that from July, 1890, to the failure of the manufacturing company, David Blake, as its treasurer, in fact acted as the agent of the company in the indorsement and discount for its own credit of notes received by it from the sewing-machine company to the credit of its current accounts with that company, and that these indorsements and discounts by David Blake were made in such a multitude of instances and to such an extent as to be sufficient to make him the agent of the company for the purpose of indorsing and discounting paper of this character, if an agency for such purpose could be constituted by the directors negligently permitting the agent to hold himself out to the world or public. I also find, for the reasons above given, that the directors of the company did not, in fact, know of these indorsements in the Newark banks or the New York banks, which are relied on as establishing this agency to indorse, but that they might have known of them, and by the exercise of a slight degree of diligence. The further relevant fact to be noted is that it does not appear that the New York banks, or any of them, knew at the time of making their discounts or purchasing the notes that David Blake had been previously making the indorsements in the Newark banks, nor does it appear that those of the New York banks who made discounts or purchases subsequent to the others knew of the previous indorsements or discounts to the other New York banks. Upon these facts, the question of law arises whether the agency of David Blake to indorse is sufficiently proved by its exercise in the multitude of instances before the indorsements in question, which should have been known to the directors, and the company is therefore liable, or whether actual knowledge by the directors of the previous indorsements is necessary in order that the company may be bound by their holding out the agent to the public, and whether it must also appear that the banks receiving the notes in question took them on the faith of such previous indorsements, and relying on them. Counsel for the banks on this branch of the case contend that the agency to indorse was itself here created by the continued exercise of the authority to indorse, which should have been known to the directors; that, as to the public, or those dealing with the company in similar transactions, the proof that the agent has in a multitude of instances exercised the power creates a general agency for that purpose as against the principal, where the prin-

principal either knows or ought to have known that the power is being exercised. It is contended, on the other hand, by the complainants, that where, as here, no actual authority to indorse for the company was given, and the liability of the company is based upon the apparent or implied authority which arises from a holding out of the agent to the public, then the liability does not arise unless, in the first place, the directors had actual knowledge that the agent was so holding himself out, and unless, secondly, the indorsements and discounts in question were made by the banks in reliance upon such holding out or previous indorsements. These contentions are based upon the view that the liability in such cases of ostensible authority rests upon the theory of ratification, which admittedly presupposes and requires previous knowledge on the part of the directors; and also, in addition, upon that of estoppel, which also requires knowledge of the course of dealing upon the part of the creditors, and reliance upon the course of dealing. Very elaborate and able arguments have been submitted to sustain these views, with a citation and discussion of many cases involving the question of agency, in some of which questions of ratification and estoppel were also involved. I shall not review or recite these cases or those cited by counsel for the banks in detail, but state the conclusions I reach after an examination of these and other authorities which I have examined. The precise question now involved, as I understand the case, relates to the effect against the company of an agent's holding himself out to the public as authorized to indorse for discount and for the company's credit the business paper of the company without the directors' actual knowledge, but when they ought to have known of the agent's discounting for their credit; and the point to be resolved is whether the exercise of the authority under such circumstances creates the power as to the public, or whether the power is only created as against the company by reason also of the actual knowledge of the directors, and of the actual reliance upon the previous holding out to the public by the person dealing with the agent. The solution of the question depends, in my judgment, upon the application of principles relating to the law of agency, which are now too firmly settled to be called in question. In the first place, a distinction between special and general agents is firmly settled in the law, which has also recognized general agencies, either to transact a business or to perform a particular act or class of acts for the principal. And in reference to the creation of these general agencies, either for a particular class of acts or the transaction of a business, the principle established is that such general agencies are in fact created against the principal by reason of his conduct in permitting the agent to hold himself out to the public as having the authority. In *Whitehead v. Tuckett* (1812)

15 East, 400, Lord Ellenborough, in reference to the distinction between a particular and a general authority (for a particular class of acts, as to sell sugar), says (page 408) "that a general authority does not import an unqualified authority, but that which is derived from a multitude of instances." This distinction between a general and special agency or authority, as thus stated by Lord Ellenborough, has been adopted by other cases and authorities, and is the distinction which Mr. Justice Story (*Story*, Ag. § 19) gives as the distinction generally recognized. In *Smith v. McGuire* (1858) 3 Hurl. & N. 554, the question of the effect towards the public of permitting another to act as a general agent was directly involved, and the particular question involved was whether the agent, who in the transaction of the business of the principal had constantly chartered vessels, but always or usually under special instructions, had a right to charter a vessel without such instructions, so as to impose a liability upon the principal for not taking a cargo. Pollock, C. B., says (page 560): "I think that questions of this kind, whether arising on a charter party, a bill of exchange, or any other commercial instrument, or on a verbal contract, should be decided on this principle: Has the party who is charged with liability under the instrument or contract authorized and permitted the person who has professed to act as his agent to act in such a manner and to such an extent that, from what has occurred publicly, the public in general would have a right to reasonably conclude, and persons dealing with him would naturally draw the inference, that he was a general agent? If so, in my judgment, the principal is bound, although, as between him and the agent, he takes care on every occasion to give special instruction." In this case the holding out to the public, by permitting the continued and general acts, itself, as to the public, created the general agency to bind the principal by the act in question, although the actual authority as created between the principal and agent would not have permitted the act. The same principle that a general agency to do a particular act (e. g. to indorse paper and make loans) may be created by a holding out to the world, is also recognized in our own decisions. In *Fifth Ward Sav. Bank v. First Nat. Bank* (1885) 47 N. J. Law, 357, 1 Atl. 478, the treasurer of the plaintiff, a savings bank, obtained a loan of the defendant in the name of the plaintiff, and ostensibly for its use, pledging securities of the savings bank for its repayment. The treasurer fraudulently misappropriated the funds to his own use, and the savings bank brought an action of trover for the value of the securities. On verdict for the plaintiff, and application for a new trial, Chief Justice Beasley said (page 358, 47 N. J. Law, and page 479, 1 Atl.), the treasurer not having express power to make the loans or pledge the bonds, "the only open point of inquiry on this question was whether or not the plaintiff

had put its treasurer in such an attitude before the public or before the defendant, as to have warranted a reasonable inference that he was its general agent, and had the right to execute the transaction in question." In this same case on error—Fifth Ward Sav. Bank v. First Nat. Bank (1888) 48 N. J. Law, 513, 7 Atl. 318—Mr. Justice Depue, delivering the opinion of the court (page 527, 48 N. J. Law, and page 328, 7 Atl.), said that "when, in the usual course of the business of a corporation, an officer has been permitted to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business, and that in such cases the authority of the officer does not depend so much upon his title, or on the theoretical nature of his office, as on the duties he is in the habit of performing." The careful and precise statement in the above case by the learned chief justice of the question to be left to the jury in such cases distinguishes, it will be noticed, between the holding out to the world and the holding out to the defendant; and this distinction, as it seems to me, touches directly one of the questions now involved, viz. whether the general agency in such cases arises from estoppel. If there was a holding out to the defendant, but not a holding out to others, or to the public as well, then the agency in such case might well be said to depend upon the estoppel of the principal to deny the agency which he had held out to the creditor, and which the creditor had relied on. But it is clear, I think, that in commercial transactions, which must be carried on largely by means of general agencies to do particular acts, there is an agency which is created by the general and public exercise of an authority with the permission of the principal; and where this general agency in fact exists as arising from this source it is not necessary for the creditor to show further that it was previously known to him, and that he acted in reliance on it. Where the agency is a general agency, provided by the continued exercise of the authority towards the public by the permission of the principal, and there is an estoppel to the public, the law presumes that the public knew of the holding out by the principal, and acted on it. The principle of technical estoppel as between parties is not at all involved in such cases, and, as it seems to me, could not be, for the reason that an estoppel of the principal towards the third person dealing with the agent must depend upon the representation by the principal made to the creditor. A representation to others could not, generally speaking, give rise to a technical estoppel at all, and the holding out to others or to the public, if it is to have any legal basis at all, must be by creating of itself, and wherever it is proved to exist, a general authority as to the public for the particular act. For this reason, as it seems to me, the distinction as stated by the chief justice must be taken

as the true one, viz. whether the holding out as general agent is to the public or to the particular dealer only. If the latter only, estoppel is the basis, but not in the former cases. The distinction is expressly made in a late case,—Fifth Nat. Bank of Providence v. Navassa Phosphate Co. (1890) 119 N. Y. 256, 23 N. E. 737. Here a company's note was indorsed by its president. There was no proof of direct authority, and the only evidence from which authority could be inferred was numerous former indorsements, and the fact that the company's apparent obligations were satisfied. The plaintiff knew nothing of these former indorsements in discounting the note. Some of the former notes were indorsed to plaintiff, but in so few instances that no estoppel between the parties was created. In the court below the complaint was dismissed upon the ground that the indorsement in question was not made in reliance on the former indorsements. On appeal the point was distinctly raised that knowledge of the previous indorsements to others was not necessary to be proved, and the court of appeals, reversing the judgment below, held (Finch, J., page 260, 119 N. Y., and page 783, 23 N. E.) that the question whether the directors knew that the president was creating obligations against the company, and gave him authority by acquiescing in its exercise, should have been submitted to a jury, and that it was not necessary in such cases for the plaintiff to show in addition that its officers knew in advance of this exercise and ratification (by acquiescence). "As to the plaintiff," says Finch, J., (page 262, 119 N. Y., and page 739, 23 N. E.), "it becomes an actual authority." In a late decision of the court of errors and appeals—Insurance Ass'n v. Jones (1890) 53 N. J. Law, 189, 21 Atl. 453, and 23 Atl. 166—a certificate of stock was signed in the principal's name, and was accepted by the assignee, supposing that the signature was in fact the principal's signature. The trial judge overruled evidence of numerous acts by the agent for the principal with other persons, offered by the assignee for the purpose of showing that the agent was in fact authorized, as the general agent of the principal, to make this assignment of stock. The reason for overruling the evidence was that the assignee had not relied on the agency. All of the judges agreed that the refusal to admit the evidence was error if the evidence was sufficient to show the agency in fact to make the transfer, and they differed only as to the effect to be given to this evidence. The decision seems to be a direct and controlling authority to the point that the powers of an agent may be proved by the exercise of previous acts with other persons, with the permission of the principal; and that, if these previous acts establish or tend to establish the agency, not only is not actual reliance on them in the transaction in question not required to be proved, but this agency, arising from this source, may be established and relied on at the trial even if the

contract in question was not supposed to be a contract of the principal by an agent, but a direct contract of the principal himself. A similar conclusion as to the effect of proof of general agency was reached in the early case of *Williams v. Mitchell*, 17 Mass. 98, where a sale was made upon the faith of an express written authority to buy, apparently executed by the principal, but which was forged by the supposed agent. It was held that, notwithstanding the express reliance of the vendor on this forged authority alone, he could show the agent was in fact a general agent to purchase goods for the principal, and recover, on the proof of such authority, although this fact of general agency has not been relied on or even known. The doctrine is established beyond question that where any particular officer of a corporation, with the knowledge and assent of the directors, is held out to the public as having authority to indorse its regular business paper, such holding out to the public creates the authority for the purpose, and in the great mass of cases enforcing this rule the application of the rule is not limited to cases where it can be shown that the paper was received with actual knowledge of the previous holding out, and in reliance on it. I refer to a few of the leading authorities on this point, stating the rule without any such limitation: 17 Am. & Eng. Enc. Law, 139; Abbott, Tr. Brief, §§ 107, 108, citing cases. *Olcott v. Railroad Co.* (1863) 27 N. Y. 546, *Selden, J.* (page 558): "The powers of the agent of a corporation are such as he is allowed by the directors or managers of the corporation to exercise within the limits of the charter, and the silent acquiescence of the directors or managers may be as effectual to clothe the agent with power as an express letter of attorney," citing numerous cases. *Lester v. Webb* (1861) 1 Allen, 34, Chief Justice Bigelow (page 36); *Prescott v. Flinn*, 9 Bing. 19, where general authority of clerk to indorse was inferred from previous indorsements, and no limitation was made that plaintiff should have knowledge. In the New Jersey cases above referred to no such limitation was attached to the statement of the rule, and the cases relied on by complainant are mainly cases where the liability depended upon an estoppel by holding out to the party rather than on a general agency arising from a holding out to the public.

Upon these considerations, I reach the conclusion that the previous indorsements of David Blake of the business paper of the company for discount to its credit, if made with the permission or consent of the directors, were of such a character as to entitle the banks discounting the paper in question to hold the corporation liable on the indorsements, as made by their general agent for that purpose, although the paper was not received or discounted by them, on the faith of such previous indorsements, but simply on the belief that he was the agent of the company for the purpose of indorsement and dis-

count; and the next question of law to be decided is whether the permission and acquiescence of the directors, in relation to these indorsements of David Blake in the Newark and New York banks, is sufficiently established by showing that, although the directors may not in fact have known of the indorsements, they ought to have known of them, and by the exercise of a moderate degree of diligence might have known of them. So far as relates to questions involving general agencies established by evidence of this character, and arising between the principal and third persons, who have dealt with the agent in good faith as being the agent, the authorities seem to establish that, so far as such third persons are concerned, the principal is bound by the acts of the person acting as his general agent, if he ought to have known that the agent was so acting, as well as in cases where he had actual knowledge. Thus, in *Davidson v. Stanley* (1841) 2 Man. & G. 721, the action was upon bills of exchange drawn and indorsed by a farm bailiff, who was agent for the defendant, and without express authority for that purpose, and the question submitted to the jury was whether the circumstances of the case (proof of previous indorsements by the bailiff and other facts) were sufficient to establish a general authority. The jury found for the defendant, and an application for new trial was denied, *Tindall, C. J.*, saying (page 728) that it was not shown that the defendant knew, or had the means of knowing, that his name had been previously used by the agent. In *Martin v. Webb* (1883) 110 U. S. 7, 3 Sup. Ct. 428, the authority of a cashier to cancel certain notes secured by trust deeds was involved, and, there being no express authority, his previous cancellation of many previous notes was one of the circumstances relied on as establishing a general authority for this purpose. Actual knowledge by the directors of these transactions was not proved, but on this point of the duty of the directors to know of the course of business, and the effect of their negligence as charging the company with knowledge, it was said that that which directors ought by proper diligence to have known as to the general course of business they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with it upon the basis of that course of business. In *Oonover v. Insurance Co.* (1848) 1 N. Y. 290, the policy issued by the company prohibited an assignment "unless by the consent of the company, manifested in writing." A consent was signed by the secretary. No express authority was proved, and the course of business was relied on as showing that the secretary was the officer who uniformly gave the consent, and that he made regular entries of the assignments on the books of the company. For the defense it was insisted that these acts of the secretary were never brought to the knowledge of the directors, or received their formal

ratification, but it was held on this point (Johnson, J.; page 292) "that the directors were bound to know the uniform course of business pursued by their sole agent for the transaction of their business at their office, especially where regular entries of his acts were made in their books; and they must be held responsible on the ground of a tacit assent and approval, unless they can show that by a strict vigilance and scrutiny into his acts they were unable to ascertain the course he was pursuing, and could not, therefore, arrest it, or put the public upon their guard." And with reference to the special obligation resting upon directors of incorporated companies, with reference to general authority exercised by their agents towards the public, it was said (page 292): "Incorporated companies whose business is necessarily conducted altogether by agents should be required, at their peril, to see to it that the officers and agents whom they employ not only know what their powers and duties are, but that they do not habitually, and as part of their system of business, transcend those powers. How else are third persons to deal with any degree of safety? They can have no access to the by-laws and resolutions by the board, and no means of judging in the particular instance whether the officer is or is not within the prescribed limits." The same doctrine of imputing to a company knowledge of and acquiescence in acts of an officer acting as a general agent was applied in the late case of *Hanover Nat. Bank of City of New York v. American D. & T. Co.* (1896) 148 N. Y. 612, 43 N. E. 72. In this case negotiable merchandise certificates were issued by an officer to himself without express authority. The fact that he had several times issued these to himself was, with other facts, relied on as establishing a general authority to issue to himself. The directors did not actually know of these issues. Vann, J., says (page 623, 148 N. Y., and page 75, 43 N. E.): "While it does not appear that the directors actually knew of these transactions, it was a question of fact for the jury to say whether they ought not to have known under all the circumstances, as their ignorance was no excuse, unless they were reasonably diligent in supervising the method and details of the business under their control." And as to the special effect of knowledge that could have been derived from an examination of the books, the court further say (page 623, 148 N. Y., and page 75, 43 N. E.): "Whatever the entries in the books of the defendant, made in the ordinary conduct of its business, would have disclosed, the jury would have been warranted in finding had come to the knowledge of the directors, who were charged with the duty of reasonable inspection of the books and reasonable supervision of the conduct of the officers."

The doctrine of these cases imputing to the directors actual knowledge of a fact which in the reasonable performance of their duty they ought to have known, and establishing the

rights of third persons against the company, the principal, upon the same basis as if actually known and assented to, is in harmony with the rules applied in other cases, both at law and in equity, as to the means of knowledge being equivalent to actual knowledge. The general rule as to charging notice or knowledge of a fact is "that whatever puts a party upon inquiry amounts, in judgment of law, to notice, provided it becomes a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding." 4 Kent, Comm. p. 179; *Hoy v. Bramhall* (1868) 19 N. J. Eq. 563, 572. The decisions cited above seem to be an application of this general principle, and in cases like the present the rule should be applied strictly, rather than relaxed; and in my judgment the directors of the manufacturing company must, on the facts of this case, be charged with knowledge that David Blake, as their treasurer, was indorsing the paper received by the company from the sewing-machine company for credit to its current account, and with the tacit or implied consent to these indorsements. With these views as to the legal rules applicable to the case, I hold, therefore, as the result of the evidence, that the banks have established by sufficient proof a general authority in David Blake as treasurer of the manufacturing company to indorse and discount the business paper of the company received from the sewing-machine company for credit on its account, and that reliance by them on this general authority previously exercised need not be shown or proved in order to recover.

I have in my above conclusions limited the finding of authority to indorse to the business paper of the manufacturing company received from the sewing-machine company in the regular course of business; for, if the paper was accommodation paper, and so known to be by the banks receiving it, then the authority to bind the corporation does not exist, for, as is well settled, the corporation has no authority to give accommodation paper. *Bank v. Young* (1896) 41 N. J. Eq. 531, 538, 7 Atl. 488. But in reference to the liability of a trading or business corporation, such as the manufacturing company, on accommodation paper, the rule as settled by this case (page 538, 41 N. J. Eq., and page 491, 7 Atl.) is that the title of the holder for value before maturity can only be defeated by proof of such circumstances as show that he took the paper with knowledge of some infirmity in it, or with such suspicion with regard to its validity as that his conduct in taking it was fraudulent. It was not claimed by the complainants at the hearing that such proof had been made in this case as to any of the banks, and the whole defense against the notes was put upon the ground of want of authority to indorse. But, in order to rely on or rebut a claim of liability imposed by reason of the actual receipt by the manufacturing company of the benefit of the proceeds of discount by the manufacturing

company, a large amount of testimony has been taken for the purpose of showing whether the proceeds of discount went ultimately to the benefit of the sewing-machine company, and not of the manufacturing company. There is no dispute that the proceeds of discount of the notes in suit were, in the first instance, deposited in the respective banks to the credit of the manufacturing company, and that all of the payments out were made by the banks on the checks of the manufacturing company; but the complainants claim that with the exception of about \$10,000, which went directly to the manufacturing company, the entire balance of the proceeds of discount was for the benefit of the sewing-machine company. Complainants did not, however, either at the trial or on the hearing, claim that the banks were chargeable with fraudulent conduct in taking the paper, or that this was established by the evidence. My conclusions on the whole evidence relating to this point of the receipt of the proceeds are: First, that the manufacturing company actually received the proceeds of the discounts to a large extent, and that as to the balance of the proceeds of discount, which seem to have gone ultimately to the credit of the sewing-machine company, the paper was not, in view of the relation between the companies, and on the whole circumstances of the case, accommodation paper; and, secondly, that even if it was in fact accommodation paper, there is not evidence to warrant the inference that the banks took the paper fraudulently. On examining the evidence and statements of the accountants upon this subject, it appears, however, that there are certain features relating to the application of the proceeds of discount by the banks, respectively, to which attention should be given. And, as they were not specially referred to by counsel on either side, it seems to me necessary to state here somewhat in detail the facts which appear in relation to the application of the proceeds of the notes now claimed by each of the banks, as bearing upon the question whether, if the paper was in fact accommodation paper, some of the notes were taken under circumstances that charged the banks with fraudulent conduct in taking the paper. Taking up first the notes proved by the Broadway Bank, and omitting therefrom three notes which were indorsed by George Blake, assistant treasurer, which notes will be specially considered hereafter, the statements of the expert accountants who have been called by the parties show that from the proceeds of the notes discounted by the Broadway Bank from April 12, 1893, to May 17, 1893, which amounted to \$51,356.06, the sum of \$28,259.21 was ultimately used for the pay roll of the manufacturing company in the following manner: Checks on the account were given by the manufacturing company to the order of the sewing-machine company for the amount of the pay roll, and deposited to the credit of the latter company in other New York banks than the Broadway Bank, and the sewing-machine

company then gave to the manufacturing company checks for similar amounts on its own accounts in the Newark banks, which were supplied for the purpose by checks on the New York banks. From four notes in suit discounted by the Broadway Bank on May 24, 1893, for \$10,244, it is admitted that \$10,023.25 went directly to the payment of the pay rolls, and the liability of the manufacturing company on these is not disputed by complainant. Substantially, therefore, the proceeds of all the notes discounted by the Broadway Bank are shown to have been ultimately applied to the pay roll of the manufacturing company, except the sum of about \$20,162.50 of the proceeds of discount of the notes discounted May 19th (or May 17th). \$19,814.50 of this amount seems to have been drawn out by checks of the manufacturing company to take up agents' notes of a similar character which had been previously discounted by the bank for the sewing-machine company, and not appearing to be indorsed by the manufacturing company. Whether the check of the manufacturing company was given direct to the bank or to the sewing-machine company, and by it indorsed to the bank, does not appear. Proof of this would be of some importance, because in the latter case the transaction would, in view of the actual business relation between the two companies, be less liable to any suspicion of fraudulent use of accommodation credit. If the companies had been conducting their business as independent companies, this payment from funds of the manufacturing company of notes on which it was not liable, if made directly to the bank itself, would seem on the face of it not to constitute the bank a bona fide holder for value to this extent. But, in view of the manner in which the business of the two companies had been conducted, their intimate and complicated relations, and their joint interest in the ultimate payment of the agents' notes, pending the formal adjustment of accounts between the two companies, a different conclusion must be reached.

The business of the manufacture and sale of sewing machines was, in point of fact, carried on by the two companies as one entire business, in which both companies were dependent for their continuance upon the realization of the proceeds of sale of the finished product finally paid over to the sewing-machine company. This ultimate source of payment was for years largely represented by the notes of customers and agents, which were required to be discounted in order that the funds necessary for the continued manufacture as well as sale might be provided. The companies, although nominally separating the business into that of manufacturing and selling, each acted to a certain extent as agent for the other, and by reason of the course of business pursued by both during the entire period the connection was so close and complicated that it was found impracticable to settle or adjust accounts be-

tween them, and the only method of settlement ever adopted was that the sewing-machine company, after making an agreed dividend to the small stock interest on the manufacturing company, outside of its own stock, took the entire residue of the profits without accounting. The last adjustment of this character took place in 1890 for the business of 1889 between the companies. No settlement or adjustment of any kind has since taken place, and the manufacturing company, pending any such settlement, has received from the sewing-machine company the notes in question, and credited the latter with them on its accounts. As between the two companies, the sewing-machine company was entitled to these credits, and the manufacturing company was entitled to and did hold the notes as its business paper, and not as accommodation. Under the circumstances of this case, I think, therefore, that the notes discounted by the Broadway Bank were not in fact accommodation paper, even to the extent to which the proceeds were used eventually to retire notes previously discounted by it for the sewing-machine company. And my further conclusion is that the Broadway Bank cannot, on the proofs in the case, be charged with having received and discounted these notes, and applied part of the proceeds under such circumstances as to show, within the rule stated in *Bank v. Young*, 41 N. J. Eq. 538, 7 Atl. 488, that they took the paper with knowledge of some infirmity on it, or with such suspicion with regard to its validity as that its conduct in taking it was fraudulent.

Of the National Park Bank notes discounted on April 19, 1893, for \$9,286.08 the sum of \$9,236.80 was applied ultimately for the pay roll in the manner above indicated as to the Broadway Bank, the sewing-machine company receiving a check deposited in another bank for the latter amount, and giving its check on the Newark banks to pay the pay roll. For the remaining notes discounted on May 3, 1893, and amounting to \$16,479.08, notes previously discounted for the sewing-machine company by the Park Bank to the amount of \$16,492.53 were retired. These were similar agents' notes, but had not been indorsed by the manufacturing company. As to these latter payments to the bank itself out of these proceeds of discount, the same conclusion as in relation to the Broadway Bank note is reached, and the evidence does not entitle me to hold that the circumstance of discounting for this purpose shows any fraudulent conduct on its part. The Chemical Bank on May 3, 1893, discounted five notes for \$10,892.34, and of this \$8,006.39 ultimately went for pay roll in the manner above described, and \$2,693.61 to the credit of the manufacturing company on the account current. On May 19th, from discounts amounting to \$23,013.72, a check of \$23,000 was deposited to the credit of the sewing-machine company in the same bank, from

which notes held by the Chemical Bank to the amount of \$22,988 were paid. These notes do not seem to have been indorsed by the manufacturing company, but in reference to the bona fide character of these payments the same conclusion is reached as in relation to the Broadway and Park Banks.

As to the proceeds of the discounts of the notes now held by the Garfield National Bank, the abstract or statement of the accounts submitted shows that the notes now held by this bank were discounted in two lots,—one of 10 notes on December 21, 1892, for \$28,967.89, and another of 8 notes on January 17, 1893, for \$25,264.88,—and, so far as I am able to ascertain from the examination of this statement, none of these proceeds were paid to the bank itself, except to take up notes which had been previously discounted by the bank for the manufacturing company itself. The proceeds of discount were, indeed, drawn out largely in favor of the sewing-machine company, and deposited by the latter to its credit in accounts with other banks, but knowledge of this indirect application of the funds to the use of the sewing-machine company is not chargeable on the Garfield Bank, which was bound to honor the checks of its depositors. There is, therefore, no question, as I think, about the bona fide character of their entire claim.

The notes now held by the Phoenix Bank were all discounted on and after February 7, 1893, and none of the proceeds of discount seem to have been used for payments to the bank itself, except to retire notes previously discounted on the credit of the manufacturing company. It appears, however, from the evidence as to the accounts of this bank that its discounting for the manufacturing company commenced on September 20, 1892, and that on December 31, 1893, the entire discounts to that date were \$76,521.16, which with checks of the sewing-machine company and other credits made the whole credit to that time \$88,121.16. Out of this payments were made to the bank itself of \$39,311, on December 5, 1892, by check of the manufacturing company to the order of the sewing-machine company, and by it indorsed to the bank to take up the notes to that amount discounted for the sewing-machine company in August, 1892. This shows that ultimately the benefit of the discount on the credit of the manufacturing company was received by the bank itself to this extent, but for the reasons above set out in reference to the four other banks the receipt from the sewing-machine company of the check drawn to it upon these funds arising from previous notes cannot be considered as preventing the bank from being considered as a bona fide holder of the notes now in suit. The above statement shows the application of the proceeds of the discount of the special notes now unpaid, so far as I have been able to make them out from the accounts and statements submitted by the expert accountants on either side, and which were prepared mainly

with the view of showing the general nature of the application of the proceeds of discounts during the entire period of discount by the New York banks from September, 1892, to the time of the failure. These statements agree substantially, except with relation to one item, and show that the whole discounts amounted in this time to \$462,801.52, and that deposits in addition were made by the sewing-machine company to the credit of the manufacturing company's accounts in different banks to the amount of \$64,484; the total being \$542,262.13. \$14,911 of the proceeds of the total discounts and deposits were transferred to the manufacturing company's accounts from one of these banks to the others, reducing the total proceeds of discounts and deposits to \$527,351.13. Out of this amount \$184,656.94 was paid for bills receivable which were indorsed by the manufacturing company, but on which the sewing-machine company was first liable, being agents' and customers' notes of the character above set out. The sum of \$5,840.83 was paid by checks of the manufacturing company on the Phoenix and Garfield Banks for materials furnished direct to the manufacturing company. Complainants claim that, inasmuch as in the accounts between the two companies this amount was credited to the manufacturing company and charged to the sewing-machine company, they are therefore to be treated as payments on account of the sewing-machine company alone. But on the question of following funds to the manufacturing company, and holding it liable on this account, the substantial question is whether it got the proceeds; and, if it did, liability on this account cannot be affected because of its right to charge the sewing-machine company with the amounts in its final settlement. It is conceded that \$10,023.25 was directly applied to the pay roll, and the only remaining item of dispute between the expert accountants in reference to the application of the proceeds is the item of \$80,856.62, which the banks claim was used for pay roll. These pay rolls were paid, not directly by the manufacturing company drawing its own checks for the pay rolls, but, as above stated, by giving its checks to the sewing-machine company for the amounts, and receiving from it checks on its accounts on the Newark banks for substantially similar amounts. This, as I take it, was the substantial character of these transactions, although the use of the separate bank accounts of the two companies for their mutual convenience sometimes involves other deposits and credits in arranging for this general method of payment. All the above payments, including the \$184,000 of notes indorsed by the manufacturing company, may, so far as the present question with the banks is concerned, be considered as payments made on account of the manufacturing company, and of which it received the benefit; for, although the sewing-machine company was, as between itself and the banks, first liable on the notes indorsed and discounted by the manufacturing

company, these notes were still obligations of that company to the banks which discounted on its credit. The principal remaining payments out of the total proceeds of discounts as ultimately disposed of, were as follows: Notes of sewing-machine company not indorsed by manufacturing company, about \$140,000; transfers to sewing-machine company's accounts in other banks, about \$175,000; and other accounts of the sewing-machine company amounting to about \$12,000. Complainants' contention is that all of these payments were for the sole benefit of the sewing-machine company, and were the result of the use of the manufacturing company's credit purely for the accommodation of the sewing-machine company. But, in view of the relation between these companies in carrying on the business, and the unsettled accounts between them, the simple fact that these proceeds were used by the sewing-machine company is not sufficient to establish that the payments were made for the benefit of the sewing-machine company alone, and not for the manufacturing company. And even if, as between the companies, the payments could be held as accommodation payments, this is not sufficient to invalidate the paper in the hands of the banks discounting and purchasing the paper. As to these fraudulent conduct in taking the paper must be shown, and, in view of the actual relations between these companies now disclosed by the evidence, and shown by their own books and discounts, it cannot be held that the conduct of the banks in their discounts and purchases of this paper was of such a fraudulent character as to impeach the validity of their title.

The principles of these conclusions as to the notes indorsed by David Blake as treasurer, and discounted for the account of the manufacturing company, and actually drawn out by it on its checks, apply also to the notes of the manufacturing company held by the Cooperstown Bank, and purchased by the latter bank in open market, for full value, on May 2, 1893. As to this bank, the holding out of David Blake as the general agent was the course of dealing permitted with the New York banks up to that date, as well as the previous course of dealing in the Newark banks; and nothing has been shown to cast any infirmity on their title to the paper, within the rule as laid down in *Bank v. Young* (1886) 41 N. J. Eq. 531, 538, 7 Atl. 488. But these conclusions do not cover the case of the First National Bank. The notes amounting to \$29,714 held by this bank, as appears from the proofs in the case on this point, which are somewhat meager, were received by the First National Bank as collateral, and in substitution for other notes, to which the manufacturing company were not parties, and which were held as collateral to a loan made by the First National Bank to the sewing-machine company, and still outstanding. The loan was made to the Ohio company in 1890, and, inasmuch as by the agreement of transfer made by the

Ohio company in April, 1891, the New Jersey company assumed all the obligations of the Ohio sewing-machine company as well as of the manufacturing company, the note was purely the New Jersey sewing-machine company's debt. The note or indorsement of the manufacturing company as collateral to this debt would, therefore, on the face of the transaction, seem to be purely accommodation on its part, and the First National Bank not a bona fide holder of the accommodation paper, for value, before maturity. If this is the correct status of their claim on these notes, then it would seem to be questionable whether their claim is valid, but, inasmuch as the point was not raised at the hearing, I will hear further argument on this point, if counsel desire.

Nor do the above conclusions apply to three notes included in the claim of the National Broadway Bank, and which were indorsed, not by David Blake as treasurer, but by George A. Blake as assistant treasurer, of the manufacturing company. These notes were also notes of the agents of the sewing-machine company, payable to the order of the sewing-machine company at its New York office, and, after the indorsements by the sewing-machine company, were indorsed by George Blake as assistant treasurer of the manufacturing company for discount to the credit of that company in the National Broadway Bank. They were of the following amounts and dates: April 24, 1892, one for \$2,786; one April 29, 1893, for \$3,886; and one May 1, 1893, for \$2,630. The total of the notes was \$9,302, and on May 9, 1893, they were discounted together as a single transaction, the proceeds of discount (\$9,115.00) being placed to the credit of the manufacturing company. The balance to the credit of the manufacturing company before this discount was \$1,861.06, and on the day following—May 10th—the manufacturing company gave a check on this account for \$9,383.37, which is charged to the pay roll on their books, and not charged to the sewing-machine company in the books of either company. The check was in fact drawn to the order of A. Fahs, cashier of the Union Square Bank, and deposited there to the credit of the sewing-machine company, which on the same day gave to the manufacturing company checks on its accounts in two Newark banks for the same amount, and from these latter checks the pay roll of the manufacturing company was paid. The latter company therefore has received the proceeds of these three notes so discounted, and must, for this reason, be held liable, even if the indorsement be unauthorized; and the liability of the company for these notes is put upon this ground alone.

The appeals from the allowance of the claims by the receiver are therefore dismissed, except the appeal from the claim of the First National Bank, which will be reserved for further argument if counsel desire.

In the equity case I will at the present time state the conclusions reached, leaving a fur-

ther statement and opinion to be filed hereafter, if desired:

First. The bonds held by complainants are still secured by the trust deed of April, 1881, conveying the 1,980 shares of the Domestic Manufacturing Company stock, and have not lost the security of this deed by reason of the agreements of July 7, 1890, and July 9, 1890, and the action of their trustees thereunder.

Second. The conveyance by the Ohio company to the New Jersey company, in April, 1891, of the assets of the former company, must be held valid as against the complainants and their trustee, George Chapin, under whom they claim.

Third. The complainants, as bondholders, are creditors of the New Jersey company, but they have no equitable lien which can now be enforced against the assets of the New Jersey company in reference to its other creditors except as to the lien on the Domestic Manufacturing stock under the trust deed of 1881.

Fourth. The bill of the receiver for specific performance of the agreement of July 9, 1890, by conveyance of the stock to him, must be dismissed.

(99 Vt. 527)

AMSDEN v. ATWOOD.

(Supreme Court of Vermont. Windsor. Aug. 5, 1897.)

LANDLORD AND TENANT—ESTATE FROM YEAR TO YEAR—HOLDING OVER—BREACH OF CONTRACT—NECESSITY FOR TENDER—PAROL EVIDENCE—DAMAGES—TRIAL—INSTRUCTIONS—CONDUCT OF COUNSEL.

1. A landlord who allowed a tenant for years by lease to hold over for a year and one month, and accepted monthly payments of rent for the time, sufficiently recognized the tenant as such; and the latter thereafter held as a tenant from year to year, although he had paid only eleven months' rent after the expiration of the lease.

2. The holding for the second year after the expiration of the lease having been commenced, the landlord could not make such holding conditional upon the performance by tenant of new duties not required in the expired lease.

3. Plaintiff notified his tenant, whose logs he had contracted to saw at a stipulated price, that he must vacate the premises unless he paid more rent and paid more for the sawing of the logs, and also discharged employes obnoxious to plaintiff. The communication ended with a statement that plaintiff was ready to saw the tenant's logs at once. *Held*, that the offer to saw the logs was conditioned upon the payment both of the increased price therefor and the increased price of rent, as well as upon the discharge as requested.

4. When a request for instructions is partly sound and partly unsound, it is properly rejected.

5. On a question of the recognition by a landlord of his tenant as such after the expiration of the written lease, parol evidence is admissible showing that the business relations between landlord and tenant were the same after the expiration as before.

6. In an action for breach of contract for refusal to saw certain logs at the stipulated price, the loss to the owner arising from having the logs left upon his hands, and being obliged to sell them for what he could get, is a proper element of damages.

7. If a landlord orders a tenant to vacate premises before his term has expired, and the tenant

does so, the landlord is liable in damages for the value of the unexpired portion of the term.

8. When plaintiff has been a witness in his own behalf, the opposing counsel, in his argument to the jury, may examine and criticise plaintiff's conduct towards defendant in the transactions at issue, as bearing upon plaintiff's credibility.

Exceptions from Windsor county court; Tyler, Judge.

General assumpsit by Rollin Amsden against John P. Atwood. Plea, the general issue, and declaration in offset. There was a verdict for plaintiff for the amount claimed under the specifications, and three special verdicts touching the amount of defendant's damages in offset, and a judgment for defendant for the balance. Plaintiff excepted. Affirmed.

The plaintiff's notice to the defendant, dated December 26, 1892, closed as follows: "And I further notify you that I am ready to saw your logs for chair stock, commencing this morning." The jury were instructed to find and state the amount of damages sustained by the defendant in the loss of the remainder of the term, and returned a verdict of \$200.87 as the value of the remainder of the term, and the court allowed the defendant that sum in the judgment. The jury were instructed to consider, in finding this verdict, "what profit and advantages would have been to the defendant if he could have had his rights under the lease in respect of having his logs sawed, the quantity of logs on hand, the amount of chair stock which could have been manufactured therefrom, and the profit at which he could have done it." In respect to the logs themselves, they were instructed to exclude any profit the defendant might have made on them, but to find how much loss he suffered by having them left on his hands, and being obliged to dispose of them otherwise. On the subject of the defendant's duty to make his damages as small as possible by diligence on his own part, the court charged as stated in the opinion. The defendant's damages on account of the logs were assessed at \$125, and that sum was allowed the defendant in the judgment.

Gilbert A. Davis, for plaintiff. J. C. Enright and J. J. Wilson, for defendant.

THOMPSON, J. After the expiration of the indenture, reported in *Amsden v. Atwood*, 67 Vt. 292, 31 Atl. 448, the plaintiff, without objection, allowed the defendant to hold over from the date of expiration, to wit, November 1, 1891, to November 1, 1892, and from thence to December 26th of that year, when he gave him written notice that he regarded him as a tenant by sufferance; that the rent would be increased to \$600 after January 1, 1893; that the charge for sawing logs would be increased; and that, as a condition of defendant's continuing as his tenant, he should not employ men who were personally offensive to the plaintiff. On this state of facts, this court held that the defendant's holding over was such that at the time of the notice of December 26, 1892, he had become a tenant from year to year. *Amsden v. Atwood*, 67 Vt. 289, 31 Atl. 448; *Id.*, 68 Vt. 332,

35 Atl. 311. The plaintiff now claims that the facts on which that holding was based are different from those established in the last trial in the county court; in that it now appears that the defendant had paid the rent only to October 1, 1892, and that his failure to pay rent for a full year from November 1, 1891, prevented his tenancy from ripening into a tenancy from year to year. The plaintiff rendered to the defendant monthly statements of the sum due for rent and power from November 1, 1891, to October 1, 1892; and the bills so rendered were paid the plaintiff by the defendant from time to time, and all before November 1, 1892. By thus demanding and receiving rent the plaintiff elected to treat the defendant as a tenant holding over under the terms of the written lease which had expired, instead of treating him as a trespasser. In the notice of December 26, 1892, the plaintiff recognized the fact that the defendant, to that time, had held as a tenant. It is not the payment of rent for a year, or any other definite time, that converts a holding over from a tenancy at will into a tenancy from year to year, but the recognition by the landlord of a subsisting tenancy, by the acceptance of rent, or by some other act of recognition of the relation of landlord and tenant. This is clearly shown by the authorities cited and reviewed in *Amsden v. Atwood*, 67 Vt. 289, 31 Atl. 448. Hence there is nothing shown by the record to change the legal effect of the facts involved when the case was here before. The county court therefore correctly held that the defendant was a tenant from year to year, and rightly denied the plaintiff's requests framed in view of the contention he now makes. *Amsden v. Atwood*, 68 Vt. 332, 35 Atl. 311.

2. The plaintiff had no legal right to require the defendant to discharge La Cross from his employment as a condition precedent to plaintiff's sawing defendant's logs, nor had he any right to impose any terms in respect to his employment of help as a condition to his future occupancy of the premises, so long as he was legally in possession as a tenant from year to year. No rights in this respect were reserved to the plaintiff in the written lease, nor by the implied terms of the tenancy from year to year. Hence the charge of the court on this branch of the case was correct.

3. Plaintiff's offer to saw defendant's logs in the manner he had previously done, made in his notice of December 26, 1892, is to be construed as conditioned upon the payment of an increased price therefor, the payment of more rent, and the nonemployment of persons offensive or uncivil to the plaintiff, by the defendant. The county court so construed it. Hence plaintiff's exception to this ruling cannot avail him.

4. The plaintiff requested the court to instruct the jury that "it was not optional with the defendant to take down his machinery and vacate December 27, 1892, as he did, and claim his future damages for all his loss of profits and value of the lease for the unexpired term, and the depreciation in the value of machinery,

or either of said elements of damage; but it was his duty to have remained in possession, brought along his logs, and had them sawed, and tendered the price of sixty cents per hour, and rent at \$36.48 a month, or \$100.44 quarterly, as stipulated in the contract of April, 1890, and, if not accepted, let the court settle the amount legally due." This request applied to the defendant's declaration in offset, declaring for damages against the plaintiff growing out of his breach of the contract. The exceptions do not disclose what the charge in full to the jury was on the subject of this request, but, assuming that the instruction as requested was refused, there is no error, unless the plaintiff was entitled to have the entire request complied with. The facts now disclosed in respect to this phase of the case do not differ in legal quality from what they were when the case was here as reported in *Amsden v. Atwood*, 68 Vt. 332, 35 Atl. 311. It was then held the defendant was not bound to bring and tender the logs at plaintiff's saw after he had imposed a condition as to his sawing them which he had no right to make, and that the refusal of the plaintiff to saw the logs except on such condition was a breach of his contract with the defendant, which excused him from tendering the logs to the plaintiff to be sawed as a condition precedent to his right of recovery for such breach. The defendant, under the circumstances of the case, was not bound to tender either the logs to be sawed, or the price for sawing them, in order to enable him to recover for the plaintiff's breach of the contract. Hence this part of the request was unsound, and it was not error to refuse it. There is no occasion to consider the other matters embraced in it. *Vaughan v. Porter*, 16 Vt. 266; *Rea v. Harrington*, 58 Vt. 181, 2 Atl. 475.

5. As bearing upon the question whether the plaintiff recognized and treated the defendant as his tenant, instead of a trespasser, after November 1, 1891, it was admissible to show by parol the course of business between them, tending to show that their relations to each other as landlord and tenant were the same after that date as before it. Of this character was the parol evidence admitted to which the plaintiff excepted, so far as pointed out by his brief.

6. The defendant has recovered only for the value of the lease for the remainder of the term, and special damages in respect to 38 cords of logs that were in the yard as stock at the time of the breach of the contract by plaintiff, as is shown by the special verdict. The charge properly instructed the jury in respect to the care and diligence the defendant was bound to exercise to prevent loss and damage to himself by reason of plaintiff's breach of the contract. In respect to the logs, it excluded the element of profit that might have been realized from manufacturing them into chair stock, and limited damages thereon to that arising from their being left on his hands as stock, and his being obliged to dispose of

them as best he could. This was a proper element of damages; so was the value of the remainder of the term; and both were properly submitted to the jury. 12 Am. & Eng. Enc. Law, 697; *Eten v. Luyster*, 60 N. Y. 252; *Chapman v. Kirby*, 49 Ill. 211. There is no occasion to consider whether the charge to the jury was erroneous in respect to the other grounds of damage claimed by the defendant, as the special verdict cures such error, if there was any.

7. The remarks of counsel for the defendant in his argument to the jury to which the plaintiff excepted were not of such a character as to be the subject of exception. They were confined strictly to the evidence in the case. He had a right to examine and criticise the conduct of the plaintiff involved in his relations with the defendant in the transactions in issue, as bearing upon his credibility as a witness, he having been introduced as a witness in his own behalf. Judgment affirmed.

(69 Vt. 535)

PIKE v. PIKE.

(Supreme Court of Vermont. Bennington. July 17, 1897.)

STATUTE OF FRAUDS—WAIVER—CONTRACTS—MERGER—SPECIFIC PERFORMANCE—DECREE.

1. The defense of the statute of frauds, to be effective against an oral contract, must be urged when such contract is attempted to be proved.

2. A parol contract was entered into between a father and his son, in 1869, whereby, in consideration of the son's remaining at home and assisting in the management of the farm, the land and personality of the father were to become the son's property on the decease of his father and mother. In 1889, the mother having died, and the father contemplating a second marriage, the son asked for a written agreement to effectuate the contract of 1869, whereupon the father transferred to the son an undivided half of the realty and personality, but refused to secure to him the title to the other half upon his own decease, as was necessary to completely effectuate the contract of 1869. *Held*, that the contract of 1869 was not completely merged in the contract of 1889, and that the son was entitled, upon his father's decease, to the other half of the property, but that in the meantime it might be drawn upon as necessary for the support of the father and his contemplated wife, and hence no decree of the title would be made to the son until the death of the father.

Appeal in chancery, Bennington county; Thompson, Chancellor.

Bill in chancery by Edgar S. Pike against Samuel Pike for specific performance. Heard upon bill, answer, and master's report. From a decree for orator, defendant appeals. Reversed in part.

The master reported in substance as follows: The orator is a son and only child of the defendant, and became of age August 25, 1869. In November of the same year he went out to work for a month. At that time his father owned and lived upon the farm described in the petition, then worth about \$4,000; and the orator's sister, Alma, was living at home, being in poor health and unlikely to live many years. While the orator was thus out at

work the defendant asked him to come home and help carry on the farm; telling him that, if he would do so, when the defendant and his wife, the orator's mother, were through with the property, everything should be his, but that Alma must be cared for while she lived. The defendant then owned the farm, well stocked and supplied with tools, and free of incumbrance, but owed about \$300 for a piece of land recently purchased. The orator, relying upon the defendant's statement, went home, and for nearly 20 years thereafter worked faithfully and diligently in carrying on the farm, and his labor was worth \$25 a month. The defendant also worked faithfully. The orator was married in 1873, and has two children,—one born in 1880, and one in 1884,—and his family have been supported out of the proceeds of the farm. In 1873 the orator and the defendant built a new house upon the farm from their joint funds. Alma died in 1879, and the orator's mother in 1883. Until the spring of 1889 the defendant made all contracts and received all moneys, and had the general management of affairs; the orator receiving from him whatever he had, and accumulating nothing of his own. No writings had been made, or agreed to be made, until March, 1889, when the orator, ascertaining that the defendant was about to marry again, suggested to the defendant that writings should be executed. It was then agreed that the defendant should deed to the orator an undivided half of the farm, and give a bill of sale of an undivided half of the personal property, not including debts due, money on hand or in the savings bank, and lease to the orator the defendant's half of the farm, to be carried on "upon the halves" so long as he should do so in a husbandlike manner. The evidence was conflicting as to whether the defendant agreed to bind himself by writing that the orator should own the defendant's half of the farm at his decease. The defendant objected to executing such a paper, saying that the orator, as his only child, would inherit it without a writing. This agreement is not found established. The deed of an undivided half of the farm and the bill of sale of an undivided half of the personal property were duly executed March 18, 1889; but the execution of the lease was postponed to another day, by reason of the lateness of the hour, and thereafter the defendant declined to execute it, and no other papers were made. The present value of the farm is about \$3,000. The defendant was married to his present wife April 27, 1889. On March 18, 1889, the orator and defendant owed nothing to outside parties, and the defendant had in cash on hand, debts due, and deposit in the savings bank, about \$700. When this petition was brought, both families occupied the homestead, but the defendant soon afterwards moved away. From the spring of 1889 to the spring of 1891 the parties carried on the farm as tenants in common, each taking one-half of the products. In the spring of 1891 the defendant leased his half

of the farm to the orator "upon the halves," and that arrangement has been continued ever since. The defendant is 79 years of age, and somewhat broken in health. The house is fairly well arranged for two families, but the farm cannot be divided without disproportionate decrease in value. The chancellor decreed specific performance of the agreement to lease, and, further, that at the decease of the defendant the latter's title to his undivided half of the farm should vest in the orator, his heirs and assigns. The latter portion of the order is referred to in the opinion as "paragraph 3."

Batchelder & Barber, for appellant. Joel C. Baker, for appellee.

ROSS, C. J. The answer of the defendant has not been furnished. We are therefore not informed whether it sets up and relies upon the statute of frauds as a defense. If it does, the defendant has waived it by allowing the contract of 1869 and the unexecuted part of the contract of 1889 to be proven by parol testimony without exception. As applicable to these contracts, that statute does not render them void or unenforceable if allowed to be proven by testimony not in writing signed by the party to be charged. *Montgomery v. Edwards*, 46 Vt. 151; *Strong v. Dodds*, 47 Vt. 354; *Battell v. Matot*, 58 Vt. 271, 5 Atl. 479; *Scofield v. Stoddard*, 58 Vt. 290, 5 Atl. 314. The solicitor for the defendant does not insist upon the statute as a defense. The orator is therefore entitled to have the contract of 1889 specifically enforced. This affirms the decree in regard to the lease of the half of the farm to which the defendant retained the title.

The solicitor for the defendant contends that the contract of 1889 merged the contract of 1869. There is no contention that it did not so far as it went. The orator contends that it did not embrace all that was contained in the contract of 1869. By the latter contract the defendant agreed that, if the orator would come home and help carry on the farm, the orator should have all the property when the defendant and his wife were through with it, except that his sister, Alma, who was in poor health, and not expected to live long, must be cared for while she lived. The orator entered upon the performance of this contract, and fulfilled his part of it for nearly 20 years. In the meantime the sister and his mother, the defendant's wife, had deceased. The property had been added to. The defendant had become advanced in years, and was about to marry. The orator was the defendant's only child and heir, and would, as heir, take all the property, if the defendant did not marry again, and die without making a will. Up to this time the defendant had controlled all of the property, and made the contracts in regard to it. There had never been any agreement in regard to making writings of any kind. Nevertheless, the understanding and agreement of 1869 necessarily

involved that the defendant, his wife and daughter, should be supported out of the property and their joint earnings, and that the defendant, beyond using what was fairly needed for his support and that of his wife and daughter, would do no act which would prevent the residue of the property from coming to the orator at his decease, and would do everything necessary to have that residue vest in the orator. During this time the house on the farm had been rebuilt, and the orator, with his family, occupied one part, and the defendant another part, of it. The contemplated marriage of the defendant was an act which might defeat the property which would remain at the decease of the defendant, or some portion of it, from coming to the orator by heirship. If the defendant's wife should survive him, she would, under the law, take more or less of the property. The orator, fearing this, solicited the defendant to execute such writings as would effectuate their contract of 1869. Their negotiations resulted in the defendant's giving the orator a deed of an undivided half of the farm, and a bill of sale of an undivided half of the personal property, excepting debts due, cash on hand, or money in the savings bank, and agreeing to execute a lease of the other half of the farm and personal property, to be carried on by the orator "upon the halves" so long as he should carry it on in a good, husbandlike manner. There was not time that day to have the lease drawn and executed. Subsequently the defendant declined to execute it. The decretal order compels the execution of the lease. As we understand the findings of the master, the defendant was to have, as his own, the debts due, cash on hand and in the savings bank, amounting to \$700, and was also to have one-fourth of crops and income of farm and personal property conveyed and leased, as his own, freed from the provisions of the contract of 1869, except this property was to be used for the support of himself and contemplated wife. The orator urged the defendant to give him a deed of the leased half of the farm, and a bill of sale of the leased half of the personal property, to take effect at the decease of the defendant, or some writing which would accomplish that purpose. The defendant said such a writing was needless, because the orator was his only child, and this property would all be the orator's at his decease, without any writing. No agreement was reached in regard to this property. It is manifest that the parties did not take the property agreed to be leased out of the operation of the parol contract of 1869, for they came to no agreement in regard to it. The decretal order adjudges that the orator is entitled to it at the decease of the defendant, and that the title thereto shall then vest in the orator, his heirs and assigns. We think this order too broad. It impliedly, at least, prohibits the defendant from raising money on it for his own support, if it should

be needed for that purpose. The conveyances and the lease, if the orator shall carry on the leased property in a good, husbandlike manner, release the orator from doing more to help the defendant manage and carry on the property. But, if the orator should fail to carry on the leased property in a husbandlike manner, then the lease becomes void, and under the contract of 1869 the orator would be under an obligation to help the defendant carry on and manage it. If the orator fulfills the conditions of the lease, or, failing that, fulfills the contract of 1869 in regard to helping the defendant in carrying on and managing the property covered by the lease, he will, unless the defendant shall need to use some of it for his proper support according to his condition and rank in life, be entitled to the property covered by the lease. At the present time this portion of the property is hedged about with so many contingencies that it is not ripe for a decree. But the court of chancery, having properly taken the case in hand for compelling specific performance of the agreement in regard to the lease, considering the age of the defendant, and the fact that he has married and his wife may outlive him, will hold the case to give such relief in regard to the property leased as the orator may be equitably entitled to, under the contract of 1869 modified by the contract of 1889, at the decease of the defendant. By the two contracts it was contemplated that the defendant might occupy the part of the house he was occupying when the agreement of 1889 was made. As that agreement contemplated his marriage, he should be allowed, with the \$700 surrendered to him, one-fourth of the crops of the farm, and income of the personal property, reasonably to support himself and wife during his life, even if he should have to raise some of the means out of the property leased. If his wife should first decease, he might need the personal care of the orator. Such care was contemplated by the agreement of 1869, and not relinquished by the contract of 1889. The decree of the court of chancery is reversed as to the paragraph numbered 3, and confirmed as to other portions. The cause is remanded, with a mandate to hold the case, in regard to the property embraced in paragraph 3, in accordance with the views herein expressed, and at the decease of the defendant to enter such a decree in regard to the property embraced in this paragraph as equity may require.

(69 Vt. 521)

JOHNSON v. BOSTON & M. R. CO.

(Supreme Court of Vermont. Orange. Aug. 5, 1897.)

RAILROADS—MAIL CONTRACTS—CONSTRUCTION—IMPLIED PROMISES.

1. A railroad company, the mail route of which does not run within half a mile of another railroad mail route, is not obliged to transfer mail thereto, although under contract to transfer mail

at "meeting points," to be forwarded by "connecting trains," and the passenger trains of the two companies do meet.

2. Plaintiff was under government contract to carry mail between one post office and also defendant's trains and another post office, "including transfers." No particular transfers were mentioned, but in a subsequent contract as to same subject-matter the transfers were limited to "direct transfers between depots." Held, that the former contract called for the transfer by plaintiff of all mail between defendant's and other connecting trains.

3. A railroad company under government contract to transfer the mail at meeting points is not liable upon implied contract for services of one who, also under government contract as to certain transfers, performs the company's contract duties without its request, under the impression that he is only fulfilling his own contract, it also appearing that the company understood and claimed that it was such person's duty to make all the transfers.

Exceptions from Orange county court; Start, Judge.

General assumpsit by W. P. Johnson against the Boston & Maine Railroad Company. Heard on the report of a referee, exceptions thereto by both parties, and defendant's motion to recommit. There was a pro forma judgment overruling the exceptions and motion, and for the defendant to recover its costs, and both parties excepted. Affirmed.

Smith & Sloane, for plaintiff. John Young, for defendant.

THOMPSON, J. 1. The contract under which the defendant carried the United States mails during the time in question required it, at "meeting points," to transfer mails to be forwarded by connecting trains to such trains. During that time the mail route over the Concord & Montreal Railroad, as established by the United States government, did not include the half mile of its track between Woodsville, N. H., and the Union Station at Wells River, Vt., at which point it connected with the road of the defendant; but all the regular mail trains of the Concord & Montreal Railroad ran from Woodsville to the Union Station at Wells River, where they exchanged mails to and from other trains entering that station, including the defendant's. A part of the service for which the plaintiff seeks to recover consisted in transferring the mails from the defendant's trains to those of the Concord & Montreal Railroad at the Union Station. If the latter were connecting trains at a meeting point, within the meaning of the defendant's contract for transporting the mails, then it was its duty, under its contract, to make such transfers of mail. If the Union Station at Wells River was not such a meeting point, as between the mail trains of the Concord & Montreal Railroad and those of the defendant, it is not contended by the plaintiff that it was the duty of defendant to transfer mails from its trains to those of the Concord & Montreal Railroad at the Union Station. "Meeting points," as used in the defendant's contract with the government, must be construed to mean points where the defendant's

mail route actually met and connected with other mail routes established by the government, and "connecting train" must be taken to mean a mail train connecting with another mail train at such meeting points. Hence the Union Station at Wells River was not a meeting point for the defendant as to the mail trains of the Concord & Montreal Railroad, the nearest point of whose mail route was at Woodsville, N. H., a half a mile distant from the Union Station. In law, this half mile was as effectual as a disconnection of the two mail routes as it would have been had it been a hundred miles. The duty of the defendant under its contract could not be enlarged upon by the fact that for its own convenience, or for some other reason, the Concord & Montreal Railroad saw fit to run its mail trains to the Union Station over the half mile of its track not included in its mail route, nor by the fact that the United States government did not object nor interfere to prevent it. Therefore the plaintiff cannot prevail on this contention, nor can he recover on this branch of the case.

2. The Union Station at Wells River was a meeting point as to the mail route over the Montpelier & Wells River Railroad, and its mail trains entering that station were connecting trains as to the defendant; and, as between itself and the government of the United States, it was its duty to transfer mails to be forwarded on mail trains of that road from its own trains to the mail trains of that road. The defendant does not claim but that such was the duty imposed upon it by its contract during the time in question, had the government seen fit to require it to make such transfers. The plaintiff made the transfers of the mails from the defendant's trains to the trains of the Montpelier & Wells River Railroad during that time, and he claims to recover for such service on an implied promise from the defendant to pay him. During the entire period covered by this service, except the last nine days thereof, the plaintiff was under a contract with the government of the United States, at a stipulated price, which was paid to him by the government, to carry the mails between the post office at Wells River and defendant's railroad and the post office at Woodsville, each way, as often as required, including transfers. By the terms of his contract, he was to carry all mails, each way, between the defendant's mail trains and the two post offices named. If the transfer of mails required by plaintiff's contract is limited to the defendant's mail trains and the two post offices specified, there is nothing left for the words "including transfers," in his contracts of 1886 and 1887, respectively, to operate upon. But they are to be given a meaning, if the subject-matter of the contract discloses anything to which this language is applicable. At the time these contracts were entered into by the plaintiff and the government, the mail trains of the defendant, the Concord & Montreal Railroad, and the Montpelier & Wells

River Railroad, all entered the Union Station at Wells River, and required a transfer of mails to and from each other. In view of the fact that no particular mail train was named, and the further fact that in plaintiff's contract of October 5, 1893, with the government, the transfers were limited to "direct transfers between depots as often as required," his contracts prior to that date must be construed to include the transfer of all the mails to and from all the mail trains of the defendant entering the Union Station. Such was the construction given to his contracts prior to October 5, 1893, by both the plaintiff and defendant, and both acted under such construction during all the time in question. The last nine days of the alleged service by plaintiff accrued under his contract of the last-named date. In his brief he does not claim that he is entitled to recover for these nine days if he is not entitled to recover for the residue of the time. The construction put upon his contracts precludes his recovery on this branch of the case. It is no concern of his if the government saw fit, by its contract with him and its performance, to relieve the defendant from any duty imposed upon it by its contract. Were it to be held that the plaintiff was not acting within his contract in transferring the mails from the defendant's mail trains to those of the Montpelier & Wells River Railroad, he cannot recover of the defendant for that service on the ground of an implied contract. Strictly speaking, it is incorrect to say that the law implies an agreement. The agreement, if there be one, though not fully expressed in words, is nevertheless a genuine agreement of the parties. "It is implied only in this: that it is to be inferred from the acts or conduct of the parties, instead of from their spoken words. The engagement is signified by conduct instead of words. But acts intended to lead to a certain inference may express a promise as well as words would have done." *Bixby v. Moor*, 51 N. H. 403; *Rohr v. Baker*, 13 Or. 350, 10 Pac. 627. An express promise differs from an implied promise only in the evidence by which it is proved. In *Pollock on Contracts* (page 29) it is said: "Tacit proposals and acceptances must, like express ones, be communicated. If A., with B.'s knowledge, but without any express request, does work for B., such as people, as a rule, expect to be paid for, if B. accepts the work or its result, and if there are no special circumstances to show that A. meant to do the work for nothing, or that B. honestly believed that such was his intention, there is no difficulty in inferring a promise by B. to pay what A.'s labor is worth. And this is a pure inference of fact, the question being whether B.'s contract has been such that a reasonable man in A.'s position would understand from it that B. meant to treat the work as if done to his express order. The doing of the work with B.'s knowledge is the proposal of the contract, and B.'s conduct is the acceptance." "When the proposal itself is not express, then it must also

be shown that the conduct relied on as conveying the proposal was such as to amount to a communication to the other party of the proposer's intention." *Day v. Caton*, 119 Mass. 513. Unless the party benefited has done some act from which his assent to pay for the service may fairly be inferred, he is not bound to pay. *Chadwick v. Knox*, 31 N. H. 226. As a general rule, *prima facie*, valuable manual services rendered by one person for another, the benefits of which are knowingly accepted and enjoyed by the latter, were not intended or understood as a donation. Unless there is something in the relation of the parties, the nature of the services rendered, or other circumstances attending or surrounding the transaction, to rebut this presumption, a contract to pay for such services will be inferred from the acts and conduct of the parties. *Hood v. League*, 102 Ala. 228, 14 South. 572. Such presumption may be rebutted by evidence showing the nature of the services, the relation of the parties, or other circumstances, to be such as to preclude any inference that such services were to be paid for by the person sought to be charged therewith. 3 Am. & Eng. Enc. Law, 861. The circumstances in the case at bar rebut any such presumption or inference. The contracts under which the plaintiff acted were fairly susceptible of the construction which he and the defendant put upon them, if that were not the correct construction. The defendant claimed and understood that it was the duty of the plaintiff to make the transfers, and he knew, or ought to have known, as a careful, prudent man, under the circumstances, that the defendant so claimed and understood. The referee expressly finds that the plaintiff, while performing the service for which he seeks to recover, supposed that it came within the scope of his contracts. This precludes the idea that while rendering the service he expected the defendant would pay him therefor, or that the defendant knew, or ought to have known, that he expected pay therefor from it. Both parties then understood that the defendant was not to pay for such service. The plaintiff understood the government was to pay him, and did the work on its credit. This precludes a recovery from the defendant. *Rohr v. Baker*, 13 Or. 350, 10 Pac. 627. It also appears that the defendant never requested the plaintiff to perform such service, and the evidence did not disclose that the subject was ever mentioned between him and any officer of the defendant before he commenced the work, nor while it was being performed, nor until he notified the defendant that he should no longer do it, and ceased to do it, October 15, 1893. After the plaintiff entered into his contract with the government in 1886, the defendant, construing that contract to mean that plaintiff was to transfer all mails arriving at Wells River on the defendant's trains, discontinued making such transfers by its servants. The plaintiff was not called upon by the defendant nor by the government to make the transfers which

the defendant had discontinued, but he, thinking that it might be his duty to make them, voluntarily proceeded to perform such service during the whole time in question. There was no such necessity for the plaintiff's interference, if he was not acting within his contract, as would authorize him to perform the service at the expense of the defendant, even though it were neglecting a duty under its contract. In this view of the case, he must be taken to be an officious volunteer, and therefore precluded from recovering. *Keener, Quasi Cont. 349-351; Chadwick v. Knox, 31 N. H. 226.* Judgment affirmed.

(69 Vt. 533)

BEERS v. FIELD.

(Supreme Court of Vermont. Addison. Aug. 5, 1897.)

FARM LEASES—TITLE TO PRODUCTS—LANDLORD'S LIEN.

1. Under a lease of a farm and certain cows in consideration of rent in a certain sum and one-half of the taxes, and providing that the lessee should not dispose of any of the produce grown on such farm until the lessor had received the rent and one-half of the taxes, and the cows had been wintered through, the absolute title to all the produce grown during the term was vested in the lessee.

2. The provision in such lease that the lessee should not dispose of any of the produce until the lessor had received the rent and one-half of the taxes, and the cows had been wintered through, was insufficient to reserve a lien on such produce in favor of the lessor, as against a creditor of the lessee.

Taft, J., dissenting.

Exceptions from Addison county court; Tyler, Judge.

Trespass and trover by Ransom Beers against B. W. Field for the removal and conversion of certain hay. Heard on an agreed statement. To a judgment for plaintiff, defendant excepts. Affirmed.

W. H. Bliss, for plaintiff. Cushman & Mower, for defendant.

THOMPSON, J. The defendant leased to one Charles H. Merrill, for one year, a farm in the town of Ferrisburg, upon which the hay in question was grown during the term of the lease. With the farm were also leased a number of cows. The rent reserved was \$250, and one-half of the taxes. The lease provided that Merrill should not dispose of any of the produce grown on the farm until the defendant had received the rent, one-half of the taxes, and the cows were wintered through. After the hay was cut, and while it remained on the leased premises, it was taken upon a valid execution issued upon a judgment rendered against Merrill in favor of this plaintiff, and Merrill's attachable interest therein was purchased by the plaintiff at the sale thereof on execution. The officer levying the execution was duly notified by the defendant not to sell the hay. Merrill made no claim to any of the hay sold as exempt from attachment. Subsequent to the sale on exe-

cution the defendant drew away the hay from the leased premises, and converted the same to his own use, and for such taking this suit was brought. The defendant applied the value of the hay, viz. \$86.10, upon the balance of the rent and taxes due him from Merrill; the latter, at the time of the taking of the hay by the defendant, consenting and agreeing to such removal and application. With the exception of the hay so taken by the defendant, all the hay grown upon the leased premises during the term was necessary for wintering the cows, and was consumed for that purpose. At the time of the sale on execution, Merrill owed the defendant on account of rent and taxes more than the value of the hay sold; and at the expiration of the term he was owing him on account of rent and taxes after the hay taken by him had been applied in payment thereof.

The defendant contends that by the terms of the lease he reserved a lien on the premises for the payment of the rent and taxes, and therefore had a right to take the hay and apply it as he did. The language of the lease on which the defendant relies as reserving a lien for his benefit is as follows: "Said Charles H. is not to dispose of any of the produce grown on said farm until the said Byron W. has received the rent, \$250, one-half of the taxes, and said ten cows are wintered through." This case is not distinguishable in principle from *McLellan v. Whitney*, 65 Vt. 510, 27 Atl. 117. In that case, among other things, the lease provided that all grain raised on the place should be fed out thereon, and it was held that such stipulation did not create a lien for the benefit of the lessor on the grain so raised. The stipulation in the lease from the defendant that the lessee should not dispose of the produce grown on the farm until the rent and taxes were paid and the cows wintered through is no more effective to reserve a lien than would have been a provision requiring the same to be fed out on the farm. The effect of the lease was to vest in Merrill the absolute title to all the produce grown during the term. The language of the lease on which the defendant relies is insufficient to reserve a lien in his favor on the produce. By the purchase of the hay at the sale on execution the plaintiff acquired title thereto and the right of possession thereof, and therefore can maintain this action. Judgment affirmed.

TAFT, J., dissents.

(67 N. H. 128)

ATTORNEY GENERAL v. LOWELL et al.
(Supreme Court of New Hampshire. Strafford.
July 29, 1892.)

MUNICIPAL CORPORATIONS—DELEGATION OF POWER OF APPOINTMENT—ORDINANCES—CONSTRUCTION.

1. The duty resting upon a city council to elect a fire engineer and one or more assistants, as provided by Pub. St. c. 115, cannot be delegat-

ed to a local board of commissioners, notwithstanding the city charter granted the right of local legislation "relative to preserving the city from exposure to fire."

2. A city ordinance void as to one provision is wholly void when it is apparent that it would not have been enacted without that provision.

Quo warranto by the attorney general against George G. Lowell and others. Judgment for plaintiff.

In October, 1891, the city councils of Dover adopted an ordinance which provided that the fire department of the city should consist of a board of three fire commissioners, a chief engineer, and one first and one second engineer, and such engine men and other members as the board of fire commissioners should deem necessary. The fire commissioners were to be elected by the city councils, and were authorized to make such rules and regulations for the government of all the officers and members of the fire department as they might deem fit and proper. It was also made their duty annually in March to appoint the board of engineers and all other members of the fire department. The ordinance contained other minor provisions. The defendants were duly elected fire commissioners, and have acted, and claim the right to act, as such by virtue of the ordinance.

J. S. H. Frink, Joshua G. Hall, and J. Ryan, Jr., for plaintiff. William L. Foster, W. F. Nason, and Robert G. Pike, for defendants.

PER CURIAM.¹ The general law establishes a fire department in every town in which apparatus for the extinguishment of fires is provided at the public expense, and fire wards or fire engineers are duly elected or appointed. The fire wards, otherwise called "fire engineers," constitute a board in whom are vested important powers and duties. Pub. St. c. 115. The evident purpose of the legislature in the passage of this chapter was to secure adequate protection of property against fire. It is a system of law intended to have uniform operation throughout the state, such towns excepted as may choose not to have fire apparatus, and not to elect a board of fire engineers. It was evidently intended that every town having a fire department should have the system prescribed by chapter 115. And there is no reason to hold that a city is not a town within the meaning of the general law on this subject. Pub. St. c. 2, § 5. Towns may choose a chief fire ward or engineer and one or more assistants (Id. c. 43, § 25), and the powers of towns are exercised by city councils (Id. c. 50, § 1).

It is claimed by the defendants that the city of Dover, while possessing all the powers conferred upon towns by the statute referred to, is not limited thereby as towns are; that its charter gave it the power of local legislation "relative to preserving said city from exposure to fire," and that the ordinance establishing a board of fire commissioners was

authorized by this charter provision and by section 2, c. 50, Pub. St., which provides that "the city councils shall have power to provide for the appointment or election of all necessary officers for the good government of the city not otherwise provided for." It is a sufficient answer to this argument to say that neither the charter nor the general law authorized the city councils to delegate their statutory power of electing fire engineers to a local board called "fire commissioners." The manner of their election was "otherwise provided for" by the legislature. Whatever authority the city has under its charter with reference to protection from fire, it did not acquire the right to repeal or suspend the statute providing for the election of a board of engineers, or to establish a board consisting of those persons and such others as three fire commissioners may deem necessary. The engineers elected in the manner provided in the statute are public officers (*Edgerly v. Concord*, 62 N. H. 8, 20); and it is no more competent for the city councils to prescribe some other method for their election than it would be for that body to delegate the duty of electing a city marshal, assessors of taxes, and other public officers to a committee of taxpayers. For similar reasons, if the city councils, under its charter, might establish an independent board for some purposes of fire protection, they could not authorize that board to make additions to the board of engineers. The duty of electing the "chief fire ward and one or more assistants" (Pub. St. c. 43, § 25) is devolved upon the city councils, and no part of that duty can be exercised under an ordinance which attempts to impose it upon other municipal officers. In these respects the ordinance in question is repugnant to law, and void. And as it is apparent that no part of the ordinance would have been enacted if it had been understood that its most important changes of the general law would be inoperative, the whole ordinance is void. 1 Dill. Mun. Corp. § 421; *Warren v. Mayor, etc.*, of Charlestown, 2 Gray, 84, 98. No sufficient reason appears why quo warranto is not an adequate, convenient, and appropriate method of procedure for the determination of this controversy. Judgment for the plaintiff.

CARPENTER, J., did not sit. The others concurred.

(67 N. H. 594)

ROBERTS v. LORD et al.
(Supreme Court of New Hampshire. Carroll.
July 29, 1892.)

SPECIFIC PERFORMANCE—EVIDENCE.

In a suit for specific performance, it appeared that defendant's intestate, a lumberman, offered to give plaintiff land sufficient for the purposes of a sawmill, if he would build one on his land; that plaintiff did so, and remained in possession thereof during the life of intestate; that defendant, as administrator, sold the land in question to a party from whom he himself afterwards acquired it; and that both such purchaser and

¹ See footnote, 86 Atl. 607.

administrator knew that plaintiff had occupied such mill since it was built, and that he claimed to own the property, and objected to the sale. *Held*, that there was sufficient evidence to sustain a finding for plaintiff.

Exceptions from Carroll county.

Bill by Joseph W. Roberts against Francis H. Lord, administrator, and another, for specific performance of a contract. The facts were found by the court in favor of plaintiff, and defendant Lord excepts. Overruled.

The defendant Lord is the administrator of the estate of Charles L. Perkins, who died in 1886. In 1877, Perkins, being the owner of a large quantity of lumber in Ossipee, offered to give the plaintiff land sufficient for the purposes of a sawmill, and to assist him with labor and materials, if he would build a mill on his land. The plaintiff accepted the proposition, and at once built a permanent sawmill, costing about \$4,000, on Perkins' land; also, during the lifetime of Perkins, he built three dwelling houses, a store, and a stable upon the land used in connection with the mill, and has been in the possession and occupation of the land ever since, as the owner thereof. In 1887, Lord, as administrator, sold the land in question to William H. Lord, and gave him a deed of it. In 1889 the defendant Lord acquired this title, and claims to own the land. Both the purchaser at the sale and the administrator knew that the plaintiff had occupied the mill since it was built, and that he claimed to own the property and objected to the sale. The court found that the plaintiff was entitled to a decree, and the defendant Lord excepted.

Frank Weeks, for plaintiff. John B. Nash, for defendants.

PER CURIAM.¹ There was sufficient evidence to sustain the finding for the plaintiff. Exceptions overruled.

CLARK, J., did not sit. The others concurred.

(68 N. H. 495)

STATE v. GERRY.

(Supreme Court of New Hampshire. Merrimack. July 31, 1896.)

CONSTITUTIONAL LAW—RIGHT TO JURY TRIAL—POLICE COURT—JURISDICTION.

1. Pub. St. c. 252, §§ 2-4, provide that a person sentenced for an offense by a police court may appeal to the supreme court by entering into a recognizance with sureties, and that, if he fail to prosecute his appeal with effect, his recognizance shall be forfeited; and the police court may tax certain additional costs, and enforce the original sentence. Laws 1895, c. 117, § 1, provides that: "Police courts shall have concurrent jurisdiction with the supreme court in any criminal case, where the fine does not exceed \$200 and the term of imprisonment does not exceed one year. In case of an appeal in any case which is beyond the jurisdiction of a justice of the peace, the appellant shall enter into a recog-

nizance as in other cases." Cases punishable by the maximum fine and imprisonment are beyond the jurisdiction of a justice of the peace. *Held*, that Laws 1895, c. 117, § 1, is void, as in violation of the constitutional guaranty that, except for offenses within the jurisdiction of a justice of the peace, a person shall have an untrammelled right to trial by jury.

2. The right of appeal is that given by Pub. St. c. 252; but, if the police court could grant an unconditional appeal, the mere obligation to appeal in order to gain a jury trial is unwarranted by the constitution.

Clark, Wallace, and Pike, JJ., dissenting.

Exceptions from Merrimack county.

One Gerry was convicted of an aggravated assault, and he appeals from the sentence of the police court. The defendant was arraigned before the police court of Concord, and pleaded not guilty. He was tried by the police court, found guilty, and sentenced to pay a fine of \$100. He appealed to the supreme court, and recognized for his appearance, and to enter and prosecute his appeal. He moved that the appeal be dismissed because the offense charged is beyond the jurisdiction of the police court, and the judgment appealed from is unauthorized and void. Subject to his exception, the motion was denied. Exceptions sustained.

W. D. Hardy, H. I. Goss, Geo. B. Cox, J. W. Remick, and D. C. Remick, for the State. A. F. Burbank, for defendant.

CARPENTER, C. J. An aggravated assault is punishable by a fine not exceeding \$200, or by imprisonment not exceeding one year, or by both. Pub. St. c. 278, § 21. If the police court had no jurisdiction to try and determine the question of the defendant's guilt or innocence of the offense charged in the complaint, the judgment is void, and the appeal must be dismissed. *State v. Dolby*, 49 N. H. 483; *State v. Runnals*, Id. 498; *State v. Thornton*, 63 N. H. 114; *State v. Perkins*, Id. 89. By the act of March 29, 1895 (Laws 1895, c. 117, § 1), jurisdiction of all criminal cases where the fine does not exceed \$200, and the term of imprisonment does not exceed one year, is expressly conferred upon police courts; and if, under the constitution, the legislature had the power to enact it, the defendant's motion to dismiss the appeal was properly denied. "No subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty or estate but by the judgment of his peers or by the law of the land." Bill of Rights, art. 15. It has never been denied or doubted that by this article trial by jury according to the course of the common law is secured to the defendant in all criminal cases without exception. *State v. Ray*, 63 N. H. 406, 407. It is the only provision of the constitution relating to trial by jury in prosecutions for crimes not capital. Strike it out, and there is nothing to prevent the enactment of a statute providing that all criminal offenses now known to our law, except murder in

¹ See footnote, 38 Atl. 607.

the first degree, may be tried and determined without a jury by the supreme court, by a justice of the peace, or by a police court. The framers of the constitution, who took care to secure a jury trial to the parties in a controversy over the smallest amount of property (Bill of Rights, art. 20; Const. 1792, art. 77), did not intend to leave in doubt the right of persons charged with an offense, however trivial (63 N. H. 407), against the criminal law, to a like trial. Their language means what they understood it to mean. "The language of the constitution is to be understood in the sense in which it was used at the time of its adoption." Opinion of Justices, 44 N. H. 633, 635; *Id.*, 41 N. H. 550, 551; *Hale v. Everett*, 53 N. H. 9, 170; *Copp v. Henniker*, 55 N. H. 179, 193; *State v. Saunders*, 66 N. H. 39, 76, 25 Atl. 588; *State v. Griffin*, 66 N. H. 326, 327, 29 Atl. 414. Whatever the parties to the Great Charter understood in 1215 to be the meaning of the words "by the judgment of his peers" (*Hurtado v. California*, 110 U. S. 516, 529, 4 Sup. Ct. 111, 292; 1 Steph. Hist. Cr. Law Eng. 162; 1 Pol. & M. Hist. Eng. Law, 152, note, 518; Hall, Mid. Ages, 342, note), our fathers, in 1784, as well as the first continental congress, in 1774, understood them to mean trial by jury,—that they secured to them "the great and inestimable privilege of being tried by their peers of the vicinage according to the course" of the common law. 2 Kent, Comm. 6. Such was the understanding of Coke when he wrote his commentary on the Great Charter. 2 Inst. 28, 29, 48-50. Precisely what significance is to be given to the words "or the law of the land" need not now be considered. *Mayo v. Wilson*, 1 N. H. 53, 56-59; *Dartmouth College v. Woodward*, *Id.* 111, 130; 2 Kent, Comm. 13; *Cooley, Const. Lim.* 353, 356; 2 Inst. 50-52. Whatever may be their meaning, they do not restrict or qualify the right of trial by jury in prosecutions for crime. "The constitution contains no definition or description of the trial by jury. * * * It is referred to in the bill of rights as an institution which constant practice from the earliest periods of the colonial history had made perfectly familiar to the people; and when trial by jury is spoken of in the constitution the term must be understood to mean that method of trial according to the common law of England, and substantially such as was used and practiced at that time in this state." Chief Justice Perley's charge to the grand jury at Plymouth, November, 1866. It "is a trial according to the course of the common law, and the same in substance as that which was in use when the constitution was framed." *East Kingston v. Towle*, 48 N. H. 57, 64; *Copp v. Henniker*, 55 N. H. 179, 193-203; *King v. Hopkins*, 57 N. H. 334, 350; *Story, Const.* § 1783. "The essentials of jury trial * * * are shown by common law and by history." *State v. Saunders*, 66 N. H. 39, 76, 25 Atl. 588, 590. "Accusations of criminal conduct are tried at the common law by jury; and wherever the right to this trial is guarantied by

the constitution without qualification or restriction it must be understood as retained in all those cases which were triable by jury at the common law, and with all the common-law incidents to a jury trial, so far, at least, as they can be regarded as tending to the protection of the accused." *Cooley, Const. Lim.* (4th Ed.) 391. It is essential to a jury trial that it be had in a court of competent jurisdiction, presided over by a judge qualified to instruct the jury in matters of law. *Pierce v. State*, 13 N. H. 536, 566-569; *State v. Saunders*, 66 N. H. 39, 76, 25 Atl. 588. "Another excellency of this trial is this: that the judge is always present at the time of the evidence given in it. Herein he is able in matters of law emerging upon the evidence to direct them, and also in matters of fact to give them a great light and assistance by his weighing the evidence before them, and observing where the question and knot of the business lies." *Hale, Com. Law*, 291, 292.

There must be a lawful accusation. This is as essential to a common-law trial by jury as any other incident,—as, for example, the number of the jurors, and the unanimity of their verdict. By the common law of the colony no one could be subjected to a trial for any criminal offense beyond the jurisdiction of a justice of the peace, except upon an indictment returned by a grand jury in cases of felony, or in the case of misdemeanors, on such indictment, or upon an information filed by the attorney general. The English common law respecting appeals of murder and other crimes (4 Bl. Comm. 312-316), and its rule that one found guilty of a felony by the verdict of a jury in a civil cause might, without other accusation, be put on trial for the crime (1 Chit. Cr. Law, 164, 165; *Bac. Abr.* "Indictment," B.), were never adopted here. The provincial act of 1718 (*Prov. Laws* 1771, c. 86) relating to the power and duty of coroners in taking inquisitions of death was declaratory of the common law. *Bac. Abr.* "Coroner," C.; 1 *East, P. O.* 381. It is not material to the present inquiry whether the colony adopted the English common-law doctrine that upon the inquisition alone one could be put on his trial for the homicide (4 Bl. Comm. 301, 302), because a coroner's jury was a grand jury (1 *Hale, P. O.* 161, note; 2 *Hale (P. O.)* 59; 2 *Burn, J. P.* [29th Ed.] 29; *Act* 1718, *supra*; *Act* June 10, 1791; *Laws* 1797, p. 132), and their inquisition an indictment (2 Inst. 32, 550; 4 *Coke*, 46, 47; *Reg. v. Ingham*, 5 *Best & S.* 257, 270). If in colonial times or since there ever was such a trial, no record or historical mention of it has been produced. Without an accusation by indictment or information, no one could be tried or punished for any criminal offense not within the jurisdiction of a justice of the peace. The required accusation was not a mere form of procedure, but a substantial protection of every citizen against false and malicious charges of crime; a valuable security of his "life, liberty, and estate," and of his enjoyment thereof. "As for trials in causes

criminal, they have this further advantage: that regularly the accusation, as preparatory to a trial, is by a grand jury. So that, as no man's interest, according to the course of the common law, is to be tried or determined without the oaths of a jury of twelve men, so no man's life is to be tried but by the oaths of twelve men, and by the preparatory accusation or indictment by twelve men or more, precedent to his trial." Hale, Com. Law, 295. "In times of difficulty and danger more is to be apprehended from the violence and partiality of judges appointed by the crown in suits between the king and the subject than in disputes between one individual and another to settle the metes and boundaries of private property. Our law has therefore wisely placed this strong and twofold barrier of a presentment and a trial by jury between the liberties of the people and the prerogative of the crown. * * * The founders of the English law have with excellent forecast contrived that no man should be called to answer to the king for any capital crime unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury; and that the truth of every accusation * * * should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion. So that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate, not only from all open attacks, * * * but also from all secret machinations which may sap and undermine it by introducing new and arbitrary methods of trial by justices of the peace, commissioners of the revenue, and courts of conscience. And, however convenient these may appear at first, * * * let it be again remembered * * * that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution, and that, though begun in trifles, the precedent may gradually increase, and spread to the utter disuse of juries in questions of the most momentous concern." 4 Bl. Comm. 349, 350. With this language of Blackstone the members of the bar who assisted in framing the constitution in 1784 were familiar. His work was the chief, if not the only, legal textbook they possessed. It is morally certain that the people among their reserved rights did not intend to omit, and did not understand that they did omit, any part of this "twofold barrier" against oppression, this "sacred bulwark" of their liberties. "The grand jury perform most important public functions, and are a great security to the citizens against vindictive prosecutions either by the government, or by political partisans, or by private enemies." Story, Const. § 1779. "If * * * the people are enlightened and honest, and zealous in defense of their rights and liberties, it will be impossible to surprise them into a surrender of a single valuable appendage of the trial by jury." Id. § 1785. "The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, ex-

pense, and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury in case of high offenses, is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive prosecutions, and as one of the ancient immunities and privileges of English liberty." Jones v. Robbins, 8 Gray, 329, 344.

In the case of misdemeanors, the requirement of an information filed by a sworn public officer, learned in the law, who has no motive "other than to protect and promote the public interest" (State v. Dover, 9 N. H. 472), and whose duty it is as much to secure the innocent from persecution as to prosecute the guilty, affords a protection against unfounded and malignant charges at least equal to that afforded by the grand jury in the case of felonies. It would be much greater than that of the latter if the proceedings and practice in the grand jury room were the same here as in England, where, to prevent vexatious indictments for certain misdemeanors, it has been found necessary to provide by statute that no one shall lay before the grand jury a charge of certain misdemeanors without permission of a judge, the attorney general, or of the solicitor general, unless he is bound over to prosecute by a magistrate. The criminal code commissioners in 1879 recommended that the restriction be extended to all offenses. 1 Steph. Hist. Cr. Law Eng. 293, 294. In this state grand juries have, it is believed, usually, if not always, been instructed not to return a bill against the accused unless upon the evidence laid before them—the state's evidence alone—they are satisfied of his guilt beyond a reasonable doubt. 1 Chit. Cr. Law, 318; 4 Bl. Comm. 303. But, whether this is the true rule or not, the law that no man can be publicly arraigned and put on trial for any alleged crime upon the mere accusation of his neighbor, though made under oath, until the charge has been investigated, and found true, or probably true, by a grand jury of his fellows, or an impartial public officer, is an invaluable protection against false and malignant accusations of crime. In the exceptional class of cases referred to,—cases of which a justice of the peace in 1784 had jurisdiction,—the right of the accused was to obtain a jury trial by taking an appeal from the judgment of the justice on giving security to prosecute it, and paying costs. State v. Griffin, 66 N. H. 326, 29 Atl. 414. This burden upon the right of jury trial has been maintained under the constitution upon the sole ground that it existed when the constitution was adopted. Copp v. Henniker, 55 N. H. 179, 195, 196. In all other cases trial by jury was free. The accused was not obliged to purchase, or even to demand, it. Without it, he could not be convicted or punished. It was his right not to be "deprived of life, liberty, or estate" for any criminal offense, until in the due course of the common law a verdict of guilty against

him was obtained. The burden rested not upon him to procure either a trial or an acquittal. It rested on the state—the prosecution—to obtain a trial by jury, as well as a conviction by their verdict. If he pleaded not guilty, he was not, and could not be, required to do or say anything more. The law esteemed him innocent until a verdict to the contrary was rendered. The common law—the words of the Great Charter—assured him that he should not be condemned or punished for any criminal offense until a verdict of guilty by a jury of his equals was first obtained against him. That the common-law right of trial by jury in criminal cases as it existed here in 1784, with all its incidents, “so far, at least, as they can be regarded as tending to the protection of the accused,” is secured to the people by the constitution, is not open to doubt. It is established by numerous judgments of the court, and is not questioned by the counsel for the state.

The question presented is whether this right is infringed or substantially impaired by the act of March 29, 1895 (Laws 1895, c. 117), which provides that: “Police courts shall have concurrent jurisdiction with the supreme court in any criminal case where the fine does not exceed two hundred dollars and the term of imprisonment does not exceed one year. In case of an appeal in any case which is beyond the jurisdiction of a justice of the peace, the appellant shall enter into recognizance as in other cases in any sum not less than one hundred dollars, nor more than three hundred dollars.” It is not claimed that offenses punishable by such a fine or term of imprisonment were, in 1784, within the jurisdiction of a justice of the peace. In substance, the act (on the interpretation most favorable to the state) declares that a person accused in the cases specified may be tried, found guilty, and condemned to the prescribed punishment by a police judge, subject only to the right of appeal provided by the general law as follows: “A person sentenced for an offense by a police court * * * may at the time such sentence is declared appeal therefrom to the supreme court at the trial term next to be holden for the county. Before the appeal is allowed the appellant shall enter recognizance with sufficient sureties in a reasonable sum, not exceeding one hundred dollars, to appear at the court of appeal, to prosecute his appeal with effect, to abide the order of the court thereon, and if so required, to be of good behavior in the meantime. If the appellant fails to enter and prosecute his appeal * * * his recognizance shall be declared forfeited, and the clerk * * * shall transmit to the * * * police court appealed from, a certificate of such forfeiture. The justice shall record such certificate, shall add to the costs fees for copies sent to the clerk, fifty cents for the clerk’s certificate, and fifty cents for recording it; and he shall issue a mittimus to carry into effect the original sentence with such increased costs.” Pub. St.

c. 252, §§ 2-4. If, because of his poverty, or because he is a stranger in a strange land, or for other reason, he is unable to obtain sufficient sureties, or to pay the required fees, the accused has no appeal, and no jury trial. If he secures his appeal, but is unable, or for any cause fails, to enter and prosecute it, not only is the sentence of the police court affirmed, but he is charged with additional costs, and his recognizance is forfeited. In other words, for taking and failing to pursue his appeal he is subjected not only to the original sentence, but also to the penalty of paying costs, and the amount of his recognizance. The only ground upon which it has been held or claimed that under the constitution the right of jury trial may be subjected to these burdens is that in 1784 they existed by law in cases within the jurisdiction of a justice of the peace; that it is, with these burdens upon it, the same trial, in substance, as that which was in use in those cases when the constitution was framed. It is not questioned that the imposition of these burdens on the right of jury trial in any other cases is forbidden by the constitution. “If, in a class of criminal cases, at the date of the constitution, a defendant was entitled to a jury trial upon his complying with the single condition of remaining in custody, or giving security for his appearance merely, as he might elect, his constitutional right would be infringed by such a material alteration of the terms on which he can enjoy the right, as making his enjoyment of it depend upon his paying a jury fee, or the costs of the prosecution, or giving security for his appearance without the option of remaining in custody, or giving security for anything else than his appearance, or incurring the risk of increased punishment, or submitting to anything else that would operate as a penalty for the exercise of the right.” *Copp v. Henniker*, 55 N. H. 179, 202; *State v. Griffin*, 66 N. H. 326, 328, 29 Atl. 414, and cases cited.

But it is suggested that the court may grant an appeal without requiring the defendant to comply with the requirements of the law regulating appeals; that an appeal may be allowed upon the defendant’s merely recognizing for his appearance, as in cases where he is bound over to answer. The statute admits of only two possible constructions. It either does or does not confer the right of appeal. If it does not, nobody contends that it can be sustained. If it does, it gives the appeal provided by the general law. This is undoubtedly the true construction. It is what the legislature intended. The statute is to be read, precisely as if the general law of appeal were repeated in it and re-enacted. But there was no occasion for re-enacting the general law. Statutes are construed in view of the existing law. The general law of appeal—the provision that any person sentenced by a police court may appeal therefrom—extends to every case created by subsequent legislation that falls within it. *Roberts v. Stark*, 47 N. H.

223, 225; *State v. Rum*, 51 N. H. 373; *State v. Bean*, 63 N. H. 249. An appeal from a subordinate tribunal's determination of fact is unknown to the common law. It exists only by statute. *Wetherbee v. Johnson*, 14 Mass. 412, 420; *Com. v. Richards*, 17 Pick. 295, 296; *U. S. v. Wonson*, 1 Gall. 4, 14, 15, Fed. Cas. No. 16,750; *State v. White*, 41 N. H. 194, 196. The court cannot allow an appeal where none is provided, nor can it dispense with any of the prescribed conditions of an appeal that is provided. When the legislature declares that before an appeal is granted the appellant shall enter into a recognizance, the court cannot say that it shall be granted without a recognizance. For appeal on condition the court cannot substitute appeal without condition. For the appeal intended and provided by the legislature the court cannot substitute an appeal which the legislature did not intend. The court cannot lawfully legislate. Undoubtedly, "when a statute may constitutionally operate upon certain persons, or in certain cases, and was not evidently intended to conflict with the constitution, it is not to be held unconstitutional merely because there may be persons to whom or cases in which it cannot constitutionally apply; but it is to be deemed constitutional, and construed not to apply to the latter persons or cases, on the ground that courts are bound to presume that the legislature did not intend to violate the constitution." Opinion of Justices, 41 N. H. 553, 555. This is merely saying that a statute is to be held unconstitutional in those particulars only that conflict with the constitution. So, "where there are different provisions in the same statute so distinct and independent that the one may not have been the motive or inducement to the other, one may be held valid and the other" unconstitutional and void. *Jones v. Robbins*, 8 Gray, 329, 338; *Nolan's Case*, 122 Mass. 330, 332, 333. A statute made in express terms both retrospective and prospective may be held valid so far as it looks to the future and void so far as it affects past transactions. *Kent v. Gray*, 53 N. H. 576; *Rockport v. Walden*, 54 N. H. 167. Undoubtedly, "whatever the language of the legislature" in any case may be, "the court is bound to presume that it intended to keep within the limits of the constitution." *Leavitt v. Lovering*, 64 N. H. 607, 608, 15 Atl. 414. In other words, if the language of the statute is capable of being so construed as to be consistent with the constitution, the court is bound to give it that construction. If not capable of such construction, all the court can do is to pronounce it void. This is the whole extent of the doctrine. It affords no warrant for giving the statute a meaning that the legislature did not intend. It does not authorize the addition to the statute of such words, provisions, or modifications not therein expressed or implied as may be necessary to render it consistent with the constitution. If it did, an unconstitutional statute would be impossible. By addition or subtraction its defects could always be cur-

ed. For example, in *Perkins v. Towle*, 58 N. H. 425, section 23, chapter 231, of the General Statutes, extending the provision for actions by a landlord against a tenant to cases where that relation does not exist, was held unconstitutional, because by section 17 of the act the defendant is required, before his appeal is allowed, to recognize with sufficient sureties to enter and prosecute his appeal, to pay all rent then due or which may become due, and such damages and costs as may be awarded against him, thereby imposing upon his right of trial by jury an unwarranted burden. The objection could have been easily cured by striking out of section 17 the requirement of a recognizance, if the court had the power. It is, in this particular, impossible to distinguish that case from the present. If the provision for a recognizance can be stricken out here, it could and ought to have been in that case. If, under the statute now in question, the court can give the defendant an appeal without costs, free of all the conditions prescribed by the statute, it could and ought to have given the defendant in that case such an appeal, and have sustained the statute, so far, at least, as the ground upon which it was decided was concerned. So a statute authorizing searches without a warrant might be sustained as constitutional by judicially incorporating in it article 19 of the bill of rights, or, perhaps, a statute giving a justice of the peace jurisdiction of all felonies (Const. art. 4) by supplying, by judicial legislation, provisions for the attendance at his court of grand and petit juries. *State v. Peterson*, 41 Vt. 504, 522. If the court had the power to repeal the statute imposing burdens upon the appeal, if in defiance of the legislature will it could give, or if the legislature should give, the accused "an unobstructed and unclogged right of appeal," the statute in question would not be free from constitutional objection. The obligation to appeal is itself a burden unwarranted by the constitution.

By the statutes of Massachusetts the appellant from the sentence of a justice of the peace or police court is required to recognize with sureties to appear at the court appealed to until the final sentence or order of that court, to abide such final sentence or order, and not depart without leave, and in the meantime to keep the peace and be of good behavior. He is subjected to no costs of taking or prosecuting his appeal, unless upon his trial he is convicted. If he "fails to enter and prosecute his appeal, he is defaulted on his recognizance, * * * and the superior court may award sentence against him for the offense whereof he was convicted, in like manner as if he had been convicted in that court." Gen. St. c. 173, §§ 1-5. On such default a more severe punishment than that imposed by the police court may be awarded him. *Batchelder v. Com.*, 109 Mass. 361. In *Jones v. Robbins*, 8 Gray, 329 (decided in 1857), it was held by a divided court that article 12 of the Massachusetts bill of rights (identical with our article 15, except that

it contains the additional provision that "the legislature shall not make any law that shall subject any person to * * * infamous punishment * * * without trial by jury") was not infringed by a statute authorizing a police court to try and pass sentence upon persons charged with an offense punishable by infamous punishment, subject to the right of appeal provided by the statutes above cited. The court also held that these statutes conferred on the appellant "an unqualified and unfettered right of appeal." The decision rests upon the mistaken view that the constitutional right of trial by jury is a privilege to be asserted, instead of an unconditional immunity from sentence or punishment for crime, until at the hands of a jury a verdict of guilty is obtained. The court, after stating in substance that the last clause of article 12, prohibiting the legislature from making any law which shall subject any person to infamous punishment without trial by jury, was "added for greater caution," and, though more explicit than the preceding clause, "judgment of his peers," did not materially modify its meaning, say (page 341): "As the object of the clause is to secure a benefit to the accused, which he may avail himself of or waive, at his own election, and as the purpose of the provision is to secure the right without directing the mode in which it shall be enjoyed, it is not violated by an act of legislation which authorizes a single magistrate to try and pass sentence, provided the act contains a provision that the party shall have an unqualified and unfettered right of appeal, and a trial by jury in the appellate court, subject only to the common liability to give bail, or to be committed to jail, to insure his appearance, and to abide the judgment of the court appealed to. This is a necessary inconvenience, as is also the delay of the trial till the sitting of such court. They are the same, and no greater than they would be in case the magistrate, instead of passing sentence, should, on examination, bind the accused over, or, as the necessary alternative, commit him to jail." A fatal objection to this doctrine is that it puts the burden of obtaining a jury trial upon the defendant, instead of the state. It compels him to appear, and demand the trial, without which the constitution expressly declares he shall not be condemned. The difference between a right to jury trial upon demand made therefor and the right not to be convicted or punished until a trial is had is wide. A man is not to be imprisoned or otherwise punished because a corrupt or ignorant magistrate has found him guilty of crime, and he has not sufficient intelligence to demand and take the proper steps to obtain a trial by jury. As long as he remains entirely passive, as long as he neither does nor says anything relative to the charge against him, except to maintain his innocence by a plea of not guilty, he is assured by the express terms of the constitution that he cannot be condemned until the state has obtained a verdict of guilty from 12 of his neighbors. "No subject shall be * * * deprived of life,

liberty or estate but by the judgment of his peers." This language does not mean—it cannot reasonably be construed to mean—that he may be tried and finally condemned by a magistrate unless he takes certain prescribed measures to secure a constitutional trial. To say that the required recognizance upon an appeal subjects the party to no greater inconvenience is no greater burden than the recognizance required upon an examination and binding over, if it were true, does not conclude the matter. It is not merely the recognizance, but the judgment of the magistrate, the sentence without a jury trial, that is in question. But it is not true. In legal effect, the difference between recognizances upon a binding over and upon an appeal is great. In the first case the sole consequence of a default or forfeiture is to create a debt in the amount of the recognizance, payment of which may be enforced. Upon the forfeiture of the recognizance taken on appeal not only is the defendant subjected to the payment of the amount of the recognizance, but he is also, under the Massachusetts statute, sentenced for the offense charged by the court appealed to, as if he had been convicted in that court. By his default he is held to waive a jury trial. *Com. v. Whitney*, 108 Mass. 5-7. If this is sound constitutional law, the legislature may enact a statute providing that a person bound over on examination, who forfeits his recognizance, or who, in default of a recognizance, is committed to jail, and escapes, may be brought in on a capias, and sentenced for the offense charged, as if he were convicted. It might dispense with the examination and recognizance, and provide that a person charged with crime, who fails to appear upon a simple notice or summons, may be brought in, and judgment rendered against him upon default, as in civil actions. In each case he would be no more deprived of a jury trial than is the appellant. If he should appear, and demand a jury trial, it would be accorded him. Trial by a magistrate, trial without a jury, is, in a constitutional sense, no trial; and no reason appears why, upon the forfeiture of a recognizance, the court may not be authorized to pronounce final sentence as well without as with such a trial. The consequence of the forfeiture of the appellant's recognizance under our statute (*Pub. St. c. 252, § 4*) is, in effect, the same as it was in Massachusetts in 1857, except that there he might receive a more severe sentence than that appealed from. The difference is immaterial to the constitutional question.

The opinion of the majority of the court in *Jones v. Robbins* makes no answer to these views, nor to those expressed by Thomas, J., dissenting, who says (pages 351-353): "I concur also in the opinion [of the majority] that the citizen cannot be subjected to a trial for an offense visited by a capital or infamous punishment without the intervention of a grand jury, which, standing between him and the power of the government and the passions of the prosecutor, shall say, upon their oaths,

that there is good cause why he shall be subjected to trial. But there is, to myself, plain-
 or and more solid ground upon which the conclusion rests that a police court or a justice of the peace cannot be clothed with jurisdiction to try the citizen for an offense which will subject him to a capital or infamous punishment. It is obvious to remark that, if the intervention of a grand jury is all that is wanting to the validity of this jurisdiction, the legislature might at once provide for the return of indictments into the police court and, reserving to the accused the right of appeal, might subject him to a trial even for his life, before a single magistrate. I find it impossible to assent to any such conclusion, or to any reasoning that would lead to it. It seems to me plain that when the constitution declares that 'the legislature shall not make any law that shall subject any person to a capital or infamous punishment * * * without trial by jury,' its meaning is trial by jury when and whosoever he shall be tried; not upon his second trial, nor after having been subjected to another and different mode of trial. If, for an offense subjecting him to capital or infamous punishment, the citizen may be tried once without a jury, it is not easy to see why he may not be so tried a second time; why the legislature may not provide that, upon appeal to the municipal court, he may be tried by a single judge, and postpone his trial by jury to his appeal to this court. Such a law would, indeed, clog and obstruct his trial by jury; but the difference between that and this is in degree only. The subjecting the accused to one trial by a single magistrate obstructs the right of trial by jury, and essentially impairs its value. It places between the accused and a trial by jury a barrier not necessary for the security of the public, such as are the preliminary examination and the holding to bail. * * * It subjects him to unnecessary, and often fatally burdensome, expense before he can reach the tribunal by which it is his right and his security to be tried. The subject cannot be said, under such a law, to obtain his right 'freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay.' When you state the proposition that a man may be constitutionally tried for murder by a justice of the peace or a police court, or by any single judge, even after indictment, and that he cannot have a trial by jury until he has been tried by a single magistrate, I think every mind familiar with the constitution, and with the common-law rights secured by it, shrinks from the conclusion. Yet it is to be observed that the twelfth article of the bill of rights makes no distinction between laws subjecting the citizen to capital and those subjecting him to infamous punishments. They stand on the same ground. * * * It is not an unobstructed and unclogged right of appeal which the twelfth article secures, but an unobstructed and unclogged right of trial by jury." To

these weighty words of Judge Thomas no satisfactory reply has ever been made.

The doctrine of *Jones v. Robbins* has not found favor. It is repudiated by the highest courts of the land. The question first arose in the United States district court of New York in *Re Dana*, 7 Ben. 1, 4, 5, Fed. Cas. No. 3,554, decided in 1873. Dana was charged by information in the police court of the District of Columbia with having published a libel, and was arrested in New York. A warrant to authorize his being taken to Washington was refused on the ground that he would there be tried in a manner forbidden by the constitution; that is to say, in the police court, without a jury, subject to a right of appeal to the supreme court of the District, and there to be tried by jury. Blatchford, J., said the offense of libel is "one of the crimes which must, under the constitution, be tried by a jury. The act of 1870 provides that the information in this case shall not be tried by a jury, but shall be tried by a court. It is true that it gives to the defendant, after judgment, * * * the right to appeal to another court where the information must be tried by a jury, but this does not remove the objection. If congress has the power to deprive the defendant of his right to trial by jury for one trial, and to put him, if convicted, to an appeal to another court, to secure a trial by jury, it is difficult to see why it may not also have the power to provide for several trials by a court without a jury on several successive convictions, before allowing a trial by jury. In my judgment, the accused is entitled not to be first convicted by a court, and then to be acquitted by a jury, but to be acquitted or convicted in the first instance by a jury." The case is cited and approved in *Callan v. Wilson* (1887) 127 U. S. 540, 554, 555, 8 Sup. Ct. 1301, where it was unanimously held that a person accused of conspiracy is entitled, under the provisions of the constitution of the United States, to a trial by jury, and that an act of congress providing that he may be tried, convicted, and sentenced by the police court of the District of Columbia, subject to a right of appeal to the supreme court of the District, is unconstitutional and void. The court say (pages 556, 557, 127 U. S., and page 1307, 8 Sup. Ct.): "The argument made in behalf of the government implies that, if congress should provide the police court with a grand jury, and authorize that court to try without a jury all persons indicted even for crimes punishable by confinement in the penitentiary, such legislation would not be an invasion of the constitutional right of trial by jury, provided the accused, after being tried and sentenced in the police court, is given an unobstructed right of appeal to and trial by jury in another court to which the case may be taken. We cannot assent to that interpretation of the constitution. Except in that class or grade of offenses called petty offenses, which, according to the common law, may be proceeded against summarily in any tribunal

legally constituted for that purpose, the guaranty of an impartial jury to the accused in a criminal prosecution conducted either in the name or by or under the authority of the United States secures to him the right to enjoy that mode of trial from the first moment, and in whatever court he is put on trial for the offense charged. In such cases a judgment of conviction not based upon a verdict of guilty by a jury is void. To accord to the accused a right to be tried by a jury in an appellate court after he has been once fully tried otherwise than by a jury in the court of original jurisdiction, and sentenced to pay a fine, or be imprisoned for not paying it, does not satisfy the requirements of the constitution." However free and unobstructed the right of appeal may be, it subjects the accused to the trouble, expense, and anxiety of two trials on the issue of guilt or innocence, instead of one.

It is said that a trial by the magistrate instead of an examination, is "rather a benefit to the accused than a burden or disadvantage to him," because on a trial he must be discharged if "a reasonable doubt of his guilt is not removed," while on examination he "must be held for probable cause," and that no more bail would be required on his appeal from a conviction than upon a binding over for his appearance. *State v. Craig*, 80 Me. 85, 89, 13 Atl. 129. But the question is upon the effect of the statute in the case of a conviction, not in the case of acquittal. The constitutional guaranty is not that the accused shall not be acquitted, but that he shall not be convicted and punished without a jury trial. *Com. v. Graves*, 112 Mass. 282. An examination is not a trial. The holding to bail thereupon is not even an accusation. It is merely a finding that, before the defendant is formally accused of the crime, the question of his guilt or innocence ought to be investigated by a competent tribunal, namely, the grand jury. 1 Chit. Cr. Law, 89. It adds nothing to the weight of the complainant's charge. The defendant may, without prejudice to his rights, or stain upon his reputation, other than that caused by the charge alone, waive an examination, and recognize without a hearing. It may be said that he may also waive a trial, and take his appeal. Possibly he may, but he goes forth as a convicted criminal, with merely a right to a new trial. He stands morally, and in respect to his character and good name, as if, after a jury's verdict of guilty, he is awarded a new trial. This is a hardship to which by the common law of England and the common law of the colony in 1784 he could not be subjected. The court in *State v. Craig* were apparently of opinion that no burden not pecuniary is or can be in law an unjustifiable burden upon the jury trial of the constitution. In the minds of a great majority of mankind a stain upon their reputation or a blot on their character is a heavier burden than any mere pecuniary loss. If the award of an unobstructed jury trial upon appeal answers the

constitutional guaranty in one class of cases, it does in all. To sustain this statute will establish it as the constitutional law of the state that a police court may, if the legislature think fit, be invested with authority to try and determine all felonies, including murder, subject only to the right of appeal. The constitutional right to an accusation by information before being put on trial for a misdemeanor stands on the same ground as the right to indictment before being put on trial for a felony. Informations and indictments are classed together in the constitution. Const. art. 87. If the former may be abolished, so may the latter, and, with them, grand juries. All the barriers which the common law interposed between malicious and groundless charges and a public trial may be removed. Any one owing a grudge against his neighbor, by his mere accusation of crime, no matter how false and malignant, may compel him to undergo the humiliation and shame of being publicly arraigned and tried on the question of his guilt or innocence. In and prior to 1784 a justice of the peace had authority to try and determine, subject to appeal, those criminal offenses only that were punishable by a fine not exceeding 40 shillings, by whipping, or setting in the stocks. 1 Prov. Papers, 392, 395; 3 Prov. Papers, 187, 224; Prov. Laws 1761, pp. 1, 2, 48, 49; Prov. Laws 1771, pp. 9, 11, 16-18, 30, 31, 39, 40, 43, 52, 60. By the act of December 18, 1812 (Laws 1815, p. 328, § 3), a justice was authorized to punish larceny of property not exceeding \$6.67 in value by a fine of \$10 or imprisonment not exceeding 30 days. By the Revised Statutes he was given authority to try and determine all cases where the punishment was by fine not exceeding \$10 (Rev. St. c. 222, § 1), certain cases punishable by imprisonment not exceeding 30 days (Id. c. 113, § 15), and certain others punishable by imprisonment not exceeding 6 months (Id. c. 118, §§ 2, 3). In the revision of 1867 a justice was given jurisdiction of all offenses where the punishment is by fine not exceeding \$20 or by imprisonment not exceeding six months or by both. Commissioners' Report, c. 235, § 4; Gen. St. c. 234, § 4.

The question of the constitutionality of this apparently increased jurisdiction of a justice of the peace has never been raised. Whether it is to be or may be sustained on the ground that the increase is ostensible rather than actual, that \$10 in 1812 and 1842 and \$20 in 1867 was no more in value than 40 shillings in 1784, and that imprisonment in jail for six months is not more than a just and reasonable equivalent for the barbarous punishment of a public whipping and setting in the stocks, or on the ground of usage and acquiescence (*Pierce v. State*, 13 N. H. 536, 573; *Copp v. Henniker*, 55 N. H. 179, 209; *King v. Hopkins*, 57 N. H. 334, 356; *Keniston v. State*, 63 N. H. 37, 38; *Boston, C. & M. R. Co. v. State*, 62 N. H. 648, 649; *State v. Bos-*

worth, 13 Vt. 402, 413), is a question not raised, and not necessary to be considered. Exceptions sustained.

BLODGETT, CHASE, and PARSONS, JJ., concurred. CLARK, WALLACE, and PIKE, JJ., dissented.

(54 N. J. E. 110)

PARKER et al. v. SEELEY et al.

(Court of Chancery of New Jersey. Sept. 20, 1897.)

TRUSTS—LIFE ANNUITY—PROFITS—APPORTIONMENT
—POWER OF SALE—WHEN INFERRED—WILLS—
CONSTRUCTION—OPTION OF LIFE TENANT TO PUR-
CHASE—WHEN LOST.

1. Where a widow is entitled to an annuity under her husband's will, on her death her estate is entitled only to that part of the annuity for the year in which she died which had accrued at the time of her death, and not to the entire annuity for the year, though all of it is needed to pay her funeral expenses, etc.

2. Where a fund is held in trust for one person for life, and another in remainder, and the trustees realize a profit on real estate bought under foreclosure of a mortgage in which the fund is invested, the profits are to be apportioned between the life tenant and remainder-man in the proportion which the principal represented by the investment bears to the interest which was in arrears, and also represented by the investment.

3. Where a will contemplates an actual division of the estate by trustees, and payment to the tenants in common in money, a power of sale is to be inferred.

4. Testator, who left surviving a son and two daughters, all married, and his wife, and who left a homestead consisting of a dwelling on the center of a tract of land 119 feet on E. street, and 752 feet deep, gave such property and furniture, etc., to his son-in-law and grandson in trust for his wife for life; and on her death he gave his son "the right to purchase (not for speculation) the said dwelling house in E. street, and a part or portion of the said lot upon which said house stands, for \$8,000" (describing such part of the lot), and provided that, if his son should elect to purchase such property, it should be vested in testator's trustees in trust for his son for life, and after his son's death to his lawful heirs. He also directed that his son should have five years after the death of the widow to pay his two sisters each their third part of the \$8,000; but the time when the son's right to purchase was to be exercised was not mentioned or limited, except that it was to take effect after the widow's death; nor was any particular mode indicated in which it was to be exercised. The property which the son was given the right to buy was worth much more than \$8,000. At the time of the widow's death the son was on his deathbed, and died 11 days afterwards; and at no time after her death was he able to attend to any business requiring any continued effort, either mental or physical. *Held*, that the son's option to buy was not one which could be exercised only by a written declaration, and where he had fully made up his mind to accept the gift on the terms named, and the trustees knew of such fact, and could have compelled him at any time to declare himself one way or the other, the option was not lost, though no formal declaration, either oral or written, was ever made by the son, directly to either of the trustees, of his intention to purchase on the terms named, and his son and only heir had the right to take the property on payment of the \$8,000.

Bill by Cortlandt Parker and others, executors of the will of Richard W. Stites, deceased, against Elizabeth W. Seeley and others.

Cortlandt Parker, Jr., for complainants. George T. Werts, for defendant Richard Wayne Stites.

PITNEY, V. C. The object of this bill is to obtain the opinion of the court upon the construction of the will of the late Richard W. Stites, of Morristown, N. J., and for instructions to the executors as to certain questions arising in the course of the administration of the estate and the settlement of their accounts. It is a friendly suit, and made necessary by the infancy of one of the parties in interest. The testator died on the 2d of July, 1877, leaving three children, Elizabeth W. Parker (wife of Cortlandt Parker), Frances B. Seeley (wife of Seeley), and Richard M. Stites, each of them being married and having children, and also a widow, Elizabeth C. Stites, who survived him, and died on the 29th of February, 1896. His daughter Mrs. Seeley died on the 11th day of January, 1889, seven years before her mother; the son, Richard M. Stites, died on the 11th of March, 1896, 11 days after his mother; and Mrs. Parker is still living. For many years before and at the time of his death the testator resided on his homestead property, situate on Elm street, in Morristown, and his son, Richard, who was married in the father's lifetime, lived with him. The homestead consisted of a tract 119 feet on Elm street, and 752 feet deep from the middle of the street. It is bounded on the northeast by the lot of S. H. Little, formerly owned by W. C. Baker, and on the southwest by the lot of Mr. Bushnell, and has no frontage on any street except Elm. The dwelling occupies a little less than one-third of the frontage, and stands in about the center of the lot, leaving a vacant lot on each side. The will, probably a holograph, executed in 1873, after appointing testator's son-in-law Cortlandt Parker and grandson Richard Wayne Parker, now known as "Wayne Parker," his executors, proceeded to give unto them his estate, real and personal, in trust: "First. To hold the lot and dwelling house in Elm street, Morristown, in which I now live, for sole use, occupation, or income of my faithful and devoted wife, Elizabeth C. Stites, with all of the furniture, plate, carriage & cetera, free of all charge or rent, for and during the term of her natural life. Also, I give and devise to my said wife, E. C. Stites, during her said life, the sum of one thousand eight hundred dollars per annum, to be paid her by my said executors and trustees when and in such sums as she may desire. The above to be in lieu of dower. My estate in general to make all needful repairs. My son and wife to pay taxes and insure to amount of seven thousand dollars upon the house, I. e. if he (my son) elects to purchase said house. Upon the death of my said wife, E. C. S. [died February 29, 1896], I give to my son, R. M. Stites [died March 11, 1896], the right to purchase (not for speculation) the said

dwelling house in Elm street, and a part or portion of the said lot upon which said house stands, for eight thousand dollars, which part or portion of the said land will consist of eighty feet front upon Elm street, beginning at the corner post in the lane between the land owned lately by Wm. C. Baker [now S. H. Little] and myself, and running back in depth three hundred and sixty feet. The above eight thousand dollars to include all of the furniture except the silver. If my son, R. M. Stites, shall elect to purchase said lot and dwelling in Elm street, then the said lot shall be vested in my trustees, Cortlandt Parker and R. W. Parker, and the survivor of them, in trust to and for the use, benefit, and behoof of my son, Richd. M. Stites, during his life, and after his death to his lawful heirs, Richard W. Stites [defendant] and Montgomery Stites [died in testator's lifetime]. My son, R. M. Stites, may have five years after the death of my wife to pay his two sisters, Mrs. Parker [defendant] and Mrs. Seeley [died 1889], each their third part of the said eight thousand dollars. Lawful interest to be paid annually on the said debt by him. To help to meet this debt, I advise my executors and trustees to lay aside out of my son's portion at least two or three hundred dollars annually as a sinking fund. If necessary, my executors and trustees are authorized to pay to the trustees of Mrs. E. W. Parker and Mrs. F. B. Seeley the two-third part of the said debt, i. e. five thousand three hundred and thirty-three dollars, out of the share held by the said trustees for him [son, R. M. Stites] and his children. If my son shall die without lawful heirs, or if, after his death, his two sons, Richard and Montgomery, shall die before the age of twenty-one years, then said house and lot shall pass over to his sisters and their heirs. If my daughter Mrs. F. B. Seeley shall ever require a home, then my son, Richard, and his trustees, shall allow her to occupy a part of the said house free of charge so long as she remains a widow. The residue of my estate, real and personal, I give and devise to my son-in-law Cortlandt Parker and grandson Richard W. Parker, and the survivor of them, in trust to and for the use, benefit, and behoof of my three children, Mrs. E. W. Parker, Mrs. F. B. Seeley, and Richard M. Stites, share and share alike, to them during their life, so that they (my said children) will receive, possess, and enjoy from my said trustees the income and profits of their respective share, each one to his or her own separate use, and after their death to their heirs forever. My grandsons, R. W. Stites and Montgomery Stites, not to have control over their respective property before each shall arrive at the age of twenty-five, and enter, if health allows, upon some way of earning an honest livelihood." Testator left a personal estate amounting to about \$80,000, which has somewhat increased in the hands of the trustees.

Four questions are submitted:

1. As the testator died in July, 1877, and the annuity to the widow commenced at that date, and she died before the end of the current year, counting from July to July, viz. February 29, 1896, whether she is entitled to the whole of that year's annuity, or only to that part of it which had accrued up to the date of her death; the balance being needed to pay her funeral expenses, etc. I regret that I can find no authority for giving her any more than the amount that had accrued up to the time of her death.

2. The next question arises between tenants for life and remainder-men, as to the disposition of extra profits to be realized upon real estate bought in under foreclosure of mortgages, and held by the executors. From this source it is expected that there will be a profit, after paying expenses, restoring the principal sum, and paying all arrears of interest. It will be observed that the real estate was purchased with the funds of the estate, consisting partly of principal and partly of interest; the principal belonging to the remainder-man, and the interest to the tenant for life. This subject was dealt with, in the case of a loss arising under such circumstances, in the case of Hagan v. Platt, 48 N. J. Eq. 206, 21 Atl. 860; and the doctrine there laid down was followed and applied by the chancellor in Tuttle's Case, 49 N. J. Eq. 262, 24 Atl. 1. The rule so established is that in case of a loss the deficiency is to be divided between the tenant for life and remainder-man in the proportion which the principal represented by the investment bears to the interest which was in arrear, and also represented by the investment. And it seems to me that the same principle applies to the case where a profit, instead of a loss, arises. The authorities and reasoning in Hagan v. Platt, and Tuttle's Case, supra, so far as I have observed, had not been presented to the court in any previous reported case. Chancellor Runyon had a similar case before him in Parker v. Johnson, 37 N. J. Eq. 366. There was there a profit of \$1,700, arising under circumstances precisely similar to those before the court; and he ordered the surplus to be retained, and not applied either to principal or interest, until it appeared whether or not there might not be a loss on some of the other investments held under the same trust, and says: "The trustee in this case is to keep the fund invested, and the tenant for life is entitled to the interest. It is clearly the duty of the trustee to apply the profits of one investment to making up the losses on the other." It thus clearly appears that the precise question now under consideration was not presented to the mind of the chancellor, nor were the authorities cited before him. The third proposition decided in Outcalt v. Appleby, 36 N. J. Eq. 73, has no application here, for the reason that the unproductive property there held was a part of the original estate. The consideration which seems to control is that the property purchased represents both prin-

cial and interest, and its growth in value is due to both sources. I shall advise that, at the final settlement of the estate at the end of the trust, the surplus, if any, arising from the purchase of property under foreclosure and resale thereof, shall be divided according to the rule laid down in *Hagan v. Platt*, and *Tuttle's Case*.

3. The next question is as to the power of sale of the executors, arising under the disposition of the residue. That residue, consisting of real and personal property, is given "in trust for the use, benefit, and behoof of my three children, Mrs. E. W. P., Mrs. F. B. S., and R. M. S., share and share alike, to them during their life, so that they will receive, possess, and enjoy from my said trustees the income and profits of their respective shares, each one to his or her own separate use, and after their death to their heirs forever." The plain rule is that if the will contemplates an actual division of the estate by the trustees, and payment to the tenants in common in money, a power of sale of land is to be inferred. On that subject I cite *Vanness v. Jacobus*, 17 N. J. Eq. 153, by Chancellor Green; *Wurts v. Page*, 19 N. J. Eq. 365, at page 375, by Chancellor Zabriskie; *Haggerty v. Lanterman*, 30 N. J. Eq. 37, by Chancellor Runyon; *Belcher v. Belcher*, 38 N. J. Eq. 126, also by Chancellor Runyon. It is probable that a close application of this rule to the case in hand would give the executors a power of sale. But I do not consider it necessary or proper in this case to determine that question, for the reason that it is perfectly clear that the real estate which will fall into the residue in this case is incapable of division and must be sold, and that the interests of the parties require that it should be sold; and all parties are before the court, so that the property may be sold by a master, and have the approval of the court, with very slight additional expense, and with the result that the title passed will be above suspicion. I will advise a sale by a master.

4. The next question arises under the gift to testator's son, Richard M. Stites, usually called "Col. Stites," of "the right to purchase (not for speculation) the said dwelling house in Elm street, and a part or portion of the said lot upon which said house stands, for eight thousand dollars, which part or portion will consist of eighty feet front on Elm street, beginning at the corner post in the lane between Baker's (now Little's) land and myself, running back in depth 360 feet." It will be observed here that this is a gift of the "right to purchase," and the time when the right is to be exercised is not mentioned or limited, except that it is not to take effect until the death of the testator's wife, nor is any particular mode indicated in which it is to be exercised. The facts are that no formal declaration, either oral or in writing, was ever made by Richard M. Stites directly to either of the trustees of his intention to take the property at the price named. The matter had

been the subject of conversation between Mr. Wayne Parker and his uncle Richard in the lifetime of the latter's mother. Mr. Parker swears: That the matter of the exercise by Richard of his right of purchase was spoken of between them about the year 1891 or 1892, on the occasion of an accident happening to his grandmother. The question of repairs was under discussion, and as to whether the executors ought to make certain repairs out of the funds of the estate, and Mr. Parker said to Col. Stites: "You may be the person interested. I do not know, for you have never told me whether you expected to take the house,"—and that his uncle answered: "That question does not arise until after mother's death." That nothing more was said after that remark. But Mr. Parker is in doubt as to whether he said to his uncle on that occasion that "he supposed he would take the house," or "he didn't know whether he would take the house or not"; but he does remember that he said to his uncle that he had never told him what he intended to do upon the subject. Col. Stites was an invalid for several years before he died, and at the time of his mother's death was on his deathbed, from which he never rose. His attending physician swears that at that time, and for three or four days after her death, he was in a very weak state; that he rallied for three or four days, about the 5th, 6th, or 7th, of March, and then began to sink, dying on the 11th; that neither he nor his family, however, were aware of his approaching dissolution. At the time of his mother's death, his sister, Mrs. Parker, was also very ill; and he was enabled, by the free use of stimulants, to be propped up in bed and write her a pencil letter on the occasion. But he was entirely unable to attend to any business requiring any continued effort, either mental or physical.

The property in question, as has been stated, had about 119 feet front on Elm street, with 752 feet depth from the center of the street, and about 720 feet from the side of the street; and the house stood in about the center of the lot, leaving a passageway of about 40 feet on each side. It was bounded on one side by land of Mr. S. H. Little (formerly owned by W. C. Baker), and on the other side by the residence of Mr. Bushnell. By the terms of the will the 80 feet, including the house, the option to purchase which was given to the colonel, was to be taken on the side next to Mr. Little, and the depth, 360 feet, was just about one-half of the depth of the lot; leaving a strip of about 39 feet on the side next to Bushnell, leading to a rear lot 119 feet by about 360 feet in size, which had no frontage on or connection with any street except Elm street. On the day of the funeral, and after the burial of the elder Mrs. Stites, Mrs. Louise Stites, wife of the colonel, had a conversation with her brother-in-law Wayne Parker in the house, in which she swears that she informed him that the colonel had determined to take the property on the terms of the will. Her hus-

band had previously told her that he intended to have the vacant lot on the side next to Bushnell. Whether he intended to have that in addition to the amount mentioned in the will, and thus control the whole front, or whether he intended to effect an exchange with the trustees, and take his 80 feet from the side next to Bushnell, giving to the trustees the 39 feet next to Little, does not clearly appear. But it does appear that Mr. Wayne Parker, who was the acting trustee, desired to have the passageway of 39 feet reserved by the will to go with the rear lot, to be taken from the side next to Mr. Little. Mrs. Stites' account of the interview with her brother-in-law after the funeral is this: She says that they sat down and talked for a time on general subjects, and then spoke about opening the back lot and running a street through. Mr. Wayne Parker, according to Mrs. Stites' account, said: "Uncle Dick seems to be determined to have that piece of land on the side of the house." I said: "Oh, yes; he feels that adds very much to the value of his property, for he expects to take the house, Wayne." Wayne said: "Aunt Louise, we won't trouble Uncle Dick about business. He is too sick a man." The defendant Richard Wayne Stites swears that a day or two after the funeral he went to Newark, and saw his uncle Wayne, and that they conversed about the property in question, and he (Mr. Parker) said that the witness' father, the colonel, seemed determined to have that piece of property next to Bushnell, but he said the will gave him the property from Little's side, but he said that they proposed to give him that 40 feet on the Bushnell side in exchange for the property on Little's side. Mr. Wayne Parker, after this testimony of Mrs. Stites and her son was given, gave his version of the two conversations, and says that he spoke to Mrs. Stites of the difficulty of selling what is known as the "back lot," and that his idea had always been that a street ought to run through on the side next Mr. Little, and where the lane is, so as to open that back lot, but that, if any option were exercised under the will, that side would be taken by Col. Stites, so as to render such a street impossible. He says he did not say that "Uncle Dick seemed determined to take that side, and he had never expressed any such determination, so that I could not say so." He admits that he did say to his aunt on that occasion that he thought that Uncle Dick was too sick to talk of business. He also recollects the conversation with his cousin Richard Wayne Stites at his office in Newark, and he says that he told his cousin that he was quite anxious that some arrangement should be made by which no option should be taken on the lane (next to Little's side), or that it could be relieved from such an option, so that a street could be opened. "I did not say to him that his father was determined to take either the Bushnell side or the other side, but I did suggest that if some arrangement could be made by which he should get land towards

the Bushnell side, to compensate for taking land off on the other side, it would, I thought, be to the advantage of the whole estate and I wanted, when I got a chance, to talk over the matter as to what ought to be done." From this conversation I infer that there was no doubt in the mind of the acting trustee, Mr. Wayne Parker, from the conversation that occurred between him and his aunt Louise,—in fact, the considerable value of the lot over the price named was of itself an assurance,—that his uncle Richard had fully determined to exercise his option under the will; and the only matter left for discussion was from which side of the lot the 80 feet should be taken. And that, surely, was a matter of business, which required some discussion and arrangement, for which Col. Stites was entirely unfit at that moment. On Tuesday, March 10th (as Col. Stites died on Wednesday, March 11th), he had a talk with his wife, and said that, as Wayne would be home from Washington on Saturday, he would arrange for him to come up, and they would settle the whole matter about the lot which he was to take. The proof is abundant, by Mrs. Stites and the son, Richard Wayne Stites, that he had fully determined to exercise the option under the will, and that the designated house and lot is worth much more than \$8,000.

It is urged by the executors, acting in the interest of the cestui que trust, that under these circumstances the option is lost, and could not be exercised by the grandson, who is the sole heir at law of Richard M. Stites, and devisee of his grandfather under the will. There is no doubt—it was admitted—that the grandson had declared his desire to have the property at the price named. The ground taken is that it was an option personal with the son, Richard M. Stites, and could only be exercised by a written declaration which bound him to purchase at the price named, and that, not having been exercised in his lifetime, it falls. I am unable to take that view. Here was a gift to the son of a valuable right, to be exercised at the death of his mother, the tenant for life. The testator himself did not limit the time or the manner in which it should be exercised. The whole thing was a family arrangement. The executors and trustees were the son-in-law and grandson of the testator, and brother-in-law and nephew of the beneficiary. It was not a case for the imposition by the testator of any special terms, and time was not declared to be of the essence of the gift. Nor is there anything in the circumstances which requires that this court should declare time to be of the essence of the gift or quasi contract. The strictest rule would at least give a reasonable time to exercise the option, and equity would relieve a party entitled to the right from the effect of failure to exercise it by reason of physical inability. Here the beneficiary had fully made up his mind to accept the gift upon the terms named, but was prevented from exercising it in a formal manner by

disease and death. There never was any difficulty at any time on the part of the trustees in compelling him to declare himself one way or the other in a conclusive manner. Either of them could have applied to him in person, and asked him to say in writing what he proposed to do. Mr. Wayne Parker could, after the funeral, have prepared two papers, two lines each, one saying, "I accept the option to purchase under my father's will;" the other, "I decline to accept the option to purchase under my father's will,"—taken them to his uncle Richard, sick as he was, and asked him which he desired to do, and he could have signed one or the other in two minutes. And I cannot for a moment doubt but that, if he had been aware of his uncle's critical condition, he would have done so cheerfully. He certainly knew, from what his aunt said to him, what his uncle Richard's mind was, and it is clear that the only ground for postponing immediate action was the matter of negotiating as to which side of the dwelling the 40-foot entrance to the rear lot should be left. That was a matter which required some negotiation and mental effort, and was very properly postponed in the hope that his uncle Richard would soon be in a condition to discuss it. Looking at the verbiage and frame of the will, I cannot think that the testator intended or expected that the right of his son to the house and lot in question should depend upon such a slender tenure as the trustees feel constrained to contend for here. He did not, as I read the will, have in mind that his son should bear to his son-in-law and grandson, acting as trustees, the relation of a party holding a written option to purchase land, to be exercised only according to the letter of a contract, and avoided by a failure to strictly fulfill certain specified conditions. In other words, he did not expect the parties would stand at arm's length. In my judgment, he contemplated a certain state of mind on the part of his son, to be communicated in conversation to the trustees named in his will, who, as trustees for the son, as well as his relatives and personal friends, would do what was necessary to carry out his will. It was evidently his expectation and wish that his widow and son should live together in the homestead during her lifetime; that his son and family should continue to occupy that homestead after her death during his son's lifetime, with the privilege of a home for his daughter Frances if she needed it. At the death of his son he wished it to go to his grandsons, upon their attaining 25 years of age,—all upon condition that the son should consent that the trustees should take \$5,333 out of his share of the personal estate, and add it to the shares of his sisters. This has all been accomplished up to the death of the son. The question of the payment of taxes and insurance was a matter entirely between the mother and son, and was presumably settled amicably between them. And so with regard to Mrs. Seeley's right. It never came

into existence, because she did not survive her mother, and so has no place here. The son, immediately upon his mother's death, was ready to give the requisite consent to the depletion of his share, when required, and occupied the house until he died. It seems to me that it would be a harsh construction of the will, and going contrary to the wishes of the testator, to say that the grandson may not now accept his grandfather's gift by formally acceding to the terms imposed.

It seems to me that the case differs little, if any, from those dealt with in *Skillman v. Van Pelt*, 1 N. J. Eq. 511, and *Yawger v. Yawger*, 37 N. J. Eq. 216. In the first the devise was: "To my sons, Abraham and James, my farm whereon I now live, to them, their heirs and assigns, forever, to be equally divided between them, provided they or their heirs shall pay or cause to be paid to my executors hereinafter named the sum of thirty-five hundred dollars within eighteen months after my decease, which said sum of money is to be paid by them equally, each one-half." And Abraham (one of the devisees) and a stranger were appointed executors, with power of sale. After the testator's death, October 31, 1820, the executors proved the will; and the devisees entered and took possession of the premises, and on the 25th of November, 1820, made partition thereof between them, by mutual releases. It was held that under this will the devisees took an estate in fee simple in the devised premises, charged with the payment of \$1,750 each, and that "the payment of this sum was not a condition, on the breach of which the right vested in the executors to sell. They could assert their claim under the will only by suit or bill." In *Yawger v. Yawger* the testator devised to his son John C. a farm of 103 acres, by his allowing and paying for the same the price of \$80 per acre. The testator died September 11, 1882, and his son John C. October 6th following. The learned vice chancellor says: "It was alleged that while John C., in his lifetime, did not reject the provisions of the will in his behalf, he did not accept them; in other words, he made no positive election. It was suggested that, because John did not in some positive way signify his acceptance of the devise of the land and the bequest of the legacy, the title never descended to him, but was, by force of law, cast upon the heirs at law." And further on: "The devise and the legacy to John were beneficial to him. He must therefore be presumed to have accepted them. A gift imports a benefit, and an assumption to take a benefit may well be presumed." It is true that we have not here, as in those cases, a direct devise to the son, subject to the payment to the sisters; but I think it is, in substance, the same. For in the cases cited the testator could not impose upon the devisees a gift subject to the payment of a fixed sum without their consent. The consent in the two cases cited was quite as essential and requisite as here. And in this case, as in those cited, the payment of the

price is not a condition precedent to the vesting of the title. All that is necessary to vest the title is that the devisee shall accept the devise upon the terms named. The trustees hold in their hands the money to pay the price named. An instructive case in the same direction is *Merrill v. Emery*, 10 Pick. 507, decided by Chief Justice Shaw. The testator in that case gave his wife certain personal property absolutely, and the use of his household furniture and pew in church for life; "the foregoing bequests being subject to the following conditions, viz.: That my said wife shall relinquish all her right of dower in my estate, and provided, also, that she educate and bring up my granddaughter Mary L. Richards until she arrive at the age of eighteen years, or is married, as the case may be." On the evening succeeding his funeral his wife sickened, and died on the seventh day from his death, without ever having expressly, by writing or other proceeding, in the probate court or elsewhere, waived the provision made for her in the will, nor did she ever claim dower. The value of the bequests to the widow was greater than all the real estate of the testator. The action was by the administrator of the widow against the executor of the will, and it was held that she was entitled to recover the personalty bequeathed to her. The learned chief justice in support of his opinion uses this language: "One of the conditions was that the legatee should relinquish her right of dower in the estate of the testator. We think it would be a forced construction of the will to construe this a condition precedent, in the manner contended for. It did not imply that the widow should by any express and formal act release her dower; it would be a sufficient compliance that she made no claim, but tacitly waived her right. The plain intent was that she was not to have the provision in the will and also her dower, and the same construction would have been put upon this request, by force of the statute, had the will contained no such condition. In such case a widow has a reasonable time to make her election, and, unless she elects to claim her dower, her right to the provision under the will is not defeated or suspended. In the present case it is manifest that the widow did no act in her lifetime denoting any intention to claim her dower, and certainly no unreasonable time elapsed, within which she could make her election. But there is another view of the subject, which is this: whether, where a personal right depends upon an election, and no express election is shown, nor any positive act or declaration manifesting such election, an election is not to be presumed from the circumstances; and we think it may be. The question, then, is, what was the widow's presumed election? to determine which it becomes necessary to look into the facts. It appears by a reference to the inventory, which is now made part of the case, that the whole of the testator's real estate was not equal in value to the provision in the will. It is manifest, therefore, that she

could not, without acting greatly against her interest, elect to take one-third of this real estate for her life, the provision in the will being obviously so much more beneficial. The presumption of law, therefore, is clear, that she must have elected the provision in preference to her dower. The first condition, therefore, does not stand in the way of the plaintiff's recovery. The other condition was that the legatee should educate and bring up the testator's granddaughter. This is clearly a condition subsequent. It was to be performed for a time which might, and probably would, continue long after the legacy was to vest. The defendant objects that it was not complied with. To this there are two answers, depending upon the force of the terms 'educate and bring up.' If they imply personal, parental care, then the duty terminates with her own life, and the condition was performed. She did educate and bring up the granddaughter so long as she lived, though it was, indeed, for a very short period. Besides, in the case of a condition subsequent the act of God excuses nonperformance. But, if 'to educate and bring up' means to furnish subsistence to the granddaughter, then the condition was a mere charge on the legacy, and it might be performed by the personal representative, and would not prevent the legacy from vesting. We think that a personal care was intended, and consequently that by the death of the legatee the legacy became discharged of the condition." This reasoning seems to me to apply with force to the case in hand.

The line of authorities relied upon by the counsel of the trustees, namely, *English v. English's Ex'rs*, 3 N. J. Eq. 504, *Baldwin v. Vreeland*, 43 N. J. Eq. 446, 11 Atl. 341, and *Young v. Young*, 51 N. J. Eq. 491, 27 Atl. 627, seem to me to have little bearing upon the present case, and what little they have is against, rather than for, the position of the trustees. In *English v. English's Ex'rs*, the question was whether a widow who had a vested estate in dower in land had lost that estate by electing to take a bequest of money made expressly in lieu of dower. It was in fact a matter of a choice between two conflicting claims. Certain acts and doings were relied upon as amounting to a binding election to accept the legacy and renounce her dower. The much-quoted language of Chancellor Vroom (pages 508-510) applies to the case of a party choosing between two conflicting claims, and follows *Dillon v. Parker*, 1 Swanst. 359, at page 382; and it was held that, by the conduct in question in *English v. English's Ex'rs*, the widow had not finally determined to accept the legacy in lieu of her dower. This case was followed in *Young v. Young*, 51 N. J. Eq. 491, 27 Atl. 627, where the question was of the same nature, though not arising out of a right of dower, and was, in effect, a choice between two inconsistent claims. The principle established in such cases is thus stated by Chancellor Vroom (*English v. English's Ex'rs*, 3 N. J. Eq. 509, 510): "What acts of

acceptance or acquiescence are sufficient to constitute an election cannot be designated with sufficient precision to justify a general rule. Each case, as it occurs, must be governed by its own peculiar circumstances. The general questions are whether the parties acting or acquiescing were cognizant of their rights, whether they intended to make an election, whether they can restore the individuals affected by their claim to the same situation as if the acts had never been performed, or whether these inquiries are precluded by lapse of time. * * * There must be some decisive act of the party, with knowledge of her situation and rights, to determine the election, or there must be an intentional acquiescence in such acts of others as are not only inconsistent with her claim of dower, but render it impossible for her to assert her claim without prejudice to the rights of innocent persons." There is in the present case no question of choice between inconsistent claims, but merely one of the acceptance of a gift upon terms. And if Col. Stites, or his son, Richard, the present defendant, had said and done certain equivocal and indeterminate things indicating an intention not to accept the devise upon the terms mentioned, those cases would be authority for the position that they might, in the absence of irretrievable action by the parties adversely interested, retract what they had said and done, and finally accede to the terms and accept the gift. In *Baldwin v. Vreeland*, 43 N. J. Eq. 446, 11 Atl. 341, there was a devise of land to a trustee, with power and direction to sell and divide the proceeds among several persons named. The beneficiaries united in an agreement to sell the premises at a price named, which, however, was never carried out. Subsequently one of the beneficiaries sold and conveyed his interest in the land to an outside party, and afterwards the executors, at the request of the other beneficiaries, proposed to exercise the power of sale; and the question was whether the uncompleted agreement entered into by the beneficiaries to sell was such an expression of an intention to take the land itself, instead of the proceeds of its sale, as destroyed the power of sale, and it was held that it was not. Clearly, the decision does not apply here.

Stress was laid at the argument upon the parenthetical expression, "but not for speculation," found in the devise in question, and it was argued that giving the unfettered title in fee to the grandson will run counter to the expressed wish of the testator. But I think this argument misconstrues the force and purpose of that expression. It was not relied upon by the testator to limit the estate given to his son. That was done by vesting it in the trustees for the life of the son, and until the grandson attained 25 years of age. After the death of his son, and the arrival of his grandson at the age of 25 years, it was his clearly expressed will that the grandson should have an unfettered fee simple. The true office of the expression in question, as I read the will,

was to express one of the reasons which influenced the testator in making this provision for his son and grandson, and for limiting the son's estate therein. I will advise a decree in accordance with the foregoing views.

BENTLEY et al. v. BENTLEY et al.
(Court of Chancery of New Jersey. Aug. 21, 1897.)

WILLS—CONSTRUCTION—INFANTS—DISABILITY—ESTOPPEL—COSTS IN EQUITY.

1. A will provided: "After payment of my debts, I give, devise, and bequeath to my wife, during her widowhood, the income of all my estate, both real and personal. * * * After the marriage or death of my said wife, I give, devise, and bequeath to my children my whole estate. * * * I nominate and appoint my wife sole executrix of this, my last will and testament, and hereby empower, authorize, and direct her to sell and convey any or all of my real estate as to her shall seem meet, and authorize and empower her to execute sufficient deeds to the purchaser thereof." A codicil declared: "I do hereby authorize and direct that, so long as my wife remains unmarried, that she may make and continue such investments of my estate as to her shall seem best, and that she shall not be held accountable for any loss or mismanagement incurred during said widowhood, nor shall she be compelled to account for the said estate or its management by any court or officer authorized for that purpose during said widowhood." *Held*, that the grant to the wife of the income only of the estate was not enlarged by the clause appointing her as executrix, nor by the codicil, nor did they authorize the appropriation by her of any portion of the corpus of the estate for her own or her children's benefit.

2. Minor children, who are beneficiaries of their deceased father's estate after the expiration of the life estate of the mother, who is also executrix, are not estopped from bringing a suit to restrain waste by the executrix, incurred in attempting to maintain a high standard of living for herself and children.

3. In a suit to restrain an executrix from committing waste, the defense was an unwarranted contention that she had complete power under the will to dispose of the corpus of the estate for her own benefit and that of her children, who were the only other beneficiaries under the will. The decree granted an injunction to restrain the waste, and appointed a receiver to manage the property. *Held*, that plaintiffs' costs should be paid from the estate, but defendant's costs must be paid by her.

Bill by Emily P. Bentley and others against Emma Bentley and others to restrain waste. Heard on bill, answer, and proofs. Decree for complainants.

This is a bill by remainder-men against the tenant for life, to restrain waste. The complainants are three of the children of the late Peter Bentley (second of that name), of Jersey City, and the defendants are the widow and four infant children of Mr. Bentley. The infant defendants are in the same interest as the complainants. The widow is the sole executrix of the will of Mr. Bentley, and also, by its provisions, entitled to the use of his whole estate during her widowhood. He died in April, 1888, leaving seven children, ranging in age from 3 to 17 years, viz. Eleanor B., Emily P., Peter, Richard, John, Eugene,

and Parker. The bill was filed on the 9th of January, 1894, and upon its presentation to the chancellor he made an order that Mrs. Bentley show cause why an injunction should not issue restraining her from further dealing with the estate, and a receiver of the estate of the deceased be appointed in accordance with the prayer of the bill. Mrs. Bentley answered the bill on the 12th of February, and, after argument, the chancellor announced a decision¹ on the 19th of February, 1894, which was embodied in an order made on the 5th of March. The injunction was granted, enjoining Mrs. Bentley from selling or incumbering the estate of her husband, and the receiver appointed, who has since had charge of it. The gravamen of the bill is: First, that Mrs. Bentley claimed, assumed, and exercised greater rights and powers under the will than the instrument warranted; and, second, that she had mismanaged and wasted the estate. Both of these matters the chancellor, as the order shows, determined against her upon the case as then presented to him. The will, which was made in July, 1871, and about a year after the marriage, is in these words: "After payment of my debts, I give, devise, and bequeath to my wife, Emma, during her widowhood, the income of all my estate, both real and personal, as well that which I may be possessed of as all that which I am now possessed of. After the marriage or death of my said wife, I give, devise, and bequeath to my children my whole estate, be it real or personal, in fee simple; all after-born children to be bound by this will. I nominate and appoint my said wife, Emma, sole executrix of this, my last will and testament, and hereby empower, authorize, and direct her to sell and convey any or all of my real estate as to her shall seem meet, and authorize and empower her to execute sufficient deeds to the purchaser thereof." In March, 1882, he made a codicil as follows: "I do hereby authorize and direct that, so long as my wife remains unmarried, that she may make and continue such investments of my estate as to her shall seem best, and that she shall not be held accountable for any loss or mismanagement incurred during said widowhood, nor shall she be compelled to account for the said estate or its management by any court or officer authorized for that purpose during said widowhood." It was suggested that Mr. Bentley was prompted to make this codicil by a then recent decision of one of our courts holding executors liable for loss arising on assets which they found in an estate, and continued to hold, but which were not such as they would be justified in investing the funds of the estate in, in the first instance. His widow proved this will, and took possession of the estate, which she found in a complicated and embarrassed condition. It consisted of several pieces of real estate in Jersey City, all unincumbered except by arrearages of taxes,

of some of which Mr. Bentley was the sole owner, but others he held as tenant in common with his sister, Mrs. Towar, having derived title by descent or devise from his father, Peter Bentley, the first. The personal estate consisted of a one-half interest in a railroad obligation of \$100,000, which was held for life by the widow of the first Peter Bentley; of a bond against a gas company for \$20,000, the validity of which was disputed; a claim for professional services against the Lehigh Valley Railroad Company, for an indefinite amount, but which was afterwards adjusted for \$12,500; \$2,600 of bank stock, and \$550 of electric light company's stock. Besides these, there were some ordinary fees due him for professional services in a number of causes; a pleasure yacht, which had cost a large amount of money; and ordinary house furniture. He was indebted for arrears of taxes to the amount at least of \$16,000, and also to the Hudson County National Bank in the sum of over \$21,000, \$15,000 of which being for direct loan, and \$6,000 his liability on indorsements. He had assigned to the bank as collateral his reversionary interest in the \$100,000 railroad obligation. In addition to the foregoing, he owed divers individuals on various accounts nearly, if not quite, \$10,000. The gross annual rental value of the real estate was a little over \$5,000, but, taking out taxes and repairs, would amount to between \$3,000 and \$4,000. His professional income had been considerable, and he had lived in rather expensive and extravagant style, but for a short time before his death had somewhat contracted his expenditures by dropping horses and carriages and coachman. After his death the widow kept the family together, continued to live in the homestead mansion, and attempted to further contract the expenses of living, but did not bring them within the income of the estate. She collected the claim against the railroad company, receiving \$12,500. She collected, also, some arrears of interest upon the gas bond, to the extent of \$3,700, and then compromised the bond itself at \$15,000. She also sold the bank stock and electric light stock, and also divers pieces of real estate, and made some payments on account of the debt to the bank. In all this she acted upon the idea that she had, by the will, unlimited power over the body of the estate during her widowhood, and was not subject to be called to account by anybody for her dealings therewith; and she claims such right and power by her answer, and by her counsel in argument before the chancellor; and in accordance with that idea she kept substantially no account of such dealings. She, however, annexed to her answer several schedules, by which she admits receiving from the proceeds of the personal estate and rents due at the testator's death, about \$38,807, omitting, however, \$3,700 of interest on the gas bond, and from sales of real estate about \$19,195, making about \$58,000 in all. She claims to have paid out of

¹ No opinion filed.

that, on account of arrears of taxes, \$10,600, due at decedent's death, and about \$20,500 on account of debts due by the testator at his death, and the expenses of his last illness and funeral; leaving still due, however, by the testator, about \$16,000 to the bank and about \$6,000 arrears of taxes. She admits receiving as income of the estate for 5½ years \$20,700, an average of about \$3,600 a year, including \$450 dividend on bank and electric light stock, but not including \$3,700 interest on the gas bond. She claims that she paid for taxes accruing after the death of testator, and for the maintenance of the estate, \$7,500; that she paid for interest on the bank debt about \$6,200; and that the balance of what she received went to the maintenance of herself and family. By another schedule she says that she has received in 5½ years from the body of the estate, over and above what she has expended for debts of the testator and cost of maintenance, about \$22,000, and that the net income has been about \$13,000, making about \$35,000 which she has expended for living, to which must be added the omitted item of interest on the gas bond, \$3,700. For this expenditure the schedule states that she can produce receipts for household expenses amounting to \$28,000, leaving by her schedule about \$7,000, but, adding the item of interest just mentioned, between \$10,000 and \$11,000, unaccounted for, except that it went for general living expenses. By schedules handed up by counsel for defendant at the argument on final hearing the average amount of the body of the estate applied annually to family maintenance was \$3,862.86, the average net income was \$2,297.07, making a total annual expenditure of \$6,179.93, making an average to each member of the family of \$772.49. In other words, living expenses were supplied from the two sources in the ratio of three from the body of the estate and two from the income. At the hearing the matter of the management of the estate in respect to the making of sales, and so forth, was gone into extensively, as well as the application of the funds which she had received as the proceeds thereof. With regard to the latter it appears that the amount expended was substantially as stated in the answer and schedules, and that she had continued to live in the mansion house of the deceased, and that all the children had lived with and been supported by her until the filing of the bill, except that the elder child had married, and left home. With regard to the management of the estate in the matter of sales, and so forth, it did not appear that the estate had suffered any serious loss in any of the sales made. With regard to the claim of unlimited power over the estate during her widowhood, it appeared that she was so advised by a very young member of the bar of this state; that she took no other advice upon that question, except that of an experienced counselor of New York, who declined to give her advice upon the subject, and only acted as a friend in the matter of ne-

gotiating sales and settling with creditors, and so forth.

Gilbert Collins, for complainants. Cortlandt Parker and Earle Insley, for defendant.

PITNEY, V. C. (after stating the facts). 1. The question raised upon the construction of the will has already been determined by the chancellor in this cause. The order appointing the receiver is in these words: "And the chancellor being of the opinion that the intention of the testator was to limit the defendant in expenditure to the income only of the said estate during her widowhood, and that the powers and immunities with which she is clothed by said will were designed to protect her from any annoyance and danger in the bona fide exercise of her discretion in making and continuing investments and otherwise managing the estate, and from responsibility for losses occasioned thereby, but that such powers and immunities were not intended to enlarge the estate by the will first given to her, or to authorize the appropriation by her of any portion of the corpus of the estate of her husband for her own or her children's benefit." The learned counsel for defendant claimed and was accorded the right to be further heard before me upon that part of the case, but his elaborate and ingenious argument has not manifested to me any unsoundness in that opinion, in which I fully concur.

2. With regard to the management of the estate with respect to sales and renting, etc., I think the defendant has succeeded as well as the testator had any right to expect that she would succeed. I am unable to believe that at the time he made the codicil he contemplated or expected to die leaving his estate in the embarrassed and complicated condition in which it was when death overtook him. No doubt, if his estate had been free from debt, and no arrears of taxation upon it, and had acquired such proportions that the income would support his family, his widow would have been quite competent to manage it. But he was, comparatively, still a young man when he died, and had been launching out into some hazardous operations, had been indulging in expensive habits, had appropriated some trust moneys, was largely in debt to his own sister for rents collected, and had permitted taxes to accumulate and become liens to a large amount upon his estate. To manage such an estate, extract it from its difficulties, pay the debts, and at the same time manage a large family of young children, was altogether beyond the capacity of the defendant. The facts developed at the hearing do not vary materially, and certainly not favorably to the defendant, from those which appeared before the chancellor on the application for an injunction. Upon those he concluded that the control of the estate should be taken from the defendant.

Criticism was made upon the prayer of the bill that the defendant should be removed from

ber position of executrix. Of course, this court has no power to do that, and so much of the prayer of the bill was properly abandoned; but it does pray further that she may be enjoined from further management of the estate, from executing the power of sale conferred by the will, from disposing of any of the personal estate, and that some fit and proper person may be appointed as receiver of the estate, real and personal; and for other relief. The power of the court to grant this relief cannot be disputed. The serious charge against the defendant is that she had assumed an unwarranted power over the estate, and exercised it to the extent of living at a rate of expense far beyond what the situation of the estate warranted. In answer to this it was said that these very complainants had the benefit of that in part. But there can be no estoppel in this case as against infants. As soon as they came of age (and, with regard to one or two of them, before they came of age), they saw the impropriety of their mother's expenditures, and applied for this remedy, and they are entirely justified in doing so for the protection of the estate against further depreciation, although they themselves, while infants, had the benefit of the waste that had previously occurred. It appears that the defendant never sat down and calmly estimated the amount of the estate after paying debts, and the amount of the net income, in order to arrive at a just conclusion or determination as to how much money the family ought to spend, but simply went on living as nearly as she thought she could afford in the style that the family had previously lived when the husband was alive and able to provide by his own daily exertions. This failure to calmly consider the situation and deal with it accordingly shows the incapacity of the defendant to act as the conservator of this estate, and to regulate the expenditures under it. It seems to me that \$700 or \$800 a year for each member of the family, including small children, was altogether too great an expenditure, considering the situation and amount of the estate. But there is nothing in the evidence to indicate that the defendant was aware how much she was spending, or how much she was depleting the estate, until made so by the exigencies of this suit.

It was urged by the defendant's counsel as sound law, and in it he is probably right, that a certain amount of depletion of the corpus, to be used in supporting and educating the children during their infancy, was justifiable in this case, and that in dealing with the present instance the court ought to allow the widow so much out of the corpus as it would have allowed if application had been made to it before any such expenditure had been made. The courts have made such allowances in proper cases, the latest instance to which my attention has been called being the case of *Alling v. Alling*, 52 N. J. Eq. 92, at pages 94, 96, 100, 27 Atl. 655, at pages 655, 656, 661. But the complainants ask no accounting

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against the defendant. They distinctly disavow any desire to compel their mother to refund any moneys spent, and the suit is not framed in that view. All they ask is protection for the future; and the question of whether or not the expenditures were reasonable is only important as showing the judgment and capacity of the defendant in the premises. And in that view it seems to me that the expenses were altogether too extravagant. Thus it appears that every summer she spent from six to eight weeks in the country with her children, at an expense of \$125 or more a week. And it is very plain that the court would not, in this case, have authorized the expenditure at a rate of three parts of the corpus to two parts of the income for the support of this family in the manner that it was supported. Much detail was gone into as to the habits of the family, and the manner in which the children were reared, which I do not consider it necessary here to comment upon, except to say that while it shows the defendant to be an affectionate mother, it also shows her to be lacking in sound sense, judgment, and discretion. The defendant's counsel did not ask that the control of the estate should be restored to the defendant until after so much of the property was sold as would suffice to pay all these debts and extricate the estate from its complications, but he urged that no decree should be made that would prevent the restoration of the estate to the wife when that end should be attained, and further asked that the costs of the litigation, including counsel fees to the defendant, should be paid out of the estate. It is unnecessary now to decide when, and under what circumstances, the court may withdraw its restraint, and restore the control of this estate to the defendant. But with regard to the question of costs and counsel fees, in view of the attitude taken by the defendant in her answer, and by her counsel in the argument before the chancellor, and even at the final hearing, I am unable to see any ground upon which I can allow costs and counsel fees to the defendant. She set up an unfounded, and I think unwarranted, claim to the complete control of this estate, and her conduct shortly before the filing of the bill was such as did, in fact, alarm her children, and I think there was enough, at least, in it to justify their alarm. The costs of the complainants, including the disbursements for writing out the evidence, etc., will be paid out of the estate. I will advise a decree accordingly.

(55 N. J. E. 674)

WHITTAKER et al. v. BELVIDERE ROLLER-MILL CO. et al.

(Court of Chancery of New Jersey. Aug. 10, 1897.)

MORTGAGES—BONDS—RIGHT TO ASSIGNMENT ON PAYMENT—DEMAND—FORECLOSURE—TENDER—PAYMENTS INTO COURT—RIGHTS OF SECOND MORTGAGEE—MARSHALING SECURITIES.

1. When a mortgage securing payment of several bonds is in process of foreclosure, an offer

to pay that one of the bonds which is held by the complainant, and the costs of the pending foreclosure to date, accompanied by a demand for an assignment of the bond, is not such a tender as will stop the running of interest or the accruing of costs.

2. Such a demand can only be made in behalf of some person having an equitable right to stand in the place of the holder of the bond, and that right must be disclosed when the demand for assignment is made.

3. The demand must be made upon the holder, or some person authorized to make the assignment. A solicitor employed to collect the bonds by foreclosure of the mortgage has no power to assign them, and is not a proper person upon whom to make a demand for an assignment.

4. A payment to the clerk of the court of moneys due in a pending suit, without a special order directing the payment to be made, is of no force, unless some statute or general rule of the court authorizes the payment to be made.

5. The right of a second mortgagee to have the assets and securities marshaled so that a preceding mortgagee may be required to look first to the lands on which the second mortgage is not a lien is absolute against the mortgagor, and against his voluntary fraudulent grantee of the lands on which the second mortgage is not a lien.

6. The purchaser at a foreclosure sale under a second mortgage receives the title which the mortgagor had at the time of the delivery of that mortgage, and, attendant upon that title, he takes the right which the second mortgagee received to have the assets marshaled, and he may assert this equity against the subsequent voluntary and fraudulent grantee of the mortgagor.

(Syllabus by the Court.)

Bill by Josephine Whittaker and others against the Belvidere Roller-Mill Company and others to foreclose a mortgage. Heard on bill, answer, etc.

The bill in this case was originally filed by Josephine Whittaker, as sole complainant, against the Belvidere Roller-Mill Company, Adam B. Searles, and William H. Searles, executors, etc., of Frederick Searles, deceased, and others, defendants, to foreclose a mortgage, with prayer that the defendants answer under oath, and for the ordinary decree for foreclosure and sale of the mortgaged premises. On and prior to May 22, 1890, Adam B. Searles was the owner of four lots of land in the town of Belvidere; lot No. 1 being a mill property situate in, and being part of, the block lying between Front street, Second street, Depue street, and the Delaware river, and the other pieces lying separately and having other uses. At that time Searles was in financial distress, and his creditors were pressing him for settlement. He sought to arrange with them, and was able to induce an agreement to be entered into by all but one Hess. The latter refused to parley or delay, and was pushing a suit for his claim against Searles to judgment. Searles made bonds to the complainant and a number of others of his creditors, obligating himself to pay their several debts upon the death of his father, Frederick Searles. These bonds he secured by a mortgage made to the complainant and other several bondholders, and recorded on May 22, 1890. The mortgage covered lot No. 1 (the mill property), and also lots Nos. 2, 3, and 4, and will hereafter be referred to as the

"complainant's mortgage." On May 23, 1890, Searles made another bond and mortgage to Robert E. Morris and others of his creditors (one of whom was Levi Ott) to secure payment of several bonds also made by him to each creditor. This mortgage was dated and recorded on May 23, 1890, at 1:20 p. m., and will hereafter be referred to as the "Morris mortgage," and included only lot No. 1, the mill property. On the same day, May 23, 1890, Searles conveyed to Levi Ott the whole block lying between Front, Second, and Depue streets and the Delaware river, including the Mill property (lot 1) in the description of that block, and also another lot on South Water street, not included in any of the mortgages. This deed was dated May 23, 1890, and was expressed to be in consideration of \$1, and contained a recital that the conveyance was not to be deemed to affect the interests of Ott in the mortgage made by Searles to Morris, Ott, and others on lot No. 1 (part of the property conveyed), but that Ott's interest in that mortgage was to continue to be a lien on lot No. 1. This deed also contains covenants of seisin, power to convey, general warranty, and against incumbrances, except from certain named mortgages, of which two are those of the complainants and Morris and others. It was recorded May 23, 1890, at 3 o'clock and 30 minutes, afternoon. On the same day, May 23, 1890, Adam B. Searles conveyed lots Nos. 2, 3, and 4 to his son Roderick B. Searles, by deed expressed to be for the consideration of \$100, with full covenants of seisin, power to convey, general warranty, and against incumbrances, except five mortgages, of which the complainant's is one. This deed was recorded May 23, 1890, at 5 o'clock and 10 minutes, afternoon. Neither of these two deeds contained any covenant or agreement on the part of the grantees to pay off any of the incumbrances. On the 18th day of August, 1890, Ott conveyed to the Belvidere Roller-Mill Company lot No. 1 in the complainant's mortgage (the mill property), with slight variances in the boundary lines, by which the lot conveyed to the Roller-Mill Company is somewhat less than that mortgaged to the complainants, leaving the title to two strips of land, parts of lot No. 1, of the mortgaged premises, still remaining in Ott at that date. This deed contains an agreement on the part of the grantee to assume and pay four mortgages, one of which was the complainant's, and another the Morris mortgage, as part of the consideration of this conveyance. It was recorded on the 24th day of November, 1890. The Belvidere Roller-Mill Company entered into possession under this conveyance, and paid off a number of the bonds which were secured to be paid by the complainant's mortgage. A number of them, however, remained unpaid. Among these was one held by Josephine Whittaker, the original complainant, and another held by Frederick Searles, who died in February, 1894, testate, and whose executors have been admitted as complainants, and are now prosecuting

this suit. Josephine Whittaker filed the bill in this case on December 20, 1895, for the foreclosure and sale of all four of the lots constituting the mortgaged premises, making her co-mortgagees, and the holders of the Morris mortgage, and the grantees of Adam B. Searles, defendants. While this suit was pending the holders of the Morris mortgage also foreclosed upon lot No. 1, and it was purchased at the foreclosure sale from the sheriff by the defendant Philip M. Miller. On January 13, 1896, after he had bid in the property, but before he had any deed, an offer to the solicitor of the complainant in this cause, made on the last-named date, was claimed to be a tender of the amount due to the then sole complainant, Josephine Whittaker. This offer was refused because coupled with a demand for an assignment of the claim. Shortly afterwards, on the 3d day of February, 1896, the executors of Frederick Searles were admitted as parties complainant. On the 4th day of February, 1896, the defendant Philip M. Miller, as purchaser of lot No. 1 under the Morris mortgage, and the defendants Henry B. Miller, L. De Witt Taylor, and John M. Morris, claiming to be holders of certain of the bonds secured by the complainant's mortgage, were admitted as defendants. At some time after this (the date is left uncertain by the proofs) the amount claimed to have been tendered the complainant's solicitor was paid to the clerk of this court by the defendants' solicitor. The defendants L. De Witt Taylor, Henry B. Miller, and John M. Morris, claiming to be the holders of some of the bonds secured by the complainant's mortgage, filed their joint and several answers, setting up their interests as owners of those bonds; and the defendant Philip M. Miller, the owner of lot No. 1 by purchase under the Morris foreclosure, sets up, by way of answer and cross bill: First, the alleged tender and payment to the clerk, which, it is asserted, satisfied the amount due Josephine Whittaker, then the sole complainant; second, the equity of the defendant Philip M. Miller, as owner of lot No. 1, to have lots Nos. 2, 3, and 4 (title to which stands in the name of Roderick B. Searles) sold and applied to the payment of the complainant's mortgage debt before lot No. 1 is so applied. The case came to a hearing upon the bill, answer, and cross bill, and testimony was taken in support of the issues raised.

J. H. Dahlke, for complainants. L. De Witt Taylor, for defendants.

GREY, V. C. (after stating the facts). This case has been discussed upon these points: First. Was there such a tender of the amount due the complainant that it was effectual to require the complainant to accept the money paid to the clerk, and thus stop the interest and costs? Second. Is the bond (one of those secured by the complainant's mortgage) formerly held by Edward B. Searles, and now claimed to be held by Henry B. Miller, still a

lawful and unsatisfied claim? Third. If a sale of the mortgaged premises shall be directed, what shall be the order of the sale and application of the several parcels to the payment of the complainant's mortgage?

As to the tender: This bill had been filed, in the name of Josephine Whittaker, to foreclose the mortgage now in suit. Besides the complainant Whittaker, there were several other persons who held bonds secured to be paid by the mortgage, but the suit was then in her name alone as sole complainant. The subpoenas had been issued and returned. Mr. Taylor, a lawyer, on the 13th day of January, 1896, called on Mr. Dahlke, the complainant's solicitor, at his office, and stated to him that he represented Mr. Miller, John Morris, and others, showed him \$550, offered it to him, and asked him if he would assign the Josephine Whittaker bond to Mr. Morris. Nothing is proven to have been said to show what right Miller, Morris, and others had to make a tender or to demand an assignment. Mr. Dahlke refused to accept the money or to assign the bond. Subsequently Mr. Taylor paid the money to the clerk of the court of chancery. The amount named was intended to be the total of the debt, and also the costs of this suit up to that date. At the time of the alleged tender, January 13, 1896, Josephine Whittaker was the sole complainant; and it is contended that the offer made satisfied her claim, and terminated her right to any additional interest or costs in this suit. The efficiency of the tender claimed to have been made is denied upon the ground that the offer was not a tender of the payment of the bond, but a proposition to purchase it. To make an effectual tender, it must appear that at the time when it was made the party making it had the right to tender payment of the debt, as in the case of the debtor himself or his representatives, or the holder of the title to the estate on which the debt was a lien; or that he had the right to require a transfer of it, as in the case of subrogation of a surety, or redemption sought by the holder of some subsequent lien, having that equity. The demand should clearly disclose the right of the party making the offer, so that the creditor may be notified of his duty to accept. The party to whom the tender is made must be the holder of the debt, or some person representing him, who has, at the time of the tender, power to accept it, and, if the circumstances call for a transfer of the debt, has also power to assign it. The offer proven in this case was clearly not one to pay and satisfy the debt. It was a request to assign it upon payment of the amount due. The attorney who made it himself testifies that the complainant's solicitor offered to accept the money and deliver over the bond, canceled. This was refused. The solicitor was willing to accept payment and cancel the bond, but he would not assign it. No evidence has disclosed that Mr. Morris had, in his own individual capacity, any position which entitled him to demand an assignment of the complainant's

bond; and, if he had any such, it was certainly not disclosed to the complainant's solicitor at the time of the offer to pay the money, so that it might clearly be known in what right the demand was made. Nor has it been shown that the complainant's solicitor, of whom alone the request was made, had any power to assign the complainant's bond to Mr. Morris, either in satisfaction of payment offered, or in recognition of a lawful offer to redeem. Presumably, after suit was brought the bond was in the hands of the complainant's solicitor for collection; and, if payment was made, cancellation and delivery of the bond might be held to be incidental to the business he was authorized to do for the complainant. If any one was entitled to an assignment of the bond, the demand therefor should, in my view, have been made upon the obligee or owner; for a solicitor engaged in collecting a bond by foreclosure of a mortgage securing it has not, as incidental to that business, power to assign it. If a demand for an assignment upon tender of amount due to a solicitor is to be supported, it must be proven that a power to assign has been given by the holder to the solicitor. The date of the subsequent payment to the clerk of this court was not stated in the answer, nor was it definitely proven in the evidence; but I am satisfied that the money was not actually paid until after the additional complainants had been admitted, and some time after the answer was filed. When the tender made after suit begins is set up as a defense, the money must be paid into court with the filing of the answer. *Shields v. Lozeur*, 22 N. J. Eq. 452. But, whenever it was paid, the payment was made to the clerk without any accompanying or previous order of the court granting leave to pay it into the custody of the court. A payment to the clerk of the court without the support of some statute or general rule of the court authorizing it, or some special order directing the payment to be made, is of no force or validity. *National Docks & N. J. J. C. Ry. Co. v. United New Jersey Railroad & Canal Co.*, 52 N. J. Eq. 372, 28 Atl. 673. The complainant was not bound to notice this payment to the clerk. It did, however, become forceful, as against the complainant, when she petitioned the court, asking to be allowed to take it out of court in satisfaction of her bond. This application was, in effect, an acceptance of the tender. The date of this application was the 23d day of March, 1896. On the 4th day of February, 1896, long before the date of the actual payment to the clerk, or the application of Josephine Whittaker, the original complainant, for the money, the other complainants, William H. Searles and Adam B. Searles, had been admitted as complainants in respect of their \$1,700 bond, also secured by complainant's mortgage, and the cause was proceeding with them as complainants. No pretense of a tender of the amount due on their bond has been set up. The defense of a tender which satisfied the complainant's claims, and should have terminated the further run-

ning of interest and costs, is therefore a failure, as against either the original or the substituted complainants.

The second point argued is the question: Was the bond (secured by the complainant's mortgage) which was formerly held by Edward B. Searles, and is now claimed to be held by the defendant Henry B. Miller, a lawful and unsatisfied claim? The defendant Henry B. Miller, in his answer, states that long before the bill in this case was filed he furnished the money to take up this bond, and took an assignment of it, and of Edward B. Searles' interest in the complainant's mortgage securing that bond. The complainant's claim is that the bond was paid by the Belvidere Roller-Mill Company under its covenant in its deed for lot No. 1. On April 6, 1895, Edward B. Searles assigned this bond to L. De Witt Taylor, under these circumstances: Taylor had procured a judgment against Searles for one of his clients, and an order for discovery, etc., in aid of his execution. He heard that Searles had this bond, procured an order forbidding its payment, saw Searles, and induced him to assign the bond to him (Taylor), and to allow the amount due on the judgment in part payment for the bond. Taylor paid the balance due on the bond in cash. Taylor swears that he was not then attorney for the Belvidere Roller-Mill Company, that he did this with his own money, and that the bond became his individual property. Edward B. Searles intimates in his testimony that he supposed, in his dealings with Taylor, that he was receiving and discharging, and not transferring, the bond. But he does not deny that Taylor took the assignment as above stated, and that he understood Taylor was going to use it to get the money back. It is obvious that Taylor expected to collect the bond for the benefit of his client for whom he had judgment. If Taylor had paid off and satisfied the bond, there would have been no reason for Edward B. Searles' allowing the judgment to be credited as part payment for the bond, which both agree was done. I think, at this stage of this transaction, the bond was not paid by the Belvidere Roller-Mill Company, but was lawfully transferred to Taylor, and was unsatisfied in his hands. On June 22, 1895, Taylor assigned the bond to the defendant Henry B. Miller, under these circumstances: Not very long (perhaps a week or two) after Taylor had received the bond, he applied to Mr. Yetter, the secretary and treasurer of the Belvidere Roller-Mill Company (the owner of lot No. 1, and under covenant to pay this bond and others secured by the complainant's mortgage), and asked him to furnish the money for this assignment. Mr. Yetter swears he loaned the money to Taylor, and produced a check dated April 17, 1895, indicating that at that date a check for \$454.10 was drawn against the account of the Belvidere Roller-Mill Company. Mr. Yetter testifies that this

check of the Belvidere Roller-Mill Company was given to Taylor for the bond which Taylor had taken up; that Taylor wanted to use the money which he had advanced on this bond, and a party intended to furnish it later. The company had some money at the time, and Yetter states that he, as treasurer, took Taylor's duebill for it, and loaned him the money, not getting the bond. On June 21, 1895, the defendant Henry B. Miller gave his check, not to Taylor, but to the Belvidere Roller-Mill Company, for \$450; and on June 22, 1895, the bond was assigned to him by Taylor. It is quite evident that from April 17, 1895, to June 21, of that year, the money of the Belvidere Roller-Mill Company had been put up to satisfy a request made upon it to raise the amount due on this bond. That company had obligated itself by its covenant in the Ott deed to pay this bond and others, and had paid a number of them. The death of Frederick Searles had brought the bonds to be due. In response to a request for the money due on this bond, that company's check was used, it is claimed, not to pay, but to loan, the amount to the holder; and two months after, on Henry B. Miller's check, drawn to the company's order,—and on which, by the indorsement, it appears to have received the money,—the bond was assigned by the holder to Mr. Miller. How it came about that the company should be paid by Miller for a bond it claims it did not own, and that a transfer of the bond should be made the next day to the party who paid the money to the company, is not explained. The impression I have received from the evidence as to this transaction is that Mr. Taylor secured the bond as he testified; that he wanted the money on it; that he demanded it of the company, which had covenanted to pay it; that it could not refuse payment; and that its treasurer adopted the subterfuge of a pretended loan of the company's funds until an arrangement could be effected by which the bond could be assigned to some one else than the company, to create the appearance that it was still outstanding. The payment by Miller to the company, while he got the assignment from Taylor, satisfies me that the company, after its payment of the amount of the bond to Taylor, was the real owner of it, and the subsequent assignment by Taylor to Miller was made at the company's instance to avoid the appearance of payment of the bond. The company, which had agreed to pay this bond, was, in this view, the real owner of it from April 17 to June 22, 1895; and being, by its covenant in the Ott deed, under the construction given to such a covenant in the cases of *Klapworth v. Dressler*, 13 N. J. Eq. 62, and *Hoy v. Bramhall*, 19 N. J. Eq. 570, and *Stiger v. Mahone*, 24 N. J. Eq. 430, the principal debtor, and bound to pay this debt, its action was, in effect, a performance of its agreement to make payment of the bond; and, having thus satisfied its own debt, its subsequent procure-

ment of the assignment to Miller was a nullity, as against the other parties secured by the mortgage.

The third point discussed was as to the order of sale and application of the several lots mortgaged to secure the complainant's debts. It is insisted with great vigor for the defendant Philip M. Miller that the undertaking of the Belvidere Roller-Mill Company to pay the four mortgages, as part of the consideration money of the conveyance of lot No. 1 by Levi Ott to that company by deed of August 18, 1890, was a personal covenant only, not attaching to the lot No. 1, nor charging any equitable burden upon it to respond first to the payment of the four mortgages assumed to be paid by the company as part of the consideration of the conveyance. It is further urged that the conveyance to Roderick B. Searles of lots Nos. 2, 3, and 4 by Adam B. Searles was in fraud of his (Adam's) creditors, and that lots Nos. 2, 3, and 4, the title to which stands in the name of Roderick B. Searles, the fraudulent grantee, should be treated as if held by Adam B. Searles, the fraudulent grantor, and that they should be first sold to pay the mortgage debts. The mortgage being foreclosed in this suit is subsequent to two of the mortgages named in the deed as assumed to be paid by the Belvidere Roller-Mill Company, grantee. As to these two the bill asks no relief, and asserts no equity. There is no reason that the holders of these prior mortgages should be made parties. The sale will be subject to these prior liens. The other mortgage given by Searles to Morris and others on May 23, 1890, has been foreclosed, and the defendant Philip M. Miller, by purchase at the sheriff's sale, holds title under it. The question involved is the superiority of the equities of the several contesting parties,—the complainants, the defendant Philip M. Miller, and the defendant Roderick B. Searles. To determine this, it is necessary that their relations to each other touching the four several tracts constituting the mortgaged premises should be first ascertained. On and prior to May 22, 1890, Adam B. Searles owned all of the tracts. The complainants are his creditors, as holders of his bonds secured by complainants' mortgage, which became a lien on all four tracts on May 22, 1890. The defendants Henry B. Miller, John Morris, and L. De Witt Taylor claim to occupy the same position. The defendant Philip M. Miller is the purchaser of lot No. 1 of the mortgaged premises under the foreclosure of a mortgage made by Adam B. Searles to Robert E. Morris and others on May 23, 1890, and is entitled to stand in the place and assert the equities of the Morris mortgage. All these parties are therefore creditors, or entitled to the equities of creditors, of Adam B. Searles,—the complainants and the defendants Henry B. Miller, John Morris, and L. De Witt Taylor, claiming under the complainants' mortgage, as of the date of May 22, 1890; and the defendant Philip M. Miller, under the

Morris mortgage, as of the date of May 23, 1890. At the time of the making of both these securities, Adam B. Searles was in great financial distress. These two mortgages were both made to secure the payment of his bona fide debts. He was unable to effect a settlement with another of his creditors, and, to prevent him from realizing his claims, Searles conveyed lots 2, 3, and 4 (mortgaged to the complainants) to his son, Roderick B. Searles. This is the testimony of Adam B. Searles himself. He also conveyed lot No. 1 (the mill property) on the same day to one Levi Ott for the nominal consideration of \$1, in order, as he testifies, "to give time that I might dispose of this property. * * * The proceeds of the property, if it was sold, would come to me." In the deed to Ott was inserted a recital to save Ott's claim, as one of the mortgagees in the Morris mortgage of the lot conveyed, from the operation of a merger. Both Ott and Roderick B. Searles appear to have known that the purpose of these conveyances was to delay the creditors of Adam B. Searles. The latter appears to have had the control of the property conveyed by both deeds quite as completely after as before the conveyances were made. Indeed, it is fully testified by Adam B. Searles himself that the deed to Roderick was made to avoid the judgment about to be entered in a suit pending in favor of the pursuing creditor, Mr. Hess, and he (Adam) has had the rents ever since. The deed to Ott was made at the same time, and was parcel of the same transaction, induced by the same purpose, and the same control was retained by Adam B. Searles over lot No. 1, conveyed by it. In my view, both these deeds were made to hinder and delay creditors, and were fraudulent and void, under the statute of frauds. They must, therefore, so far as they relate to the claims of these creditors, be treated as if they were ineffective, and the title still remained in Adam B. Searles. When the mortgage of the complainants was made, on May 22, 1890, it became a lien on lots Nos. 1, 2, 3, and 4. When the mortgage to Morris and others was made, on May 23, 1890, on lot No. 1 only, the mortgagees, Morris and others, took with their mortgages an equity entitling them to require the complainants to resort in the first instance, for satisfaction of their mortgage, to the other lots, Nos. 2, 3, and 4, mortgaged to the complainants, upon which the Morris mortgagees had no lien, and to look to that lot—No. 1—on which they had a lien only for the residue of the complainants' claim which might remain unpaid from the sale of the other lots. This principle of so marshaling the assets of a debtor that all his creditors may be paid is a well-established head of equity jurisprudence, and is always applied in cases where it is not injurious to the superior claim of the precedent mortgage, and no superior equity has affected this property. In the matter in hand there does not appear to have existed at the time the Morris mortgage was taken any reason why the application of

this rule would affect the complainants' lien injuriously. All the mortgaged lots then belonged to the common debtor, Adam B. Searles. Lot No. 1 was a separate and distinct property, having a special use. Lots Nos. 2, 3, and 4 are not shown to have had any such relations to No. 1 as would require that they should all be sold as an entirety. As the parties stood at the time the Morris mortgage was made, the only party to be affected was Adam B. Searles, the common debtor. All the lots must, in any event, stand to pay the complainants' mortgage, but the complainants cannot resist such order of application for that purpose as may protect the claims of the Morris mortgagees, if it is not injurious to the complainants. Adam B. Searles' interest in the property held by him when the Morris mortgage was given might be affected, but by the mortgages which he had made he had charged the lots with the payment of these debts, and he had no equity which he could assert against such an application of the premises mortgaged as would most nearly pay all of the mortgages. As against him, the right of the creditor to have the assets marshaled was absolute. *Herbert v. Association*, 17 N. J. Eq. 504. As between the parties interested in the lots at the time the Morris mortgage was given, the right of the Morris mortgagees to have the assets marshaled seems to have been unquestionable. It only remains to inquire whether the subsequent events have taken from them their existing equity. After the Morris mortgage had been given and recorded, the deed conveying lots Nos. 2, 3, and 4 to Roderick B. Searles was made. If this had been a bona fide deed for a valuable consideration paid, without notice of the outstanding equity of the Morris mortgagees to have the assets marshaled, the purchaser would have received an interest superior to the latent equity of the Morris mortgage. *Herbert v. Association*, 17 N. J. Eq. 499. But, as has been shown, this deed was a mere sham to avoid or postpone the payment of Adam B. Searles' debts. It had no operation as against Adam B. Searles' creditors who held the Morris mortgage. Their equitable right to have the complainants' mortgage first paid, if possible, out of lots Nos. 2, 3, and 4, was unaffected by such a deed, and so remains to this day, as Roderick B. Searles still holds the title to those lots. No court of equity would permit a debtor, as against whose property an equity had become established, even though it be latent, to nullify its effect by making a purely voluntary deed. To allow this would make such equitable rights not absolute as against the debtor, but existing solely at his will. Nor has the fraudulent voluntary grantee any status to question the justice of this rule, for it does not injure him. He has parted with nothing, and has not changed his position so that he would lose anything by the enforcement of the equity. His deed is unquestionably within the operation of the statute of frauds, and therefore absolutely

futile to vest any rights in him as against the creditors of Adam B. Searles, his grantor. The conveyance to Roderick B. Searles did not, in my view, in any way deprive the Morris mortgagees of their right to marshal the assets.

Next comes the inquiry whether the deed made by Adam B. Searles to Levi Ott on May 23, 1890, conveying lot No. 1, in any way destroyed this equity of the Morris mortgagees. But the same criticism applies to this transaction. This conveyance of lot No. 1 was purely voluntary, for a nominal consideration, and in fraud of Searles' creditors. It contained a covenant of general warranty, and, although it excepts the mortgages in question from the covenant against incumbrances, they are not excepted from the general warranty. If this deed had been for a full and valuable consideration paid, Ott would himself have had a right to the same equity as the Morris mortgagees to compel the satisfaction of the complainants' mortgage, in the first place, out of lots Nos. 2, 3, and 4. As it was a voluntary and fraudulent deed, it had no effect to give him any rights as a bona fide purchaser. He took the same place which his voluntary grantor had held, and no more.

The next step in the title came by the deed of August 18, 1890, from Ott to the Belvidere Roller-Mill Company. By this deed, bona fide, Ott imposed upon that company a covenant to pay off these two mortgages, as part of the consideration money of the conveyance; and it is claimed that the defendant Philip M. Miller purchased from the Belvidere Roller-Mill Company by sheriff's sale, with notice of this covenant, and that he stands in the position of that company, and *Engle v. Haines*, 5 N. J. Eq. 186, is cited in support of the position. Since *Finley v. Simpson*, 22 N. J. Law, 311, it has been uniformly held that such a covenant as that inserted in the deed to the Belvidere Roller-Mill Company is, if the deed is accepted by the grantee, binding on him, though the deed is signed by the grantor only. This obligation inures in equity to the benefit of the mortgagee, who has by the covenant assumed the payment of the mortgage debt. *Klapworth v. Dressler*, 13 N. J. Eq. 62; *Hoy v. Bramhall*, 19 N. J. Eq. 570. But there is no compulsion upon the mortgagee, whose debtor has thus provided an additional covenant for the payment of the mortgage debt, to accept the benefit of this covenant, and resort to it at the sacrifice of other equities. The rights of the mortgagee against the purchaser are adjudged not because of any original equity in him but to avoid circuity of action, and to save the mortgagor from being harassed for payment of the debt, and then being driven to seek relief from the purchaser, upon whom the ultimate liability must fall. *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 656. The mortgagee by the covenant becomes entitled to be substituted in the place of the mortgagor, but he is under no obligation to enforce the covenant unless he chooses to do so. He may look only to his mortgage and to its

equities, if he likes. Nor can the taking of such a covenant by the mortgagor from the purchaser force the mortgagee to give up the equities attendant upon his mortgage, and to accept in their place the covenant of some party of his debtor's selection to pay his debt. The equity to have the securities marshaled, outstanding in the mortgagees having a lien only upon one fund, can only be taken away by the consent or act of those mortgagees themselves, or by the intervention of some superior equity, as that of a bona fide purchaser without notice. The Belvidere Roller-Mill Company is in no way harmfully affected by the marshaling of the securities. It has bound itself, as purchaser of lot No. 1, to pay both the complainants' and the Morris mortgage debts, and it cannot be injured if the equity of the Morris mortgagees to require the complainants to look first to lots Nos. 2, 3, and 4 is enforced. It does not resist its enforcement. The party unfavorably affected is Roderick B. Searles, the owner of lots Nos. 2, 3, and 4. If he can compel the complainants to look first to lot No. 1 for their mortgage debt, he can retain lots Nos. 2, 3, and 4, in accordance with the original fraudulent plan to avoid payment of Adam B. Searles' debts, because there will probably be sufficient proceeds of lot No. 1 to pay the complainant's debt, without calling on lots Nos. 2, 3, and 4, and the Morris mortgage is no lien on the latter three lots. It was held in *Herbert v. Association*, 17 N. J. Eq. 504, that the right of a second mortgagee to have the assets marshaled was superior to the right of a judgment creditor of the mortgagor, who had acquired a lien upon the assets included in the first mortgage, but not in the second, and which were sought to be first charged. The principle propounded is that the equity of the second mortgagee is vested in him on the taking of his mortgage. The mortgagor's subsequent judgment creditors have no higher rights than the mortgagor. Their equity is inferior. The equity is absolute as to the debtor himself, is subject to the legal and equitable claims of prior creditors, but cannot be impaired or in any way injuriously affected by the intervention of those of a later date, unless they be bona fide purchasers without notice, or holders of some other superior equity. So in this case, in my view, the equity of the Morris mortgage and of the defendant Philip M. Miller, who has succeeded to its rights by his purchase at the sheriff's sale, is superior to any rights arising upon the after-created covenant imposed by the mortgagor or his grantee. I cannot regard Roderick B. Searles as a bona fide purchaser, in any aspect of his relations to this case. If there be any virtue in the covenant made by the Belvidere Roller-Mill Company to assume the payment of these mortgages, let those who are injured by its breach bring their action therefor. It cannot, in a court of equity, under the circumstances recited, deprive the parties interested of equities existing before that covenant was made. Neither

the mortgagor nor his fraudulent grantee, Roderick B. Searles, can compel the first mortgagee to resort first to that tract upon which the first and second mortgages are both liens, and thus free the other tracts not included in the second mortgage; nor can they deprive the second mortgagee of his equity to have the assets so marshaled that both mortgages may, if possible, be paid. It is mistakenly assumed that Philip M. Miller, who purchased at the foreclosure sale under the Morris mortgage, occupies the position of a grantee from the Belvidere Roller-Mill Company, and that he is bound by its covenant entered into by the acceptance of the deed from Ott, of which Miller had notice. The title acquired by Philip M. Miller, the purchaser at the foreclosure sale under the Morris mortgage, was not that of the Belvidere Roller-Mill Company, charged with the equities incumbent upon that company. The purchase at a foreclosure sale relates back to the title passed by the mortgage foreclosed, and conveys to the purchaser the estate which the mortgagor had in the mortgaged premises on the day of the delivery and record of that mortgage, freed from subsequent equities, unless superior by reason of lack of notice, etc., as hereinbefore discussed. In the case under consideration the defendant Miller by the deed from the sheriff acquired the title which Adam B. Searles had on the 23d day of May, 1890, when he delivered the mortgage to Morris and others, with all its attendant equities, and free from equities which Searles or subsequent holders of the property had afterwards imposed on it. In the case of *Engle v. Haines*, above cited, the grantor received a title of a date not prior, but subsequent to the imposition of the covenants, and it was properly held that his estate was subjected to the payment of the purchase money.

Upon all the questions argued I will therefore advise: First. That there has been no tender shown. Second. That the bond formerly held by Edward B. Searles, claimed to be assigned to Henry B. Miller, has been paid. Third. That lots Nos. 2, 3, and 4, held by the defendant Roderick B. Searles, should be first sold, and the proceeds applied to the satisfaction of the bonds secured by the complainants' mortgage, and costs of foreclosure, and lot No. 1, held by the defendant Philip M. Miller, should be secondly sold, and its proceeds applied to satisfy any balance remaining due on the complainants' mortgage; that an order of reference be made to a master, to ascertain and report the amounts due, etc., on which reference the evidence taken on the hearing may be used, subject to these conclusions.

CRAIGHEAD et al. v. PIKE et al.

(Court of Chancery of New Jersey. Aug. 28, 1897.)

PARTNERSHIP PROPERTY—PARTITION—PARTIES.

1. Lands purchased by a partnership for development and sale are not subject to partition

among the partners at the request of one of the number, if such partition would hinder the venture, until the object of the partnership has been attained, or proved impracticable.

2. When an important question in a suit is whether partnership lands are subject to partition, persons that have rights thereto, arising only in the event of partition, are proper parties.

Bill by Frances Craighead and husband against Ellen M. Pike and others. Bill retained for the bringing in of new parties.

C. L. Corbin, for complainants. James B. Vredenburg, for defendants.

PITNEY, V. C. The facts in this case are voluminous, but undisputed; and I shall content myself with simply stating my conclusions, omitting the facts.

1. The complainant has proved her interest in the property, both real and personal, which is the subject of the suit, to the extent of an undivided $\frac{1}{64}$ part, and is rightly in court for two purposes—First, to establish that right, of which she had no record evidence; and, second, to invoke the aid of the court in realizing upon the same.

2. The landed property was purchased by four individuals, the title being vested at first in one of the four in trust for the others for a special purpose, namely, to improve the same in a particular manner, and, after improving, to sell and divide the profits among the four in certain proportions. It was a joint adventure, in the nature of a partnership, but lacking the ordinary qualities of a partnership, to wit, investing each partner with authority to bind by contract his co-partners, as their agent. The lands themselves were the very objects dealt in. This distinguishes the case from that class of cases where land is purchased for use in furthering the principal object of the joint adventure, as a factory for manufacturing purposes, and a warehouse for storing merchandise, where the goods manufactured and the merchandise stored are the principal objects of the joint enterprise, and the real estate simply an incident thereto. In such cases, where real estate is purchased with partnership funds, and the title becomes vested, at law or in equity, in the members of the partnership, after the partnership has been wound up, and the debts paid, the land, in this country, is subjected to the ordinary liability to be divided by partition proceedings instituted by either of the tenants in common. But here, before the scheme of the partnership has been carried out or shown to be impracticable, a partition would arrest and break up the whole adventure. In such case the land is not subject to partition until the scheme of the enterprise has been carried through so far as practicable. *Coleman v. Coleman*, 19 Pa. St. 100.

3. As to the question of parties: Objection is made by the defendants that the grandchildren of Samuel N. Pike, one of the owners of the real estate, should have been made parties, because they are interested as tenants in remainder, by the terms of his will. If the

view above taken of the status of the real estate here in question is correct, it follows, as I think, that the land here in question was not subject to the disposition of the testator as land, and did not pass thereby, and may be sold and a good title made without the presence of those grandchildren as parties. But if it should finally be held that, under the circumstances, it is better for all parties that the property should be divided than that it should be sold, then a serious question would arise,—whether or not those grandchildren ought not to have been made parties. At any rate, they are interested in the very question as to whether these lands are or are not, upon the facts already stated, and without further proof, liable to partition. I think they should be made parties. When they are brought in there should be a reference to ascertain the interests of the respective parties in the assets, real and personal, of the joint adventure, and as to whether or not it can be further prosecuted to advantage according to the original scheme between the parties, and whether it is better that it should be divided among the parties, or in part sold and in part divided. In any view that may be taken, I think—unless some new matters or new arguments are advanced in behalf of the grandchildren of Pike—that the complainant, though her interest is so small, is entitled to have the adventure brought to a close, or put in process of being brought to a close. It is to be here observed that the decree of 1876, relied upon by the defendants, expressly declares “that the surviving partners of said S. N. P., deceased, do and shall proceed without unreasonable or unnecessary delay to settle up the affairs of the said partnership by selling and converting into money the said lands so to be conveyed, and collecting and disposing of the other sales of the said lands and other assets, after the payment of the debts and expenses of the administering the same, among the original parties mentioned in the said partnership, or those who have the right to represent them as heirs at law or next of kin, according to their respective interests.” The bill will be retained until the new parties are brought in.

(56 N. J. E. 102)

ARKENBURGH v. LAKESIDE RESIDENCE ASS'N et al.

(Court of Chancery of New Jersey. Sept. 9, 1897.)

MORTGAGES—RIGHT TO FORECLOSE.

1. Where a mortgage, due in a specified number of years, provides that in case any tax remains unpaid for 90 days the principal sum shall become due, on the unexcused failure to pay taxes within 90 days after becoming due the mortgage may be foreclosed.

2. In a suit by one executor against the other, and the grantee of land, to foreclose a mortgage given thereon to the executors to secure payment of the purchase money of the land, which had been conveyed by them pursuant to a power contained in deceased's will, it appeared that in a suit by third persons against the executors it

was decreed that deceased held the land conveyed in trust for himself and such third persons, and that an appeal had been taken to the court of errors from a judgment of the supreme court affirming such decree. *Held*, that complainant, who was the acting executor, properly treated such third persons, the cestuis, as having a controlling voice in the matter of enforcement of the mortgage.

Bill by Oliver M. Arkenburgh, executor of the will of Robert H. Arkenburgh, deceased, against the Lakeside Residence Association and Eliza J. Arkenburgh, to foreclose a mortgage. Heard on pleadings and proof. Decree for complainant.

The bill is in the ordinary form to foreclose a mortgage made by one Dunn to the complainant, Oliver M. Arkenburgh, and the defendant Eliza J. Arkenburgh, as executor and executrix of the last will of Robert H. Arkenburgh, deceased. The mortgage, with the accompanying bond, was given to secure part of the consideration money of a conveyance by the executor and executrix to Dunn, the mortgagor, of land of which the testator died seised; the conveyance being made by virtue of power for that purpose found in his will. The allegation and proof are that the defendant Eliza J. Arkenburgh refused to join with the complainant in the suit for foreclosure. Besides the ordinary prayer to foreclose, there is a prayer to reform the mortgage, which was drawn by a New York conveyancer, and was made to the two executors and “their successors and assigns.” The prayer for reformation is that it may be declared to be payable to their heirs and assigns. The proof is clear on this subject, and no question is made but that it should be so reformed. The defense to the action is that the amount secured by the mortgage was not, by its terms, due when the bill was filed, to wit, February 25, 1897. The mortgage was dated the 16th of July, 1894, to secure the sum of \$22,500, with interest at 5 per cent., payable semiannually, on the 16th day of January and July in each year, with installments on account of the principal as follows: \$2,500 in one year, \$2,500 in two years, \$2,500 in three years, \$2,500 in four years, and \$12,500 in five years, from the date of the bond. The mortgage contains a clause to the effect that “should any default be made in the payment of the said interest or said principal sum, or of any part thereof, on any day whereon the same is made payable as above expressed, or should any tax, assessment, water rent, or other municipal or governmental rate, charge, imposition, or lien be hereafter imposed or acquired upon the premises described in this mortgage, and become due and payable, and should the said interest or said principal sum, or any part thereof, remain unpaid and in arrear for the space of thirty days, or said tax, assessment, water rent, or other municipal or governmental rate, charge, imposition, or lien, or any or either of them, remain unpaid and in arrear for the space of ninety days, then and from thenceforth (that is to say, after the lapse or expi-

ration of the said periods, as the case may be) the aforesaid principal sum of \$22,500 shall become due." The allegation of the bill is that on the 15th of October, 1896, the taxes assessed against said property by the mayor and common council of the city of Rahway, where the same is situate, for the year 1896, became a lien thereon, and have remained unpaid and in arrear for the space of 90 days before the filing of the bill, and that on the 16th of January, 1897, there became due and payable 6 months' interest upon said bond and mortgage, and that the same remained in arrear and unpaid for the space of 30 days. It is proper to say that this clause in the mortgage was intended to be, but appears not to have been, set out in the bill. No point was made about that omission, either in the answer or at the hearing, and the cause was tried precisely as if that clause had been inserted in the bill, which has since been amended accordingly. The property was conveyed by Dunn, the mortgagor, immediately after the giving of the mortgage, to the defendant the Lakeside Residence Association. In fact, Dunn was a mere figurehead for the corporation defendant.

The corporation and Mrs. Arkenburgh have separately answered, and by different solicitors, but the solicitor of Mrs. Arkenburgh is a mere clerk in the office of the solicitor of the corporation. The defense manifested by the answer of the corporation is that all the payments of interest were duly made; that the installment of interest due on the 16th of January, 1897, was paid before it was due to the defendant Eliza J. Arkenburgh, by a check drawn to the order of both executors,—Eliza and the complainant. The precise allegation of the answer in that respect is that the mortgage had previously been in the hands of the complainant, as the acting executor, and that, payments of interest having been theretofore made to the complainant, the defendant Eliza before the 16th of January, 1897, notified the corporation, in writing, not to pay any more interest to the complainant; that the defendant corporation made an offer to the complainant to pay him and his co-executor, Eliza, jointly, which the complainant refused to accept, whereupon the defendant corporation paid the installment of interest to Eliza, and took a receipt from her for the amount. The further allegation is that there is no tax due or unpaid upon the premises, and that all taxes have been paid, and that no covenant or condition of the said mortgage which the defendant corporation is obligated to keep or perform has been broken or unfulfilled. The answer further sets up that the co-mortgagee, Eliza, does not wish the mortgage to be declared to be due and payable, and that she is willing and ready to accept and receipt for the installments of interest and principal as they severally fall due. In effect, it is a statement that she waives the breach, if any, of the conditions. The answer of Eliza denies that the complainant has been the managing executor

of the estate, or that he has any special right or authority to hold the possession of the bond and mortgage, but that such bond and mortgage, together with the other assets of the estate, are, and of right should be, held jointly by the defendant and the complainant. It further sets up that all the installments of interest have been duly paid, and that Oliver was, by order of a court of competent jurisdiction, ordered to pay over and deposit in the trust company designated in the order the interest and installments of principal so received by him, and that he has failed and neglected so to do. It then sets out that she caused a written notice to be served on the corporation, directing them to pay to her the installment of interest then to become due. She then says that she does not desire that the bond and principal should become due and payable at once by reason of the nonpayment of the interest, if it was not paid, or the taxes, if they were not paid, but, on the contrary, elects that as long as said installments of interest and principal are paid according to the conditions of said bond, and the taxes assessed or to be assessed against the premises are promptly paid, to continue said bond and mortgage according to its terms and conditions.

It appeared in proof that the bond and mortgage had always been in the possession of the complainant as acting executor, and that he received the payments of interest. It appears that the taxes were duly assessed upon the premises for the year 1896, and became due and payable on the 15th of October, and that they were not paid within two months, and in fact were not paid until the last of May or 1st of June, 1897, and after the filing of the bill. It further appears that on the 11th of January, 1897, five days before the last installment of interest became due, Mrs. Arkenburgh served upon Mr. Savage, the president of the corporation defendant, a notice reciting that the payments of interest had been previously made to the complainant, and "that hereafter no payment for or on account of the principal or interest of said bond will be due satisfaction thereof, except such payment be by check to the joint order of said executor and myself as such executrix"; that previous to that time, to wit, on the 21st of December, 1896, the complainant had notified Mr. Savage, in writing, of the semiannual interest, amounting to \$437.50, coming due on the 16th of January, 1897, at which time payment would be expected, and that the check for same must be made payable to the order of the estate of R. H. Arkenburgh, and sent to him at his address, Great Barrington, Mass. Subsequently, and before the 16th of January, Mr. Arkenburgh called upon Mr. Savage at his place of business, and, not finding him in, wrote him a note informing him that any payment of interest made to Mr. Souther, the New York attorney of Mrs. Arkenburgh, would not be acknowledged, as he had no authority whatever to collect any

money due the estate of R. H. Arkenburgh. Notwithstanding that notice, Mr. Savage, on the 13th of February, just three days before the interest fell due, drew a check of the defendant corporation in favor of Eliza J. Arkenburgh, executrix, and Oliver M. Arkenburgh, executor, of Robert H. Arkenburgh, for the sum of \$437.50, and delivered it to Mr. Souther, who signed a receipt for it as attorney of Mrs. Arkenburgh. Some difficulty occurred in negotiating the check without the indorsement of Oliver M. Arkenburgh, but it seems finally to have been cashed upon the indorsement alone of Mrs. Arkenburgh, and deposited to the credit of the estate of Arkenburgh in the trust company on the 2d of March, 1897. Complainant had no notice of this payment until after that day. The will of Arkenburgh was put in evidence, showing how his estate was divided, and that the complainant was only entitled to one-eighth of it; and an attempt was made to prove that all the other persons beneficially interested in the estate were desirous that the mortgage should not be collected, but that the so-called forfeiture for nonpayment of interest and taxes should be waived, and the loan permitted to stand. In answer to that the complainant asserted that only a small portion of the bond and mortgage in question belonged to the estate of Arkenburgh, and that in point of fact the deceased held the premises conveyed by the mortgage in trust for himself and other persons, known as the Kinseys, and that that trust had been followed and fastened upon the mortgage by a decree of the supreme court of New York made on the 29th of October, 1895, and that the complainant, Oliver M. Arkenburgh, and his solicitor in this matter, represent those cestuis que trustent, and were instructed by them to enforce the mortgage. In support of that allegation they produced a printed copy (certification and exemplification being waived) of the pleadings and decree in a suit in the supreme court of New York brought by Jeannette A. Allen against Oliver M. Arkenburgh and Eliza J. Arkenburgh individually and as executor and executrix of the will of Robert H. Arkenburgh, in which the trust was set up and enforced. To that suit Eliza J. Arkenburgh alone made defense, by Mr. Souther as her attorney. The complainant, Oliver, answered separately, and substantially admitted the trust. The decree was in favor of the cestuis que trustent, and by it it was ordered, adjudged, and decreed that the defendants therein hold the bond and mortgage sought to be foreclosed as trustees for the benefit of Thomas H. Kinsey, Robert H. Kinsey, Jeannette A. Allen, and Robert H. A. Adams, and the estate of Robert H. Arkenburgh. An appeal was taken from that decree to the appellate division of the supreme court, and it was affirmed, for the reasons given in the opinion. A further appeal has been taken to, and is now pending in, the court of appeals. There was further put in evidence a decree of the surrogate's court of the county of Rock-

land, state of New York, dated the 12th of December, a short time after the decree of the supreme court above referred to, in which the accounts of the executors were settled, and the amount due each legatee fixed, and immediate payment ordered. Schedules are referred to in the decree, which are not annexed, but the inference from the whole document is that the bond and mortgage were not considered as part of the estate. No proof was produced in support of the allegation that complainant had been restrained by any court in the exercise of his rights and duties as executor. The bill was filed February 25, 1897, before the deposit of the interest in the trust company.

Benjamin A. Vail, for complainant. Edward S. Savage, for defendant. Leroy A. Gibby, for defendant Mrs. Arkenburgh.

PITNEY, V. C. (after stating the facts). I do not find it necessary to determine whether, under the circumstances, the payment of the interest by check to the order of the executor and executrix, and handing it in good time to the attorney of one of them, was a good payment or not, for the reason that I think the complainant is entitled to succeed on the other ground taken, viz. the nonpayment of the taxes. I think the excuse set up at the hearing for the delay in that payment is quite insufficient, and fails to bring the case within the principle of the cases in which our courts have relieved parties from the effect of failure to make prompt payment. The principle governing courts of equity in these cases is fully stated by Chancellor Williamson in *Baldwin v. Van Vorst*, 10 N. J. Eq. 581, and again by Chancellor Zabriskie in *Spring v. Fisk*, 21 N. J. Eq. 175. It has been usual to speak of this class of cases as "forfeitures proper," such as when a party, by reason of the failure to pay a small sum, is subjected to the loss of a much larger one, or of land of much greater value,—for instance, the amount of the real debt mentioned in the condition of a bond, or where the title to land is lost at law by reason of the nonpayment of a sum of money either advanced by way of loan, or due upon a contract to sell land. Against such failures equity relieves, almost as a matter of course. But here, as pointed out by Chancellor Zabriskie in *Spring v. Fisk*, *supra*, those elements do not exist. Nothing is lost except the right to a credit, and that depends upon a contractual condition. At the present rate of interest the right to extend a 5 per cent. loan can hardly be considered of much value. It is well settled that mere forgetfulness or oversight will not excuse. *De Groot v. McCotter*, 19 N. J. Eq. 531; *Spring v. Fisk*, *supra*; *Voorhis v. Murphy*, 26 N. J. Eq. 434; *Neale v. Albertson*, 39 N. J. Eq. 383, at page 386. In the cases in which the courts have relieved there has been either some inability on the part of the mortgagor

to find the mortgagee for the purpose of payment, or some waiver on the part of the mortgagee of prompt payment, or something in the nature of a contract to vary the place and time of payment. There is here no room for mistake or misapprehension as to when the tax matured, or to whom it should be paid. The corporation defendant is stated to be an association of a few rich gentlemen, who purchased the mortgaged premises on speculation. They produced a little income, which was collected by one of their number, a Mr. Blakeley, living at Rahway, and it was his practice and duty to pay these taxes. This, in the present instance, he neglected to do, and no reason or excuse is given for such neglect. The tax bills were sent in December, 1896, by the complainant to Mr. Savage, one of the owners, and the solicitor, and at that time the president of the corporation. So that complainant is in no wise responsible for their nonpayment, and it stands wholly without excuse. As to the willingness and desire of the majority of the legatees of Arkenburgh to have this loan extended, I think I cannot here take that into consideration. The complainant is undoubtedly the acting executor. As matters stood at the hearing, the estate has but a small interest in the mortgage. Much the greater part belongs to the Kinseys. The complainant is, in my judgment, properly treating them as having a controlling voice in the matter of its enforcement. His failure to do so might produce serious results for the Arkenburgh estate. I think the complainant is entitled to a decree.

BUTTLAR v. BUTTLAR.

(Court of Chancery of New Jersey. Sept. 9, 1897.)

HUSBAND AND WIFE—SEPARATION AGREEMENT—ACTION BY WIFE—EQUITABLE DEFENSE.

1. A wife filed a bill against her husband to recover arrears of an annuity provided for in a separation agreement under seal, in which he, in consideration of covenants of the wife, agreed to pay her \$75 per month from the date of the contract. *Held* to be, in effect, a simple action for money due by contract, and not a suit for specific performance.

2. Though such suit is brought in equity simply because the husband or wife cannot sue the other at law, defendant may avail himself of an equitable defense.

3. In a suit by a wife against her husband to recover arrears of an annuity provided for in a separation contract under seal, in which he agreed, in consideration of covenants of the wife, to pay her \$75 per month from the date of the contract, without mentioning the time the payments should continue, it appeared that he paid such sum 21 months, and afterwards, for 5 months, paid only \$50 per month; that at the date of the contract the income from real estate standing in their joint names, and which income he was to have, was sufficient to pay her \$75 per month, the fixed charges on the property, such as taxes, repairs, and interest on mortgages, and leave him a small margin; that the amount of the payment fixed in the contract was based on the net income of the property, and not on his earning capacity; that it was not expected he

was to pay more than he received in rents, and it was supposed by both that the rents would be ample to pay her \$75 a month and leave him a balance; that owing to depreciation in rental value, not expected by either, the rents had been, during such 5 months, insufficient to meet the payments; and that he had done his best to make them, and keep down the fixed charges, and was unable to do so. *Held*, that the wife was not entitled to relief.

Bill by Mina Buttlar against Christian Buttlar. Heard on pleadings and proof. Decree for defendant.

John I. Weller, for complainant. William S. Stuhr, for defendant.

PITNEY, V. O. The bill in this cause is filed by a wife against her husband to recover certain arrears of an annuity secured to her by his personal covenant under seal. That document is dated January 31, 1894, and provided for the payment of \$75 a month, commencing with the following month, but not mentioning any period that it should continue. Payments under it were made and all pecuniary matters settled between the parties up to the 1st day of May, 1895. Six more payments, to October, 1895, inclusive, were made in full. In November, 1895, the defendant declined to pay more than \$50, and made that payment each month up to the time of the hearing in May, 1897. The bill was filed on April 15, 1896. At that time by the terms of the agreement there was due \$25 on each of the months of November, December, 1895, and January, February, and March, 1896, and the prayer is for the arrears thereof shown. The agreement is somewhat similar to that which was the foundation of the suit in *Aspinwall v. Aspinwall*, 49 N. J. Eq. 302, 24 Atl. 926. It recites unhappy differences between the parties, and an agreement to live separate; a covenant on the part of the husband to permit his wife to live separate from him, and not to molest or disturb her, etc., and that she might have all of the property that might thereafter in any wise come to her. Then follows a covenant on the part of the husband to pay the wife the sum of \$75 a month, commencing on the day following the date of the contract, which would be February 1, 1894, payable on the 15th of each month, which the wife accepted in full satisfaction of her support, maintenance, and all alimony whatever, but the length of time during which the payment should continue is not mentioned; and in consideration of the premises she agreed with her husband that he should be entitled to receive during the term of his natural life all the rents, income, and profits of the property then owned by them in their joint names, known as Nos. 600, 602, 604, 606, and 608 Malone street, and No. 399 West street, in the town of West Hoboken, and Nos. 654 and 656 First street, Hoboken; and the husband was to pay all taxes that might be hereafter levied or assessed on the real estate, and all interest that might thereafter come due on the mortgages

held against the property, and all repairs that might be required, except the painting of the outside of the buildings to be done the then coming spring, the expense of which the parties were to jointly bear. She further covenanted and agreed to indemnify her husband against all her debts contracted, or that might thereafter be contracted, by her, and all money or moneys which her husband might be compelled to pay on her account, and on violation of that covenant such amount so paid by him should be deducted from the monthly payments to be made to her for her maintenance and support. The husband also agreed to pay all assessments (proven in the case to amount to \$484.99) then in arrear against the premises, and the wife agreed to contribute \$62.50 towards such payment. The defendant took possession of the premises, has collected the rents, kept the premises in repair, and kept down the interest, ever since. He has not paid all of the taxes, for the reason, as he swears, and I think truly, that he has been unable to do so. The defense is that owing to the unexpected change in rental values the bargain turned out to be a hard one for the husband; that the rents and profits have not been sufficient to pay the taxes, keep the premises in repair and insured, keep down the interest on the mortgages, and also to pay the annuity to the wife. The West Hoboken lots were covered by five tenement houses, each containing two suites of rooms. The Hoboken property was covered by a feed store, which was, and has ever since been, occupied by Buttlar himself. A fair but full rent for the feed store is \$35 a month, amounting to \$420 a year. At the date of the agreement the tenement houses were all rented, except the flat which was occupied by the husband, at the rate of \$33 a month for each house; that is, \$17 for the first floor and \$16 for the second floor. At that rate the total income was \$200 a month, or \$2,400 a year. The West Hoboken premises were subject to a mortgage of \$6,000, and the Hoboken feed store to one of \$3,000, amounting in the aggregate to \$9,000. The interest on the \$6,000 mortgage was at 5 per cent., and on the \$3,000 mortgage at 6 per cent., making \$480 annual interest. The ordinary taxes amount to \$250 a year, and the water rents on all the premises \$75 more, the ordinary repairs to \$200, and the insurance to \$20, making a total fixed charge of \$1,025 a year, or a monthly payment of \$85. If the houses had been occupied steadily by tenants who paid their rent at that rate, the husband would have made a small profit out of the transaction; for while his fixed charges were about \$1,025 a year, and his wife's payments amounted to \$900, or in all \$1,925, his income, including his own rent, was \$2,400, leaving him about \$475. But he had a large arrear of assessments (\$485, less \$62.50) to pay, and he had also to meet the inevitable losses arising from tenants failing to pay and moving

out, and a part of the premises remaining unoccupied and unprofitable. The income from rents began to fall off within a year or two after the contract was made, and in November, 1895, fell off so greatly that he then, as above stated, reduced his payment to his wife from \$75 to \$50 a month. He was also obliged to reduce the rent. From November, 1895, to April, 1897, inclusive, a period of 18 months, the total cash income from the rents was \$1,454,—an average of \$81 a month. During some of the months it fell as low as \$35. Adding to this \$15 a month for one of the flats occupied by the husband, and \$35 a month for the rent of the feed store, we have a total of \$131 a month. Deducting from that the fixed charge of \$85 a month leaves a net income of \$46 a month for the 18 months. In the months of March and April, 1897, the rents had risen to \$120 and \$122 a month, respectively, besides (as I understand the evidence) the rent of the portion occupied by the husband, which would make it in all about \$175 a month. The evidence satisfies me that \$29 a month for each of the five tenement houses, or \$145 a month for the whole, is a full price; and from that sum must be deducted something for the unavoidable loss from tenants unable to pay, or from actual vacancies. I am also satisfied that the loss of rent, occurring principally in the calendar year 1896, was owing to the depression in business, and the falling off of demand for dwellings, and not to any fault of the husband.

If, then, the defense of hard bargain is available to the defendant, I think it is made out. But for the circumstances that the relation of husband and wife exists between the parties, the remedy upon this contract would be an action at law in contract, and the suit is brought in equity simply on account of the technical rule that a husband or wife cannot sue each other at law. The question is whether the suit brought by the wife, by such a necessity, in a court of equity, is liable to equitable defenses. It was called, but I think not properly, a suit for specific performance. I think it must be considered as a simple action for money due by contract. But, having been brought into a court of equity, it seems to me that the defendant may avail himself of any equitable defense. He has not resorted to a cross bill and asked to be relieved entirely from the effect of his covenant, but he does set up in his answer, and has proven, that he has offered to resume—and he did offer at the hearing to resume—marital relations with his wife; and he further offered, by his answer, to convey to her the West Hoboken property, out and out, if she would relieve him from his covenant. Each party, under protest by the court, entered into evidence as to which was to blame for the differences between them which led to the separation, but an examination of the evidence fails to show with any certainty which party was

to blame. I think the probability is that the husband's statement of the cause is the true one, viz. that his wife insisted on collecting and appropriating to her own use all the rents, leaving him personally liable for taxes, assessments, repairs, and insurance. The arrears of taxes and assessments due at the date of the agreement indicate this. The question of the support of infant children did not enter into the contract, the two children of the marriage being grown up, and able and willing to take care of themselves. The wife and the husband appeared equally hale, hearty, and able-bodied persons, and the wife as well able to support herself as the husband. The property in question stands in their joint names, the estate being the peculiar one arising out of the conveyance to husband and wife as such, and was the result of the joint labors of both. Taking all the facts and circumstances, and the verbiage of the contract, I am satisfied that the amount of the payment fixed therein was based upon the net income of the property, and not on the earning capacity of the husband, and that it was not understood or expected that the husband was to pay more than he received in rents, but that it was supposed by both that the rents would be ample to pay the wife the whole annuity, and leave something over for the husband. Owing to the depreciation in the rental value of the property, not expected or anticipated by either party, the rents have been for a time insufficient to meet the payments. I am satisfied that the husband has done his best to make the payments and also keep down the fixed charges, and has been unable to do so. He exhibited his books of account of his personal business, and seemed desirous of making a complete exposé of all his affairs. For these reasons I come to the conclusion, contrary to my first impressions, that the complainant is not entitled to relief, and that her bill should be dismissed, without costs, and without prejudice to any future suit based upon nonpayments from and after May 1, 1897.

SCHWEITZER v. BONN'S EX'RS.

(Court of Chancery of New Jersey. Sept. 1, 1897.)

ESTATES OF DECEDENTS—DESCENT AND DISTRIBUTION—LAW OF FOREIGN DOMICILE—LACHES OF CLAIMANT.

The widow of a deceased resident of France, to whom was left a legacy during her widowhood, filed a bill, on behalf of herself and her infant stepchildren, to recover her husband's estate and settle the rights of complainants, respectively, to the fund when recovered,—the widow expressly claiming the legacy, but making no mention of the community law of France,—on which bill a decree was entered whereby the amount of such fund was ascertained, but the disposition thereof was reserved. Orders were subsequently made, on motion of counsel for complainants, for the payment of portions of the fund to the guardian of the infants, but reserving enough to pay

the widow's legacy. Afterwards, and before the entire amount of the estate had been paid into court, the guardian filed a petition claiming the whole fund in behalf of his wards, except the amount of the widow's legacy, to which proceeding the widow appeared, without answer; and on the hearing it was ordered that all the money recovered be paid over to the guardian, except the amount of such legacy. Thereafter the widow presented a petition for her legacy, whereupon an order was made directing the investment of the principal of such legacy by the guardian of the infants, as a special trustee, and the payment to the widow of the interest which had accrued thereon, and reserving the final distribution of the principal, and also requiring her to release him, on receipt of such interest, from all claims beyond payment of the income derived from such principal, which requirement was abrogated on her petition, on the ground that such release might be construed as barring her personal representatives from claiming the fund after her death, should she continue to remain single until such event. The widow thereafter presented a petition reciting the prior proceedings, and, for the first time, setting up the community law of France, and claiming that under it she was entitled to one-half of all the estate of her deceased husband, and praying that such portion thereof be paid to her; and, no action having been had thereon, she filed another, in which she asked leave to amend her original bill so as to enable her to present her right under the community law. *Held* that, in the absence of a showing of ignorance of her rights under the community law, either on her own part or on that of her counsel, the widow was barred from setting up such claim by her failure to assert it in any of the prior proceedings.

Petition by Maria M. S. Schweitzer, one of the complainants in a bill filed by her and others against the executors of John H. Bonn, deceased, to open certain decrees made in said cause to permit her to amend her bill by setting up that by the law of France she is entitled to one-half the fund in controversy and to permit her to prove the same. Dismissed.

For former proceedings in the cause, see 31 Atl. 24.

Garrick & Ewald, for petitioner. George G. Tennant, pro se.

PITNEY, V. C. The bill was filed by the petitioner, Maria M. S. Schweitzer, widow, and two infant children by a former marriage, of Emile Schweitzer, deceased, a resident and citizen of France, against the executors of John H. Bonn, late of Hudson county, to recover the estate of the deceased in the hands of Bonn as his administrator, and also to settle the rights of the complainants inter sese to the fund when recovered. The bill sets out a will made by the deceased, as follows: "This is my last will and testament. I, the undersigned, Emile Schweitzer, gentleman of independent means, residing at Dax, declare this to be my last will and testament, to wit: I bequeath to my second wife, Maria Martha Seglas, the sum of twenty thousand francs. I name Mr. Jules Cazals, contractor and proprietor, of Dax, as guardian of my two children. My children shall be in the custody of my second wife until they arrive at their majority, providing she does not remarry, in which case she shall not have the twenty thousand francs. I annul any other will.

Dax, the 24th of February, 1887. Emile Schweitzer." Litigation took place upon this bill with the representatives of Bonn, resulting in a considerable increase over the amount charged to him by the orphans' court, as reported in *Schweitzer v. Bonn*, 31 Atl. 24. The estate recovered was about \$30,000, and was paid into court in installments,—some before decree, and some afterwards. The widow, by her bill, expressly claimed the 20,000 francs mentioned in the will, without any limitations being imposed thereon, but did not set up the community law of France, or make any claim under it. The infants were represented in the bill by Mr. Cazalis, the guardian mentioned in the will, as their next friend; and he, as their next friend, joined with the widow in a prayer that the several rights of the widow and the infant children in the fund might be determined by this court. The decree against Bonn's executors was signed March 18, 1895, and expressly reserved for further consideration the disposition of the fund. It appeared in the progress of the cause that the claim on behalf of the widow and children was brought to this country through Messrs. Coudert Bros., of New York and Paris,—highly intelligent, capable, and reliable Franco-American lawyers,—and was by them placed in the hands of Messrs. Babbitt & Lawrence, of Jersey City; that, by the consent of the widow, letters of administration were issued to Mr. Bonn; that a copy of the will of Mr. Schweitzer, and the probate thereof in the French court, were produced and filed in the Hudson county surrogate's office; that Mr. Bonn, after accounting in the orphans' court as administrator, employed as counsel in the matter Messrs. Babbitt & Lawrence, who filed a bill, by Mr. Bonn, as administrator, for instructions as to the disposition of the fund; that, before any proceedings were had under that bill, Mr. Bonn died, and a French advocate came to this country from France, by direct employment of Mrs. Schweitzer, who investigated the affairs of Mr. Bonn, and discovered that the estate of Schweitzer in Mr. Bonn's hands had been improperly undervalued by Mr. Bonn, and the other facts which led to the filing of the bill herein under his direct instructions. In the meantime, and before the decree of March, 1895, part of the fund was paid into court by Bonn's executors. The first payment was \$5,000, before April, 1894, and another payment of \$7,000 was made in June, 1894. In April, 1894, Mr. Tennant, of the Jersey City bar, was appointed by the ordinary guardian of the infants; and two orders were made to pay portions of the money in court over to the guardian, reserving enough to pay the widow's legacy. These orders were made on the motion of the counsel of the complainants. Up to this time Messrs. Babbitt & Lawrence, at first, and afterwards Messrs. Collins & Corbin, had acted for the complainants—mother and stepchildren—generally. No one had appeared especially for either as against the other. On the 17th of

February, 1896, and before the whole amount ascertained by the decree of March, 1895, to be due from the estate of Bonn had been paid into court, Mr. Tennant filed his petition, as guardian of the infants, acting as solicitor for himself, in which he set out the proceedings in the cause up to that time, claimed to be entitled to the whole fund recovered, except 20,000 francs, and prayed that it might be so decreed by the court, and that a decree might be made declaring such right, and that the fund, except the 20,000 francs, be paid over to him as guardian. A copy of this petition, and the notice of motion based thereon, was given to both Messrs. Babbitt & Lawrence and Messrs. Collins & Corbin; and the latter appeared thereto, without answer, and an orderly hearing was had on witnesses sworn in open court. Upon the hearing on this petition a French lawyer from the office of Coudert Bros. was called as a witness by Mrs. Schweitzer's counsel, was sworn, and gave evidence in open court, translating the will of Schweitzer, and the documents constituting the probate thereof, stating the law of France regulating its execution and probate, and showing that it was properly proven; but no mention was made by him, or proof given, of the French law of community. Another witness was called on that hearing, who swore that he had recently seen the stepmother and two children in Switzerland, and generally gave proof of their ages, and that they were the children of the decedent named in the bill. Upon that petition and hearing an order was made April 17, 1896, that all the moneys recovered be paid over to Mr. Tennant, the guardian of the children, except the sum of \$3,860, the equivalent in money or account of 20,000 francs bequeathed to the widow, "which sum of \$3,860 shall be held until the further order of the court, subject to the rights therein of Mrs. M. M. S. Schweitzer under the terms of the will of Emile Schweitzer, her deceased husband."

In the spring of 1896, after the decree of April 17, 1896, just recited, Mrs. Schweitzer and her two stepchildren came to this country. Messrs. Blair & Crouse were substituted as solicitors for her, and on July 14, 1896, presented a petition, signed and verified by her, setting out the will of her husband, and a brief résumé of the proceedings in the cause, including the order directing all moneys except \$3,860 to be paid to the guardian of the children, and declaring that she had not married, and therefore was entitled to have the fund of \$3,860 paid to her without limitation. No mention was made of the community law of France, or any claim under it. This petition came on for hearing on October 3, 1896, when, after hearing counsel for Mrs. Schweitzer, and Mr. Tennant on behalf of the children, an order was made appointing Mr. Tennant special trustee of the fund of \$3,860, and directing it to be paid to him and invested, and the interest paid by him to Mrs. Schweitzer during her widow-

hood, and, further, that she be paid, either out of the funds in court, or out of the funds in his hands as guardian of the infants, the sum of \$1,651.75 for interest on the sum of \$3,860 after one year from her husband's death; and the final disposition of the fund of \$3,860 was reserved. The decree provided that Mrs. Schweitzer, upon receipt of the arrears of interest, should execute to Tennant, the guardian, "a release releasing and discharging him from all claims beyond the payment of the income to be derived from the principal sum." On the 24th of November, 1896, Mrs. Schweitzer presented a further petition for a modification of the decree made on the 3d of October in respect to that part of the order requiring her to execute a release in the terms mentioned; and on that day (November 24th) an order was made thereon modifying the decree in that respect. This was done upon the ground that the release required might be construed as barring her personal representatives from claiming the fund after her death if she should continue to live single until her death. On the following day (November 25, 1896), Mrs. Schweitzer presented another petition, setting out a résumé of the proceedings in the cause up to that time, and then, for the first time, setting up the community law of France, and claiming that under it she was entitled to one-half of all the estate of which her husband died possessed, which consisted wholly of the fund in Bonn's hands; claiming that her rights in that behalf had never been passed upon by the court, and praying that they might now be declared, and the guardian of the infants ordered to pay one-half of the fund to her. No action having been had upon this petition, the widow on the 22d of March, 1897, filed another petition, by different solicitors, of which notice was given to Mr. Tennant, in which she again recites the proceedings, and sets forth as an excuse for not having previously advanced her rights under the law of community that the suit as originally constituted was simply one to recover the estate (this was inaccurate, as the bill especially set out the will, and prayed that the rights of the complainants to the fund might be determined *inter sese*), and that she had never had any interview with her counsel, Mr. Collins, prior to the making of the decree of the 18th of March, 1895, or prior to the decree of April 17, 1896, and that her counsel on the making of the last-named decree was not aware of her right or claim to have the estate; that she, with her children, arrived in this country on the 22d of April, 1896, and found Mr. Collins about to leave for a vacation in Europe, and was recommended by him to Mr. Crouse; and that she employed Mr. Crouse. No excuse was offered for not presenting and proving her whole claim, either in the original bill, or in the petition filed by Mr. Crouse to recover the 20,000 francs. The petition proceeds to state that under the laws

of France the petitioner is entitled to the whole income of the estate during the minority of the children, and also to one-half of the whole absolutely; and she asks relief against the decretal order of April 17, 1896, and that she may amend the bill of complaint in such a manner as may be necessary in order to present her right under the community law.

Mr. Justice Collins states in an affidavit annexed to the petition now under consideration that he did not at any time while acting as counsel in this cause know that Mrs. Schweitzer made any claim to any greater estate in, or part of, the estate than the 20,000 francs given by the will; but he does not state that he himself did not know of the community law of France, and that it was or might be open to Mrs. Schweitzer to make such claim. It was admitted by counsel for Mrs. Schweitzer that the previous orders directing this money to be paid to the guardian of the infants (made either upon her application, or in the presence of her counsel) were a bar to the present application, and the court is asked to modify those orders in such a manner as that they shall not stand in the way of the present application, and counsel for the widow offers to submit to terms in that respect. Those decrees were made according to the allegation and prayer of the bill, and the proofs before the court. There was neither allegation nor proof of the French community law. That, of course, could not be taken notice of by the court, but was a matter of fact to be proven by evidence offered in court in the same manner as any other matter of fact should be proven. Mrs. Schweitzer does not swear that she was at any time ignorant of her rights in that behalf, and she makes no excuse whatever for not instructing her lawyers to claim her full rights until after her right to the immediate possession of the 20,000 francs had been dealt with. There is no allegation, and no room to suspect, that she has at any time been misled by any mistaken advice from any of her lawyers, who were all men of the highest character for capacity and integrity. The only inference to be drawn from her conduct in this respect is that she hoped and expected to succeed in first getting absolutely the 20,000 francs, with nine years' interest upon it, and then in claiming and getting one-half of the whole estate. She therefore occupies the position of a person who brings a suit to establish an interest in a certain subject-matter, and consciously refrains from putting forward a claim which she has therein, and from proving the essential fact upon which that claim rests, namely, the law of a foreign state, until after final judgment has been rendered in the suit. Now, it is quite impossible to read the will without concluding that the husband and father had no thought that his wife could or would make the claim that she now does against his children. His name indicates German origin. The widow is a Swiss. The marriage took place

in Switzerland in 1884. She states in her affidavit that her husband was a resident of France, and made her acquaintance in 1884, while visiting Switzerland, and that afterwards he bought a residence at Dax, in France, and lived there two or three years, until he died; that there was no marriage contract; and the absence of any is a necessary part of the petitioner's case. The neglect to have a marriage contract indicates that the husband was unaware of the community law when he married; for the will, which was a holograph, and written a few days before he died, indicated that he had not lost his affection for his children, or become unduly subject to the influence of his wife. Be that as it may, it is quite clear that the testator did not intend that his wife should have anything more than the use of the 20,000 francs during her widowhood. But, although the decedent may have been unaware of the existence and effect of the French community law, yet the petitioner, if also unaware of it before his death, would naturally have her attention called to it in connection with the legal proceedings following that event. And, as I have already observed, there is nothing on the face of the petition and affidavits to indicate that she has been acting in ignorance of her rights. The question, then, is whether, having, with full knowledge of her rights, twice failed to assert them at the proper time, or to prove the essential fact upon which they are based, and having, by her bill, asked that her rights should be ascertained, and having stood by while they were adjudicated upon, and the subject of the adjudication awarded to others, she shall now be relieved.

The suit, as originally framed and conducted, must be treated, in part, as a suit by the stepmother, the petitioner, against her infant stepchildren to settle their respective rights to this fund. It is impossible to avoid this view. The petitioner was an adult, and entirely capable of looking after her own interests. The children were represented by their next friend, absent from the country. As infants, they were and are entitled to receive the especial care of the court. In this contest the petitioner was not, under the circumstances above stated, at any disadvantage, to say the least. Admitting (contrary to the apparent fact with regard to the proceedings upon Mr. Tennant's petition of February 17, 1896, resulting in the decree of April 17, 1896) that previous to her arrival in this country she had not been especially represented by counsel in direct antagonism to her stepchildren, yet she was in fact represented by counsel, and her counsel did not fail to protect her rights to the extent of her instructions to them. If the community law was overlooked, or not invoked in her behalf, it certainly was not the fault of the counsel employed. And the authorities are clear that if, in point of fact, they had been instructed by her to prove and enforce the community law, and, acting

in good faith, had concluded that her position in that respect could not be maintained, their judgment in that behalf, though erroneous, would bind the petitioner. This was distinctly ruled in the case of *Perrine v. White*, 36 N. J. Eq. 1, and page 632 on appeal. In this case the presumption is that the advancement by the widow of her claim under the will was inserted in the bill by Messrs. Babbitt & Lawrence by her express instructions; and Messrs. Collins & Corbin, who succeeded Messrs. Babbitt & Lawrence as solicitors, and responded to the petition of Mr. Tennant of February 17, 1896, were not without ground for the conclusion that the demand by their client for the 20,000 francs was inconsistent with her claim under the community right, and was, in equity, an abandonment thereof. The case is clearly distinguishable from *Day v. Allaire*, 31 N. J. Eq. 303, where the solicitor retained refused to take testimony and abandoned the case. There was fraud and absolute neglect on his part, which distinguishes it from this case. But whatever excuse there may have been for her failure through her counsel to advance her rights under the community law, in connection with the petition of February 17, 1896, resulting in the decree of April 17, 1896, and prior to her personal arrival in this country in April, 1896, there can be none for such failure since that time. She knew her rights thoroughly when she employed other counsel to present her petition of July 14, 1896, and must be charged with, and suffer the consequences of, her failure then to assert them. I can find no authority for the position that a party having two separate and distinct rights in the subject-matter, who deliberately chooses to assert one of them in a suit at law or in equity without mentioning the other, after having her claim in that respect rejected by the court, can afterwards resort to the claim which was omitted in the first suit. It seems to me that the petitioner stands in the same position as if she had come in personally, when the motion was made in 1896 on behalf of her children to have the whole fund, except 20,000 francs, paid over to them, and had defended the motion simply to the extent of asking to have that 20,000 francs paid to her absolutely. In such case, having failed to set up her defense when she had her day in court, she is barred from setting it up afterwards. The authorities on this subject are clear. *Carpenter v. Muchmore*, 15 N. J. Eq. 123; *Miller v. Hild*, 11 N. J. Eq. 25; *Brinkerhoff v. Franklin*, 21 N. J. Eq. 335. I will advise that the petition be dismissed, with costs.

(56 N. J. E. 280)

PARRET v. CRAIG.

(Court of Chancery of New Jersey. Sept. 20, 1897.)

GIFTS—DELIVERY—EVIDENCE ON PRIOR TRIAL.

1. In an action by the administrator of C. against the executor of Y. to recover money of C. deposited by Y., during a period of nine years,

in a savings institution, it appeared that Y., who was C.'s nephew, for several years managed her business; that she made two wills, in which she gave him substantially all her property; that a few days before her death she made a third will in favor of another nephew; that Y. contested the last will; and that on such contest he, as a witness, explicitly admitted that he had appropriated to his own use the money so deposited, except as to two items, and justified his acts by declaring that the money had been given to him before it was deposited. *Held*, that complainant, who relied on Y.'s evidence in the will contest to prove the appropriation, was not bound to accept his evidence as to the gift, where it appeared that the deposit account was with him as "trustee for C.," while he had another account of his own in the same institution; that, on receiving \$200 of the money deposited, he gave C. a paper, reciting, "Rec'd of C., to deposit in savings bank, \$200"; and that, on the same day that he drew from the account \$1,000, he gave C. a mortgage for the same amount, which was afterwards canceled.

2. A mortgage given by a nephew to his aunt, which was unaccompanied by any bond, but which itself contained a covenant to pay the money in five years, was afterwards delivered by her to him with intent to make him a gift of it, and of the money which it secured. Before delivering it, she made in his presence an indorsement thereon that she had received "principal and interest to date," and directing the register to "cancel this of record." *Held*, that the gift of the money secured was effectual.

Bill by Waters B. Parret, administrator of the estate of Catherine Craig, deceased, against James Craig, executor of the will of John Young, deceased, for an accounting. Heard on pleadings and proof. Decree for complainant.

Craig A. Marsh, for complainant. Chas. H. Hartshorne, for defendant.

STEVENS, V. C. This suit is brought by the administrator of Catherine Craig against the executor of John Young, under the following circumstances: Catherine Craig died in 1893 at the age of 81. She had been a widow for about 12 years before her death, and had no children of her own. John Young, her nephew, died in the year 1895. He is shown by the evidence to have been her confidential adviser for 9 or 10 years prior to her decease, and to have had, to a considerable extent, the management of her business affairs. On December 15, 1883, he opened an account in the Provident Institution for Savings of Jersey City, entitled "Provident Institution for Savings in Account with John A. Young, Trustee for Catherine Craig." Between this day and April 29, 1892, he made 20 deposits, aggregating, without interest, \$3,222.76. During this same period, he drew out, on various occasions, nearly all the money thus deposited, with the interest. The bill charges a misappropriation of these moneys by Young to his own use, and prays an account and a decree for payment. It is admitted that, with the exception of two items,—one of \$76.73, to take up a protested check, and one of \$100, given to Morgan Turton,—the money was used by Young for his own purposes. The defendant's insistence is that Young had a right to so use them, because they were given to him by Mrs.

Craig. The proof of the alleged gift rests on Young's declarations alone. Mrs. Craig had made two wills, one in 1885 and the other in 1890. The first of these wills gave her entire estate, and the second her entire estate except her wardrobe, to Young. Three or four days before her death, she made a third will in favor of another nephew, Morgan Turton, and his wife, with whom she was then living. The validity of the third will was contested by Young in the orphans' court of Union county. He was called as a witness, and cross-examined in reference to the account in the savings bank. He explicitly admitted that he had, with the exceptions I have mentioned, appropriated the money to his own use. He justified the appropriation by declaring that the money had been given to him. The contention of defendant's counsel was that, as complainant relied upon Young's evidence for proof of misappropriation, he was bound to accept all of it as true, and that, on the whole evidence, it appeared that Young had taken the money only because it was given to him.

While I think that the defendant was entitled to have the whole of Young's evidence read, I do not think that the court is bound to give equal credit to every part of it. There cannot be the slightest doubt that Young used the money for his own purposes. He tells us how he used it. But there is on Young's own statement, and on the undisputed and undoubted facts, a very serious question as to whether Mrs. Craig made him a gift of it. It will be borne in mind that the bank account stood in the name of Young, as trustee for Catherine Craig. Now, Young's statement was, not that Mrs. Craig had authorized him, after he had deposited the money, to draw it, and spend it upon himself or upon his property, but that she had given it to him before he deposited it. He testified as follows: "Q. Although you entered your account in that bank in her name, you still say that the money was given to you out and out, and that you did not hold it as trustee, do you? A. Yes; I considered that money was a gift to me. Q. Did you deposit anything in this account except the presents of money from Mrs. Craig? A. Money and checks; that is all. Q. Well, they were all presents from her? A. Yes, sir." It is certainly strange that if Young regarded this money as his own, he should have opened the account as a trustee account, and continued it so for nine years. It is strange, too, that he should have opened it in this way, when he had in the same bank, as he admits, another account of his own. It is still stranger that he should, as he says he did, have opened it in this form after consultation with counsel. The fourth entry in the bank pass book is an item of \$200, under date of April 8, 1884. On April 6, 1884, there appears in a little diary belonging to Mrs. Craig the following receipt, which Young admits he gave her: "Apr. 6, 1884. Rec'd of Mrs. Adam Craig, to deposit in savings bank, \$200. John A. Young." The \$200 credited in the pass book Young admits to

be the same as that which he receipted for. The language of this receipt is not the language of gift. Again, when first examined about the form of the account, Young explained it by saying that he was Mrs. Craig's banker. On re-examination, on a subsequent day, he was asked: "Q. What did you mean when you said you were her banker? A. Well, I meant that she gave me money, and I had a separate account of it in the bank, knowing how much she wanted to give me. * * * Q. Why did you want to know how much she gave you? A. Merely as a record; that is all. Q. What did you want of a record? A. Well, I can't tell exactly why I wanted a record,—curiosity." There is another still more significant fact. On April 9, 1887, he drew out of this account \$1,000. On the same day he executed to his aunt a mortgage for that amount. The mortgage was recorded, and subsequently, on a certificate of his aunt authorizing its cancellation, canceled. This action on his part seems to me to be utterly irreconcilable with Young's statement that the money in the bank was his own, or that he then so regarded it. I have no doubt, on the whole evidence, that the account itself correctly states his position. As to this fund, he was trustee for Catherine Craig, and not absolute owner. In foro conscientiae, he, no doubt, sought to justify his conduct in taking it on the ground that his aunt's income was ample for her support and that he was her sole legatee.

On the part of the defendant, Maggie Cheever was called as a witness to prove the gift. But her testimony, taken altogether, strongly indicates that Mrs. Craig's intention was, not to make a gift of this money *inter vivos*, but to give it to Young by her will. According to this witness, Mrs. Craig, within a year before she died, appears to have thought that the money, except that which had been secured by mortgage, was in the bank. Nearly all of it had, in fact, been drawn out.

The remaining question relates to the \$1,000 secured by mortgage. This money, as I have said, was drawn out on April 9, 1887. The mortgage given to secure it was dated on that day, and was acknowledged on the 14th, and recorded on the 15th, of the same month. On it is indorsed the following: "Dunnellen, Sept. 29, 1888. Received of John A. Young principal and interest to date. Catherine Craig. Register will please cancel this of record. Catherine Craig." It is not denied that the signatures to this receipt and request are Mrs. Craig's. *Prima facie*, they indicate payment of the amount secured. But it was admitted by Young in his evidence before the orphans' court that he never paid anything on this mortgage; his statement being that his aunt's intention in signing the indorsements was to cancel the debt. The evidence shows, I think, that Mrs. Young intended to make a present of this mortgage to her nephew. She told Maggie Cheever that she had given him \$1,000 on a mortgage, and that she had can-

celed it. She told James Craig the same thing. She appears to have had the strongest affection for him, and she does not appear to have needed the money herself. She had, moreover, given all her money to him by her will. John, on the other hand, may have been at that time partially disabled by the loss of a finger, and, not working steadily at his trade of machinist, may have found it hard to pay back what he had borrowed. Nothing was more likely, then, than that Mrs. Craig should have been willing, and perhaps, as Young says, anxious, to cancel the debt. That she intended to do it is beyond all question. Her indorsements are proof of that. The matter then comes down to this, did she do it effectually? I think she did. On this branch of the case John's testimony is supported by the written documents and by the evidence of witnesses. He said: "That \$1,000 I took out. I gave my aunt a mortgage for that, * * * which was canceled by my aunt a year afterwards." He is then, in the will case, called upon to procure the mortgage, and does so. He did not say, in so many words, that after signing the direction to cancel, she redelivered it to him, but he said that he was present when she signed the direction to cancel, and it is a matter of fair inference that he received it from her at that time. He procured it to be canceled of record three years before her death. In *Smith v. Burnet*, 35 N. J. Eq. 323, Mr. Justice Reed, after stating that declarations of the deceased with respect to the alleged gift would, standing alone, be of little or no force, says that, where there is other evidence of a transference of the chattel from the possession of the alleged donor to the donee, the evidence of the donor's declarations becomes relevant and important in fixing the meaning of the act transferring the possession. The declarations of Mrs. Craig, to which I have above referred as having been made to James Craig and Maggie Cheever, tend to prove that her object in thus canceling the mortgage was to make John Young a present of it, and of the money which it secured. The cancellation itself, coupled with her acknowledgment of the receipt of the money, is evidence in the same direction, furnished by Mrs. Craig herself. There was no separate bond given, but the mortgage itself contained an express covenant to pay the money in five years; so that the debt thus created was made a specialty debt, and the mortgage thus given constituted the only instrument on which a recovery could be had. This instrument was given up. In the language of Knight Bruce, V. C., in *Moore v. Darton*, 4 De Gex & S. 517, the delivery of this instrument was not the delivery of the mere evidence of the debt, but it was "the delivery of that without which the debt would not have been a specialty." I think, therefore, that when Mrs. Craig directed the cancellation of this mortgage deed, and handed it to Mr. Young, with intent to make him a gift of it, and of the money which it secured, she effectually canceled the debt.

The complainant stands in this position: If Young's evidence on this subject in the will case is altogether excluded, then the receipt on the mortgage is prima facie evidence of payment, and there is no evidence to the contrary. If the evidence is received, then it appears that the receipt was signed in furtherance of Mrs. Craig's intent to make him a gift of the security. In either alternative, the defendant, as Young's executor, is discharged from liability to account for the money.

CLAYTON v. DAVETT et al.

(Court of Chancery of New Jersey. Sept. 18, 1897.)

PARTNERSHIP—ASSIGNMENTS—EQUITABLE MORTGAGE—CONTRIBUTION—VOLUNTARY PAYMENT—LIABILITY FOR TORTS—MORAL FRAUD.

1. D. and R. formed a partnership; D. borrowing of C. the money contributed as his share of the capital, which he secured by an assignment of his interest in the assets of the firm. By a contemporaneous agreement, D. was to collect and take all dividends, income, interest, and profits earned by the share so assigned, and appropriate them to his own use, except sufficient to pay C. interest on the sum borrowed. The parties, including R., regarded the arrangement as in the nature of a mortgage security. On dissolution of the firm, R. was authorized by D. to collect the assets and pay the debts. To a bill by C. against D. and R. for an account, R. answered, showing the amount realized, and the disbursement thereof,—a certain sum for debts, another to D., another to C. on account of D.'s share, and the balance to himself. In a cross bill, R. asked contribution from C. on account of judgments recovered against the firm since such distribution, on the ground that, as the assets were insufficient to satisfy such judgments and yield him an amount of money equal to that which he had paid on D.'s account, C. was liable to repay him such sum as would, with the amount remaining in his hands, make his share of the assets equal to D.'s, and that C. became subject to a partner's liability by reason of D.'s assignment to him. *Held*, that R. was not entitled to contribution, as C., instead of being a partner, merely held a lien on D.'s share of the assets, of which R. had made disposition as D.'s agent, voluntarily paying to C., on D.'s account, more than he was under obligation to pay.

2. Where one of such judgments was recovered in an action of deceit grounded on false and fraudulent representations, contribution would not be enforced, even if R. were otherwise entitled to it, because of the moral fraud on which such action is founded.

Bill by Charles W. Clayton against Julius T. Davett and another for an injunction and an account. Answer in the nature of a cross bill, setting up a counterclaim on behalf of defendant Alexander H. Ross. Relief under the cross bill denied.

Frank E. Bradner, for complainant. Robert H. McCarter, for defendants.

STEVENS, V. O. The complainant filed his bill against the defendants for an injunction and account. The evidence shows that on April 20, 1892, the defendants, Julius Davett and Alex. H. Ross, formed a co-partnership to carry on the business of brokers,

which was to commence on the 1st day of May, 1892, and to continue for five years, unless sooner dissolved in the manner pointed out in the partnership articles. The partnership lasted for a year only. By the terms of the partnership articles, each of the partners was to contribute the sum of \$10,000 in cash. Ross paid in his share of the capital at once. Davett, not having any money of his own to pay in, applied to the complainant to lend him \$10,000, which he did. On December 22, 1892, Davett signed a written acknowledgment that he had received the money. In this paper he agreed to put it in the business, and not to draw it out except for the purpose of repaying it to complainant. A few days after, Davett executed to complainant a deed of assignment of his undivided one-half interest in the assets of the firm. This assignment, in terms, purported to be an unconditional assignment. The consideration therefor was stated to be \$10,000. But very shortly afterwards, if not contemporaneously, he and complainant executed another sealed instrument, in which, after reciting the assignment, it was agreed that, in consideration of one dollar, so long as complainant retained his interest or share in said business, Davett should collect and take all dividends, income, interest, and profits earned by said share formerly held by him (Davett), but now owned and held by Clayton, and should apply and appropriate the same to his own use, except sufficient to pay said Clayton interest on \$10,000. Davett was also empowered to collect and take whatever accumulated income and profits might be coming to the share at that date. The three papers just referred to were nearly contemporaneous in date, and were evidently parts of one arrangement. Taken together, they show that the real transaction was a loan of money by Clayton to Davett, secured by an assignment of Davett's interest in the assets of the partnership. The arrangement was therefore in the nature of a mortgage security, and was so regarded, not only by complainant and Davett, but—and this is a matter of considerable importance—by Ross as well. He was asked on the witness stand, "Did you keep any account for [with?] Clayton at all?" And his answer was, "Only to put in the entries when money was paid on Davett's share of the assets, on which Mr. Clayton held a mortgage." At the time of the dissolution of the partnership, on May 1, 1893, Ross was authorized by Davett, who was then insolvent, to get in the assets and pay the debts. According to an account appended to Ross' answer, he realized \$20,976. He paid out for debts \$7,259.37. Of the balance, he paid to Davett \$756.87; he paid to Clayton, on account of Davett's share, \$7,553.81; and he retained the balance (\$5,405.96) for himself. In addition to the sum which the complainant, Clayton, received from Ross, it appears that he also received \$1,675 from Davett. He has

thus been paid at least \$9,228.81 out of a total of \$10,000 owing to him.

The question to be decided arises out of a counterclaim made by Ross against Clayton under the following circumstances: Ross paid the above money to Clayton before one Ward had recovered a judgment of \$3,850 against the firm of Davett & Ross, and before one Illingworth had recovered a judgment of \$1,941.18 against Ross personally. Ross now claims that, the assets of the firm having been insufficient to satisfy these judgments and yield him an amount of money equal to that which he paid on Davett's account, Clayton is liable to repay to him such sum as would, added to the amount of assets remaining in his hands, make his share of the assets equal to Davett's. The first of the judgments was recovered against the two partners, Davett and Ross, in an action of tort for trover and conversion of certain shares of stock. The second was recovered against Ross alone in an action of deceit grounded on certain false and fraudulent representations made with respect to the solvency of one Graham, whose notes the plaintiff, Illingworth, was thereby induced to take. His claim for contribution in respect of the Illingworth judgment is entirely untenable, whatever view may be taken of the relations between Clayton and Ross. The judgment being rendered in an action of deceit, it was thereby conclusively established that Ross had been guilty of moral fraud in making the misrepresentation which was the foundation of that action. In *Cowley v. Smyth*, 46 N. J. Law, 383, Mr. Justice Depue expressly says: "In such an action [deceit] a false representation without a fraudulent design is insufficient. There must be moral fraud in the misrepresentation, to support the action." Counsel for Ross cites many cases in equity (where the rule is different), and in other jurisdictions, to show that a judgment in an action of deceit does not necessarily establish moral guilt; but, in view of the decision just quoted, they are without weight here. It was admitted that the rule of law is that, where there is moral guilt, contribution is not enforced, as between wrongdoers. But this is a case in which the sole wrongdoer seeks to have contribution against a person perfectly innocent. The case is much stronger than that of *Thomas v. Atherton*, 10 Ch. Div. 185, cited on the argument, in which contribution was refused.

If the claim to contribution in respect of the Illingworth judgment be thrown out, there remains the Ward judgment, in respect of which, if his account be correct, Ross would be entitled to recover a part of the money paid, as against his co-partner, Davett. This he does not ask. He seeks to recover it against the creditor of that co-partner, on the ground that that creditor, by reason of the assignment which he took, stands in his debtor's shoes. In his answer in the nature of a cross bill he alleges an express agreement on Clayton's part to refund in case of deficiency, but

this he fails to prove; and so he based his right of recovery upon Clayton's legal or equitable obligation to contribute by reason of the assignment. His position is that the assignment made Clayton his partner, or quasi partner, and that as such he became subject to a partner's liability. If the legal effect of the assignment were as contended for, this position would be sound. But I do not think that, either in fact or in law, Clayton ever became Ross' partner. Certainly he did not carry on the business as partner, and, as I have already said, the legal effect of the assignment, read in connection with the two other papers already referred to, was merely to put Clayton in the position of an equitable mortgagee. After their execution the firm of Davett & Ross was to continue in the business in that name, as before, and did so continue, and Davett was to take the profits and apply them to his own use. He was only to reserve thereout sufficient to pay Clayton interest on \$10,000. But, if Clayton was to be paid interest, it could only be because the relationship of debtor and creditor still continued in respect to that sum. An absolute, unconditional sale of the interest could not have been contemplated, and, as I have said before, Ross himself so construed the writings. He says he "only put in the entries in the account he kept when money was paid on Davett's share of the assets on which Mr. Clayton held a mortgage." Now if Clayton was merely Davett's creditor, secured in the manner I have mentioned, on what principle can he be bound to make contribution to Ross? Davett, the partner, is bound to make such contribution, but why is Clayton? The situation is this: Clayton, to the knowledge of Ross, has a lien, not upon the assets of the partnership, but upon Davett's share of those assets after the partnership debts are paid. Ross is intrusted with the winding up of the partnership affairs. In the ultimate disposition of Davett's share, he acts as Davett's agent. He knows the facts concerning the partnership transactions. Among other things, he knows that Ward has a claim against the firm. He must be presumed to know the facts concerning that claim. If it is good, its payment will diminish the amount to be ultimately distributed among the partners. Now, with knowledge of the existence of this claim, Ross, assuming it to be bad, pays to Clayton a larger sum on Davett's account than he otherwise would have paid. He does not think it necessary to retain in his own hands money sufficient to satisfy it, if it shall be adjudged good. He voluntarily pays to Clayton more, as the result shows, than he was under any obligation to pay. It is a well-settled rule that money voluntarily paid under a mistake of law cannot be recovered back. This is so held in cases where the mistake has reference to the amount which the creditor may properly demand from the debtor. *Skyrting v. Greenwood*, 4 Barn. & C. 282; *Bramston v. Robins*, 4 Bing. 11; *Higgs v. Scott*, 7 C. B. 63. It must be so held with still greater reason where

the mistake of law has reference, not to the debt itself, or to the amount demandable thereon, but to a collateral question arising between the debtor, or the debtor's agent, and some third person, of which the creditor may know nothing. I think I am safe in asserting that no case has gone the length of deciding that if an agent, through a mistake of law, supposing that he has in his hands more money of his principal than he really has, pays his principal's debt, he can recover back from the creditor as much of the money paid as turns out ultimately to be his own. Indeed, I do not understand counsel to have seriously contended for such a proposition. He rather rested his claim for contribution on the ground that Clayton, by reason of the assignment made to him by Davett, stood in Davett's shoes, and was affected by Davett's liability to reimburse him for partnership debts paid after distribution of the partnership assets among the partners. But this contention fails, of course, as soon as it appears that the effect of the papers signed was merely to give to Clayton a lien upon Davett's share of the assets, and not to make him a partner with Ross. I think Ross is not entitled to contribution from Clayton in respect of the money paid either on the Ward or on the Illingworth judgments.

(38 Conn. 555)

WINSTED HOSIERY CO. v. NEW BRITAIN KNITTING CO.

(Supreme Court of Errors of Connecticut. July 13, 1897.)

CORPORATIONS—OFFICERS—IMPLIED AUTHORITY—APPEAL—REVIEW—CONCLUSIONS OF LAW.

1. The secretary-treasurer of a knitting company undertook to sell certain machines belonging to the company as part of its plant. The sale was not authorized by any vote of the corporation or board of directors, nor by the by-laws defining the duties and powers of the secretary and treasurer, nor by any vote at the time of appointment of the incumbent as secretary-treasurer, nor subsequently. The secretary-treasurer, with another person, was accustomed to buy raw material and supplies, and had bought some machines for use of the company, but neither he nor the company had ever before sold or attempted to sell any machines of the character of those in controversy. *Held*, that the company had not impliedly authorized the sale.

2. Nor was the company estopped to deny authority in such officer to make the sale, since it had never permitted him to perform, in its behalf, acts of a character similar to that of the sale.

3. The statute authorizing a trial to the judge, as phrased in the Revision of 1821 and succeeding revisions, has, in so far as it required the judge to settle the facts in the same manner as if the case were tried 'o a jury, been modified by *Prac. Act 1879, §§ 22-24, 30, 33; Gen. St. § 1111; Pub. Acts 1893, p. 318; and Pub. Acts 1895, pp. 493, 494.* Accordingly, where the trial court, from its own findings of fact, concludes that a sale of property of a corporation by one of its officers was impliedly authorized, the conclusion is one of law (and hence reviewable on appeal), notwithstanding that, if the facts had been found by a jury, the latter would also have determined the conclusion as to authority.

Appeal from court of common pleas, Litchfield county; Arthur D. Warner, Judge.

Replevin by the Winsted Hosiery Company

against the New Britain Knitting Company. From judgment for plaintiff on facts found by the court without a jury, the defendant appeals. Reversed.

Frank L. Hungerford, for appellant. Samuel A. Herman and Wilbur G. Manchester, for appellee.

HAMERSLEY, J. The plaintiff's ownership of the goods replevied depends on the validity of the contract in writing claimed to have been made between the parties and contained in the letter dated September 27, 1892, offering to purchase the goods, and the acceptance of the offer, signed "New Britain Knitting Co. E. M. Schultz, Tr." The goods which were the subject of the contract were not articles sold by the defendant in the ordinary course of its business, but were machinery constituting a part of its manufacturing plant. Mr. Schultz was a servant of the defendant, appointed by its directors. "The extent of his power to bind the corporation depends in part upon its by-laws, if any such there be touching his office; in part upon the language of the vote of the directors appointing him, if any such appears of record; in part upon their knowledge and approval, or the acquiescence of the corporation in acts performed by him; and in part upon usages which may be shown to exist, controlling the matter." *Swazey v. Manufacturing Co., 42 Conn. 556, 559.* The trial court has found, and made a part of the record, all the facts from which authority to make the sale in question can be inferred. These facts are: The sale was not authorized by any vote of the corporation or of the board of directors. It was not authorized by the by-laws which define the duties and powers of the treasurer and secretary, and was not authorized by any vote passed at the time of Mr. Schultz's appointment to these offices or subsequently. Mr. Schultz, jointly with a Mr. Bird, superintended the manufacturing carried on by the defendant company, and was accustomed to buy raw materials and supplies for manufacturing purposes, and had purchased sewing machines, and also attachments for other machinery. It is certain that as director merely Mr. Schultz did not have the authority claimed. It is also clear that the corporation had not given such authority unless it is implied by law from acquiescence by the corporation in the acts detailed as done on its behalf. The acts may be appropriate to the employment of Schultz in the ordinary course of business, but they are not such as involve or imply any authority to sell machinery constituting a part of the defendant's plant. Acquiescence in these acts is not acquiescence in the sale of such machinery, and it is expressly found "that Mr. Schultz had never sold any machinery of the kind mentioned in the above proposition before, and it did not appear that the defendant, or anybody acting in its behalf, had ever sold any such machinery, and the present transaction was the first sale of the kind that any officer of the

company had ever attempted to enter into." A corporation may be estopped from denying the authority of an agent in respect to acts in and about its affairs which it has knowingly permitted him to do in its behalf (*National S. & L. Bank's Appeal*, 55 Conn. 409, 494, 12 Atl. 646; *Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192, 194; *Merchants' Bank v. State Bank*, 10 Wall. 604), but such estoppel cannot extend to acts that are clearly not of the character of those so permitted. We think that the facts found by the trial court show that Mr. Schultz was not authorized to make the contract on behalf of the defendant, and show nothing on which a claim of ratification can be based. The plaintiff therefore never had any property in the goods replevied.

A claim is made in the brief of plaintiff's counsel that the question of authority is one of fact found by the trial court, and not reviewable. The judgment or ultimate conclusion of a court upon the special facts in issue, as ascertained from the evidence and settled by the trier, is a conclusion of law, and as such reviewable by this court; and this is true whether such facts are settled by a special verdict of a jury or a special finding of a judge. *Hayden v. Allyn*, 55 Conn. 280, 289, 11 Atl. 31. Such conclusion by a judge may sometimes involve a subordinate conclusion determining a question which, by the law defining trial by jury, must, in such trial, be submitted to the jury as a question of fact, and so, in its relation to jury trial, has been called a question of fact. But when the law authorizes a trial of facts to the judge, a conclusion or inference from special facts found clearly demanded by the rules and principles of law does not cease to be a conclusion of law because an arbitrary rule protecting the rights of trial by jury gives to the jury a right to determine such conclusion as a question of fact, unless, indeed, the law authorizing a trial to the judge requires him to settle the facts in the same manner as if tried to a jury. The statute authorizing a trial to the judge, as phrased in the Revision of 1821, and preserved unchanged in succeeding revisions, seems to contain this restriction. The effect that might result from such language has, however, been modified by recent legislation. *Prac. Act 1879*, §§ 22-24, 30, 33; *Gen. St. § 1111*; *Pub. Acts 1893*, p. 318; *Pub. Acts 1895*, pp. 493, 494. We think that the result of this legislation is that in cases tried to the court the judge is now authorized, and, upon request, required, to find and state in a special finding the facts adjudicated by him in reaching his ultimate conclusion, including all specific facts which, when so adjudicated, must determine the nature of the ultimate conclusion and subordinate conclusions involved therein by force of settled rules and principles of law. The judgment rendered on such an adjudication of facts is merely the voice of the law declaring the legal effect of the facts adjudicated. There are some conclusions that must be stated and treated simply as facts because they are impossible to

be reached except as the personal conviction of the trier induced directly by the evidence; such as the conclusion of negligence under conditions so peculiar to the case on trial that the particular duty of the person charged with negligence under these exceptional circumstances cannot be determined by any general rules of law, and must be ascertained by the trier in the exercise of his own reasonable judgment, induced by all the testimony before him. The conclusion in the case at bar is not of this nature. All the special facts having been adjudicated, the conclusion is determined by settled principles of law, and is, therefore, reviewable. As the contract made by Schultz was not binding on the defendant, the questions as to the legal effect of such a contract, if binding, are not before us. There is error in the judgment of the court of common pleas, and it is reversed. The other judges concurred.

(69 Vt. 486)

STATE v. SLACK et al.

(Supreme Court of Vermont. Windsor. July 17, 1897.)

WITNESSES—IMPEACHMENT—METHOD—PROVINCE OF COURT.

1. The state may impeach its own witnesses in criminal cases, on account of the obligation resting on it to bring forward all witnesses obtainable for a criminal prosecution, irrespective of their character.
2. Where defendants in a criminal case are permitted, over objection, to impeach a witness in a certain manner, they cannot complain if the prosecution is permitted to impeach in the same manner.
3. In cross-examination much latitude is allowed to counsel in asking questions tending to impeach the witness; the extent to which such examination may go being in the discretion of the trial court.

Exceptions from Windsor county court; Munson, Judge.

Frank P. Slack and Romeo Clough were convicted of assault with intent to rob, and they except. Exceptions overruled.

J. G. Harvey, State's Atty., and W. W. Stickney, for the State. G. A. Davis and D. A. Pingree, for respondent Slack. W. E. Johnson and Wm. Batchelder, for respondent Clough.

ROWELL, J. The state, in its opening, called Orson Sargent as a witness, to prove flight. The prisoners called him in defense, to prove innocence. On cross-examination, to impeach him, the state was allowed to ask him if he was not convicted in the United States circuit court for selling liquor without a license, and he said he was not; that he settled it, but could not tell just how it was done. The state was also allowed, for the same purpose, to introduce a copy of the record of his conviction in 1883 for selling liquor contrary to law, and to prove by him that he was the person convicted. Before said copy of the record was offered, and Sargent inquired of concerning it, the prisoners, on cross-examina-

tion of the state's witness Armstrong, had shown by him, without objection, that he had been convicted at that term of selling liquor contrary to law. They had also offered in evidence a copy of the record of his conviction of a similar offense at Norwich, which was objected to, but admitted. It was competent for the prisoners to show by Armstrong, as they attempted to do, and nearly, if not quite, did, as tending to show that he had a grudge against them, that he knew that they, or one of them, testified against him before the grand jury when he was indicted for selling liquor; and, as no objection was made, they properly enough went further, and perhaps could have any way, and showed his conviction, as that would naturally tend to displease him still more. Counsel for the state probably regarded it all as admissible for the purpose indicated, and so did not object to it. But the same cannot be said of the conviction at Norwich. That was objected to, and it does not appear that the prisoners, or either of them, had anything to do with procuring it; so evidence of it could have been offered and received only for the purpose of impeaching Armstrong because of the conviction. After this was done under objection, the principal question is whether the prisoners can object to the state's impeaching Sargent in the same way, provided it could impeach him at all. They say that the state could not impeach him at all, save as allowed by statute, because it first called him, wherefore he was its witness throughout. This is the general rule, but the question is whether it is applicable to the state in a criminal case. As reason is the soul of the law, the maxim is that when the reason of a law ceases the law itself ceases; or as Willes, C. J., puts it in *Davies v. Powell*, Willes, 46, referred to in argument in *Morgan v. Earl of Abergavenny*, 8 C. B. 786, "when the nature of things changes, the rules of law must change too." Now, the reason of the rule that a party cannot impeach his own witness is that by calling him in proof of his case he represents him to be worthy of belief, and that to attack his general character for truth after that would be not only bad faith to the court, but, in the language of Buller, would enable the party to destroy him if he spoke against him, and to make him a good witness if he spoke for him. But cases of what are called "instrumental witnesses" do not come within the rule,—certainly not fully, if at all; for there the reason of the rule fails, as the law compels the party to call such witnesses, and therefore they are the witnesses of the law rather than of the party, and it would be absurd to say that the party accredits a witness whom the law compels him to call,—as absurd as Chief Justice Willes said, in the case referred to, it would be to hold that deer were not distrainable when they had become a sort of husbandry, as horses, cows, sheep, and other cattle, because formerly they were not distrainable, as they were kept for pleasure, and not for profit, and were not sold and

turned into money as they were then. In *Thornton's Ex'rs v. Thornton's Heirs*, 39 Vt. 122, where it was held that a party calling a subscribing witness to prove a will could impeach him by showing prior contradictory statements, as the law compelled the party to call him, the court said that many, but not all, of the reasons for permitting that kind of impeachment, applied to an impeachment of a general nature, but that the authorities had in many instances made a clear distinction between permitting an impeachment of the general veracity of a witness and an impeachment by showing declarations of the witness inconsistent with his testimony, but declines to express an opinion as to the soundness of the distinction, but says that the fairness of holding a party estopped by reason of an act concerning which he has no choice, or by an indorsement that he does not make of a witness whom the law calls and makes current whether the party indorses him or not, may well be questioned. This strongly tends against any such distinction as the court says some of the cases make, and we think no distinction can logically be made; for the same reason that makes the rule inapplicable to one mode of impeachment makes it equally inapplicable to all modes, as the different modes are but different ways of doing the same thing, namely, discrediting the witness, and they are equal in degree and alike in essence. The reason of the rule does not fall in part and stand in part,—fall as to one mode of impeachment, and stand as to another mode. It is indivisible, and stands or falls as a whole. This view is sustained by *Williams v. Walker*, 2 Rich. Eq. 291. There, in tracing the complainant's title, it became necessary to prove a mortgage. His solicitor stated to the court that the character of the attesting witness was such as not to entitle him to credit, and proposed to prove the mortgage by other testimony; but the court held that the attesting witness must be called, as he was at hand, and thereupon he was called, and testified that the mortgage was executed and delivered at a time subsequent to its date. The complainant then tendered testimony to impeach his general character, which was excluded, for that a party could not impeach his own witness. But the supreme court said that, in the circumstances, the complainant ought to have been allowed to show that the witness was undeserving of credit; referring to what Lord Ellenborough said in *Rex v. Inhabitants of Harringworth*, 4 Maule & S. 350, that the testimony of a subscribing witness is not conclusive, for he may be of such a character as to be undeserving of credit, and then the party calling him may prove him such, and call other witnesses to prove the execution. As the public, in whose interest crimes are prosecuted, have as much interest that the innocent should be acquitted as that the guilty should be convicted, we hold it to be the duty of the state to produce and use all witnesses within reach of process, of whatever character, whose testimony will shed

light upon the transaction under investigation, and aid the jury in arriving at the truth, whether it makes for or against the accused, and that, therefore, the state is not to be prejudiced by the character of the witnesses it calls. *State v. Magoon*, 50 Vt. 333; *State v. Harrison*, 66 Vt. 523, 29 Atl. 807. This doctrine, carried to its logical result, exempts the state, in criminal cases, from the operation of the rule in question, and places it in the position of a party calling an instrumental witness, and for the same reason. We are aware that in many, if not most, jurisdictions, the rule is applied to the state in criminal cases; but it is upon the ground that the state stands like any other party, and accredits a witness by calling him, from which we infer that they do not hold, as we do, that the state is bound to call all the witnesses, but is at liberty to choose, and to call whomsoever it will. We are the more satisfied with the conclusion here reached because we think the state ought not to be hampered by such a rule. Prosecutions are carried on by the government, through the agency of sworn officers elected for that purpose, who have no private interests to serve nor petty spites to gratify, but whose sole and only duty is to faithfully execute their trust, and do equal right and justice to the state and accused. The course of public justice, thus directed, ought not to be obstructed by a rule without a reason. The ascertainment of the truth, which is the object of the prosecution, is of more consequence than the instrumentality by which it is sought to be ascertained; and when an instrumentality becomes an obstruction to the course of justice the state should be at liberty to remove it, and by trampling upon it if necessary.

But the prisoners further say that, if the state was at liberty to impeach the witness, it could not do it by showing that he had been convicted of selling liquor, for that is not an infamous crime. But, whether an infamous crime or not, the prisoners, against objection, were allowed to impeach the state's witness *Armstrong* in the same way, and therefore they cannot be heard to say that the state could not afterwards impeach in that way. This is a just application of the maxim that he is not to be heard who alleges things contradictory to each other, or, as Lord Kenyon once said, a man cannot be permitted to "blow hot and cold" concerning the same transaction, nor to insist at different times upon the truth of each of two conflicting allegations, according to the promptings of his private interest. *Broom*, Leg. Max. *160. *Herman* says that it has become axiomatic that a party must be consistent, and not contradictory, in the positions he takes. 2 *Herm. Estop.* § 1040. This maxim is of pretty general application in the law. Thus, in pleading, repugnancy vitiates. A witness who contradicts himself is thereby discredited. When one professes to act in an official or a professional character, it is conclusive evidence against him that he possesses such character. So, if a party takes

advantage of, or voluntarily acts under, bankrupt or insolvent laws, he is estopped, as against persons who are parties to the same proceedings, to deny their regularity. 1 *Greenl. Ev.* (5th Ed.) § 207. Indeed, this principle is the foundation of equitable estoppels generally. It was held, in *Morgan v. Couchman*, 14 C. B. 100, not to be competent for counsel, after making a stand upon a point of law, to fall back upon the evidence, and afterwards say that the matter ought to have been submitted to the jury. So, where on a former trial a party's counsel, in his presence, put the case on ground wholly inconsistent with the party's present testimony, it was held competent for the other party to show that fact. *Nye v. Merriam*, 35 Vt. 438. When a party introduces irrelevant testimony without objection, he cannot object to the other party's meeting it, if it has a moral tendency to render a claimed fact more probable. *Lytle v. Bond's Estate*, 40 Vt. 618. See, also, *Gottlieb v. Leach*, Id. 278. So, when a defendant pleads double for the purpose of drawing on the plaintiff to demur, he cannot, on demurrer, shift his position, and say that one of the matters pleaded as a defense is no defense. *Wright v. Watts*, 3 Q. B. 89. A party who calls and uses a witness on his own behalf admits his competency, and cannot object to him on that ground when called by the other party. *Linsley v. Lovely*, 26 Vt. 123, 133. It does not comport with the propriety of things that parties should be allowed to occupy inconsistent positions in the trial of cases. Courts would soon become objects of ridicule under such a practice.

As to the cross-examination of *Sargent* about his having been convicted in the circuit court, we do not think that the testimony elicited went beyond permissible bounds, though probably one of the questions was improper, for most of the authorities hold that the fact of conviction must be shown by the record. The modern tendency is to greater liberality of cross-examination for the purpose of finding out who and what the witness is. This is recognized in *State v. Fournier*, 68 Vt. 262, 270, 35 Atl. 178, where it is said that much latitude is allowed in cross-examination in regard to facts that bear directly upon the pursuit, character, and moral principles of the witness, and therefore essential to the due estimation of his testimony by the jury, but that it rests largely in the discretion of the trial court how far the examination shall go. Mr. Justice *Stephen* (*Steph. Ev.* art. 129) lays it down as a general proposition that on cross-examination a witness may be asked any question that tends to shake his credit by injuring his character, but submits that the rule ought to be modified by adding that the trial court has a right to exercise a discretion in such cases, and to refuse to compel such questions to be answered when the truth of the matter suggested would not, in the opinion of the court, affect the credibility of the witness as to the matter he is required to testify. This accords

with Mr. Greenleaf's idea, and is probably the correct view, though it must be admitted that it is very difficult to draw the line with such precision as to make it easy in all cases to apply the rule thus modified; for in the realm of judicial discretion there is necessarily more or less doubt, notwithstanding, as Lord Coke says, that discretion is supposed to follow the right line of the law, and not the crooked cord of public opinion, which some call law. Judgment that there is no error in the proceedings of the county court, and that the prisoners take nothing by their exceptions. Let sentence be imposed and execution done.

(69 Vt. 545)

CLEMONS v. CLEMONS' ESTATE.

(Supreme Court of Vermont. Bennington. July 17, 1897.)

JUDGES—DISQUALIFICATION TO ACT—PLEAS IN BAR—TIME FOR FILING—DISCRETION OF COURT—NUL TIEL RECORD—SCOPE OF PROOFS—ATTACHMENT—SUFFICIENCY OF RETURN—INSOLVENCY—INTEREST ON CLAIMS.

1. Although an insolvency court judge has acted as counsel in obtaining a judgment in a county court, he may allow that judgment to be proved before him as a claim against an insolvent estate, as the two proceedings are not the same cause, within the meaning of the statute prohibiting a judge from acting in a judicial capacity in a cause in which he has acted as counsel.

2. No exception lies to the refusal of the court to allow special pleas in bar to be filed out of time, as the permission is discretionary with the trial judge.

3. In a trial on appeal from the allowance of a claim in an insolvency court, the general issue will be considered as already pleaded, after the court has refused to allow special pleas in bar to be filed out of time; for by statute the pleadings, trial, and determination of the case are to be the same as in an action at law.

4. In an appeal from an insolvency court allowing a creditor's claim, consisting of a judgment, if the plea is nul tiel record the judgment cannot be impeached for fraud, or otherwise assailed except as to the existence of the record as pleaded.

5. A return of an attachment, describing the property attached as the debtor's as all the real estate in a certain town, with the appurtenance thereof, and the debtor's right in equity to redeem the same, is a sufficient return to hold all the debtor's land in said town as appears of record.

6. The statute providing that interest on interest-drawing debts against an insolvent's estate shall be computed to the date of filing the petition in insolvency does not bar computation to a later date, if that be necessary to secure equality among creditors, or if the estate is more than sufficient to pay the claims.

Exceptions from Bennington county court; Thompson, Judge.

Oath of claim by Louise Clemons against the estate of Warren Clemons in the court of insolvency. Upon appeal to the county court from a decision allowing the claim, after pleas to the jurisdiction had been made and held insufficient on demurrer, a trial was had on a plea of nul tiel record, and judgment rendered for plaintiff. Defendant excepts. Affirmed.

Under the plea of nul tiel record, the defendant offered evidence to impeach the judg-

ment which constituted the plaintiff's claim, but the same was excluded, and the defendant excepted. Upon the facts found the court rendered judgment for the plaintiff to recover the amount of her judgment, with interest to date, and costs, and adjudged the same to be a preferred and secured claim by attachment, and ordered that the real estate attached be sold by the assignee, subject to all prior incumbrances and the debtor's homestead, and that the net proceeds, or as much thereof as might be necessary, should be applied to the payment of the debt and costs, and that the judgment and order should be certified to the court of insolvency.

Batchelder & Bates and Barber & Darling, for plaintiff. W. B. Sheldon, for defendant.

ROWELL, J. The claim proved and allowed against the defendant, an insolvent estate, was a judgment of the supreme court affirming a judgment of Bennington county court. The oath of claim set out with great particularity the proceedings in the suit in which the judgment was obtained, but the defendant claimed, notwithstanding that, that upon entering the appeal in the county court the plaintiff should file a statement of her claim, setting forth the same substantially as it would be necessary to set it forth in a declaration thereon in an action at law as provided by V. S. § 2088. But the court held that the oath contained a sufficient statement of claim, and that no other need be filed, to which no exception was taken. Thereupon the defendant obtained leave to plead, and pleaded to the jurisdiction the pendency of a suit in chancery involving the same matter. This plea was held bad on demurrer, whereupon the defendant again obtained leave to plead, and again pleaded to the jurisdiction, for that the judge of the court of insolvency who allowed said claim and granted the appeal had been retained by the plaintiff and had acted as counsel for her in obtaining the judgment of the county court that was thus affirmed, to which the plaintiff demurred. The oath of claim set forth that the plaintiff had security by attachment of land made more than four months before the filing of the petition in insolvency, but the record does not show, nor the plea allege, that the judge of the court of insolvency passed upon the validity of the attachment, nor that he was even retained or acted as counsel in respect of the attachment. For aught that appears, he may have been retained long after the suit was commenced and the attachment made. The statute prohibits a judge from acting in a judicial capacity in, or as a trier of, a cause or matter in which he has been retained or acted as an attorney or counsel. But this case does not come within the prohibition. The cause and matter that the judge tried were not the cause and matter in which he had been retained and acted as counsel, for that had been determined and ended by final judgment, and the allowance of that judgment was another and a

different cause and matter. Therefore the plea is bad.

No exception lies to the refusal of the court to allow special pleas in bar to be filed out of time. That was matter of discretion, well exercised, in view of the fact that the defendant pleaded to the jurisdiction, instead of to the merits,—the declared purpose for which the leave was asked.

The court held that, under the rule in such case made and provided, the general issue must be considered as already pleaded, and the case was tried thereon. This was correct, for, by statute, the pleadings, trial, and determination of the case were to be as in an action at law, except that no execution could be awarded against the assignee for the debt found due to the plaintiff. Under this plea, which was nul tiel record, the judgment could not be impeached for fraud, nor otherwise defended against, except to contest the existence of the record as stated in the oath, which was held to be a sufficient declaration.

The defendant questions the correctness of the adjudication that said attachment is valid against the assignee, for that the return on the copy of the attachment left in the town clerk's office is too general in description of the land to create a lien thereon. The return describes the property attached as the debtor's as all the real estate in the town of Dorset, with the appurtenances thereof, and the debtor's right in equity to redeem the same. It was held the best part of a century ago that such an attachment is good to hold all the land in the town owned by the defendant in the action, as appears of record, and such has been the law ever since. *Young v. Judd*, Brat. 151.

Interest was allowed on the judgment proved. It is conceded that the plaintiff is entitled to interest thereon to the time of payment, to the extent of the realization from the attachment, but claimed that as to the unpaid balance of the debt, if any, interest must cease at the time of filing the petition. It is true, the statute provides that, upon debts subject to the payment of interest, interest shall be computed to the date of filing the petition. It is matter of convenience that a time should be fixed for that purpose, and the time chosen is as convenient as any; but the statute does not mean that interest shall in no event be computed to a later date, for obviously it should be when, for instance, the assets are more than enough to pay the face of the debts as allowed. So, too, should it be when necessary to secure equality among creditors; and equality can be secured in this case by computing interest on all the other debts down to the time of the rendition of this judgment, which the court of insolvency can do on the matter being brought to its attention by the assignee. There was therefore no error in augmenting the judgment of the supreme court by adding accrued interest, although perhaps there might have been a judgment rendered as to the unpaid balance that would effectuate

the same equality as the method above suggested. Other methods might also be suggested.

It is said that the court also increased the judgment of the supreme court by the amount of \$9 costs, and objected that costs incurred after the filing of the petition cannot be proved. But the costs referred to, as we understand it, are the costs of this suit, to which the plaintiff is entitled by statute. V. S. § 2089. Judgment affirmed, and to be certified to the court of insolvency.

(89 Vt. 469)

GUILTINAN v. METROPOLITAN LIFE INS. CO.

(Supreme Court of Vermont. Bennington. July 27, 1897.)

LIFE INSURANCE—CONDITIONS AND WARRANTIES—OCCUPATION AND HABITS—FRAUD—PLEADING—EVIDENCE—BURDEN OF PROOF—INSTRUCTIONS.

1. An applicant for life insurance was not "engaged" in the sale of alcoholic beverages, though, as servant in an hotel, he was occasionally called upon to serve liquor to guests.

2. A charge that an insured is entitled to the presumption of innocence should be given on request, where the insurer charges that insured obtained the policy by fraud.

3. Where the evidence disclosed that the insurer's agent wrote on the proof of death that he believed the physician's statement that insured used no intoxicants except on the physician's order, and it was sought to defeat the policy on the ground that insured used intoxicants, insured's attorney was justified, while arguing to the jury, in saying that, "if that is the way this company is going to treat its policy holders, the policy holders need some protection by statute."

4. One suing on a life insurance policy does not need either to plead or to prove the truth of answers made to questions in insured's application, though the truth of such answers was warranted in the policy, and made a condition of its validity.

5. An insurer may show, under a general denial, that insured's answers in his application for life insurance were untrue, but it must point out which of the numerous answers it will contest.

Exceptions from Bennington county court; Thompson, Judge.

General and special assumpsit by Francis Guiltinan, administrator of the estate of Michael J. Guiltinan, deceased, against the Metropolitan Life Insurance Company, upon a policy of life insurance. Plea, the general issue, with notice of special matter in defense. There were general and special verdicts, and judgment thereon for plaintiff, and defendant excepts. Affirmed.

The application contained the following questions, each of which the applicant answered in the negative: "Question H. Are you now, either directly or indirectly, concerned in either the manufacture or sale of any kind of alcoholic beverages? Question H.a. Have you ever been so engaged?" Rolan Taylor, a witness for the defendant, testified that in the spring before the application was made he frequently visited the hotel in which the insured was then employed, in the village of

Bennington, and as many as 10 times purchased whisky, which was sold to him by, and for which he paid, the insured. The plaintiff produced Harry Kennon, who testified that he was the manager of the hotel during that period, and had control of the bar, and that, while the insured might possibly have served some liquor, the witness was never aware of it, and had almost the constant oversight of the business. The plaintiff also produced other witnesses, who knew the insured and were frequently about the hotel during that period, who testified that they had never seen the insured take any part in the sale of liquors. There was no other testimony to contradict that of Taylor. At the conclusion of the evidence the defendant moved for a verdict on the ground that the undisputed evidence showed that the answers to questions H and H a were false. The motion was denied, pro forma, and the defendant excepted. The plaintiff introduced the proof of death. In argument to the jury, counsel for the plaintiff, against the objection and exception of the defendant, was allowed to call attention to the statement of the defendant's agent thereon to the effect that he believed the statements of the physician to be true, among which statements was one certifying that the insured used no intoxicants except by his (the physician's) order, whereas the defendant was now attempting to defeat the policy on the ground, among others, that the insured had been addicted to the use of intoxicants, and to say, "if that is the way this company is going to treat its policy holders, the policy holders need some protection by statute." The court instructed the jury to return special verdicts with reference to the truth of each of the answers in the application which the defendant claimed to be false, and, in case any of the answers were untrue, to return a general verdict for the defendant, but that the burden was upon the defendant to show that the answers were untrue, to which the defendant excepted. The defendant requested the court to charge that if the insured, before the date of the application, had ever, as clerk, servant, or agent, sold alcoholic beverages, he was "engaged in the sale," within the meaning of the contract. The court declined, and the defendant excepted.

Batchelder & Bates and Barber & Darling, for plaintiff.

Dillingham, Huse & Howland and F. O. Archibald, for defendant.

The exception to the ruling of the court, "that the burden of proof to establish by fair balance of testimony that there was a breach of warranty by reason of the answers relied upon as being false having been in fact untrue rests upon the defendant," should be sustained. *Wilson v. Insurance Co.*, 4 R. I. 159; *Sweeney v. Insurance Co.* (R. I.) 36 Atl. 9; *Craig v. Insurance Co.*, 1 Pet. C. C. 410,

Fed. Cas. No. 3,340; Phil. Ins. § 2122; *McLoon v. Insurance Co.*, 100 Mass. 472.

TYLER, J. There was no error in the refusal of the trial court to direct a verdict for the defendant. The testimony of Kenyon and other witnesses called by the plaintiff tended to contradict the testimony of Taylor, and it became a question of fact for the jury whether or not the insured ever sold any liquor while he was employed at the hotel. In answer to questions in the application, the insured stated that he was not then, and never had been, directly or indirectly, engaged in the manufacture or sale of alcoholic beverages. The court instructed the jury that if he was employed in that house generally to do what he was called upon to do from day to day, and as a part of that general employment he sold alcoholic beverages to the guests as they called for them, he was engaged in the sale of alcoholic beverages, within the meaning of the contract; but, on the other hand, if this was no part of his general business or employment, even though he did occasionally, out of his ordinary line of duties, by direction of his employer, or otherwise, furnish the guests with intoxicating liquors, and take pay for them, he was not engaged in such sale, within the meaning of the contract. This instruction was correct. The word "engaged," as used in the application, means "occupied," and does not relate to an occasional act outside of a regular employment, and the obvious purpose of the question was that the defendant might be informed whether or not this was the applicant's occupation. The defendant could have no interest to ascertain whether the applicant, as a servant of the hotel, was occasionally called upon to furnish liquor to a guest.

The defendant charged that the insured obtained the policy of insurance by fraud. Therefore the instruction of the court that the insured was entitled to the presumption of innocence was correct. *Childs v. Merrill*, 66 Vt. 302, 29 Atl. 532.

The remarks of the plaintiff's counsel upon the conduct of the defendant in resisting payment of the policy were justified by the evidence, and the exception is not sustained.

It was "declared, agreed, and warranted" by the applicant, in his application, that his answers and statements were full and true, and should be the basis and become part of the contract of insurance. It was recited in the policy that the defendant's promise to pay the legal representatives of the insured the sum of \$2,000 was made in consideration of the answers and statements contained in the printed and written application, which by the terms of the policy were made warranties, and a part of the contract. This part of the policy is set out in the declaration, which also recites the condition in the policy that if any statement contained in the printed and written application therein re-

ferred to were not true, or if any of its conditions were not observed, the policy should thereupon become void. The declaration alleges that upon the written application of the insured the defendant made and delivered to him a policy of insurance upon his life, and thereby, in consideration of the answers and statements contained in the application, insured his life for \$2,000, and agreed to pay that sum to his legal representatives upon proof of his death. It alleges the payment of all premiums, the death of the applicant, proof of death, defendant's acceptance of the proof, a tender of the policy, and demand and refusal of payment. It does not allege that the applicant's answers and statements in his application were true, nor that he in his lifetime performed all the conditions of the contract by him to be performed. The defendant raised the issue in its notice that it was not liable to pay the amount of the policy, for the reason, as it alleged, that certain answers and statements made by the insured in the application in respect to his personal habits, and in respect to diseases with which he and certain relatives had been afflicted, were untrue. The application contains a great number of questions that were answered by the insured, many of them relating to his occupation, to his past and present physical condition, and to his habits in respect to the use of stimulants and narcotics, about which he must have had personal knowledge, and many others relating to diseases with which his relatives had been afflicted, as: "Has either of your parents, brothers, sisters, grandparents, uncles, or aunts now or ever had consumption, cancer, gout, scrofula, diabetes, rheumatism, epilepsy, insanity, or other hereditary diseases?" about which he may or may not have had personal knowledge, and yet all answers were warranted to be true. Was it necessary for the plaintiff to allege and prove the truth of these numerous answers? The rules of law that have been laid down relative to actions upon insurance contracts of this kind are not in harmony. The cases cited on the brief of defendant's counsel, hold, in effect, that, whether the terms used are affirmative or negative, the warranty is a condition precedent, and that its performance must be averred and proved by the party seeking to recover upon the contract. It is apparent that the enforcement of this rule would defeat a recovery in very many cases. After the lapse of years it might be impossible for the administrator to prove affirmatively that the assured never had asthma or bronchitis, or that he never consulted any other physician than his usual medical adviser. The answers may have been strictly true, and yet a failure to prove the truth of one so unimportant as that last suggested would defeat a recovery. It is the purpose of the law to give effect to contracts honestly made, rather than to defeat them. To avoid the unjust results of this rule, it was

held in *Sweeney v. Insurance Co.* (R. I. 83 Atl. 9, in an action where the application and policy were like the ones in this case, that the answers constituted warranties, so far as they rested upon the applicant's own knowledge, without deciding whether statements that obviously could not lie within his knowledge were warranties or not. The court cites *Jeffries v. Insurance Co.*, 22 Wall. 47, which holds that when the statements are made warranties they must be proved; that a party cannot recover upon a conditional contract until he shows that he has complied with its conditions. On the other hand, in *Insurance Co. v. Ewing*, 92 U. S. 377, it was said by Justice Miller that, if the insurer knew or believed that any of the statements were untrue, it was no hardship for it to single out the answer the truth of which he proposed to contest, and if he had any reasonable ground to make such an issue, to show the facts on which it was founded; that the plaintiff must prove the issuing of the policy, payment of premiums, death of the assured, proof of death, and general performance of conditions; but to say that, because all answers are warranties, the truth of every one must be proved, would be manifestly unreasonable. In *Benjamin v. Association*, 44 La. Ann. 1017, 11 South. 628, the modern rule is stated to be that the defendant carries the burden of proving such defenses, which involves the necessity of specially pleading them, and numerous cases are cited in support of the rule,—among them, *May, Ins.* § 591, and 2 Wood, *Ins.* § 522. *Cooke on Life Insurance* (sections 14, 93, 123) says that this is the prevailing rule, though this and many of the established principles of the law of life insurance are in direct contrariety to the rule requiring allegation and proof of the performance of conditions precedent. In the able opinion of the Louisiana court, after citing the above works on Life Insurance, and many decided cases, it is said: "Finally, this court, in a line of decisions, has maintained the principle announced by Mr. Arnould in his work on Insurance, that, as relates to policies of insurance, 'all matters in confession and avoidance, including not only those by way of discharge, but those also which show the transaction to be void or voidable, on the ground of fraud or otherwise, shall be specially pleaded.' 2 Arn. *Ins.* 1287." The cases cited on the brief of the plaintiff's counsel generally support this statement of the law, notably, *Spencer v. Insurance Ass'n*, 142 N. Y. 506, 87 N. E. 617; *Insurance Co. v. Rogers*, 119 Ill. 474, 10 N. E. 242; *Price v. Insurance Co.*, 17 Minn. 497 (Gil. 473). In the present case we hold that, upon reason and authority, the plaintiff was not bound to raise an issue in respect to the truthfulness of the answers of the insured. It was a matter of defense, which by our statute could be made under the general issue; but it was the duty of the defendant to point out in evidence which of the numerous answers

it should contest, and the burden was upon it to establish their untruthfulness. Judgment affirmed.

(90 Me. 354)

SAWYER v. RUMFORD FALLS PAPER CO.

(Supreme Judicial Court of Maine. May 31, 1897.)

MASTER AND SERVANT—DEFECTIVE MACHINERY—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE—FELLOW SERVANTS—DAMAGES.

1. The plaintiff recovered a verdict of \$4,250 for personal injuries sustained while employed in the defendant's mill. He charged the defendant with actionable negligence in three particulars: First, the continued use of a defective dynamo belt, with full knowledge of its condition; second, the omission to provide any temporary lights to supply the place of electric lights, which were known by the defendant to be frequently extinguished; and, finally, the retention of a disobedient machine tender after knowledge of his alleged incompetency and inefficiency.

Upon a general motion for a new trial, it appeared that the case was submitted to the jury on the evidence furnished by the plaintiff only, the defendant offering no testimony. *Held*, that the absence of light was the reason of the plaintiff's failure to seize the lever to save himself from falling; that such an occurrence might be reasonably expected to result from such a cause in the darkness, either in the way it did happen, or in some similar way; and that it must be regarded as the real and proximate cause of the injury.

2. The plaintiff was injured in attempting to remove broken paper that was choked between the roll and the doctor, when the presses were in motion. He anticipated no more unusual or extraordinary service was required at this time than when he had at other times successfully and safely performed the same service without injury or apparent knowledge of the danger; but he had no knowledge that the paper was choked on the doctor, and only a partial appreciation of the peril involved in his attempt to remove it in the darkness.

Hence, when he stepped upon the platform in obedience to the order of the machine tender he understood that he was simply required to render an ordinary service, which he had before safely and successfully performed, and obeyed that instinctive impulse to follow the direction of his superior which is the characteristic of a faithful, resolute, and loyal servant, and his conduct is entitled to be viewed in the light of reasonable charity.

3. *Held* that, while neither the prudence of the plaintiff nor the negligence of the defendant can be regarded as conclusively established, the verdict of the jury is not so utterly without support from the evidence as to justify the court in saying that it is manifestly wrong and must be set aside.

4. Upon the question of damages, the court orders that, if the plaintiff will remit all of the verdict above \$2,500 within 30 days after receipt of the rescript by the clerk, the motion for a new trial is to be overruled; otherwise, the motion is sustained and the verdict set aside.

(Official.)

Action by Angus T. Sawyer against the Rumford Falls Paper Company to recover damages resulting from personal injuries sustained by the plaintiff while employed in the defendant company's paper mill at Rumford Falls. At the trial of the case the defendant's counsel moved for a nonsuit, and, the motion being denied, rested upon the evidence already

presented. The jury returned a verdict for the plaintiff in the sum of \$4,250. The defendant company filed a general motion that the verdict be set aside as being against law and evidence, and for excessive damages. Overruled on condition.

F. L. Noble and R. W. Crockett, for plaintiff.
G. A. Wilson and H. C. Smyth, for defendant.

WHITEHOUSE, J. The plaintiff obtained a verdict for \$4,250 as compensation for personal injuries sustained while employed in the paper mill of the defendant company at Rumford Falls. The case comes up on a motion to have this verdict set aside as against the evidence relating to the question of the defendant's liability, and also because the damages are excessive.

The case was presented to the jury on the testimony of the plaintiff and his witnesses, no testimony being introduced by the defendant.

The accident occurred on the 7th day of December, 1894, while the plaintiff was engaged in the service of the company in the capacity of "third hand" in a gang of four on the No. 2 paper machine in the defendant's mill. At that time he was 20 years old, and had been employed in the mill about 18 months in the aggregate, viz. about 5 months as a helper in setting up machines, about 5 months as a "fourth hand," and about 7 months as "third hand" on the No. 2 machine. The mill was operated day and night, and on the occasion in question he was on the night gang. About 4 o'clock in the morning of December 7th, by reason of the breaking of the dynamo belt, the electric lights by which the mill was lighted were suddenly extinguished, leaving the machine room where the plaintiff was employed, as well as the rest of the mill, in complete darkness. What then happened the plaintiff described in his testimony as follows: "When the light went out I was where the winder is, and I was sitting down with the fourth hand, and the machine tender was down to the wet end, lighting a match once in a while. Six or seven minutes after the light went out the machine tender whistled, and he lighted a piece of paper, and we went down, the fourth hand and I, and he gave me the order to pull the broke the [broken paper] off the second press. So I went, and I stand on that step, and I begun to pull off the broke, and the broke was choked. * * * When I stepped up on that stand I went to pull the broke, and I went to pull it out, and the paper gave way in my hand, and I fell backward, and I went to stop myself from falling, and I went to put my hand on the rod or lever (some call it a rod), and I missed that rod, and I fell, my hand on the top of the felt, and my hand went between the rolls, and it caught my hand here, and you see how it cut it." As the result of the accident the plaintiff lost three fingers and a portion of the forefinger of his left hand, and a portion of the outside of the hand itself.

There was evidence tending to show that the dynamo belt was old and much worn, and, being used in a wet place, its strength had become so impaired that it was no longer suitable for use.

It also appears that, from different causes, the electric lights had frequently been extinguished prior to this time, on an average two or three times a week, and that they had twice been out for a few moments on the night in question before the time when the accident happened. In anticipation of these contingencies, a supply of lanterns had been provided for temporary use while the electric lights were out in the room where the paper machines were located; but for several months prior to December 7, 1894, none of these lanterns appear to have been in existence, and no others had been furnished to take the place of those broken or carried away.

There was, however, on each press of the paper machine, what is termed a "friction clutch," which was used to stop one or more of the presses while the machines were still running, and orders had been given by the superintendent to all of the machine tenders to stop the presses whenever the lights went out and the paper broke in the nighttime. But there was evidence that this order was disobeyed by the machine tender who had charge of the operating of machine No. 2, and had been disobeyed by others prior to that time.

In view of this evidence it is contended for the plaintiff that there was actionable negligence on the part of the defendant company in at least these three particulars: First, the continued use of a defective dynamo belt, with full knowledge of its condition; second, the omission to provide any temporary lights to supply the place of the electric lights, which were known by the defendant to be frequently extinguished; and finally the retention of a disobedient machine tender after the knowledge of his alleged inefficiency and incompetency. It is confidently urged that as a practical result of these conditions the plaintiff was required to labor in total darkness in connection with dangerous machinery, and that on the occasion in question, while faithfully and zealously performing his master's work, the plaintiff sustained an injury which he would not have received if the room had been suitably provided with light, or with means for lighting it. It is claimed that, although the unexpected breaking of the choked paper which the plaintiff was struggling to draw out of the machine may have been the immediate occasion of his fall, the absence of light was the reason why he failed to seize the lever to save himself from falling; that such an occurrence might reasonably be expected to result from such a cause, either in the way it did happen, or some similar way; and that it must be regarded as the real and proximate cause of the injury.

On the other hand, the learned counsel for the defendant company as confidently argue that there was no causal connection between

the temporary absence of light in the machine room and the plaintiff's injury; that the injury was not the ordinary or probable result of the darkness in the room, but was due to the breaking of the choked paper,—a wholly unlooked-for and unexpected event,—and must be deemed a purely accidental occurrence, causing damage without legal fault on the part of any one.

It is also suggested that, as the machine tender was only a fellow servant, his failure to stop the rolls of the press by the use of the friction clutch was but the negligence of a fellow servant, for which the defendant is not responsible, if indeed the failure to use it was not the negligence of the plaintiff himself.

It is further contended that the plaintiff was under no obligation to obey directions from any one to labor in an unsuitable and dangerous place, and that if he continued to labor in such a place, or obeyed an order to perform a special service in such a place, with full knowledge and appreciation of the dangers, he must be held to have assumed all the risks incident to the service under such circumstances.

Finally, it is insisted that the plaintiff should be precluded from recovering by his own want of ordinary care and prudence; that after the lights went out he sat for six or seven minutes in a place of perfect safety; if he had remained there no accident would have befallen him; and that the act of stepping from such a place of security into close proximity to the running machinery, and of reaching over it to perform a dangerous service in the midst of total darkness, was imprudent and reckless, and must be deemed contributory negligence on the part of the plaintiff.

The principles of law applicable to these several contentions of the parties, on the one side and the other, have been so fully considered and carefully distinguished in the recent decisions of this court that no further discussion of them can be required on the motion here presented for a new trial as against evidence. They were elaborately stated and aptly illustrated by the presiding justice in the instructions to the jury, to which no exceptions have been taken.

The evidence all came from the testimony of the plaintiff and his witnesses, and must receive all the probative force to which it is fairly entitled when thus uncontradicted and unmodified. The evidence tending to show inefficiency and incompetency on the part of the "tender" of the plaintiff's machine is not sufficient to establish the liability of the company on that ground. But the defendant had knowledge that it was a common occurrence for the electric lights to go out, and it is admitted the men were expected to keep the machines in operation and carry on the work during these periods of temporary darkness, provided the paper did not break. It is obvious that there was the same liability that the paper would "break," and also that it would gather and "choke" between the roll and the

"doctor," in the nighttime as in the daytime, but with less probability of seasonable discovery. Under ordinary circumstances, however, it involved more trouble, difficulty, and delay to stop the presses by means of the friction clutch, for the purpose of removing the broken paper and relieving the "choke" on the doctor, than it did to accomplish the same thing while the presses were running. Hence it does not appear that the workmen were ever reprimanded for disobeying the order to stop the presses under such circumstances. The plaintiff had but a limited and imperfect acquaintance with the operation of the machine on which he was working. He had never handled the paper when choked, and had received no special instructions touching his duty when the paper broke, except to go upon the platform or step and remove the broken paper while the presses were running. He had several times performed this service without injury, or apparent knowledge of danger. On the occasion of the accident, when directed to "pull the broke off the press" he had no knowledge that the paper was choked on the doctor, and only a partial appreciation of the peril involved in his attempt to remove it in the darkness. When he stepped upon the platform in obedience to the order of the tender he understood that he was simply required to render the ordinary service of removing the broken paper, which he had before successfully and safely performed. He anticipated no unusual or extraordinary service requiring greater risk or peril. He doubtless understood that there was a general order that the presses should be stopped at night if the paper broke while the lights were out, but he also knew that this was a custom more honored in the breach than the observance. He was under no obligations to obey an order to remove broken paper while the press was in motion in the darkness, but he evidently believed that he was expected to do it if requested by the machine tender. No accident had happened in so doing prior to that time. He obeyed that instinctive impulse to follow the direction of his superior which is the characteristic of a faithful, resolute, and loyal servant, and his conduct is entitled to be viewed in the light of reasonable charity.

The removal of broken paper choked between the roll and the doctor while the presses were in motion was attended with more danger when the lights were out. That the workman might be thrown from his proper position by the sudden giving way of the paper under the force applied to remove it, or in some similar way, was an occurrence which might reasonably have been anticipated, and regarded as likely to happen; but the injurious consequence of such an accident might have been avoided if the defendant had exercised reasonable care and diligence in providing sufficient means for lighting the room in the nighttime. The omission of the defendant to exercise such care, diligence, and prudence would thus become the real, efficient, and proximate cause of the plaintiff's injury.

After a careful examination of all the evidence and of the arguments of the learned counsel, it is the opinion of the court that, while neither the prudence of the plaintiff nor the negligence of the defendant can be regarded as conclusively established, the verdict of the jury is not so utterly without support from the evidence as to justify the court in saying that it is manifestly wrong and must be set aside.

If the plaintiff will remit all of the verdict above \$2,500 within 30 days after receipt of the rescript by the clerk, the motion for a new trial is to be overruled. Otherwise the motion will be sustained and the verdict set aside.

Ordered accordingly.

(90 Me. 385)

ROBINSON v. PENNSYLVANIA FIRE INS. CO.

(Supreme Judicial Court of Maine. June 2, 1897.)

FIRE INSURANCE—PROPERTY COVERED—PROOFS OF LOSS—WAIVER—ISSUES OF LAW AND FACT.

1. When there is no express waiver, it is not only necessary for the jury to determine what the facts are which are relied upon for the purpose of showing a waiver, but it is also the peculiar and appropriate province of the jury to determine what inferences are properly deducible from such facts.

2. That the question whether or not there has been a waiver, where it is a matter of inference, is one of fact, for the determination of the jury, is generally, if not universally, held by the courts of this country.

3. In an action on a fire insurance policy there was evidence that the plaintiff did not furnish proofs of loss within a reasonable time, as required by Rev. St. c. 49, § 21, but claimed that the defendant had waived the same. There was also evidence tending to prove that the defendant denied its liability, for the reason that the policy did not cover the goods which were in a new building, or carriage house, which the plaintiff claimed belonged with her dwelling house. The plaintiff contended that such denial was a waiver of the proofs of loss, and the defendant contended the contrary.

Upon the question of waiver the presiding justice instructed the jury as follows: "So, gentlemen, you will determine whether or not, from the beginning, the defendant has denied its liability under this policy because they claim it did not cover this property, and, if it has, then, gentlemen, they have waived any proof on the part of the plaintiff; and, as I have said to you, she may recover, provided she satisfies you that the policy covers the property consumed by reason of its being in the building that was mentioned in the policy."

Held, that the question as to whether or not there had been a waiver was one of fact for the jury.

It was therefore for the jury to determine, from the acts relied on and proved, whether the inference could be properly drawn, either that there was an intention upon the part of the insurer to waive its rights to have a proof of loss furnished by the insured, or that the denial of liability, for another cause, was of such a character, or made under such circumstances, as to reasonably induce a belief upon the part of the insured that the furnishing a proof of loss would be useless formality, and that in relying upon the belief thus induced the plaintiff neglected to make one.

4. The carriage-house building was erected soon after the policy was issued, and distant from the dwelling house nearly 200 feet, but on the same

lot. The presiding justice, after instructing the jury that they would determine whether or not said building belonged to the house and stable, to be used therewith as a carriage-house building, or whether it was a separate place where business was to be carried on, and extrahazardous articles were to be kept, further instructed the jury as follows: "It is not necessary that it should be a building where only carriages are kept. It might be used for various purposes. The only question is, did it belong to them to be used to some extent as a carriage house with that stable? If it did, then this policy covered the property that was in it, and the plaintiff would be entitled to recover under the policy. If it did not, then the plaintiff cannot recover."

Held, that these instructions are correct, and in accordance with the previous decision of this court in 32 Atl. 996, 87 Me. 399. The building, viz. "her frame stable and carriage-house buildings, belonging with said dwelling and on the same lot," was within the description in the policy, if it was in part used by the plaintiff as a carriage house, belonging with her dwelling house, and on the same lot, although it was also used to some extent by persons other than the plaintiff for other purposes.

(Official.)

Exceptions from supreme judicial court, Knox county.

Action by Sophronia E. Robinson against the Pennsylvania Fire Insurance Company. There was a judgment for plaintiff, and defendant brought exceptions. Sustained.

T. P. Pierce, for plaintiff. W. H. Folger, for defendant.

WISWELL, J. By a policy dated May 27, 1892, the defendant insured against fire the household furniture and certain other personal property of the plaintiff, "while contained in her one and one-half story frame dwelling and additions, situated No. 112, on the south side of the old Thomaston road, in Rockland, Maine"; and, in another clause, \$325 on her vehicles of all kinds, harnesses, robes, and all horse furnishings, hay, and grain, together with farming and miscellaneous tools, all while contained in her frame stable and carriage-house buildings, belonging with said dwelling, and on the same lot."

At the date of the policy the plaintiff, with her husband, was occupying the frame dwelling house and additions mentioned in the policy. The buildings consisted of a house, ell, and stable, all connected. In the month of May, 1892, the plaintiff erected, and completed at about the date of this policy, another building on the same lot with the dwelling house, 189 feet distant from the stable connected with the dwelling house. The testimony showed that this new building was occupied in part by the plaintiff's son in making and painting carriages, in part for the storage of carriages there for sale, and that it also contained various carriages, harnesses, robes, and other articles belonging to the plaintiff, and paint stock, paint brushes, and carriage tools belonging to the plaintiff's son.

The new building, described as a "frame carriage-house and paint-shop building," together with the paint stock, materials, and tools, household furniture, and other articles

contained therein, was also insured by the same company, under a policy dated June 30, 1892, and issued to the plaintiff and her son.

On September 30, 1892, the new building and all of its contents were destroyed by fire. The defendant paid the plaintiff and her son the full amount of insurance under the policy dated June 30th. This suit is to recover for the loss of carriages, harnesses, and other articles, mentioned in the description in the policy, belonging to the plaintiff, and contained in this building. The defendant denied all liability upon the policy in suit, claiming that the property in the new building was not covered by the policy, for the reason that, although it stood on the same lot with the dwelling house, it was not "a carriage-house building belonging with said dwelling."

Upon this point the presiding justice, after instructing the jury that they would determine whether or not said building belonged to the house and stable, to be used therewith as a carriage-house building, or whether it was a separate and distinct place, where business was to be carried on and extrahazardous articles were to be kept, instructed the jury as follows: "It is not necessary that it should be a building where only carriages are kept. It might be used for various purposes. The only question is, did it belong to them to be used to some extent as a carriage house with that stable? If it did, then this policy covered the property that was in it, and the plaintiff would be entitled to recover under the policy. If it did not, then the plaintiff cannot recover."

We think that the instructions were appropriate and correct, and in accordance with the opinion of this court when the same question between the same parties was before the court. See 87 Me. 399, 32 Atl. 996. It certainly was not necessary that the building should be used exclusively as a carriage house. It was within the description of the policy, if it was in part used by the plaintiff as a carriage house belonging with her dwelling house, and on the same lot, although it was also used to some extent by persons other than the plaintiff for other purposes.

As to the second point raised, we quote from the bill of exceptions: "The plaintiff did not within a reasonable time after her loss deliver to the defendant an account of the loss and damage, as required by section 21 of chapter 49 of the Revised Statutes, but claimed that the defendant by its agents had waived the delivery of such proof of loss. There was evidence tending to prove that, when the defendant's agents were notified of the loss, they denied that the defendant was liable for such loss on the policy in suit, for the reason that the policy did not cover the goods and chattels, in said new building, destroyed by fire. The plaintiff contended that such denial was a waiver of the proof of loss required by the statute, while it was contended by the defendant that such denial of the plaintiff's claim was not such a waiver."

Upon the question of waiver the presiding justice instructed the jury as follows: "So, gentlemen, you will determine whether or not, from the beginning, the defendant has denied its liability under this policy because they claim it did not cover this property; and, if it has, then, gentlemen, they have waived any proof on the part of the plaintiff, and, as I have said to you, she may recover, provided she satisfies you that the policy covered the property consumed by reason of its being in the building that was mentioned in the policy."

We think that this instruction was erroneous. Ordinarily the question as to whether or not there has been a waiver is one of fact for the jury. "It is always so whenever it is to be inferred from evidence adduced, or is to be established from the weight of evidence." *Nickerson v. Nickerson*, 80 Me. 100, 12 Atl. 880.

It was a question of fact in this case. There was no express waiver. It was therefore for the jury to determine whether, from the acts relied upon and proved, the inference could be properly drawn either that there was an intention upon the part of the insurer to waive its right to have a proof of loss furnished by the insured, or that the denial of liability, for another cause, was of such a character, or made under such circumstances, as to reasonably induce a belief upon the part of the assured that the furnishing of a proof of loss would be a useless formality, and that in relying upon the belief thus induced she neglected to make the required proof of loss within a reasonable time.

When there is no express waiver, it is not only necessary for the jury to determine what the facts are which are relied upon for the purpose of showing a waiver, but it is also the peculiar and appropriate province of the jury to determine what inferences are properly deducible from such facts.

That the question whether or not there has been a waiver, where it is a matter of inference, is one of fact for the determination of the jury, is generally, if not universally, held by the courts of this country. It was early so decided in this state in the case of *Manufacturing Co. v. Armstrong*, 17 Me. 34, in which it was held, "Whether there was or was not such a waiver is for the decision of the jury, and the presiding judge cannot order a nonsuit, even if the court should be of opinion that the evidence of waiver would not warrant a verdict." This case was cited and approved in *Nickerson v. Nickerson*, supra.

In *Smith v. Insurance Co.*, 87 Me. 190, 32 Atl. 872, the plaintiff's counsel requested the presiding judge to rule as a matter of law that the defendant had waived its right to arbitration. The court declined to do this, but, explaining what might constitute a waiver, it submitted the question to the jury to determine for themselves. The ruling was sustained, although there was no discussion or the question as to whether this was within the province of court or jury.

In *Fitch v. Iron Works*, 29 Conn. 91, it was held that this was a question for the jury, "because a question of waiver is one of intention, and most usually depends on acts or declarations which, in regard to their character, are of an inconclusive or doubtful nature, and furnishes only evidence of intention and grounds of inference and deduction which it is the appropriate province of the jury only to consider."

In *Fox v. Harding*, 7 Cush. 516, it is said: "It may be laid down as a general rule that the question whether the evidence in any case establishes a waiver of any legal right by a party is one of fact, to be settled by the verdict of a jury. * * * In all questions of this sort so much depends on the intent with which parties act that it would be impossible for courts to establish any certain rule by which all cases could be governed. They must necessarily be left to the determination of juries, whose peculiar province it is to ascertain the intent of parties as gathered from the various facts and circumstances proved in each particular case."

In *Railroad Co. v. Paige*, 135 Mass. 145, it is said: "Taking the view most favorable to the defendant, it was a question of fact, upon the evidence, whether he had not thus waived his rights upon which the plaintiff would, in a jury trial, have the right to go to the jury. The ruling, therefore, that as matter of law the defendant was entitled, upon the evidence, to recover under his declaration in set-off, without passing upon this disputed question of fact, was error." Numerous other cases to the same effect might be cited, but it is unnecessary.

Nor, in our opinion, was the instruction complained of a strictly correct statement of the law. It was too broad and unqualified. The mere denial by the company of its liability, because of the claim that the property destroyed was not covered by the policy, was not, in and of itself, a waiver. It would be evidence from which a jury, in connection with all the other facts and circumstances, might draw the inference that a waiver was intended; or it might have the effect of a waiver, under certain circumstances, upon the doctrine of estoppel. A waiver is the intentional relinquishment of a known right. And even where a waiver is not intended, the language, conduct, or even the silence of one party to a contract may be of such a character and under such circumstances as to induce the other party to believe that a waiver was intended; and if, acting upon this belief, he fails to perform a required condition, then the party whose conduct caused the belief will be estopped from taking any advantage thus obtained.

Upon the same principle it has very generally been held that if an insurance company denies its liability upon other ground, and thereby causes the insured to believe that a compliance with the condition to furnish proofs of loss would be unavailing and but a

useless formality, and he for that reason neglects to comply with such condition, it will be considered as equivalent to a waiver.

It is true that many decided cases contain statements to the effect that a general denial by an insurance company of all liability waives notice and proof of loss, but an examination of these cases will show that they very generally rest upon the essential principles of estoppel. And while this is not universally true, and although some courts assert that this rule is independent of, or at least not necessarily based upon, the doctrine of estoppel, we think that upon principle there can be no waiver unless one was intended, or unless the circumstances create an estoppel.

In *Welsh v. Corporation*, 151 Pa. St. 607, 25 Atl. 142, it was decided that when the insured, in good faith and within the stipulated time, does what he plainly intends as a compliance with the requirements of his policy as to proofs of loss, good faith equally requires that the company shall notify him promptly of any objections thereto, so as to give him an opportunity to obviate them, and that mere silence may so mislead him, to his disadvantage, to suppose the company satisfied, as to be of itself sufficient evidence of waiver by estoppel. In the opinion in that case it is said: "The plaintiff's fifth point, however, that if the authorized agent of the defendant refused payment of the loss, giving a specified reason therefor to the plaintiff, they must be confined to that reason upon the trial, and the jury should disregard any other defense now made by them, was entirely too broad, and its affirmation, as a general proposition of law, would be clear error. It ignores the elements of estoppel, and lays down a rule without reference to conditions essential to its existence and applicability." And later in the same opinion, in speaking of certain cases in that state, it is said: "All of these cases rest upon the substantial element of estoppel, that the defendant, having led the plaintiff to suppose that a compliance with the preliminary formalities would be unavailing, could not thereafter set up the want of such preliminaries. Of the soundness of that principle there can be no question."

In *Insurance Co. v. Eggleston*, 96 U. S. 572, Mr. Justice Bradley, in delivering the opinion of the court, said: "Any course of action on the part of an insurance company which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract."

In *Insurance Co. v. Potts*, 55 N. J. Law, 158, 26 Atl. 27, 537, the court adopts the language of Mr. Justice Bradley above quoted. In this case the insured procured additional insurance without the written consent of the insurer, as required by the policy. He notified the company, and the company directed its agents to

cancel the policy, which they failed to do until after the loss. It was held that the insurer was estopped from setting up a forfeiture, the court saying in its opinion, "The case thus presented would, in my opinion, come within the elemental rule of estoppel, that in dealing with others no one shall be permitted to deny that he intended the natural consequences of his conduct, when such conduct has in fact induced others to rely upon it to their loss."

"In cases like the present, it must appear that the insured was misled to his prejudice; and, where no act has been done or left undone by the insured in reliance on the act or nonaction of the insurer, there can be no estoppel. The acts or declarations must have influenced the conduct of the other party to his injury." *Wheaton v. Insurance Co.*, 76 Cal. 415, 18 Pac. 758.

In *Butterworth v. Insurance Co.*, 132 Mass. 469, the principle of estoppel is recognized in this language: "No objection is here made to the proofs, but, on the contrary, they are by implication recognized as satisfactory. It is against good faith for the defendant, after thus having lulled the plaintiffs into a feeling of security, to object at the trial that the proofs were not sufficient; and the jury were justified in finding, if not required to find, a waiver by the defendant."

The decisions of the New York court have been somewhat conflicting upon this question, but in *Devens v. Insurance Co.*, 83 N. Y. 168, the court of appeals distinctly recognizes this doctrine in the following language: "The doctrine of waiver was, we think, properly applied in that case; but it should not be extended so as to deprive a party of his defense merely because he negligently or incautiously, when a claim is first presented, while denying his liability, omits to disclose the ground of his defense, or states another ground than that upon which he finally relies. There must, in addition, be evidence from which the jury would be justified in finding that with full knowledge of the facts there was an intention to abandon, or not to insist upon, the particular defense afterwards relied upon, or that it was purposely concealed under circumstances calculated to, and which actually did, mislead the other party to his injury."

The doctrine is thus stated in Bigelow, *Estop.* p. 660: "Frequent illustrations of the estoppel in question are to be found in cases of actions upon insurance policies, where the conduct of the underwriter has been such as reasonably to lead the assured to believe, until too late, that a requirement of the policy, as, e. g., in regard to the proofs of loss or the prompt payment of the premium or of a premium note, will not be required. If the assured, as a sensible man, has really been misled, it would be a fraud upon him to insist upon the term or condition forborne." And on page 604 the same author says: "The question to be considered in such cases, it will be seen, is whether the conduct of the one party had had a natural tendency to prevent the oth-

er from doing what he has undertaken to do, and has not done."

For the reasons given, and upon the authority of the cases cited, this exception must be sustained.

Exceptions sustained.

(90 Me. 338)

HANSCOM v. HOME INS. CO.

SAME v. NORTH BRITISH & MERCANTILE INS. CO.

(Supreme Judicial Court of Maine. June 1, 1897.)

FIRE INSURANCE—CONDITIONS—NONOCCUPANCY—WAIVER—INCUMBRANCES—PROOFS OF LOSS—FALSE SWEARING.

1. A waiver involves the idea of assent, and assent is primarily an act of the understanding. It presupposes that the person to be affected has knowledge of his rights, but does not wish to enforce them. It is an intentional relinquishment of a known right, and is a question of fact whenever it is to be inferred from evidence adduced, or is to be established from the weight of evidence. Again, it may happen that a waiver of a breach of the condition in a policy is not actually intended; but if the conduct and declarations of the insurer are of such a character as to justify the belief that a waiver is intended, and acting upon this belief the insured is induced to incur trouble and expense, and is subjected to delay to his injury and prejudice, the insurer may be prohibited from claiming a forfeiture for such a breach, upon the principles of equitable estoppel.

2. A policy of fire insurance upon a dwelling house, furniture, and other personal property contained these stipulations: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the building herein described, whether intended for occupancy by the owner or tenant, be or become vacant or unoccupied, or so remain ten days, * * * or if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage. This entire policy shall be void * * * in case of any fraud or false swearing by the insured touching any matter relating to this insurance, or the subject thereof, whether before or after a loss."

Held, that the fact that the furniture remained in the house during the owner's absence, and that his hired man made a frequent inspection of the household goods, and had a general oversight of the buildings during the day, being on the premises throughout the day every day, is not a full equivalent for the constant supervision involved in the occupancy of the premises as a customary place of abode, and the actual presence in the building of those who are living in it as a dwelling house day and night.

3. In this case the company's agent knew that the plaintiff designed and used the premises as a summer residence.

The buildings and a considerable portion of the personal property were wholly destroyed by fire July 22, 1895; and the defendant claimed that the dwelling house had been unoccupied from the 8th day of January preceding until the day of the fire, without the knowledge or consent of the insurer or his agent. It was also claimed that the personal property was incumbered by a chattel mortgage prior to the loss, and that there was false swearing by the plaintiff in his formal proof of loss and in his testimony before the court.

Held, that if the defendant had denied its liability under the policy by reason of forfeiture, arising from the nonoccupancy of the buildings, a cause of action would have accrued within 60 days after such denial. Also, that the defendant had waived the alleged forfeiture by failing to make such claim immediately after the fire, and refusing absolutely to pay the loss. On the

contrary, the company informed the plaintiff that it was necessary for him to furnish a schedule of the furniture, that he could take time to furnish it, that what was wanted was the real value of the property, and that when the schedule was wanted the agent would come and see him, furnished him with blanks and instructions on which to make proofs of loss, subjected him to trouble and expense in preparing the schedules and proofs of loss, and required his attendance at the general manager's office, at a distance, on two occasions, for conference as to the ownership of the property and the extent of the loss. Under these circumstances, covering a period of four months after the fire, the defendant cannot now be permitted to set up in defense a forfeiture of the policy alleged to have been created by the nonoccupancy of the buildings.

4. *Held*, that the mortgage, so far as it affects the personal property embraced in the policy, was not completed by delivery until the day after the fire, and could not have the effect of increasing the risk of insurance. Hence it would be inequitable now to give effect to the incumbrance as a reason for avoiding the policy, there being no evidence that the insurance company for nearly three months following the fire intended to refuse payment on account of the mortgage.

5. *Held*, that erroneous estimates and innocent misstatements are not a cause of forfeiture, when it is conceded that the loss under a policy, honestly stated, exceeds the amount of insurance.

(Official.)

Report from supreme judicial court, Androscoggin county.

Separate actions by John Hanscom against the Home Insurance Company and against the North British & Mercantile Insurance Company. The two cases were heard together, and were submitted to the law court on report. Judgments for plaintiff.

A. R. Savage, H. W. Oakes, and Jesse M. Libby, for plaintiff. G. M. Selders and F. V. Chase, for defendants.

WHITEHOUSE, J. These actions were brought on two policies of insurance against loss or damage by fire, issued to the plaintiff by the defendant companies, respectively. The two cases were heard together, and come to the law court on a report of the evidence relating to both claims. The aggregate amount of insurance effected in the two companies on the plaintiff's farm buildings and certain personal property was \$5,500. Of this amount, \$3,000 was on the buildings, \$1,500 on the household furniture, \$500 on vehicles, etc., and \$500 on horses. It is stipulated in the report that, if the defendants are found liable, judgment shall be rendered for the plaintiff for \$2,100 against the Home Insurance Company, and for \$3,000 against the North British & Mercantile Insurance Company.

Each policy contains the following stipulations: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if a building herein described, whether intended for occupancy by the owner or tenant, be or become vacant or unoccupied, or so remain for ten days, * * * or if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage."

"This entire policy shall be void * * *

in case of any fraud or false swearing by the insured touching any matter relating to this insurance, or the subject thereof, whether before or after a loss."

Thereupon it is contended in behalf of the defendants that they are justified by the evidence in resisting payment on the three distinct grounds covered by the foregoing stipulations in the policies.

The buildings and a considerable portion of the personal property were totally consumed by fire about 11 o'clock p. m., on the 22d of July, 1895; and it is claimed that the dwelling house had been unoccupied from the 8th day of January preceding until the date of the fire, without the knowledge or consent of the defendants or their agents. It is also claimed that the personal property covered by the policies was incumbered by a chattel mortgage after the execution of the policies, and prior to the loss, and that there was false swearing on the part of the plaintiff after the loss, in his formal proof of loss, and in his testimony before the court when the evidence was reported for this court.

The buildings in question were situated on the southerly side of a road running nearly east and west on White Oak Hill, in the town of Poland, about two miles from the nearest village. At a distance of about eight hundred feet westerly was the town farm, and still further west were two other farm houses, distant about one-third of a mile and one-half of a mile, respectively. Next easterly from the plaintiff's buildings, on the same road, was a small house, about a quarter of a mile distant, occupied by an elderly lady. Two hundred feet further to the east was another small house, and a half mile to the east of the plaintiff's buildings was another farm house.

The plaintiff's buildings consisted of a dwelling house 30 feet wide on the street, and running back 35 feet, a stable 30½ feet by 60, and a shed 100 feet long connecting the house with the stable.

The plaintiff's home was in Brooklyn, in the state of New York, but he occupied these premises in Poland during the summer months, spending the rest of the year in New York.

In the fall of 1894 he left the premises, and returned to Brooklyn on the 13th of September, leaving his sister Mrs. Lane and one Holmes and his wife in charge of the premises, and in the actual occupancy of the house. Mrs. Lane died soon after, but Holmes and his wife remained until January 9, 1895, when they left. At this time there were 2 colts, 1 horse, 5 or 6 hogs, and 30 or 40 hens on the premises, belonging to the plaintiff. Thereupon a young man named Thurston, who lived with his grandmother in the first house east of the plaintiff's, a quarter of a mile distant, was engaged by the plaintiff to take charge of the premises and take care of the stock. Thurston continued to live at his grandmother's home,

sleeping there and generally taking his meals there, from that time until the date of the fire. No one slept in the plaintiff's house during this time, but Thurston ate some of his meals there, which were brought to him from his home, and was on the premises throughout the day every day, except when called away by business for the plaintiff, with a single exception, when he procured some one to take his place. He piled up the wood, helped cut the hay, took care of the garden, and had the general oversight of the place. Early in May, 1895, he cleaned the house and put it in order for the reception of Mr. Hanscom and his family; and from that time forward he went through the house nearly every day, and dusted, swept, and aired it. Prior to July 22d the coverings had been taken off the furniture, and on that day Thurston was engaged in cleaning up around the buildings outside and inside. The blinds were all open, the windows up, and the screens in place. During the summer months the doors of the barn were generally open, and those of the carriage house frequently were. The day before the fire occurred at night these doors were open all day. After the screens were put in, a month before the fire, the windows in the house had generally been open during the day. It was Thurston's practice, when he got ready to go home nights, to begin at the further end of the barn, and pass through the barn and carriage house, fastening the doors as he proceeded, and thence through the house, and out of the front door. On the day of the fire he had been through the entire house, airing every room, and left the buildings with all the doors securely fastened.

Under these circumstances, and in view of the fact that it must have been well understood by the defendant's agent, Mr. Gammon, who had been a frequent visitor there for several years, that it was designed and used by the plaintiff as a summer residence, it is contended by the plaintiff's counsel, in the first place, that the house ought not to be deemed to have been "unoccupied or vacant" at the time of the fire, within the meaning of the terms of the policy, or, if so, that any presumption of increase of risk ordinarily arising from nonoccupancy is fully rebutted by the peculiar circumstances and conditions existing in this case, and by the appearances of occupancy and the precautions actually taken for the protection and safety of the premises.

It is the opinion of the court that the plaintiff's contention upon the first proposition is not sustained.

The fact that the furniture remained in the house, and that the plaintiff's hired man made a frequent inspection of the household goods, and had a general oversight of the buildings during the day, is not a full equivalent for the constant supervision involved in the occupancy of the premises as a customary place of abode, and the actual presence in the building of those who are living in it and using it as a

dwelling house day and night. *Ashworth v. Insurance Co.*, 112 Mass. 422; *Hermann v. Insurance Co.*, 85 N. Y. 162; *Bonefant v. Insurance Co.*, 76 Mich. 654, 43 N. W. 682; *May, Ins.* 249, A; *Wood, Ins.* 180.

Whether or not the risks of an insurance on buildings were materially increased by their nonoccupancy under peculiar circumstances and conditions, and the construction of section 20 of chapter 49 of the Revised Statutes, with special reference to the burden of proof, were questions considered by this court in the recent case of *Jones v. Insurance Co.*, 90 Me. 40, 37 Atl. 326. Assuming, without deciding, in the case at bar, that the risks may have been appreciably increased by the facts relating to the occupancy of the buildings, the evidence afforded by the natural presumption of such an increase of risk, on the one hand, and by the immediate supervision, care, and oversight on the other, may reasonably be deemed so nearly in equilibrio as to strengthen the probability underlying the plaintiff's third proposition, that the defendants waived any forfeiture which may have occurred by reason of the nonoccupancy of the dwelling house.

The question of waiver or estoppel in this class of cases has frequently been before the courts in different jurisdictions, and its solution should now be attended with little or no difficulty.

A waiver involves the idea of assent, and assent is primarily an act of the understanding. It presupposes that the person to be affected has knowledge of his rights, but does not wish to enforce them. *Jewell v. Jewell*, 84 Me. 304, 24 Atl. 858. It is an "intentional relinquishment of a known right" (*Robinson v. Insurance Co.* [Me.] 38 Atl. 320), and is a question of fact whenever it is to be inferred from evidence adduced, or is to be established from the weight of evidence (*Williams v. Association*, 89 Me. 158, 36 Atl. 63; *Nickerson v. Nickerson*, 80 Me. 100, 12 Atl. 880). Again, it may happen that a waiver of a breach of the condition in the policy was not actually intended; but if the conduct and declarations of the insurer are of such a character as to justify the belief that a waiver was intended, and acting upon this belief the insured is induced to incur trouble and expense, and is subjected to delay to his injury and prejudice, the insurer may be prohibited from claiming a forfeiture for such a breach, upon the principles of equitable estoppel. *Wood, Ins.* 170, 832, 837, and cases cited; *May, Ins.* § 504; *Peabody v. Association*, 89 Me. 96, 35 Atl. 1020.

In support of the claim of waiver in this case the plaintiff calls attention especially to the facts disclosed by the testimony of Mr. Champlain, the resident secretary of the North British & Mercantile Insurance Company, having general management of their business in this state. He was notified of the fire by Mr. Gammon, the local agent at Mechanic Falls, who issued both of the policies in suit. On the 26th of July he met Mr. Gammon at his place of business, and together they went to

the Hanscom place. Mr. Champlain there learned from Mr. Gammon that the "family had not been in the house since the fall before, and was informed by the plaintiff that Thurston the night before the fire went to his home after doing the chores, and did not return to the place. Mr. Gammon says he was informed of the nonoccupancy on the morning after the fire. Continuing his testimony, Mr. Champlain says: "I then questioned him as to the value of the building. He said: 'Some eight or nine years ago I purchased this place of my sister Mary A. Lane. I gave her \$2,500 for the place. Since then I have laid out a good deal of money on the buildings,—as much as \$10,000.' * * * I then questioned him about the furniture. He said he had a good deal of furniture in it. Then I said to him, 'Are you prepared to-day to give a schedule showing the value, or the values, of the property burned?' He said: 'No; I am not. The property was worth more than the insurance, and I do not see the need of it.' I told him it would be necessary for him to make a schedule; that he probably had his bills of his repairs to the house, and also of his furniture; that he should take those bills, and from them, and from what information he had, he should make us a schedule showing the correct value of the house and the barn, also of the personal property in the house, and the personal property in the stable or barn; that he could take time to do it; that what we wanted in such a case was the real value of the property at the time of the fire. He said he did not see any need of doing it, but he would do it. I told him, when he had his schedule completed, to give it to our agent, who was present, and he would forward it to me; upon its receipt I would endeavor to make arrangements with Mr. Moses R. Emerson, the general agent of the Horie Insurance Company, to meet me and come to see him.

"Then we went up to the ruins of the fire, which was quite a little distance from the Walker house. Mr. Hanscom showed me the size of the buildings; explained to me the rooms of the main house. He showed me the remains there were of the plumbing,—the soil pipe that came down, he said, from the bathroom,—and explained to me about the construction of the house. Then he took the L part in the same way, and the stable and the barn.

"Then we returned, and, going by the Thurston house, he pointed it out, and said, 'This is where Mr. Thurston lived, and this is where the furniture that was removed from the house is now located.' I asked him to show it to me, and we went in. I think it was sort of a shed or carriage house,—something of that nature. It was not in the main house. It was all piled up there indiscriminately. There was quite an amount of it. I said, 'It will be necessary for you to also make a schedule of this property saved, and give that to Mr. Gammon, our agent, with the other schedule I spoke to you about.'

"The schedule was sent to me very shortly after that. I think I received it in July. Upon my return I endeavored to arrange a meeting between Mr. Emerson, of the Home, Mr. Hanscom, and myself. On the 27th of August, Mr. Emerson sent Mr. Wetherbee, special agent of the Home Insurance Company, to Portland, and we came together to Mechanic Falls; drove to Poland to find Mr. Hanscom. I then made arrangements for Mr. Emerson and Mr. Hanscom to meet me at my office on the 4th of September. They came there. Mr. Emerson and I talked over the schedules that we had received, gave Mr. Hanscom blanks upon which to make his proofs, and told him to make them out, which he did, and served upon our agents the 10th day of September.

"I received that proof from Mr. Gammon on the 11th. Between the time I first went to see Mr. Hanscom, in July, and the 11th of September, when I received the proof, Mr. Hanscom came into my office twice, I think, and said he thought we ought to pay the loss; that he had had a large loss there; he thought we ought to pay it. I told him I would arrange, as soon as possible, to have Mr. Emerson and myself to see him, and then we would instruct him what to do about his proof, so that he could go ahead and make it. On one of those occasions I said to him: 'I have made some inquiries about the bills of goods purchased at W. T. Kilborn & Co.'s and Walter Corey & Co., and I find that they were largely purchased by Mrs. Pope, and that small amounts were purchased by Mr. Hanscom. I also find, by looking at the records in Auburn, that the price you paid Mrs. Lane for the property was \$1,000; that no money seemed to pass, as on that day you gave her a bond back for \$1,000, to support her during the remainder of her life. These statements do not exactly correspond with those you made to me.' Mr. Hanscom was quite excited,—rather violent in his talk.

"On the 10th day of October I was called to the telephone, and learned that Mr. Hanscom wished to speak to me. He said: 'I want to have that claim of mine settled to-day.' I said: 'I cannot settle it to-day, Mr. Hanscom. The claim is not due, and we should not think of settling the claim before it is due.' He said: 'The claim is due to-day.' I said: 'No; the claim is not due until the 11th day of November. Your proofs were received on the 11th of September, and the sixty days carry it until the 11th of November. He said: 'I am coming down, and I want that claim settled to-day.' I said: 'It will do no good for you to come down, Mr. Hanscom, as we shall not settle the claim to-day. We shall not settle it before the 11th day of November, and it is somewhat doubtful if we do then.' About half past 12 of that day he came to my office and demanded payment. I told him that we should not pay it. He said the claim was due. I told

him the claim was not due. He insisted that he made his proof on the 10th of August. I told him the proof was not made until the 10th of September, and received by me the 11th of September. Mr. Hanscom was quite excited about it. He said he would sue us; he would make us pay it all; that we would have to pay interest from the 10th day of August. I said to him, 'That remains to be determined.' On the 12th day of November Mr. Hanscom again came into my office and demanded his pay. He said the claim had become due, and he wanted his money. I told him that I should not settle that day; that I would confer with my company, and also with Mr. Emerson, of the Home; then we would let him know what we decided to do.

"I conferred with my company and with Mr. Emerson, and we both declined to pay. Mr. Emerson afterwards arranged a meeting between Mr. Hanscom, himself, and myself at my office on the 19th day of November. At that meeting Mr. Emerson and I thoroughly discussed the matter; decided that we would not pay the claim; informed Mr. Hanscom that on account of the nonoccupancy of the property, the excessive valuation put upon the furniture, and information that we had received that the personal property belonged largely to other people, we declined to pay it. Mr. Hanscom was considerably excited; said the property all belonged to him, that he would make us pay, sue us, and so on,—the old story. I said to Mr. Hanscom: 'When I first came to see you in regard to this matter, you told me that you paid \$2,500 to your sister Mary A. Lane for this place. I went to the records, and found that you paid \$1,000. You told me that you purchased your furniture largely of Walter Corey & Co. and W. T. Kilborn & Co. I went to them, and found that you purchased very little furniture of them; that a large part of the furniture was purchased by Mrs. Pope, and paid for by Mr. Pope's checks.' That on account of the nonoccupancy of the property, and the excessive value put upon the furniture, and the information that we had that it largely belonged to others, we declined to pay,—we had concluded that we did not owe him anything. Mr. Hanscom was very much excited, talked violently, gesticulated violently, declared we would have to pay it, with interest, etc., and went out.

"When I said to him, 'You told me that you paid \$2,500, and I found that you paid \$1,000,' he said, 'Yes; I afterwards made it up to \$2,500.' I said to him, 'I found no record of any such deed.'"

On cross-examination the witness further testified as follows:

"Q. Having noticed that the buildings, as you claim, were not occupied, you still directed Mr. Hanscom to make out a proof of loss, did you not?

"A. I directed him to make out a schedule

of the articles burned; told him how to do it. They were furnished within a few days. Later I furnished him the blanks to make out the formal proofs of loss.

"Q. Told him how to do that?

"A. I do not think I gave him any instruction at that time. Mr. Emerson and I gave him the blanks, and told him to make out his proofs of loss.

"Q. At that time you had raised no question with him in regard to the increased risk by nonoccupancy?

"A. I had mentioned the nonoccupancy and ascertained the nonoccupancy at the time I first saw him.

"Q. You did not give it to him at that time as a reason for not paying?

"A. No question of paying at that time.

"Q. You still directed him to go on and make out his proofs of loss?

"A. I gave him the blanks. I did not direct him how. I did not tell him at that time I should not pay it because the buildings were not occupied.

"Q. Did you ever tell him, until the 11th or 12th of November, that you should not pay on the ground of nonoccupancy?

"A. I do not think I ever told him we should not pay; on any ground, until that time. He furnished the proofs of loss. I told him on one occasion that I had received information from other people that somebody else owned part of the property. I think I told him from whom I had received the information,—from W. T. Kilborn & Co. and Walter Corey & Co. and N. Q. Pope. On one occasion I told Mr. Hanscom that I had received information from N. Q. Pope. Mr. Pope resides in the state of Maine part of the time. His home is near Portland a portion of the time. His family is there a portion of the time."

According to Mr. Champlain's testimony, it was November 19th "when they informed the plaintiff that they would not pay on account of nonoccupancy, among other reasons." Yet on November 30th Mr. Emerson wrote to the plaintiff's attorney, saying, "We have had several conferences with Mr. Hanscom looking to a final settlement of his claims, but fail to arrive to any agreement as to the amount for which the company is liable under the policy."

It is manifest from this testimony that, being reasonably satisfied with the precautions taken by the plaintiff for the protection of his buildings, the defendants' agents had no thought of contesting the claim on the ground of nonoccupancy until they became irritated and incensed by the plaintiff's persistence and impatience in pressing his demand for payment, and by the discussion over the value and ownership of the furniture. The foregoing acts and declarations of the agents afford stronger indication of an intention to waive the forfeiture, if any, and, when examined in their relation to the action of the plaintiff induced thereby, present

also more satisfactory grounds for an estoppel than those held sufficient for the purpose in numerous decided cases analogous to the present.

In *Titus v. Insurance Co.*, 81 N. Y. 410, the policy contained a condition declaring it void in case foreclosure proceedings were commenced against the insured property; and such proceedings having been commenced, and the property advertised for sale before the fire, the defendants claimed a forfeiture. Upon this branch of the case the court say: "The insurance company may, consulting its own interests, choose to waive the forfeiture; and this it may do by express language to that effect, or by acts from which a waiver follows as a legal result. * * * But it may be asserted broadly that if, in any negotiations or transactions with the insured after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is, as a matter of law, waived; and it is now settled in this court, after some difference of opinion, that such a waiver need not be based on any new agreement or estoppel. * * * After the fire, and after the defendant had notice of the proceedings, it required the insured to appear before a person appointed by it for that purpose, to be examined under the claim in the policy hereinbefore mentioned, and he was there subjected to a right, inquisitorial examination. It had the right to make such examination only by virtue of the policy. When it required him to be examined, it exercised a right given to it by the policy. It then recognized the validity of the policy, and subjected the insured to trouble and expense after it knew of the forfeiture now alleged; and it cannot now, therefore, assert its invalidity on account of such forfeiture." See, also, *Landers v. Insurance Co.*, 86 N. Y. 414; *Tripp v. Society*, 140 N. Y. 23, 35 N. E. 318.

In *Gans v. Insurance Co.*, 48 Wis. 108, the policy contained the usual provision that, if the building should become unoccupied without the consent of the company, the policy should be void, and the loss occurred during the period of nonoccupancy. It was held, in accordance with the previous decisions of that court, that "the requiring of further proofs of loss after the company was chargeable with notice or knowledge that a condition of the policy had been broken (which requirement subjected the plaintiff to expense and delay) is a waiver of the breach, and estops the company to claim a forfeiture of the policy." See, also, *Webster v. Insurance Co.*, 36 Wis. 67, and *Northwestern Mut. Life Ins. Co. v. Germania Fire Ins. Co.*, 40 Wis. 446, 80, also, in *Cannon v. Insurance Co.*, 53 Wis. 594; 11 N. W. 11, it was held that where there has been a breach of condition, and the insurer, with full knowledge of the breach, and without denying its liability on that ground, requires the assured to furnish, and he does furnish, at some trouble and expense, proofs of loss under the policy

cy, whether first or additional proofs, the breach could not be set up as a defense.

In *Insurance Co. v. Kittle*, 39 Mich. 51, a forfeiture was claimed by reason of additional insurance; and the question of waiver was submitted to the jury as one of fact, and they found in favor of the insured. In the opinion by Cooley, J., it is said: "We think the jury were warranted in finding that the defendant, by calling upon the plaintiff to go on and make out her proofs, and by requiring her to be at the trouble and expense of correcting these to satisfy the criticism made by the agent, without giving her to understand that the company would rely upon the forfeiture, should be held to have waived it, and that, if it was the purpose all the while to insist upon it, the agent did not act towards her in good faith."

In *Cleaver v. Insurance Co.*, 71 Mich. 414, 39 N. W. 571, it was also claimed that a forfeiture had been incurred by taking additional insurance contrary to the conditions of the policy. But, with full knowledge of the facts showing such forfeiture, the company failed to notify the insured of an intention to insist on such defense until after its adjuster had examined into the loss, and received from the insured all the information he asked for in relation to its extent and value, taking two days of his time, and the services of a man furnished by the insured, and making no point of the taking of such additional insurance as a reason why the insurance should not be paid. And it was held that these facts were sufficient to warrant the jury in finding a waiver of the forfeiture by the company.

See, also, *Marthinson v. Insurance Co.*, 64 Mich. 372, 31 N. W. 291, in which the court says: "With a knowledge of all the acts creating the forfeiture claimed upon the trial, the defendant company put the assured to expense in perfecting proofs of loss, which under the present claim of defendant were wholly unnecessary, as the proofs, however perfect, were valueless if the defense of forfeiture was a good one. By this action the defendant company must be held to have waived such defense." The question of waiver, however, appears to have been submitted to the jury as a question of fact, and their finding was in favor of the plaintiff.

In *Insurance Co. v. Miller*, 120 Pa. St. 504, 14 Atl. 385, the court says: "It is not denied that the incumbrances exceeded the amount stated by the insured. Whether it was by accident, ignorance, or design, does not appear. The court below * * * submitted the question of waiver to the jury, who found against the company. I do not think that the mere fact of the company's calling upon the assured to furnish the preliminary proofs of loss would of itself be a waiver of the company's right to avoid the policy. Cases might arise where such proofs might be necessary to enable the company to show the breach of warranty. There must be an intention to waive a forfeiture by notice or acts inconsistent with acts exercising the right to forfeit.

* * * With full knowledge of the incumbrances, the company not only called for proofs of loss, but required the assured to furnish full plans and specifications of the building destroyed, and joined in the appointment of appraisers. * * * The company was bound to good faith to the assured, and if, with the knowledge in its possession of every fact upon which to avoid the policy, they misled the plaintiff for nearly a year, subjected him to the expense of procuring plans and specifications of his building, and never informed him that they would not pay because the policy was avoided, they have no ground to complain if they are now held to be estopped from setting up such a defense."

In *Peabody v. Association*, 89 Me. 98, 35 Atl. 1020, the court says: "It would have been an inexcusable imposition to invite the plaintiff to make up proofs of loss, when the intention of the company was to wholly disregard the same, whatever might be the result of their investigation."

If the defendants in the case at bar had frankly denied all liability on the policies by reason of the alleged forfeiture, it would have been a waiver of proofs of loss, and the cause of action would have accrued within 60 days after such denial. (*Marston v. Insurance Co.*, 59 N. H. 94; *Walsh v. Insurance Co.*, 54 Vt. 351), while the practical effect of the course taken by the company towards the plaintiff was a postponement of the action for more than four months from the date of the fire. Instead of saying to the plaintiff explicitly and unequivocally, immediately after the fire, that it clearly appeared from his own admission and the statements of Thurston that his policies were forfeited for nonoccupancy, and that they must absolutely refuse to pay the loss, they informed him that it was necessary for him to furnish a schedule of the furniture, that he could take time to do it, that what they wanted was the real value of the property, and that when the schedule was prepared the agents would come and see him; they furnished him with blanks on which to make his proofs of loss, and gave him instructions with reference to the proofs; they subjected him to the trouble and expense of preparing these schedules and formal proofs of loss, and required his attendance upon them at Portland on two occasions for the purpose of holding conferences in regard to the ownership of the property, and the extent of the loss. The conclusion is irresistible that during the four months succeeding the fire the defendants either intended in good faith to waive the alleged forfeiture arising from nonoccupancy, and to pay the amount of the loss when satisfactorily determined, or they were guilty of "inexcusable imposition," in subjecting the plaintiff to unnecessary trouble and expense, and in delaying his action for several months, by encouraging the delusive hope that the loss would be paid upon receipt of due proofs of loss. The former inference is warranted by the evidence, is more creditable to the defend-

ants, and more equitable towards the plaintiff. It is accordingly the opinion of the court that the defendants cannot now be permitted to set up in defense a forfeiture of the policy alleged to have been created by the nonoccupancy of the buildings.

2. The second ground of defense is that the household furniture and other personal property on the premises became incumbered by a chattel mortgage for \$1,000 on the 22d day of July, 1895, and that the policy was therefore forfeited before the fire, which occurred near midnight on the same day. It has been seen to be one of the conditions that "this entire policy shall be void if the subject of the insurance be personal property, and be or become incumbered by a chattel mortgage." It appears from the copy of the mortgage in the case that it covered the land and buildings in question, "together with all the furniture contained on said premises, with all the stock and fixtures on the premises hereby mortgaged." It is not claimed that the forfeiture was incurred by virtue of the mortgage on the real estate (see *Smith v. Insurance Co.*, 50 Me. 96), but it is insisted that this incumbrance placed on the personal property without the consent of the defendant voided the policies.

In regard to this transaction the plaintiff testified as follows: "I 'placed' a mortgage on this place the 22d of July. The buildings were burned on the night of that day. I did not get the money on the mortgage until the next morning, the 23d. I received the telegram that the buildings were burned after I had * * * purchased my tickets. It must have been one o'clock in the afternoon." It also appears from the certificate of the county clerk on the mortgage, that the signature of the commissioner who took the acknowledgment of the instrument was not presented to him for authentication until July 23d. In view of these facts it does not satisfactorily appear that the transaction was completed by the delivery of the mortgage and the payment of the money until after the fire had occurred. It is a reasonable inference that the instrument was delivered after the clerk's certificate had been obtained, and at the same time the money was received. In any event, it is obvious that the existence of this incumbrance was wholly unknown in Poland at the time of the fire, and that it could not possibly have had the effect to increase the risk of the insurance. Furthermore, although the mortgage was recorded in Androscoggin county on the 24th of July, and the defendants' agent must have known of the existence of it from his examination of the records early in September, there was no intimation from the defendants, for nearly three months following, that they intended to refuse payment on account of this chattel mortgage; and in view of all the evidence heretofore recited, showing an intention to waive any forfeiture, it would now be grossly inequitable to give effect to this incumbrance as a reason for avoiding the policies.

3. Finally, it is contended by the defendants

that the policies are both void by reason of false swearing on the part of the plaintiff in his formal proofs of loss, and in his testimony before the court.

It has been seen that each of the policies in suit is by its own terms declared void "in case of any fraud or false swearing by the insured touching any matter relating to this insurance, or the subject thereof"; and in such a case it is settled law in this state that, if the insured knowingly and purposely makes false statements on oath in his proofs of loss in relation to the amount or value of the goods destroyed, the policy is thereby voided, both as to the buildings and personalty covered by it, although the actual losses, truly stated in the proofs of loss, may exceed the whole amount of the insurance. "The forfeiture of all claim under the policy is the penalty for * * * willfully false swearing, whether such false swearing in fact operates to defraud the company or not." *Dolloff v. Insurance Co.*, 82 Me. 266, 19 Atl. 396. But in determining whether an excessive valuation, for instance, of any article of personal property, was the result of willfully false swearing, or of an error in judgment, misinformation, misrecollection, or mistake, it is obviously material and important to consider the amount of the actual loss in relation to the amount of insurance, and to inquire whether the insured could have had any motive to swear falsely in order to swell the amount of the loss, when it was already conceded that the loss, honestly stated, would exceed the amount of insurance. Erroneous estimates and innocent misstatements are not a cause of forfeiture. As stated in the instruction sustained by this court in *Linscott v. Insurance Co.*, 88 Me. 497, 84 Atl. 405: "If a man attempt to defraud the company by means of false swearing, * * * he has forfeited his whole claim. If he is blameless in these particulars, although inaccurate, although he has made misstatements that are not chargeable to his dishonesty, not chargeable to his falsehood, not chargeable to his desire and determination to cheat and defraud and deceive, but are mere mistakes of either judgment or memory, then you will deal with the witness accordingly. Punish no man for a mistake, but visit condemnation upon men who are false and fraudulent, and upon such only."

The length to which this opinion has already been extended by reason of the importance of the questions involved forbids any discussion of the details of the evidence relating to this branch of the case. The announcement of conclusions is of more importance to anxious suitors, and less burdensome to the profession when published, than the elaborate analysis of voluminous testimony.

The totals insurance on the buildings was \$3,000. The plaintiff states in his proofs of loss and in his testimony that they cost him \$8,500. Forest Walker, a carpenter who has for many years had charge of the work at Poland Springs, was called as a witness for the defendants, and testified that at the time

of the fire they were worth from \$5,500 to \$6,000. The valuation placed upon the buildings by the defendants' local agent, Mr. Gammon, was from \$4,000 to \$5,000.

The whole amount of insurance on the personal property, not including the horses, was \$2,000. The insurance on the horses was \$500, but as the plaintiff sustained a loss of only one horse, of the estimated value of \$100, his claim for insurance on the personal property is for \$2,100. In the proofs of loss the estimated value of furniture destroyed is \$2,785.75; and of the property saved, \$1,795; a total of \$4,570.75. In the testimony of the defendants' agent, Mr. Gammon, the value of the property covered by the furniture clause is estimated at \$3,500, and the value of the other personal property is fixed in the proofs of loss at \$1,282.50,—a total of \$4,782.50. According to the proofs of loss, the value of the personal property destroyed and damaged was \$4,048.25,—nearly double the amount of insurance claimed. It has also been seen that the parties stipulated in the report that, if the plaintiff is entitled to recover, he is to have the full amount of the insurance claimed. Indeed, the testimony of the plaintiff in relation to the value of the multitude of items involved in the inquiry indicates entire confidence on his part that the losses greatly exceeded the insurance, and leaves the impression that he considered all efforts to make a critical examination of values as unimportant and superfluous. Under these circumstances, it would seem that he had no motive to make statements on oath that were knowingly and designedly false in relation to values, either in his proofs or in his testimony. It must be admitted, however, that his valuation of the personal property in many instances appears to be excessive, and that there is often a discrepancy between the value stated in the proofs of loss and the estimate given in his testimony. He sometimes betrays impatience under cross-examination, and gives answers that are hasty and ill considered, and makes statements that are often indefinite and apparently inaccurate. The schedule appears to have been the result of the combined efforts of himself and his wife and son and Thurston, the hired man; and he evidently testifies under the embarrassment which any householder would experience in attempting to recall specifically a multitude of articles in a dwelling house destroyed by fire, and to fix the price or estimate the values of those which he did not purchase, and with which he was not familiar. His testimony shows confusion and uncertainty, resulting from his attempts to apply his memory, make use of his information, and exercise his judgment in regard to the different articles. Before the change in his circumstances which made it necessary to raise money on mortgages, he appears to have lived in affluence, and to have been accustomed to select purchases of the best quality, with but little regard to the expense. He shows that partiality in favor

of the worth of his own property, and that tendency to overestimate the value of favorite and familiar articles, which are the proverbial attributes of ownership. But it appears from his testimony that, with the exception of the instances in which he stated the cost price of the articles, his statements are for the most part such estimates, expressions of opinion, and even conjectures as he might reasonably be expected to give, and such as were not calculated or designed to mislead or deceive. In some instances he may be censurable for not exercising more care and caution in giving his answers, or more frankness and promptness in disclaiming the requisite knowledge to make accurate statements; but it appears from the schedules furnished the defendants that he placed relatively the same estimates upon the value of the property saved as he did upon that which was lost. The claim that the plaintiff was not the owner of all the furniture was abandoned by the defendants.

The conclusion therefore is, after a careful and patient examination of the case, that the charge of willfully false swearing on the part of the plaintiff is not so clearly and fully established by the evidence as to justify the court in declaring that he has incurred the penalty of forfeiting his entire insurance.

According to the stipulations in the report, the entries must be:

Judgment for the plaintiff against the Home Insurance Company for \$2,100, and against the North British & Mercantile Insurance Company for \$3,000, without interest in either case.

(90 Me. 333)

STATE v. BOWMAN.

(Supreme Judicial Court of Maine. June 1, 1897.)

GRAND JURIES—SECRECY OF PROCEEDINGS—RIGHT TO OBJECT.

1. The presence of a stenographer before a grand jury while witnesses are being examined, by express order of the court, who takes stenographic notes of the testimony, although he retires before the jury commence their deliberation, invalidates an indictment found upon the testimony of witnesses given under these circumstances.

2. *Held*, that this is a matter that can be taken advantage of by the respondent in an indictment. (Official.)

Exceptions from supreme judicial court, Kennebec county.

Frank M. Bowman was indicted for being a common seller of intoxicating liquors, and he filed a plea in abatement, to which demurrer was sustained, and he took exceptions. Exceptions sustained. Demurrer overruled. Plea adjudged sufficient. Indictment quashed.

G. W. Hesselton, Co. Atty., for the State.
S. L. Titcomb, for defendant.

WISWELL, J. To an indictment charging him with being a common seller of intoxicating liquors, the respondent filed a plea in abatement, in which it is alleged, in substance,

that while the grand jury which found and returned this indictment was in session the presiding judge made and issued the following order to the official stenographer of the court: "At the request of the county attorney, you are instructed to attend with him before the grand jury, there to assist him in taking down the testimony of witnesses in the case of *State v. F. M. Bowman*, being investigated by the grand jury. You will not be present during the deliberations of said jury, and you will not disclose any testimony so taken down or heard by you, excepting to said jury or the county attorney, or by order of the court." In obedience to this order the stenographer, after being sworn to faithfully perform the duties imposed upon him by the foregoing order, attended with the county attorney before the grand jury, and took down the testimony of the witnesses for the state in the case against the respondent then being investigated. He left the grand-jury room before the jury commenced their deliberations upon the case.

To this plea in abatement the county attorney demurred. The demurrer was sustained, the plea adjudged bad; and the respondent took exceptions.

The question presented is whether the presence of a stenographer before the grand jury while witnesses are being examined, by express order of court, who takes stenographic notes of the testimony, but who retired before the jury commenced their deliberations, invalidates an indictment found upon the testimony of witnesses given under these circumstances.

It has long been the policy of the law, in the furtherance of justice, that the investigations and deliberations of a grand jury should be conducted in secret. The obvious reasons for this, founded upon sound principles of public policy, are to secure the utmost freedom of disclosure of alleged crimes and offenses; to secure that freedom of deliberation, expression of opinion, and of action among the grand jurors which would be impaired if the part taken by each might be disclosed to the accused or to others; to prevent, to some extent, the opportunity of perjury and subornation of perjury, by withholding the knowledge of facts testified to before the grand jury; and to conceal the fact that an alleged crime is being investigated, or that an indictment has been found, so as to avoid the danger of the escape of the accused before his arrest.

In accordance with this policy, the oath administered to grand jurors, established by common-law usage, ancient and modern, and prescribed by our own statute, contains this clause: "The state's counsel, your fellows, and your own you shall keep secret." The expression "state's counsel" means more than the opinions or advice given by the prosecuting attorney to the jury. The injunction of secrecy applies as well to the secrets of the state, the persons accused, the facts testified to which indicate the guilt of the accused of the offense under investigation, and the witnesses

who testify to such facts. In the case of *State v. Fasset*, 16 Conn. 457, it is said: "The grand jury swear 'the secrets of the cause, their own and their fellows', they will observe and keep.' The secrets of the cause must relate to the persons accused, the witnesses, who they are, and what they testify." We think that the expression "state's counsel," in the oath prescribed by our statute, is equivalent to "the secrets of the cause," construed in the above case.

In view of the fact that public policy requires secrecy, not only as to deliberations of a grand jury, their own counsel and their fellows', but also as to the witnesses who testify and their testimony, the state's counsel, for the reasons suggested, and as the oath of the jurors, declaratory of this policy, enjoins them to keep secret the state's counsel, was it proper for the court to order a person, other than the county attorney or assistant, to be present while witnesses were being examined before the grand jury, and to take down their testimony? We think it was not; that it was contrary to the policy of our laws, and to the universally prevailing custom in our state.

It would be of little avail to swear the jurors to keep secret the "state's counsel," and at the same time to open the doors of the jury room to persons unauthorized by law, while the state's counsel is being disclosed to the jury. Although in this case the stenographer went through the form of taking an oath "not to disclose any testimony so taken down or heard by you, excepting to said jury or the county attorney, or by order of the court," such an oath was not authorized by law. It was extrajudicial, and had no binding force.

It is true that the obligation of secrecy as to the "state's counsel," or state's secrets, may subsequently be removed, and that after the purposes of secrecy have been accomplished any revelations in this respect may be made which justice demands. In accordance with this principle, the case of *State v. Benner*, 64 Me. 267, was decided,—a leading case upon the subject,—in which it is said, "But the oath of the grand juror does not prohibit his testifying what was done before the grand jury when the evidence was required for the purposes of public justice or the establishment of private rights." And again, "So, in all cases when necessary for the protection of the rights of parties, whether civil or criminal, grand jurors may be witnesses."

But in this case neither public justice nor the establishment of private rights required that the testimony of witnesses who testified while the accusation against the respondent was under investigation should be disclosed in the presence of a stenographer, whose presence was neither authorized by statute nor custom. And at that time none of the purposes of secrecy had been accomplished.

Another, and perhaps more difficult, question is whether this is a matter that can be taken advantage of by the respondent. The presence of the stenographer affected only the

injunction of secrecy as to the "state's counsel." If this can be waived by a prosecuting attorney, so that it cannot be taken advantage of by a respondent, it was done in this case.

In *State v. Clough*, 49 Me. 573, in which it was decided that the presence of an unauthorized person, who participated as a juror in the proceedings of the grand jury, invalidated the indictment, although 12 competent grand jurors concurred in finding it, it is said: "The mere fact that a stranger was present when the indictment was found would not render it void. Though obviously proper and highly important that the proceedings of a grand jury should be in secret, one who is indicted cannot take advantage of it if they are not." This question was not involved in the decision of the case. The person present in the grand-jury room in that case was an unauthorized person, who assumed to act as a grand juror. But it is unnecessary to decide whether it is a correct statement of the law, because the stenographer in this case was not a mere stranger. He was in the grand-jury room by express order of court. He participated in the proceedings to the extent of taking and preserving the testimony.

Although the obligation of secrecy in regard to the "state's counsel" required by immemorial usage, and imposed by the oath of grand jurors prescribed by our statute, was undoubtedly intended for the benefit more particularly of the state, we think that neither the prosecuting attorney can waive it, nor the court nullify its objects. If such an order may be made at the request of the county attorney, we know of no reason why it may not be done without his request, or even against his protest. If done under such circumstances, the government could not present the question for review to the law court. It can only be raised in any case by a respondent. We think that in the interests of justice, and in accordance with the principles of public policy, it is wiser to hold that this is a matter which may be taken advantage of by a respondent, than that, although improper and unauthorized, it cannot be made the subject of review.

Another consideration should not be lost sight of. The object of an investigation by a grand jury is not only to bring the guilty to trial, but also to protect the innocent from groundless accusation. The duties of grand jurors are important and responsible. They should be entirely independent. They should be uninfluenced by any consideration except a desire to "diligently inquire and true presentment make of all matters and things" given them in charge, according to their oaths and their consciences. If it be competent for the court to order a stenographer to be present and take stenographic notes of the testimony of witnesses, for such future use as the court might order or the law allow, it might be done in one case only during a whole session, while all other matters were investigated in the ordinary way. Should that be done, we cannot tell what influence such a dis-

crimination might have upon the jurors. We think that in some cases it might affect their independence and impair the rights of the accused.

Our conclusion is that for the reasons given the proceeding is unauthorized and improper, and that the indictment so found is void.

The entry will therefore be:

Exceptions sustained. Demurrer overruled. Plea in abatement adjudged sufficient. Indictment quashed.

(30 Me. 333)

SAWYER v. J. M. ARNOLD SHOE CO.

(Supreme Judicial Court of Maine. June 1, 1897.)

MASTER AND SERVANT—NEGLIGENCE—ELEVATORS—
ACCIDENT INSURANCE—EVIDENCE—
CUSTOM—INSTRUCTIONS.

1. In an action to recover for personal injuries by a defective elevator, the alleged defect being the manner in which one of the dogs used to hold up the elevator gate was attached to the gate, it is competent to ask an expert in mechanical devices how the dog might be fastened so that there would be no danger of its moving except in the natural or intended way.

It is proper for an expert to describe the different ways that the device can be secured so as to be safe, because the jury are thereby enabled to pass upon the question whether the defendant used ordinary care in the particular respect complained of.

2. To a requested instruction to the jury by the defendant, containing a general principle of law applicable to the defendant's duty to furnish suitable appliances, the presiding justice said: "That is so; but what would be due care in driving a dull horse would not be in driving a locomotive."

Held, that this qualification to the requested instruction is not open to objection. It is simply an illustrative way of saying that ordinary care in any case depends upon the circumstances of the case; that what may be ordinary care under some circumstances would be gross negligence under others.

3. The defendant requested this instruction: "However strongly the jury may be convinced that there may be better or less dangerous appliances or machinery, it should not say that the use of appliances or machinery commonly adopted by those in the same business is a negligent use, for which liability should be declared or imposed."

In answer, the presiding justice said to the jury: "Not if they [the jury] believe at the same time that it was reasonably sufficient themselves. The common use will not, of course, prove its usefulness. That is evidence of its usefulness, but not conclusive." Whereupon the defendant asked the court, "Would it not be due care to use as is ordinarily used by persons in the same line of business?" to which the court replied, "Yes; but that must be reasonably safe and sound, or he should use due care to have it safe and sound." The defendant then requested this instruction: "That he does use reasonable care when he uses the same machinery that is in use in the same sort of business." To which the court replied: "Though the jury should find that it was actually defective? I should not say to the jury that, if they found that machinery actually defective and insufficient, it would be any better because others used it."

Held, that these rulings are unobjectionable upon the point involved. Ordinary care is such care as persons of ordinary prudence exercise under like circumstances. It does not depend upon custom.

4. Evidence was admitted during the trial that

the defendant held an accident policy upon the elevator. This evidence was admitted only for the purpose of showing any admission of the defendant as to how and when the accident happened, and whether the defendant was using ordinary care or not. In his charge to the jury the presiding justice said: "Now, it is contended by the plaintiff that they [referring to the defendant] exercised no care; that they intrusted to insurance. And there I think it admissible that it should appear that there was an insurance, or that they trusted to one rather than upon any investigation, inquiry, or experiment, or conduct otherwise of their own."

Held, that this instruction was erroneous. The burden was upon the plaintiff to prove the negligence of the defendant, and, because the defendant had taken the precaution of protecting itself against accidents, this fact should not influence the jury in determining the question of negligence.

Juries should not be allowed, in cases of this kind, to take into consideration the fact that an employer is insured against accidents. It would do more harm than good, and would increase the already strong tendency of juries to be influenced in cases of personal injuries, especially where a corporation is defendant, by sympathy and prejudice.

(Official.)

Exceptions from supreme judicial court of Maine, Penobscot county.

Action by Winfield S. Sawyer against the J. M. Arnold Shoe Company to recover for damages sustained by the plaintiff on account of the alleged negligence of the defendant company in not providing suitable machinery and appliances in and about a freight elevator in the defendant's store, and under their management and control, whereby the said plaintiff, while engaged in the employ of the defendant company, and while passing onto said elevator in the performance of his duty, sustained severe injuries in and to one of his legs. The jury returned a verdict for the plaintiff for \$771. On motion for new trial and exceptions by defendant. Exceptions sustained.

P. H. Gillin and C. J. Hutchings, for plaintiff. F. A. Wilson and C. F. Woodard, for defendant.

WISWELL, J. This action was to recover for personal injuries sustained by the plaintiff, and caused, it is alleged, by a defective elevator of the defendant, which the plaintiff had occasion to use in the course of his employment. The alleged defect was the manner in which one of the dogs used in holding up the elevator gate was attached to the gate. Various exceptions are alleged in regard to the admission of testimony, and as to the instructions to the jury, which we will consider in detail.

1. An expert upon mechanical devices, called by the plaintiff, was allowed to answer, against the defendant's objection, this question: "How might that dog have been fastened on so there would be no danger of the dog moving except in the natural or intended way?" We think that the question was properly allowed. The issue for the jury to pass upon was whether the defendant had used ordinary care, in view of the particular

circumstances of the situation, in providing a reasonably safe elevator for the plaintiff to use in the course of his employment. It did not by any means follow that the manner of securing the appliance which the witness might describe in his answer was the only proper way in which it could be done, or that it was a practical or necessary way, or that the defendant was negligent in not having adopted that method. But, to enable the jury to pass upon the question of whether the defendant had used ordinary care in the particular respect complained of, it was certainly proper for a qualified person to describe the way, or the different ways, that the device could have been secured so as to have been safe.

2. Counsel for defendant requested this instruction: "An employer performs his duty when he furnishes appliances of ordinary character and reasonable safety, and 'reasonable safety' means safe according to the usages, habits, and ordinary risks of the business. No man is held to a higher degree of care than the fair average of men in the same line of business conducted under substantially similar circumstances." In answer to which the justice presiding said: "That is so; but what would be due care in driving a dull horse would not be in driving a locomotive." The defendant excepts to the qualification. We think that there is nothing objectionable in this remark. It was simply an illustrative way of saying that ordinary care in any case depended upon the circumstances of the case; that what might be ordinary care under some circumstances would be gross negligence under others,—a proposition too clear and well settled to need comment.

3. Counsel for the defendant requested this instruction: "However strongly the jury may be convinced that there may be better or less dangerous appliances or machinery, it should not say that the use of appliances or machinery commonly adopted by those in the same business is a negligent use, for which liability should be declared or imposed." In answer to which the justice presiding said to the jury: "Not if they [the jury] believe at the same time that it was reasonably sufficient themselves. * * * The common use will not, of course, prove its usefulness. That is evidence of its usefulness, but not conclusive." Whereupon defendant's counsel asked the court, "Would it not be due care to use such as is ordinarily used by persons in the same line of business?" To which the court replied, "Yes; but that must be reasonably safe and sound, or he should use due care to have it reasonably safe and sound." Defendant's counsel then requested this instruction: "That he does use reasonable care when he uses the same sort of machinery that is in use in the same sort of business." To which the court replied: "Though the jury should find that it was actually defective? I should not say to the jury

that, if they found that machinery actually defective and insufficient, it would be any better because others used it."

We think the defendant has no cause of complaint in regard to any of the rulings of the justice presiding, upon the points involved in these requests. Ordinary care is such care as persons of ordinary prudence would have exercised under like circumstances. It does not depend upon custom. "It would be no excuse for a want of ordinary care that carelessness was universal about the matter involved, or at the place of the accident, or in the business generally." *Mayhew v. Mining Co.*, 76 Me. 100.

4. The defendant corporation was insured against accident. This fact incidentally appeared in the case because of a statement in writing from the defendant to the insurance company, which, it was claimed, contained certain admissions of the defendant, and was admitted only for the purpose of showing any admission of the defendant as to how and when the accident happened, and whether the defendant was using ordinary care or not. In his charge to the jury the justice presiding said: "Now, it is contended by the plaintiff that they [referring to the defendant corporation] exercised no care; that they intrusted to the insurance. And there I think it admissible that it should appear that there was an insurance, or that they trusted to one, rather than upon any investigation, inquiry, or experiment, or conduct otherwise of their own."

We think that this was error; that, while the fact that the defendant was insured against accidents should have no legitimate bearing, it might very naturally have an improper influence upon the jury in passing upon the one question involved,—whether or not the defendant had failed to exercise that degree of care which the law required of it. The burden of proving that the defendant had failed in this respect was upon the plaintiff, and we do not think that, because the defendant had taken the precaution to be insured against accident, it should have any influence with the jury in determining that question. It is true that the fact of insurance might have the effect of lessening the defendant's reason or motive for being careful. But the question was not as to how much or how little motive the defendant had for being careful, but whether or not it had in fact exercised due and reasonable care.

We think that to allow juries, in cases of this kind, to take into consideration the fact that an employer was insured against accidents, would do more harm than good, and would increase the already strong tendency of juries to be influenced, in cases of personal injury, especially where a corporation is defendant, by sympathy and prejudice.

The only case which has been called to our attention, or that we have noticed, which at all touches this question, is that of *Anderson v. Duckworth*, 162 Mass. 251, 38 N. E. 510, in

which the defendants were insured against accidents, and that fact appeared in evidence because of a conversation between the plaintiff and one of the defendants, in which it was claimed that there was an admission of liability, and a reference made to the fact that the defendants were insured against accident. At the trial the jury was instructed that the fact of insurance had nothing to do with the duty of the defendants to the plaintiff, or their liability to him. In the opinion of the court it is said: "And we think that it was competent for the court, in the exercise of its discretion respecting the conduct of the trial, to admit the conversation, with a caution to the jury that the fact of insurance was not to be taken as an admission by the defendants."

It is the opinion of the court, therefore, that upon this point the exceptions must be sustained.

Exceptions sustained.

(30 Me. 376)

TREFETHEN et al. v. LYNAM et al.
(Supreme Judicial Court of Maine. May 31,
1897.)

HUSBAND AND WIFE—FRAUDULENT CONVEYANCE—
BURDEN OF PROOF—RIGHTS OF GRANTEE.

1. The court will scrutinize thoroughly, and even with suspicion, the transfer of means and earnings by husbands to their wives, however innocent any such transaction may appear, when the effect of the transfer is not for the support of the family, but to put them beyond the reach of creditors. The wife will not be allowed, as against creditors, to absorb the debtor husband's property under the cover of family support.

2. When a husband appropriates his own money to erecting buildings upon his wife's land with her consent, the increment of value thereby created can be taken by his prior creditors through proceedings in equity, even though there was no actual intent to defraud such creditors.

3. When a wife, receiving from time to time her husband's income, first invests it in her separate business, and then pays the family expenses out of that business, the burden is upon her, as against his prior creditors, to show affirmatively the amount actually consumed in such expenses.

4. In such accounting the wife cannot be allowed for rent of her real estate occupied by the family, at least in the absence of a pre-existing agreement by the husband to pay rent.

(Official.)

Appeal from supreme judicial court, Cumberland county.

Equitable trustee process by Charles E. Trefethen and another against Eri V. Lynam and others. Heard on bill, answers, and proofs. The bill was dismissed, and plaintiffs appeal. Reversed.

One of the principal portions of the decree appealed from is as follows:

"That, as Mrs. Lynam owned the real estate, she was entitled to its income, and might justly appropriate to herself, from her husband's remittances, an amount equal to a fair rental of the premises occupied by her husband's family, which were owned by her, and that the amounts remitted to her by her husband

have not exceeded the amount expended for the support of his family, and the fair rental of the premises occupied by his family."

Benj. Thompson, for plaintiffs. J. A. Peters, Jr., for Mrs. Lynam and R. E. Campbell.

EMERY, J. From the documents and the testimony of the various defendants themselves, the following facts appear to be practically undisputed:

In 1859 the defendant Linda M. Lynam (then Linda M. Clement) was the owner, by inheritance from her father, of a homestead at Seal Harbor, Mt. Desert, and was living upon it with her mother. In that year she married the defendant Capt. Eri V. Lynam, and the pair began married life upon this homestead, and their home has been upon it ever since. The family has consisted of Mr. and Mrs. Lynam, their children, and Mrs. Lynam's mother. In 1882 the defendant Robert E. Campbell married a daughter of the other two defendants, and lived with her upon the same homestead as a member of the family. Capt. Lynam's occupation was that of a master mariner, and he was absent most of the time after 1874 upon foreign voyages.

In 1883 Mrs. Lynam and her son-in-law, Campbell, began the enterprise of building and running a summer hotel on her place. One hotel building was erected and furnished in 1884, and a second one in 1887. The money was raised by notes of Mrs. Lynam and her mother, Mrs. Clement, secured by a mortgage of the homestead. In this way money was borrowed as follows: In 1883, \$4,000, at 8 per cent.; in 1884, \$6,600, at 8 per cent.; in 1887, \$1,500, at 8 per cent.,—amounting to \$12,100. In addition to the above, \$2,500 were borrowed on note alone, at 7 per cent., in 1887. The business was managed by Campbell, for himself and Mrs. Lynam, under the name of Lynam & Campbell. Mrs. Lynam and a minor daughter worked in and about the hotel during the season, at least. The interest on the loans, aggregating over \$1,000 annually, and occasionally small sums upon the principal, were paid from year to year, up to 1892. A \$1,000 payment was made in 1889, and another \$1,000 payment in 1893. In 1894 some of the property of Mrs. Lynam was sold to one Cooksey, and from the proceeds of that sale the various mortgages were finally paid that year.

During all this time Capt. Lynam was away at sea, coming home at infrequent intervals and for short stops only. From time to time he remitted sums of money to his wife, the different remittances varying in amount from \$50 to \$500. They were usually by draft or check. In making these remittances, Capt. Lynam gave no directions as to what should be done with the money. He seems to have left its disposition entirely to his wife's discretion. The remittances, with but few if any exceptions, were turned over by Mrs. Lynam to Mr. Campbell, and by him deposited in the

bank to the credit of Lynam & Campbell,—in the same account with the hotel business. One draft of \$350 was sent direct to Mr. Campbell, who deposited it to the same account. The aggregate amount of these remittances is much in dispute. The respondents admit that they averaged \$700 yearly. The plaintiffs claim that they were nearer \$1,200 per year. There seems to be no exact account of the amount, and it is to be largely determined by inference from circumstances.

As stated above, nearly all the remittances, whatever the amount, were turned into the funds of Lynam & Campbell. Out of these funds of Lynam & Campbell were paid the hotel expenses, the interest on the notes, the partial payments upon the principal, and also the family expenses of the Lynam and Campbell families, who were living together. No accounts were kept, and both Mrs. Lynam and Mr. Campbell are utterly unable to state the amount expended for either or both families. The two families comprised five persons,—Mrs. Lynam, her mother, and an unmarried minor daughter, with Mr. and Mrs. Campbell. Nor were any accounts kept of the hotel business, but both Mrs. Lynam and Mr. Campbell say there was little or no profit in it. Mrs. Lynam says there was a loss.

At a period about midway between the years 1874 and 1883, Capt. Lynam, with his wife's consent, built a stable on the homestead, expending thereon about \$300 of his own money. He does not claim to have built the stable with his own labor, and, as he was away at sea the greater part of the time after his marriage, it is a fair inference that the stable was built out of his money.

But all this while, and as early as 1874, Capt. Lynam was indebted to the plaintiffs in a sum of over \$1,500, with interest, which he has never paid any part of, and has had no property in his name with which to pay it. This indebtedness (now in the form of a judgment) does not seem to have been known to Mrs. Lynam or Mr. Campbell till 1889.

The plaintiffs now bring this bill in equity, in the nature of an equitable trustee process, under Rev. St. c. 77, § 6, cl. 10, to reach and apply to their judgment the money of Capt. Lynam thus appropriated or used in the improvement of Mrs. Lynam's property, and in her business enterprise. They claim that they have shown a direct appropriation of their debtor's money to the erection of the stable, which they say ought, in equity at least, to be appropriated to his debts. While they do not claim to have shown any direct appropriation of any specific sum of their debtor's money to the payments on the hotel erections, they do claim they have shown a general appropriation of nearly all his earnings by the business association of Lynam & Campbell, and their incorporation into the fund from which that concern paid the interest, and some parts at least of the principal, of the hotel mortgages. They further claim that, having shown this, the burden is on the respondents to show that the

debtor's money thus taken was in fact expended for his family's suitable maintenance, and that they have failed to do this, and hence should submit to its reappropriation for his debts.

The justice hearing the cause in the first instance did not sustain these claims of the plaintiffs, but dismissed the bill upon the following grounds, among others: (1) As to the stable, that it was built without any understanding between Capt. Lynam and his wife as to its ownership, and so became a part of the wife's realty, with no legal or equitable title thereto left in him; (2) that Mrs. Lynam was entitled to deduct from her husband's remittances a fair rental for her homestead occupied by their family; (3) that, making the above allowance for rent, it did not appear that any appreciable or ascertainable part of Capt. Lynam's remittances was in fact applied to his wife's property or business. The justice seemed to put on the plaintiffs the burden of showing such specific application. He also seemed to intimate that there was or might be a surplus if the rent were excluded.

On account of the intimacy of the marriage relation, the husband and wife cannot ignore the creditors of either to the extent that two strangers might. A debtor's wife, receiving her husband's earnings, may entirely consume them in the suitable support of his family, including herself, without becoming in any way answerable to his creditors. She has no right, however, as against his prior creditors, to appropriate her husband's earnings or income to making investments in her own name, either for him or herself, or to keeping down or paying off incumbrances on, or otherwise improving, her own property, or to paying the debts or increasing the profits of her separate business. Nor can she rightfully retain, as against them, the value of permanent additions voluntarily made by him to her property. Outside of the statute exemptions, he cannot acquire any property which shall be free from the claims of prior creditors, nor can she acquire such property out of his principal or income. Whenever it appears that she has thus absorbed his money or estate, she can be compelled to account for it by this equitable trustee process. The prior creditor of the husband need not show an actual fraudulent intent on the part of either husband or wife. It is enough for him to show that the wife has acquired some property or value out of her husband's unexempted principal or income. This value thus obtained should be restored by her for the payment of his prior debts, though the husband or his representatives might have no legal or equitable claim to such restoration. The wife may owe a duty of restoration to her husband's prior creditors without owing any such duty to him. These propositions are deducible from the following cases: *Call v. Perkins*, 65 Me. 446; *Sampson v. Alexander*, 66 Me. 182; *Robinson v. Clark*, 76 Me. 494; *Lane v. Lane*, 76 Me. 528; *Stratton v. Bailey*, 80 Me. 345, 14 Atl. 789; *Merrill v. Jose*, 81

Me. 22, 16 Atl. 254; *Berry v. Berry*, 84 Me. 541, 24 Atl. 957.

1. It is undisputed that Capt. Lynam, while in debt to the plaintiffs, and having no visible property of his own, directly expended, with his wife's consent, some \$300 of his own money in making a permanent, visible, appreciable addition to his wife's estate and to its value,—not merely keeping up the estate, or carrying it on, but adding to it. This addition (stable) became a part of the wife's realty, and Capt. Lynam himself, as found by the justice of the first instance, may have no right in it, or to reimbursement for it.

Under the principles above stated, however, the husband's right is not the test of his prior creditors' rights. As to them, neither husband nor wife can erect buildings on her land with his money, and retain the benefit. In the absence of fraudulent intent or active participation upon the part of the wife, it might not be equitable to require her to account for the full sum thus subtracted from her husband's means and appropriated to her property, since the benefit to her estate might not be so much, but she should not retain any benefit or increment in value of his estate made at the expense of her husband's prior creditors. To turn over to those creditors the benefit or increment, if any, thus obtained, would cause her no loss of her own property, but would simply transmit some part of the husband's property to his creditors,—a most equitable proceeding.

2. It is undisputed that Capt. and Mrs. Lynam and their family lived upon her homestead. It does not appear, however, that there was ever any agreement or understanding between them for the payment of rent by him to her therefor. Without expressing an opinion upon the effect of such an agreement if its existence were shown, it may be safely said that in the absence of that agreement the wife has no right to such rent from the husband. It is true the wife may, at her will, manage and dispose of her own property, including her homestead upon which the family live. She may lease it to other parties, and recover and retain the rent; but while she occupies it herself with her husband and family she cannot, at least in the absence of any agreement, require the husband to pay to her rent therefor. The relation between them as to such occupancy is that of husband and wife uniting to make a common home. The relation of landlord and tenant is not to be inferred or implied. The occupation is that of both. *Southworth v. Edmonds*, 152 Mass. 203, 25 N. E. 106. There are doubtless numberless instances in this country where the husband and wife and family are living upon a homestead owned by the wife, yet no case has been found of a claim made in the courts by the wife against the husband or his estate for the rent, in the absence of an agreement. This circumstance is strong against the validity of such a claim.

If the wife cannot insist on such rent as

against her husband or his estate, it follows that she cannot insist upon it as against his creditors. Her husband's indebtedness does not create for her a new right in his property.

3. A wife simply keeping her own and her husband's home and family need not account to her husband's creditors for any part of his income received by her, so long as it does not appear that she is using any part of it for her separate profit. In this case, however, it does affirmatively appear that the wife, with a business associate, was engaged in a business for her own profit, entirely apart from her husband, and that all or nearly all of her husband's remittances were, in the first instance, turned into this business, to the account of Lynam & Campbell. The support of the families of both was drawn indiscriminately from the funds of the business. This procedure was certainly unjust to her husband's creditors,—this subjecting their debtor's income not solely to the support of himself and family, but to the risk of a business from which he was in no event to derive any profit or increase of estate. At least, it has put on the wife and her business partner the duty of showing affirmatively that such absorption of her husband's income into her property and business worked no wrong to his creditors; that an equivalent sum was properly and actually consumed by the husband's family. This they have not done. At the most, they only give a guess.

It is urged at this point that the justice of the first instance has found this to be the fact, and that his finding of fact is not to be reversed unless clearly wrong. We do not understand the justice to have found this specific fact. His finding was general, including both law and fact. He seemed to concede that the Lynam family expenses alone, not counting rent, might not have consumed the remittances. He made much account of the rent in arriving at his conclusion.

The lamentable tendency of so many debtors to transfer their means and earnings to their wives' possession, or to expend them upon their wives' property, not for the support of the family, but to store them away from the reach of their creditors, renders it necessary for the courts to scrutinize thoroughly, and even with suspicion, any such transaction, however innocent it may appear on the surface. The wife must not be allowed to absorb the debtor husband's property under the cover of family support. *Robinson v. Clark*, 76 Me. 494; *Seltz v. Mitchell*, 94 U. S. 580. Applying that scrutiny to this case, we are satisfied that at least \$1,500 of the debtor husband's earnings have been used in additions and improvements upon the wife's real estate, with her consent, by which her estate has been increased in value to that full amount.

The plaintiffs are entitled to judgment and execution for that amount and costs against the debtor husband and the defendant wife, to be applied to their former judgment against the husband. The defendant Campbell does

not appear to have any interest in the property, and hence the bill should be dismissed as to him, but without costs.

Decree below reversed.

New decree in accordance with this opinion.

(90 Me. 395)

RICKER et al. v. PORTLAND & R. F. RY.

(Supreme Judicial Court of Maine. June 2, 1897.)

EQUITY PRACTICE—TRADE-NAMES—INFRINGEMENT—CARRIERS—COMPETITION—INJUNCTION.

1. Where an answer to a bill in equity is filed, containing, as permitted by the practice in this state, a demurrer, *held*, that either party may then set the cause for hearing on the demurrer alone, before replication filed. But, if the complainant files a replication to the answer, then he only can set the cause for hearing before the lapse of 60 days, within which time testimony may be taken.

2. When a cause is set down for hearing generally, and not specifically on the demurrer, after replication filed, and before the expiration of 60 days after issue joined, *held*, that in the absence of agreement of parties this could be done by complainant alone. *Held*, that the effect of such proceeding is a waiver of the replication, and the cause is set down for hearing on bill, answer, and demurrer, the answer to be taken as true. Upon such hearing, the bill, answer, and demurrer are all to be passed upon by the court.

3. The plaintiffs alleged in their bill, praying for an injunction, that the use of the words "Poland Springs" by the defendant railway to designate its station in the town of Poland, where the plaintiffs have a spring of water with the same name, besides a large hotel, endangered their trade-mark in the name of "Poland Spring Water," and also alleged that water shipped from the defendant's station may be marked "Poland Spring Water," and sold in competition with the plaintiffs' water. The bill did not allege that this had been done, or was threatened to be done, by the defendant or any one else.

Held that, conceding the plaintiffs have a trade-mark, it has not been infringed upon, nor threatened to be infringed upon, by the defendant. The defendant is a railroad company, chartered for the transportation of persons and merchandise, as a common carrier, and only for that. It would be ultra vires for it to enter upon the business of bottling, shipping, and selling water, or to enter into commercial business not necessary and incident to its business of common carrier. Until it does or threatens to do this, the plaintiffs are not injured, and have no cause for an injunction upon that ground.

4. *Held*, that because the plaintiffs for a series of years had run a stage line from Danville Junction, a station on two other railroads, to their hotels, affords no legal right to exclude another stage line over the same route, and much less from another station upon another railroad to the same destination, so long as the new line is not represented in some way as that of the plaintiffs, or by this means a fraud is perpetrated upon the traveler or the plaintiffs. Such competition is not open to legal objection, in the absence of fraudulent representation.

(Official.)

Exceptions from supreme judicial court, Androscoggin county.

Bill in equity by Hiram Ricker & Sons against the Portland & Rumford Falls Railway. On a hearing by a single justice a demurrer to the bill was sustained, and complainants appeal and bring exceptions. Affirmed.

Elder, Wait & Whitman, A. R. Savage, H. W. Oakes, W. H. Newell, and W. B. Skelton, for plaintiffs. W. H. White, S. M. Carter, G. C. Wing, G. D. Bisbee, J. P. Swasey, and E. M. Briggs, for defendant.

STROUT, J. Bill in equity praying an injunction against the use by defendant of the words "Poland Springs" and "Poland Springs Junction" to designate two stations upon its road. Answer was filed, which contained, as permitted by our practice, a demurrer. Either party could then set the cause for hearing on the demurrer alone, before replication filed. But complainant filed replication to the answer. After that, complainant only could set the cause for hearing before the lapse of 60 days, within which time testimony could be taken. Rev. St. c. 77, § 17, as amended by chapter 156, Laws 1893; Equity Rule 22 (20 Atl. xlii.).

This cause was set down for hearing generally, and not specifically on the demurrer, after replication filed, and before the expiration of 60 days after issue joined. In the absence of agreement of parties, this could be done by complainant alone. The effect of this proceeding was to waive the replication and set the cause for hearing on bill, answer, and demurrer, the answer to be taken as true. Upon such hearing, the bill, answer, and demurrer were all to be passed upon by the court. *Dascomb v. Marston*, 80 Me. 230, 13 Atl. 888. Hearing was had by a single justice, and by him the demurrer was sustained and the bill dismissed. The case comes here upon appeal from that decision and exceptions to the ruling. The appeal vacated the decree below. And the cause would now regularly be heard by this court upon the bill, the answer taken as true, and the demurrer contained in the answer; but, as counsel have argued the demurrer alone, we confine our opinion to it.

The complainant owns a tract of land in Poland, upon which are two hotels, one known as the "Mansion House" and the other as the "Poland Spring House," with accommodations for over 500 people in both houses. The bill alleges that upon said tract of land there is "a spring of water known as the 'Poland Spring,' which water is of great medicinal and commercial value, and has been for upwards of thirty years; that it is widely sold throughout the United States and foreign countries; * * * that it is of great value, both because of the patronage which it draws to said hotels, and because of its wide sale"; that it has been for many years sold "under the name of 'Poland Spring Water,' or 'Poland Water, Natural Mineral Spring Water,'" and that said name is of great value "as a trademark"; and that "by reason of the reputation of the water from said spring, and of the popularity and reputation of said hotels," the tract of land has been for many years, and still is, known as "Poland Spring" or "Poland Springs."

The defendant operates a railroad running

from Mechanic Falls to a point on the Maine Central Railroad about three miles east of Danville Junction, and has upon its line a station at a point nearest to complainant's property, and about two miles distant therefrom, which is named and called "Poland Springs," and at its junction with the Maine Central it has a station called "Poland Springs Junction." The bill alleges that, at or near said station named "Poland Springs" there is no house, shop, or settlement requiring the existence of said station.

Complainants allege that the use of the words "Poland Springs" by defendant "to designate its station" endangers their trade-mark in the name of "Poland Spring Water," and that water shipped from defendant's station may be marked "Poland Spring Water," or "Water from Poland Spring," and sold in competition with complainants' water. There is no allegation in the bill that this has been done, or is threatened to be done, by the defendant or any one else.

It may be conceded that the complainants have a trade-mark, as claimed; but it has not been infringed upon, nor threatened to be infringed upon, by the defendant. Defendant is a railroad company, chartered for the transportation of persons and merchandise, as a common carrier, and only for that. It would be ultra vires for it to enter upon the business of bottling, shipping, and selling water, or to enter into any commercial business not necessary and incident to its business of common carrier. Until it does or threatens to do this, the complainants are not injured, and have no cause for an injunction upon that ground. The cases cited by the learned counsel for complainants in his very able and instructive argument in relation to trade-marks have no application to the facts of this case.

Complainants allege that the name "Poland Springs," given to defendant's station nearest complainants' property, tends to deceive the public, and induce the belief that the station is at the complainants' hotel property. It is matter of common knowledge that the stopping places on railways are stations upon the road. The names given to such places indicate only that passengers destined for the place named are to alight at that station, as the nearest or most direct point from which to reach their destination. The word "station" is not added to the name, because it is implied from the universal understanding of railway travelers. In many instances the station is named for a town which may be several miles distant from the station. It is universally understood to be the station, which may be either at the place sought, or the nearest approach to it from the railway. Naming this station "Poland Springs" does not mean, and probably no railway traveler familiar with the practice of naming stations on railways ever supposed it meant, the Poland Spring Hotel or the Poland Spring property. It appeared to be admitted at the arguments that, if defendant had added the word "station" to that of "Poland

Springs," there would have been no objection. But the word "station" is so universally implied that it would be superfluous to add it. Every regular stopping place of a railway train, where it receives or leaves passengers, is a station, and universally so understood.

The station is called "Poland Springs," in the plural. The trade-mark claimed by complainants is "Poland Spring," indicating one only. The station name indicates the nearest approach by that railway to the mineral springs in Poland, not to any particular one.

The bill alleges that defendant has contracted with the Maine Central and Boston & Maine Railroads to sell tickets with coupons marked "Poland Springs," and that the holders, intending to visit complainants' hotel property, are misled thereby to suppose they are to be transported to complainants' hotel property, and the complainant "is greatly and peculiarly injured in its said stage line, and in its said hotel and spring water properties." It is not claimed that defendant owns or manages any hotel, or threatens to do so, in competition with complainants' hotels.

It would seem that a railroad which carried guests four miles nearer complainants' hotels than any other railroad would benefit the hotels by tending to increase their patronage, as travelers are apt to seek the quickest and easiest transportation to their destination.

But the gravamen of complainants' bill is that "for many years a stage line now owned by complainants has been operated throughout the year from its said property to Danville Junction, on the line of the Maine Central and Grand Trunk Railways, receiving from said companies all passengers holding tickets with coupons entitling the holder to be transported by this stage line to plaintiffs' property." These tickets, with stage coupons, it is alleged, were issued by various railroads, presumably by arrangement with complainants, and thus the profitable transportation by stage was insured to the complainants. There is no allegation in the bill that the facilities for transportation from defendant's station named "Poland Springs" to complainants' hotel are not ample and convenient. In the absence of such allegation, it is fair to presume that no complaint is made upon that ground by complainants or travelers visiting complainants' hotels. It is admitted that the distance from defendant's station to complainants' hotels is four miles less than by complainants' stages from Danville Junction, and travelers can reach complainants' hotels from defendant's station with much less fatigue than by complainants' stages. Yet the complainants ask this court, sitting in equity, to aid it in deceiving travelers desiring to visit its hotels into the belief that the only practicable approach thereto is by way of Danville Junction, and thus secure to it the profits on six miles of stage transportation, as a gainful monopoly, although the traveler is thereby subjected to four miles of unnecessary stage ride, which, to the aged, infirm, or timid, is a serious incon-

venience. The widely-reputed medicinal quality of its water naturally attracts to complainants' hotels a large number of the weak and invalids who hope for benefit from its use. They should be freed, as far as practicable, from unnecessary annoyance or fatigue on their journey thither.

The principle in *Marsh v. Billings*, 7 Cush. 322, and kindred cases, does not apply. In that case the defendant was restrained from placing the words "Revere House" on his coaches and the caps of his drivers, because it tended to lead the public to believe the coaches were owned or controlled by the proprietors of the Revere House. Defendant in that case was engaged in the business of carrying passengers to and from the railroad stations to hotels, and it was the well-known custom for hotels to indicate to the public the coaches controlled by them by the name of the hotel upon the coaches and caps of the drivers. A railway, as a common carrier of passengers, terminates the transportation at its station, and does not undertake to carry passengers to any hotel or other special place beyond its station. The name of its station involves no such implication. The name of defendant's station would not justify or suggest the inference that the line of stages from the station to complainants' hotels was owned or controlled by the complainants.

The fact that complainants for a series of years had run a stage line from Danville Junction to their hotels affords no legal right to exclude another stage line over the same route, much less from another station upon another railroad to the same destination, so long as the new line is not represented in some way as that of complainants, and by this means a fraud is perpetrated upon the traveler or the complainants.

The duty of the railway was accomplished when it furnished safe egress to its passengers at their terminal station, in the absence of special contract for further transportation. If the passenger's ticket contained a coupon for conveyance from the station to complainants' hotel, the natural implication would be that the stage connection was controlled by the railway rather than by complainants. It is not charged that any representation that this stage communication was that of complainants was made in fact; and no fraud, to the injury of complainants' line, is shown to have been practiced.

It is inconceivable that travelers familiar with the connection of the Maine Central and Grand Trunk Railways at Danville Junction with a stage line to Poland Spring Hotel should suppose, when they alight from defendant's road at its station Poland Springs, several miles from Danville Junction, and take stage to complainants' hotels, that they are being conveyed by the stage line running from Danville Junction, or one controlled by the same proprietors. And if they did, in the absence of express fraudulent representation, complainants could not object; one approach

being from the Maine Central or Grand Trunk at Danville Junction, the other from defendant's road at a station about three miles east of Danville Junction,—two independent lines from different railroads, by different routes, to the same ultimate destination. Such competition is not open to legal objection, in the absence of fraudulent representation. And, if not familiar with the connection at Danville Junction, the traveler would be without knowledge of the proprietorship of the stage line from thence, and would have no preference for complainants' line over any other affording as good accommodation. *Marsh v. Billings*, supra, rests upon the ground that the defendant fraudulently represented his coaches to be those employed or controlled by the Revere House. The liability in that case, the court says, was not "that they had the words 'Revere House' on the coaches and on the caps of the drivers merely, but that they falsely and fraudulently held themselves out as being in the employment, or as having the patronage and confidence, of the lessee of the Revere House."

The case stated by the bill does not entitle the complainants to the relief prayed for. The demurrer was rightly sustained.

Decree affirmed. Demurrer sustained. Bill dismissed, with additional costs.

(90 Me. 374)

SARGENT v. INHABITANTS OF MILO.

(Supreme Judicial Court of Maine. May 29, 1897.)

TOWNS—TAXATION—LIABILITY OF NONRESIDENTS.

Electors living in unincorporated places may furnish lists of their polls and estates to the assessors of any adjacent town on or before the 1st day of April, and said assessors shall assess state and county taxes upon all such persons. And such electors so presenting their polls and estates may vote in such town in all elections for governor, senators, representatives, and county officers.

Held, that such elector is not liable to be assessed for a town tax.

(Official.)

Report from supreme judicial court, Piscataquis county.

Action by Horace W. Sargent against the inhabitants of Milo to recover back the amount of an illegal tax paid by plaintiff. Submitted on report. Judgment for plaintiff.

J. B. Peaks, for plaintiff. G. W. Howe, for defendants.

PER CURIAM. On the 30th day of March, 1892, the plaintiff, then living in the unincorporated township of Lake View, or No. 4, range 8, adjacent to the town of Milo, furnished the assessors of that town with a list of his poll and of his estate, consisting of one horse; and thereupon the assessors of Milo, in pursuance of said application, and, as they understood, in conformity with Rev. St. c. 4, § 58, on the 1st day of April of that year assessed the plaintiff a tax of \$3 upon his poll,

and \$1.50 upon his horse, in accordance with the list by him furnished to them.

The application made by the plaintiff to the assessors of the defendant town, and the list furnished, was for the purpose of voting in that town, and by virtue of the statute above mentioned he should have been assessed a state and county tax.

The assessors of Milo, however, through some mistake or inadvertence, assessed upon the plaintiff a state, county, and town tax. That statute provides that "electors living in other unorganized places, may furnish lists of their polls and estate to the assessors of any adjacent town, on or before the first day of each April, and said assessors shall assess state and county taxes upon all such persons, and they shall be collected in the same manner and by the same officers, as if such electors were inhabitants of such town; and such electors so presenting their polls and estates may vote in such town in all elections for governor, senators, representatives and county officers."

The plaintiff contends that the tax thus imposed by the assessors was illegal, and, having paid the same under protest and to avoid arrest, he seeks to recover back the money in this action.

The jurisdiction of the assessors by statute was limited to the state and county tax. For them also to undertake to assess a town tax, in addition to the state and county tax, was more than an error, mistake, or omission in exercising their jurisdiction to assess state and county taxes.

It was going outside of their jurisdiction: The assessment of the town tax was not a mere irregularity. It was wholly unauthorized, and hence void.

The town has received the plaintiff's money without right. In equity and good conscience it should be refunded, and this action therefore is sustained.

Judgment for plaintiff.

(56 N. J. E. 63)

GRAND LODGE, KNIGHTS OF PYTHIAS OF NEW JERSEY, v. GERMANIA.

LODGE, No. 50, et al.

(Court of Chancery of New Jersey. Aug. 21, 1897.)

PARTIES—BENEFICIAL ASSOCIATIONS—SUBORDINATE LODGES—OWNERSHIP OF FUNDS—SURRENDER OF CHARTER—MEMBERS—LIABILITY.

1. In suing the trustees of an unincorporated lodge, the lodge was joined as party defendant, although its disbandment had occurred, unknown to complainant, before the filing of the bill. *Held*, that a motion by complainant to strike from the bill both the name of the lodge as a party defendant, and also an allegation of the continued existence of such lodge, should be granted.

2. An unincorporated subordinate lodge was organized under a charter granted by an incorporated grand lodge, which, in turn, was subordinate to a supreme lodge. The members of the subordinate lodge pledged themselves to act at all times in obedience to and in accordance

with the enactments of the grand lodge, which enactments were bound by charter to be in conformity with the statutes of the supreme lodge. These supreme statutes provided that the receipts of a subordinate lodge "shall constitute a trust fund for carrying out the fraternal and beneficial features of the order. * * * This fund shall not be subject to partition among the members of the lodge, and in case a lodge shall, for any cause, cease to exist, this fund shall revert to the grand lodge within whose domain the lodge is located." The members of the subordinate lodge disbanded, first voting to pay the money in the treasury to a sick-benefit society not connected with the order, and to which the lodge members belonged. The vote was carried into effect. *Held* a diversion of the trust funds.

3. The trustees and those assisting in the actual disposition of the funds were jointly and severally liable to the grand lodge for the whole fund.

4. The charter of the grand lodge provided that it "shall and may at all times hereafter be capable in law of having, purchasing, holding, and possessing any land, tenements, hereditaments, and personal estate." *Held*, that the title to moneys paid into the subordinate lodge vested at once in the grand lodge, and the officers of the subordinate lodge were merely custodians of the fund during the existence of the lodge.

5. Members of a subordinate lodge, organized under a charter from a grand lodge, who have disbanded as a lodge, and deny their membership in the organization, and have forsaken the lodge property, are estopped from denying that the forfeiture of property held by the subordinate lodge, consequent upon the surrender of their charter, has taken place.

Bill by the Grand Lodge, Knights of Pythias of New Jersey, against Germania Lodge, No. 50, and others, to recover funds held by defendant lodge in trust. Heard on bill, answer, and proofs. Decree for complainant.

This bill is filed by a corporation named the Grand Lodge, Knights of Pythias of New Jersey, duly incorporated by act of the legislature March 29, 1871 (P. L. 1027), against a subordinate lodge, known as the Germania Lodge, No. 50, Knights of Pythias of New Jersey, and certain individuals, late members thereof. Germania Lodge, No. 50, is an unincorporated association acting under a charter issued by the grand lodge on the 25th of May, 1870. The gravamen of the bill is that the individual defendants have diverted certain funds of Germania Lodge, No. 50, for purposes not authorized by the charter or by-laws of the association, and that thereby a right of action has accrued to the complainant to recover the same.

The order of the Knights of Pythias is composed of three series of lodges: First, the Supreme Lodge, Knights of Pythias, which is an institution incorporated under the laws of the United States, and is the highest and supreme lodge of the world, its headquarters being in the United States. Next to that are the grand lodges, which possess charters or warrants legally granted by the supreme lodge. Of these, the Grand Lodge of New Jersey is one. Then come subordinate lodges, which are chartered by the grand lodge, of which the Germania Lodge, No. 50, is one. The order has a written constitution and statutes. The constitution divides the organization into three

separate departments,—executive, judicial, and legislative,—and creates a great number of officers. The constitution provides modes of enacting laws, to be binding on all lodges and members of the lodges. The legislative records of the supreme and grand lodges, contained in several volumes, were offered in evidence to show that the constitution and laws, as contained in the printed book offered in evidence, were properly and lawfully adopted and passed. The Grand Lodge of New Jersey was instituted by the Supreme Lodge of the World by a charter dated the 1st of April, 1870. By the terms of its charter the grand lodge was "authorized and empowered to organize subordinate lodges in its own jurisdiction in conformity to the laws established by the Supreme Lodge of the World, and govern said lodges according to the intent and meaning of the laws of the order as promulgated by the supreme lodge"; and it closes thus: "And the said Grand Lodge of the State of New Jersey doth solemnly promise to act according to the instructions of this charter until it is revoked," etc. The charter by the Grand Lodge of New Jersey to Germania Lodge, No. 50, authorized and empowered it "to make laws, rules, and regulations for its government and support in conformity with the laws, rules, and regulations of the said grand lodge and those of the Supreme Lodge of the Knights of Pythias; the officers and members of the said lodge No. 50 solemnly pledging themselves to act at all times in obedience to the commands and enactments of the said grand lodge, and in accordance with the laws, rules, and regulations of the order, in default of which this charter or warrant of authority may be revoked, suspended, or taken away at the pleasure of the said grand lodge." By the installation ritual, each officer sincerely promises that he will faithfully and impartially perform all the duties incumbent upon him as such officer, to the best of his ability and understanding, and in accordance with the provisions of the constitution and laws of the Grand Lodge of New Jersey and of the Supreme Lodge, Knights of Pythias of the World.

Germania Lodge, No. 50, acted in full sympathy with and in subordination to the Grand Lodge of New Jersey, certainly up to and including the 31st of December, 1893, and thence apparently until November, 1894. On the 13th of January, 1894, they rendered to the grand lodge a statement of their affairs for the previous year, including the names of their officers, the amount of money received and disbursed, the amount of cash on hand, and the number of their members, the latter being 65. This was made under the hand and seal of the association by Nicolaus Rommell, chancellor commanding (president), and Charles A. Firner, keeper of records and seals (secretary). In the fall of 1894 a majority of the members of Germania Lodge took offense at some direction or regulation of the grand lodge with regard to the mode of keeping their records, and disbanded, and resolved to proceed no further

under the charter from the grand lodge. No formal action as a body was taken on this subject until a meeting of November 27, 1894; but previously to that, at a regular meeting on November 13th, four members, who did not wish to leave the order, applied for and received from the lodge, in meeting, what are called "withdrawal cards," which enabled them to enter any other lodge of the same order. On November 27, 1894, the lodge, in meeting, adopted a resolution to the effect that they should dissolve, draw the money from the bank, and turn it over and make a present of it to the Beneficial Verein. The language of the resolution, as translated from German, is: "Whereupon the lodge resolved to dissolve, draw the money from the bank, establish a society, and present the same the money for charitable purposes." The evidence shows that they acted on the idea that, while they had no right to divide the money among themselves, they could make a present of it to a sick-benefit association. Previous to the adoption of this resolution each of the officers had tendered his resignation as such. There is no proof as to what sort of an association the Beneficial Verein was, or how organized, except that it was said to be a sick-benefit association formed by the members of Germania Lodge, No. 50. That all the members of the lodge, except those who took withdrawal cards on the 13th of November, resolved to abandon, and did actually abandon, the Knights of Pythias organization, is an admitted fact. The insignia, paraphernalia, seals, books, and papers were left without care or custody in the hall which they had occupied, over a beer saloon owned and occupied by one of their members, Otto Jansen; and upon the stand all of them denied any custody or knowledge of the whereabouts of any of the books, insignia, paraphernalia, etc. Some of them were afterwards, pending the trial, found by the solicitor of the complainant, acting under the verbal order of the court, in a closet in the lodge room.

The lodge kept an account in the German Savings Bank of Newark, which commenced on the 1st of July, 1894, and went on continuously until the 14th of November, 1894, when it was transferred to a new account, known as the Columbia Kranken Unterstuetzungs-Verein (Sick-Benefit Association), No. 3. The transfer was made by virtue of an order dated November 13, 1894, signed by the defendants Charles A. Firner, knight of the records and seals, Max Seelinger, the chancellor commanding, F. Teschke, Heinrich Sonn, and Otto Jansen, trustees (all defendants), and is as follows: "Newark, New Jersey, November 13, 1894. To Cashier of German Savings Bank: Please pay over to trustees of Germania Lodge, No. 50, K. of P., the full amount due to said lodge. Respectfully, by order of above-named lodge." This order was filed with the bank, and a receipt given in these words: "\$695.59, Newark, New Jersey, November 14, 1894. Received from the German Savings Bank six

hundred and ninety-five dollars ⁵⁹/₁₀₀ on pass book No. 5,204, Germania Lodge. Order on file. [Signed] Otto Jansen." There is nothing on the minutes of November 13th to justify the order of that date, and the first entry on the minutes showing official action is that above set forth of November 27th, two weeks later. Besides this money in the German Savings Bank, the lodge was the owner of four bonds of the Newark water bonded registered debt, standing in its name on the register of the city in the comptroller's office, numbered 3,089, 3,090, 3,091, and 3,092, of the par value of \$100 each; and on November 26th, by a paper signed by Max Seelinger, chancellor commanding, Charles A. Firner, secretary, that water stock was assigned to the Columbia K. U. V., No. 8, and was registered in its name. In addition to that, the lodge had a small sum of money—\$102.25—in the Security Savings Bank, in the name of "Christian Specht, [former] Treasurer of Germania Lodge, No. 50," and on the 14th of November this sum was withdrawn by Otto Jansen, then treasurer, and the pass book delivered up. On the 14th of November, 1894, there was deposited in the same bank, to the credit of the trustees of Columbia K. U. V., \$77.25; being just \$25 less than the amount previously standing to the credit of Germania Lodge, No. 50. That money was afterwards drawn out by the defendant Heinrich Sonn.

These parties afterwards organized another association, called "Germania Lodge, No. 1; Improved Order Knights of Pythias," and some of these funds were turned over to it. This last organization, however, was not subordinated and owed no allegiance to the Grand Lodge of New Jersey. It seems to have been set on foot about the 10th of December, 1894, and on that date the whole of the \$695.59 standing to the credit of the Columbia K. U. V., No. 8, was drawn out by Anton Schonk, president, and Heinrich A. Sonn, treasurer, of Columbia K. U. V., No. 8. The order was in these words: "10,203. Newark, December 10, 1894. Columbia Kranken Unterstuetzungs-Verein, No. 3. To the Cashier of German Savings Bank: The trustees of the above-named society are herewith authorized to draw all the money belonging to the Columbia Kranken Unterstuetzungs-Verein, No. 3, N. J. The cashier will please oblige. \$695.59. Pres., Anton Schonk; Sec., Max Seelinger; Treas., Heinrich A. Sonn; Trustees, Otto Jansen, Max Seelinger, Nicolaus Rommell." And the receipt for the money was signed by Max Seelinger, secretary. This money, when drawn out, came into the actual possession of Heinrich Sonn, as treasurer of the new organization, Germania Lodge, No. 1, Improved Order Knights of Pythias. A portion of it was deposited in the Dime Savings Bank of Newark to the credit of Heinrich Sonn, trustee, where it still remains. On the 10th of December, 1894, Max Seelinger, as secretary, and Anton Schonk, as treasurer, of

Columbia K. U. V., No. 3, sold to Charles Teschke the \$400 of funded water bonds, and received the money therefor, which was handed to Otto Jansen. That made at least \$1,155 of cash belonging to the lodge, counting the fund in the Security Savings Bank as \$77.25, instead of \$102.25; and it is so entered, as of November 28, 1894, on a small account book kept and produced by Mr. Sonn, and offered in evidence. A paper was produced, dated November —, 1894, which recited, "We, the undersigned, members of Columbia Kranken Unterstützungs-Verein, No. 3, of Newark, New Jersey, do hereby acknowledge the receipt of cash money due us amounting to \$25," signed by 38 or 39 men, all of them said to have been members of Germania Lodge, No. 50, Knights of Pythias. The proof at first tended to show that that money was paid in cash to each of them; but cross-examination showed that it was actually paid in cash to very few,—not more than two or three, at the outside,—the whole being left in the hands of Mr. Sonn, the treasurer. But a considerable portion of it was disbursed for sick benefits, at the rate of \$10 a week; and all that remained at the time of the hearing, so far as appeared, was \$400, deposited in the Dime Savings Institution. The fund, which on the 14th of November, 1894, amounted to about \$1,200, was the result of the accumulation of years of contributions of present and previous members of the association, and not of the contributions of the then actual members.

The intended action of the lodge, which was really developed on the 13th or 14th of November, 1894, coming to the knowledge of the officers of the Grand Lodge of New Jersey, Mr. Kranmer, the grand chancellor of the grand lodge, issued a commission to Mr. George Schmidt, of Granite Lodge, No. 21, as district deputy grand chancellor of the district which included Germania Lodge, No. 50; and Schmidt, by virtue of that commission, went to the lodge rooms, over Jansen's saloon, found Mr. Jansen, learned from him that the lodge had disbanded, and thereupon demanded the books, papers, paraphernalia, and money belonging to the lodge, but was told that the money had been distributed, and that the paraphernalia of the lodge was in the lodge room. Shortly after that, and, as far as appears, before the filing of the bill, he demanded and received the charter of the lodge from Mr. Jansen, who had it behind his beer counter.

The original bill was filed on the 8th of December, 1894, against the lodge by its name, Charles A. Firner, Otto Jansen, and the savings bank. An injunction was issued, which, however, did not succeed in staying the money in the hands of any of the persons who received it. Further information coming to the complainant, an amended bill was filed early in February, 1895, adding the additional defendants, and praying relief against them. The actual tracing of the movement and dis-

position of the funds of the lodge came out on the hearing. Subsequently a motion was made to strike out the Germania Lodge as defendant, and the allegation that it was still in existence as a voluntary organization, on the ground that it was substantially dissolved and had ceased to exist before bill filed. The exact amount received by each of the defendants, as distinguished from the others, is as follows: Otto Jansen received \$102.25, moneys deposited in the name of Christian Specht, as treasurer, in the Security Savings Bank. He (Jansen) also received \$400 in cash from the sale of the water bonds. He also signed, with the others, an order for the \$895.59 on the German Savings Bank. Heinrich Sonn enters in his book on November 28, 1894, that he received \$1,155 of the funds. He actually received on December 10th \$695.59, and he received from Mr. Jansen the \$77.25, and presumably he received the proceeds of the water bonds, \$400, which would make, in all, \$1,172.84. Seelinger and Schonk transferred the water bonds, and paid the money to Jansen. The \$102.25 deposited in the Security Savings Bank was transferred by the order of Seelinger, Jansen, and Rommell.

The constitution of the supreme lodge provides, among other things, that "the rituals of the order, the supreme constitution, and the laws enacted by the supreme lodge in accordance therewith, shall be the supreme law of the order of Knights of Pythias." By chapter 16, § 328, of the supreme statutes, the funds of the lodge are devoted to a particular purpose, as follows: "The receipts from fees and dues and the increments thereof shall constitute a trust fund for carrying out the fraternal and beneficial features of the order, and shall not be expended for any other than those purposes and the payment of the necessary expenses of the lodge, as those purposes and expenses may be determined legislatively or judicially by the grand lodge having jurisdiction, which grand lodge shall also determine the vote that shall be necessary to make an expenditure from the fund, and the manner in which it may be invested, if at all. This fund shall not be subject to partition among the members of a lodge, and in case a lodge shall, from any cause, cease to exist, said fund shall revert to the grand lodge within whose domain the lodge is located." By section 5, art. 8, it is provided that on the decease of a member in good standing an appropriation of not less than \$20 shall be made towards defraying the expenses of his funeral. There was in addition to that a sick-benefit privilege. Article 8, § 2, on that subject, is this: "Every member who has received the rank of knight, and is in good standing in his lodge, incapacitated by sickness or other disability from attending to his usual business or some other occupation, shall be considered a beneficial member, entitled to receive such weekly benefits as the by-laws prescribe, which shall not be less than one dollar per week." In addition to the sick and funeral benefits provided, there is an in-

insurance branch of the order, known as the "Endowment Rank," of which members of the order are privileged to become members; and of this at least one of the members, Christian Specht, who took his withdrawal card from the lodge November 14, 1894, when it was found that the lodge was about to dissolve, was a member. This branch of the business is intrusted to a board of trustees appointed and controlled by the supreme lodge. The constitution and by-laws of Germania Lodge, No. 50, show that the terms of its charter were complied with, and that its by-laws were made in accordance with and subordinate to the constitution and statutes of the supreme lodge and grand lodge. The grand lodge enacted and ordained a constitution for all the subordinate lodges, and that constitution was accepted by Germania Lodge, No. 50. By article 13, § 4, of the constitution of the subordinate lodges, it is provided as follows: "A lodge becoming dissolved by the surrender of its charter, its property and effects shall be returned to the grand lodge as provided for in article 12, § 3, Subordinate Lodge Constitution, and the penalty provided for in said article and section relative to failure or refusal shall have full force and effect." Article 8, § 1, of the by-laws of Germania Lodge, No. 50, which, as we have seen, were approved by the grand lodge, is in these words: "Any brother of this lodge who is already a member for six months, and has paid to the lodge all dues, fines, and assessments, shall, if he fall sick through no fault of his own, and disabled for work, and possess the third grade, receive the sum of five dollars, weekly sick-benefit money," until he has received \$200, and after that he shall only receive \$2.50 a week; but, if he becomes afflicted with an incurable disease, then he is to have \$1 a week. The complainant offered in evidence several large volumes of the record of the proceedings of the supreme lodge to show that the laws contained in the volume offered in evidence had been regularly and lawfully enacted in accordance with the constitution of the supreme lodge. The constitution of the subordinate lodges provides for the election of certain officers, as president, secretary, master of finances, and treasurer, and that no disbursements of the funds shall be made except by an order from the president attested by the secretary.

Walter F. Hayhurst, for complainant. Samuel Kallsch, for defendants.

PITNEY, V. C. (after stating the facts). The first question to be considered arises on the motion to strike out of the bill the allegation of continued organic existence of Germania Lodge, No. 50, Knights of Pythias, and its name as a party defendant. I think the motion should be granted. The organization of the lodge had been destroyed by the withdrawal on November 13, 1894, of a part of its members, and by the resignation on November 27th of all its officers, and the resolu-

tion to dissolve, accompanied by the complete abandonment by all its members of the organization. This was not fully known to the complainant when it prepared its bill, and it should not be bound by the allegation of its continued existence. Though the statutes of 1885 and 1890 (2 Gen. St. p. 2588, § 324; *Id.* p. 2592, § 342) provide for suing an unincorporated association like this at law, and it is possible (though I doubt it) that it warrants the making such association a party to a suit in equity like this, yet nothing can be gained thereby, and I think its name should be stricken from the bill as a party defendant. This brings us to the merits.

It is familiar law that funds accumulated as were those here in question become, as soon as paid in, impressed with a trust, with all its consequences. In this case the terms of the trust are found in the constitutions of the supreme, grand, and subordinate lodges, and the laws of the former and by-laws of the latter. The funds, being impressed with such a trust, cannot lawfully be diverted therefrom; and all persons aiding and assisting in such diversion are guilty of a breach of trust, and liable for the consequences. *Tarrey v. Baker*, 1 Allen, 120; *Abels v. McKeen*, 18 N. J. Eq. 462; *Fraas v. Barilement*, 25 N. J. Eq. 84; *Aikmann v. Benz*, 27 N. J. Eq. 831; *Van Houten v. Fine*, 36 N. J. Eq. 124, and note on page 185; *State Council v. Sharp*, 88 N. J. Eq. 24, and cases cited; *Crisman v. Smith*, 44 N. J. Eq. 240, 14 Atl. 484; *Gable v. Miller*, 10 Paige, 627; *Den v. Bolton*, 12 N. J. Law, 208; *Den v. Pilling*, 24 N. J. Law, 653; *Hendrickson v. Shotwell*, 1 N. J. Eq. 577; *Nihl. Ben. Soc. & Acc. Ins.* § 144 et seq.; *Id.* § 354. The case of *State Council v. Sharp*, *supra*, is quite in point. At pages 26, 27, Chancellor Runyon says: "The defendants have willfully violated the law of the society, in dividing up its funds among themselves, and taking them to their own use. Of these funds, part, at least (that called the 'Widows' and Orphans' Fund'), was the accretion of years; and it is highly probable that others than they made some of the contributions from which, during those years, it has been accumulated. But, from whomsoever derived, the money in question, the council and widows' and orphans' funds, was contributed under the charter for and dedicated to certain specified purposes, for which it was, from the time when it was contributed, held in trust by the society and its officers to whose hands it was committed, or to whose control it was subjected. It was held by them also subject to the trust to pay it over to the state council in case of the dissolution of the subordinate one. The defendants therefore had no right to take the money. It is within the jurisdiction of this court to grant the relief which the complainant seeks." The laws of the order of the Knights of Pythias provide how, and upon what formalities, payments out of funds like these shall be made. In letter and spirit they require that such payments shall be made only for certain purposes, and

after certain prerequisites have been complied with; and these are all based upon certain action taken by the society when properly organized in subordination and allegiance to the supreme society. These prerequisites and conditions were not complied with in the disposition made of the funds in this case. It will not help the defendants to show, as they have attempted to do, that some of the funds went to the same persons and upon the same occasions as they would have gone if the original organization had been preserved. The persons so receiving moneys had lost their right in that behalf by abandoning the organization, and the appropriation was not made in accordance with the by-laws of the association.

It is objected to the right of the complainant to relief that, although it was duly incorporated by special act of the legislature, yet it has no authority to collect and retain this money; and a distinction is made between the charter of the complainant corporation (P. L. 1871, p. 1027) and that of the complainant in *State Council v. Sharp*, supra (P. L. 1871, p. 356). The language of the charter of this last corporation, after giving express power to sue, etc., is this: "Shall be able and capable in law and in equity to take, purchase, hold, and receive to them and their successors, for the use of said association, any lands, tenements, goods, chattels, sum or sums of money by grant, gift, bargain and sale, will, devise or bequeath, from any person or persons whatsoever, and the same to grant, bargain, sell, mortgage, improve or dispose of for the use of the association, and in general to do all things which may be lawful or necessary for the well-being and proper management of the said corporation." The corresponding language in the charter of complainant is this: "Shall and may at all times hereafter be capable in law of having, purchasing, holding, and possessing any lands, tenements, hereditaments, and personal estate purchased, devised, or bequeathed by any person or persons, bodies corporate or politic, capable of making the same." I am unable to perceive any material difference in the effect of the verblage of the one and that of the other. The right to sue is given by the general corporation act to all corporations; and it is not too much to say that when these moneys were paid into the treasury of Germania Lodge, No. 50, Knights of Pythias, the payment was, in law, to the complainant, as the only corporate entity in existence which could hold the title and protect it. The actual custody and care of the fund was, by the by-laws, intrusted to certain individuals so long as they continued to act as an association in obedience to the laws of the order; but when they ceased so to act their right and power of control also ceased, and the legal title in the complainant at once became paramount.

It is further insisted by the defendants that the complainant fails to show any facts out of which a forfeiture arose; and counsel plants himself upon the ground that the lan-

guage is that the charter of the lodge must be surrendered by its chancellor commanding, and that there must be some formal suspension of the organization by the superior lodge. But this argument ignores the language of section 328, c. 16, of the Supreme Statutes, which enacts that "in case a lodge shall, from any cause, cease to exist, said fund shall revert to the grand lodge within whose domain the lodge is located." Besides that, I think that under the other section relied upon by the defendants, to the effect that, "a lodge becoming dissolved by the surrender of its charter, its property and effects shall be returned to the grand lodge," etc., the defendants are estopped from setting up that this lodge was not, to all intents and purposes, dissolved and its charter surrendered. They did all in their power to produce that result, and in my judgment they succeeded.

I am of the opinion that the complainant is entitled to relief, and it remains to consider against whom, and to what extent. The individual defendants are 13 in number. Of these, one was reported by the sheriff dead, and one out of the state, against whom no further proceedings have been taken; leaving 11, who were served with process, appeared, and joined in a single answer. They are Huff, Rommell, Seelinger, Kirschbaum, Firner, Jansen, Kull, Schonk, Schill, Sonn, and Robert Teschke. By their answer they denied every allegation of the bill, and put the complainant on proof even of matters that were within their own personal knowledge. The only information the complainant derived from the answer is an allegation, towards the last, to the effect that "all the members of the said Germania Lodge by unanimous consent divided the funds of said lodge between themselves, share and share alike, as they had a lawful right to do, and that each of these defendants' shares did not exceed \$40, and that each of these defendants has long since used up his share for living expenses; that the said division of said fund was made some time before the filing of the original bill of complaint in this suit." This statement in the answer is substantially untrue. There was no actual division of the fund, but only a nominal division; and it was made by individuals, not as members of Germania Lodge, No. 50, Knights of Pythias, but of Columbia K. U. V., No. 8. The evidence shows that Rommell, Seelinger, Firner, Jansen, Schonk, Sonn, and F. Teschke took an active part in the disposition and handling of the funds of the Germania Lodge, No. 50; and, while some of them may not have actually had the money in their personal possession, the disposition of the funds which was made was the result of a common understanding and action. Those defendants must, in my judgment, be held jointly and severally liable for the whole fund. I can find no evidence to implicate Huff, Kirschbaum, Kull, Schill, and Robert Teschke, and there will be no decree against them; but as they joined in an answer with the others, which failed to disclose

the real facts of the case, and as they admitted and claimed that they were among the seceding members of Germania Lodge, No. 50, which authorized, in effect, the action taken by the others, I think they are not entitled to costs. The bank book of the Dime Savings Bank, containing a credit of about \$400 to Germania Lodge, No. 1, Improved Order Knights of Pythias, was impounded during the hearing, and must be delivered to the complainant, and the defendants must do all acts necessary to enable the complainant to draw the money. The decree will be for \$1,172.25, with interest from February 11, 1895, subject to a credit for whatever is realized from the Dime Savings Bank. The complainant is entitled to costs against the defendants individually.

(56 N. J. E. 78)

SCHUBERT LODGE, NO. 118, KNIGHTS OF PYTHIAS OF NEW JERSEY, v. SCHUBERT KRANKEN UNTERSTUETZUNGS-VEREIN et al.

(Court of Chancery of New Jersey. Aug. 21, 1897.)

BENEFICIAL ASSOCIATIONS—SUBORDINATE LODGES—OWNERSHIP OF FUNDS—CONSTITUTION AND LAWS—EVIDENCE—PRESUMPTIONS—CONTRACT OF MEMBERSHIP.

1. Printed copies of the constitution and laws of a beneficial order, in the hands of the secretary of the grand lodge of the state, sent for his guidance and use by the secretary of the Supreme Lodge of the World, are presumed to be genuine and accurate.

2. Moneys received by the subordinate lodge of a beneficial order were held in trust, to be used for lodge expenses and dues, for sick benefits, and for burial expenses of members. A majority of the members of a subordinate lodge disbanded and surrendered their lodge charter; first, however, making a present of the funds in the treasury to a sick-benefit society, which they had formed independently of the order. *Held*, that such a disposition constituted a wrongful diversion of the funds.

3. The provisions of the constitution and laws of a beneficial order concerning the disposition of the funds of subordinate lodges form a contract between the members of an incorporated subordinate lodge, so that the failure to dispose of its funds in accordance with those provisions is a breach of contract.

4. The fact that a supreme lodge of a beneficial order has broken its contract with the members of a subordinate lodge, by refusing to allow them to use the German language for their ritual and records, is no justification for the diversion by those members of the funds of the lodge held in trust for the purposes of the order.

Bill by Schubert Lodge, No. 118, Knights of Pythias of New Jersey, against the Schubert Kranken Unterstuetzungs-Verein and others, for the recovery of trust funds. Heard on bill, answer, and proofs. Decree for complainant.

De Witt C. Bolton, for complainant. William B. Gourley, for defendants.

PITNEY, V. C. Complainant is an incorporated benevolent association, and belongs

to the order of the Knights of Pythias. That order consists of the Supreme Lodge of the World, incorporated under a statute of the United States, and of several grand lodges subordinate to it, located in different states of the Union, among which is the Grand Lodge of the State of New Jersey, and then of numerous subordinate lodges acting under a charter from one of the grand lodges. See Grand Lodge, K. P., v. Germania Lodge, No. 50, K. P. (N. J.) 38 Atl. 341. Complainant is a subordinate to the Grand Lodge of New Jersey. The bill alleges and the answer admits that the complainant here is a corporation created and existing under the laws of the state of New Jersey. In that respect the case differs from the case developed in Grand Lodge, K. P., v. Germania Lodge, No. 50, K. P., where Germania Lodge was an unincorporated association. The bill does not state how or when the complainant was incorporated, but, presumably, it was done under the "Act to authorize the incorporation of benevolent societies" (1 Gen. St. p. 149). In other respects the case developed herein much resembles that of Grand Lodge, K. P., v. Germania Lodge, No. 50, K. P.

The same volumes containing the constitution and laws of the order were put in evidence here as were admitted in the case of Grand Lodge, K. P., v. Germania Lodge, No. 50, K. P. Objection was made in argument to the sufficiency of the proof of the printed books of the constitution and laws of the order. They were proven to be genuine by the grand secretary of the state lodge, who received them in due course of business from the secretary of the supreme lodge for guidance and use by the grand and subordinate lodges of New Jersey. The presumption of their genuineness and accuracy results from their origin and custody.

The complainant was organized as a German lodge by persons, with a single exception, who spoke the German language, and the understanding that its work was to be done and its proceedings carried on in the German language was an inducement to all the members who joined it. Its by-laws were adopted in the German language, and so approved by the grand lodge of the state, and books of ritual were furnished to it by the grand lodge, printed in the German language. I think it sufficiently appears that for the first two years, at least, of its existence, its use of the German language was by the permission, either express or implied, of the grand lodge of the state. In 1892 the supreme lodge, the superior of the grand lodge, made some order directing the German lodges to discontinue the use of the German, with the result that the German ritual books which had been furnished them were demanded by the chancellor of the grand lodge, and were delivered up by the complainant. The different subordinate German lodges of the country united in an effort to

reverse the action of the supreme lodge, and were finally defeated. This angered a great majority of the members of complainant lodge, and they resolved quietly to rebel, throw off the yoke of the grand lodge, dissolve the Schubert Lodge, as such, and surrender its charter, but not to permit the grand lodge to obtain the funds which they had on hand, amounting to about \$800. They were aware that upon the dissolution of the lodge and the surrender of its charter the grand lodge became entitled, by the constitution and laws of the order, to all their property and funds. In that view, they formed (as in the case of Germania Lodge, No. 50) a society called the Schubert Kranken Unterstuetzungs-Verein (Sick-Benefit Society), and, by resolution, made a present of \$800 to that society, which was substantially all of their funds. The members of the complainant lodge were not unanimous in this action, and a small number (nine) refused to vote for or to approve it. The charter was sent to the grand lodge, but upon investigation the officers of the grand lodge found that there were this number of eight or nine still remaining loyal to the order, and redelivered the charter to them; and the organization, under the dominion of the grand lodge, has been kept up. This bill was filed to recover the funds. They had been deposited in a savings bank to the credit of three or more of the individual defendants, and were there stayed by the injunction of this court, and the dispute is as to the rights to those funds. It was not disputed but that these funds were the result of the accumulation of dues paid in by members of the order, and that they became at once impressed with a trust, the terms of which are to be found in the constitution, laws, and by-laws of the order, and that they cannot be applied to any use except those defined in those instruments. Those uses are—First, to pay the expenses of the lodge, and dues to the grand and supreme lodges; second, to make payments to sick members; and, third, payment of expenses of burial of deceased members. And all such payments are to be made only after certain formalities have been complied with. On this simple statement, as in the case of Grand Lodge, K. P., v. Germania Lodge, K. P., the breach of trust appears manifest.

Two defenses are set up: First, that the gift to the K. U. V. was justifiable under the decision in the case of Lady Lincoln Lodge v. Faist, 52 N. J. Eq. 510, 28 Atl. 555. But in that case the appropriation called in question was to a new lodge formed of members of the old lodge, and owing and acknowledging allegiance to the supreme lodge, and subject to its constitution and laws. It was held that the appropriation so made did not have the effect of changing or breaking the trust to which the funds were subject, and besides the terms of the trust in that case were not so strict and exclusive as in the

present case. And it may be remarked that it is manifest that the learned vice chancellor felt that in approving the action of the members of the lodge in that case he went to the very verge of safety.

The second ground of defense is that there was an implied contract between the members of Schubert Lodge and the supreme lodge that the proceedings of the subordinate lodge might be conducted in German, and that such contract was not subject to a right of variance by subsequent action of the supreme lodge, though such right of variance was expressly reserved by the constitution of the supreme lodge; that the supreme lodge had deliberately broken the contract, by forbidding the use of the German language, and hence absolved the Schubert Lodge from all allegiance to the supreme lodge, and all obligations to observe the laws and constitution thereof. I think this position is untenable, for reasons which do not involve an inquiry as to whether there was in fact such a contract, and breach thereof, as is alleged by the defense. In the first place, it is to be observed that the Schubert Lodge being not only organized under the constitution and laws of the order, but also incorporated under the laws of the state, the constitution and laws of the order not only defined the terms upon which the funds of the lodge were held in trust, but also formed a contract between the different members of the lodge; and a breach of the contract between the Schubert Lodge and the supreme lodge, if there ever was such contract, could not have the effect of altering the terms of the trust and contract between the members of that lodge. Each member of the lodge was interested in those funds, and none of them could be diverted from the purposes to which they were devoted without the consent of every individual member. Such consent was not had. And the well-settled rule in such cases is that the rights of the minority who stand by the regular organization, and their contract rights, must be respected. In the second place, the alleged breach of contract did not justify any such action as was taken. The most that could result from it was a right on the part of the Schubert Lodge to refuse to obey the grand lodge by giving up, as it did, its German rituals and the use of that language. On the theory of the defendants, the right of the members of Schubert Lodge was to continue to use the German ritual, and language, and to record their proceedings therein, and to claim and exercise the right to exist as a subordinate lodge of the grand lodge, notwithstanding the adoption of the statute which forbade the use of the German language. On the theory of the defendants, that statute was void as to Schubert Lodge, and need not have been observed by it. The complainant corporation has never lost its identity and organization. The funds in question belong to it, and must be so decreed, with costs against the defendants.

(56 N. J. E. 83)

TODD v. MEDING et al.

(Court of Chancery of New Jersey. Aug. 27, 1897.)

INSOLVENCY—PRESENTATION OF CLAIMS—PARTIAL ASSIGNMENT—COLLATERAL SECURITY—PAYMENT BY RECEIVERS—EQUITABLE ESTOPPEL.

1. A claim against insolvent, founded on notes of \$10,000 of insolvent to R., and sworn to by R., which alleges that deponent has assigned an interest of \$5,000 in the claim to T., and that the claim is presented on behalf of T. as well as on deponent's behalf, sufficiently presents the claim of T. for the \$5,000, and charges the receiver with notice of the right of T., rather than R., to receive dividends thereon.

2. One to whom a claim is assigned as collateral security is, on the claim being paid, entitled to receive the money, the debt for which the collateral was given not having been paid, even if it was not due.

3. Though only part of a claim is assigned, the debtor, having notice of the assignment, cannot ignore it and pay the whole debt to the original creditor.

4. Where a claim of \$5,000 was presented to a receiver by T., and a claim of \$10,000 by R., with a recital in the latter that half of it had been assigned to T., and that it was presented on behalf of T. as well as of R., the receiver is not excused from liability for payment to R. of the entire dividend on the \$10,000 because of the fact that when T. received a check from the receiver for \$1,000, marked "20% dividend," the amount of dividend on his individual claim of \$5,000, he made no inquiry as to whether a dividend had been declared and paid on the \$10,000 claim, or because of the fact that his attorney saw the dividend check of R., he not having observed that it included the dividend on the whole claim of \$10,000.

5. One for whom money is left in trust, and who, on joining with his next of kin in a release of the trustee, obtains the money to loan to his sister, to be loaned by her to a corporation for his benefit, has, on the corporation becoming insolvent, no right to a preference because the money loaned by him had been a trust fund.

Bill by Joseph C. Todd against Charles A. Meding and others.

The complainant, Joseph C. Todd, is a creditor of the Butler Silk Manufacturing Company, an insolvent corporation, of which the defendant Meding is the receiver. The defendant Madeline A. Roe is also a creditor of the said corporation. A part of the assets has been divided and distributed by the receiver. A part remains to be divided and distributed. The allegation of the bill is that in the distribution already made the defendant Meding for some reason paid to Madeline Roe moneys which should have been paid to the complainant, and the object of the bill is to compel Meding to make good to complainant the mispayment to Miss Roe, who is insolvent, either out of the receiver's own pocket, or out of the future dividend coming to Miss Roe. One Haffey, who was a trustee under the will for Augustus C. Roe, a brother of Madeline, is made a defendant because he claims to be interested as assignee of Miss Roe of a share of her claim against the insolvent corporation. He has not answered. Augustus C. Roe was not made defendant by the complainant's bill, but was admitted on his own application after the cause was at

issue, and filed an answer and cross bill after the cause had been referred to a vice chancellor, and during the hearing. The complainant has answered and traversed the new matter set up by this cross bill. The facts and circumstances of the case are as follows:

The insolvent corporation in May, 1893, was indebted to Miss Roe in the sum of about \$10,000 (witnessed in part by four promissory notes, one for \$2,503.34, another for \$4,100, another for \$1,300, and another for \$566.57) for money loaned and advanced by her to the company; and on that day it executed to her a chattel mortgage to secure that indebtedness, which, however, was withheld from the record until the 31st of July, 1893, when it was duly recorded. On the 1st of August, 1893, a bill was filed by J. H. Blauvelt for the appointment of a receiver of the insolvent company, and Meding was appointed such receiver on the 7th of August. At that time the complainant, Todd, held the promissory note of the insolvent company, dated June 8, 1893, at six months, for \$5,000, indorsed by Miss Roe; and, in order to secure him, Miss Roe on the same 7th day of August executed to him an assignment of a one-half interest in the chattel mortgage, "and the one-half interest of the money due and to grow due thereon, with the interest." At the same time, upon the delivery of that assignment, she entered into a written agreement with Mr. Todd by which it was agreed that, in case the note for \$5,000, held by Mr. Todd "is paid and discharged at maturity," then Todd agreed to reassign the one-half interest in the mortgage to her. This assignment from Miss Roe to Todd was duly recorded on the same 7th day of August, 1893, in the record of assignments of Passaic county, where all the parties lived. On the 31st of August, 1893, Meding, as receiver, filed his bill in this court against Miss Roe and Todd, the complainant herein, setting out the chattel mortgage and the assignment of one-half to Todd, and praying that it might be set aside and declared not a lien, with the result that the mortgage was set aside and decreed to be void. The history of that litigation is found in the report thereof in 53 N. J. Eq. 350, 33 Atl. 394. The decree in this court was signed on the 16th of May, 1894; and it was affirmed, on appeal, on the 18th of November, 1895. In that suit Todd and Miss Roe set up their defense in a joint answer, and it was conducted by Mr. (now Governor) Griggs. He does not appear to have been the confidential counsel of either of the parties. Certainly he was not the counsel of either one as against the other, but was employed by them jointly to defend that suit, upon the understanding that the expense was to be equally divided between them. Pending the hearing before the vice chancellor of the suit of Meding v. Roe a petition was presented by the receiver in the Blauvelt insolvency suit for leave to sell the mortgaged property free and clear of the incumbrance of the chattel

mortgage, and such order was made on the 28th of December, 1893. Such sale was made in March, 1894, with the result that the chattels mortgaged realized about \$6,500. In addition to that sum, the receiver had in his hands nearly \$19,000, proceeds of the sale of other property, and the total amount of claims was a little over \$36,000. Upon the presentation to the court of these facts, he was ordered to make a dividend of 20 per cent. among the creditors, payment of which would leave in his hands sufficient to meet the demand of the chattel mortgage, if it should be sustained. In the meantime, on the 18th of September, 1893, in the usual course of business, the receiver obtained an order calling on the creditors to present their claims within three months from that date. Neither Miss Roe nor Mr. Todd presented any claim within the time, and on the 8th of January, 1894, before the case of *Meding v. Roe* was argued, Gov. Griggs, as solicitor of Mr. Todd and Miss Roe, gave notice of a motion to extend the time within which Miss Roe and Mr. Todd might present their claims; and an order was made, accordingly, extending the time to the 20th of January, instant. Gov. Griggs already had in his hands the sworn claims, ready for presentation. That of Mr. Todd was sworn to before his present solicitor, Mr. Osborne, as master in chancery, on the 6th of January, 1894; that of Miss Todd was sworn to on the same day before Gov. Griggs; but both appear to have been prepared under the direction of Gov. Griggs. A memorandum is made at the foot of the claim of Mr. Todd, in Gov. Griggs' handwriting, of the note and protest fees. It is based upon the promissory note before mentioned, of June 8, 1893, for \$5,000, at six months, indorsed by Miss Roe. The claim of Miss Roe is based upon the four promissory notes above mentioned. Both claims are in typewriting, with the exception of a special clause in Miss Roe's claim, which is in the handwriting of Gov. Griggs, and in these words: "Depo-
nent further says that an interest to the extent of \$5,000 in said claim has been assigned by her to J. C. Todd as collateral security, and this claim is presented on behalf of the said Todd as well as on her own behalf." These claims were handed by Gov. Griggs to Mr. Stevenson, counsel for the receiver, and by him to the receiver, and, with the others against the insolvent corporation, were intrusted by Mr. Meding to a bookkeeper and accountant, Mr. Townley, who duly arranged and tabulated them, and in so doing entered on the list of creditors the claim of Miss Roe as being in favor of her alone, instead of in favor of her and Todd in the proportion of each one-half, as he might have done according to the terms of the special clause inserted therein above quoted. This appears by the answer of the defendant herein, and by the list of proven claims annexed to the report of the receiver presented to the court in the insolvency suit as a basis for an order of partial

distribution. The same bookkeeper prepared the checks to be paid to the creditors and to be signed by Mr. Meding as receiver, and the corresponding receipts to be signed by the creditors. They are dated June 4, 1894. That of Mr. Todd was for \$1,000.37, and that of Miss Roe was for \$2,071. This was after decree had passed in this court against Todd and Roe in *Meding v. Roe*, but before its affirmance on appeal.

It will be perceived, by the amount of these checks, that Todd received 20 per cent. on his claim of \$5,000, and Miss Roe 20 per cent. on her claim of \$10,000. It would be fairly inferable from the circumstances that Mr. Townley, in drawing the checks, followed, thoughtlessly, the list of creditors above referred to; but, upon his attention being particularly called to it on the stand, he swears that he had Miss Roe's sworn claim before him when he drew her check, and that he observed that one-half of it belonged to Mr. Todd as collateral security. Asked whether he inquired as to whether one-half of the claim ought not to be paid to Mr. Todd, he says he did not. Asked whether it did not strike him at the time that the claim was one-half of it for Miss Roe and one-half of it for Todd, he answered: "No, sir; Todd has his proof of claim. Q. Well, he had a claim, but you knew nothing about that. This claim was declared to be, as to one-half, in favor of Miss Roe, and, as to the other one-half, in favor of J. C. Todd, and this language is used: 'This claim is presented on behalf of the said Todd as well as on her own behalf.' A. But it says there, as 'collateral security.' Q. What of that? The claim is presented on behalf of each. That didn't strike you at the time? A. No; not at all." These checks were drawn on the Second National Bank of Paterson, and had stamped on their face, "Twenty per cent. dividend." Mr. Todd seems to have deposited his check in the First National Bank of Paterson, and it was paid by the Second National Bank on the 7th of June, 1894. Miss Roe drew the money for hers in person on the 9th of June, 1894. She paid one-half of the proceeds to her brother's trustee, Mr. Haffey, and the other one-half she spent for her own purposes, and is wholly insolvent. Before drawing the money she called upon Gov. Griggs, and, as she swears, asked him whether that money was hers for her to do as she chose with, and that he answered that it was. Gov. Griggs recollects the circumstance of her calling, but not precisely what occurred. He says that the call was a casual one, made while his attention was occupied with some other matter of business, did not excite his serious attention, and he cannot recollect distinctly what passed, but he feels quite sure that he did not say anything to Miss Roe to indicate that she had a right to hold all of that money as against Mr. Todd.

The facts upon which Augustus C. Roe's right in the fund is based are substantially as follows: An aunt of Augustus and his sister died in New York, leaving some money in trust

for the benefit of Augustus, and Haffey was the substituted trustee in charge of that fund. Augustus Roe was out of business, and seeking employment, and sought it of the Butler Silk Manufacturing Company. His sister Madeline had already advanced to that corporation funds of her own, and, in order to procure him a situation at a remunerative salary, she agreed to increase the loan to \$10,000, and for that purpose obtained of Haffey upward of \$3,000 of the trust fund to loan to the silk manufacturing company, and that money made a part of the \$10,000 owed by it. The language of the trust in the will is as follows: "To be held in trust to pay over the interest and income thereof, to my nephew Augustus C. Roe from time to time for and towards his maintenance and support; and whenever in the exercise of their discretion she [that is, the trustee] shall be satisfied that my said nephew is in unembarrassed circumstances, and that payment thereof to him will inure to his benefit and advantage, then I authorize and empower her [the trustee] to pay over to him the amount of the trust fund in her hands, and his receipt thereof shall be a sufficient discharge from the trust thus created." Upon the payment of that money, Augustus C. Roe, his mother, Eliza Roe, and his sister Madeline executed a release to Haffey, the trustee, in these words:

"Whereas, on the 11th day of January, 1898, John Haffey was duly appointed by an order of the New York superior court, city and county of New York, the substituted trustee of Augustus C. Roe under the last will and testament of Caroline A. Roe, deceased; and whereas, as such trustee, he has received from the executors of the last will and testament of the said Caroline Roe, deceased, the sum of twenty-seven hundred and ninety-three $\frac{34}{100}$ dollars; and whereas, it is the desire of Augustus C. Roe, the beneficiary of such trustee, to loan said sum of money to his sister Minnie A. Roe, one of the parties hereto, to be by her invested in the Butler Silk Manufacturing Company, in which company the said Augustus C. Roe is interested, the said Augustus C. Roe hereby stating that the said company is responsible and is solvent, and the said Minnie A. Roe having security for the said loan: Now, therefore, this agreement made by Augustus C. Roe, the said beneficiary, Minnie A. Roe, his sister, and Eliza Roe, his mother, with the said John Haffey, trustee, witnesseth as follows: First. The said Augustus C. Roe hereby requests and directs the said John Haffey, after payment of the expenses incurred for attorney's fees, &c., in the proceedings praying for the appointment of a trustee, &c., in the matter above mentioned, to loan the balance of the said trust fund to the said Minnie A. Roe, who is to invest said moneys with the Butler Silk Manufacturing Company on interest, and upon such investment being made the said parties hereto forever release and discharge the said John Haffey from any claim, demand, action, or proceeding that may arise or grow out of,

or by reason of, the loss of the said moneys, or any part thereof. Said parties further agree that they will take no steps to make any claim against said John Haffey, trustee, at any time, it being their desire that said moneys shall remain so invested as above mentioned, they having full control thereof; and it is further understood and agreed that this agreement shall be a bar, estoppel, and defense to any proceedings in actions brought by the said Roes, or either of them, arising out of the matters herein mentioned, unless the said moneys should be returned to the said John Haffey, trustee; but in no event shall the sureties of the said John Haffey, trustee, given by him on the 8th day of February, 1893, be liable for any cause or reason whatever; we, the said Roes, if any liability occurs, looking only to said trustee. It is further understood that this agreement shall bind our heirs, executors, administrators, and assigns. In witness hereof, we have hereunto set our hands and seals this 9th day of February, 1898."

The exact amount of the Augustus C. Roe fund included in the \$10,000 mortgage was \$3,070.01, and is witnessed by two of the notes secured by the mortgage, in these words:

"\$2,503 $\frac{44}{100}$. Paterson, New Jersey, Feb. 9, 1893. One year after date we promise to pay to the order of John Haffey, trustee for Augustus C. Roe, at the First National Bank of Paterson, two thousand five hundred and three dollars and $\frac{44}{100}$. Value received. The Butler Silk Manufacturing Co., R. V. Butler, President."

"\$566.67. Paterson, New Jersey, April 22nd, 1893. One year after date we promise to pay to the order of John Haffey, substituted trustee for Augustus C. Roe, at the First National Bank of Paterson, ——— dollars. Value received. Butler Silk Manufacturing Co., R. V. Butler, President."

In January, 1894, about the time of verifying her claim against the insolvent company, Miss Roe made and executed an assignment of the remaining one-half of her claim to John Haffey, her brother's trustee. The claim set up by Augustus C. Roe's cross bill is that he is entitled to be paid the \$3,070.01 trust funds out of the dividends on the whole \$10,000, in preference to the complainant herein.

J. P. Osborne, for complainant: Eugene Stevenson, for defendant Meding. John S. Barkalow, for defendant Augustus C. Roe.

PITNEY, V. C. (after stating the facts). The first question raised at the argument was, to whom was the dividend upon the claim of \$10,000, verified by Miss Roe, properly due and payable? It was argued that it was due and payable to Miss Roe because the debt was originally due to her; that the affidavit was made by her, and the receiver was not bound to notice or act upon any partial assignment of the debt, or, at least, that the notice of the assignment contained in the sworn claim amounted to no more than a mere declaration

of trust by Miss Roe, which reserved to her the right to receive the dividend as trustee for Mr. Todd, and pay it over to him. The point is thus put in the remarkably able brief of defendants' counsel: "First. Treating this as a case of notice from the assignee of a debt to the debtor, Meding is not charged, under the circumstances, with notice of Todd's right to receive the money, instead of Miss Roe." I am unable to adopt that view. The claim was, on its face, plainly made in favor of Todd, to the extent of \$5,000, just one-half, and in favor of Miss Roe for the remainder. The language used, "This claim is presented on behalf of the said Todd as well as on her own behalf," will admit of no other interpretation. The express declaration "that an interest in the said claim has been assigned by her to J. C. Todd as collateral" is, in and of itself, an assignment of so much of the debt, quite independent of the previous formal deed of assignment duly made and executed by her, of which Meding and his counsel had full notice. An ingenious argument was made to the effect that an assignment as collateral did not vest in the assignee any right to the immediate receipt of the money, and that Todd's right to receive the money from the receiver depended upon the question whether or not the state of the indebtedness, as collateral to which the assignment was made, was such as to entitle him to receive the money as between him and Miss Roe. But I do not understand such to be the law. Take a simple illustration: If A. wishes to borrow money from B., and holds a bond and mortgage of C., which is due, but upon which he cannot immediately realize, and gives his promissory note to B. for a sum of money payable at a future day, and assigns the mortgage of C. to B. as collateral to that note, and before the maturity of the note C. wishes to pay his mortgage, and has notice of the assignment to B. as collateral, he cannot with safety pay the money to A., the mortgagee. B. is entitled to receive the money, although the debt which it is assigned to secure is not yet due. The assignment vests the title to the money in the assignee. The mere fact that it is assigned as collateral does not alter the situation of the parties. Any other rule would destroy the value of such an assignment. The fact that the assignment is merely as collateral to a certain debt does not affect the intrinsic character of the transaction, or disentitle the assignee to demand the money, so long as the debt which it is assigned to secure still exists. The circumstance that only a part of the claim was assigned does not affect the result. It is too late to dispute the proposition that a part of a debt may be effectually assigned in equity. The qualifying rule that such an assignment cannot be enforced by action at law without the acceptance or assent of the debtor does not vary the result. The qualifying rule avails the debtor only to the extent that, if he wishes to dispute the existence of the debt, he is entitled to make his defense in a single suit,

and cannot be subjected to several suits at law. But it does not justify him in ignoring the partial assignment after he has notice of it, and in paying the whole sum to the original creditor. To so hold would be to nullify the doctrine which sanctions partial assignments. The rule is well settled that the payment of the whole debt to the original creditor, after notice of an assignment of part of it, will not avail the debtor when sued in equity by the assignee. If the debtor is in any doubt as to the right of the person claiming to be an assignee, as against the assignor, he has an easy remedy. He can inquire of the original creditor and alleged assignor, and, if he denies the assignment, the debtor may file his bill of interpleader. I can find no solid basis for the notion that Miss Roe occupied the position of trustee of a part of this fund for Mr. Todd, with power, as such, to receive the money without his consent. In one sense, no doubt, she was a trustee; but not in the sense which would give her a legal right to handle the money for his use and benefit, and without his consent. By the old common-law practice the assignee of a negotiable chose in action was obliged to bring suit thereon in the name of the original contractee as nominal plaintiff to his use. But the necessity to use the name of the original contractee as nominal plaintiff did not authorize the payment by the debtor of the amount due to such plaintiff in person, after notice of the assignment.

The next question is, was the receiver excusable for the mistake he made of paying the whole dividend to Miss Roe? The particular defense developed in the brief of counsel which applies to this part of the case is this: "Second. This is not an ordinary case between a debtor and the assignee of the debt. The receiver was an officer of the court of chancery, administering a fund in an official capacity, and bound to distribute that fund, according to the orders of the court, among a certain definite class of creditors, who should pursue certain specified legal proceedings to lay their claims before the receiver. Todd never complied with the law and the orders of the court of chancery in respect of any interest he had in the \$10,000 claim. He did make himself a party to the insolvency proceedings before the receiver in respect of his \$5,000 claim. It follows that the receiver never had any right to pay one dollar of the dividend on the \$10,000 claim to anybody but Miss Roe, who presented and proved it." This proposition, like the other, seems to me entirely untenable. The claim, in my judgment, was properly and artistically made out and verified. I am unable to see in what respect it could have been improved. It was plainly presented on behalf of both Todd and Roe. On its face, Todd was the payee of one-half of the amount. The verification of all such claims should always be made by the party who has personal knowledge of it,—such a person as would be competent to prove the facts to sustain the claim if called as a witness in a court of justice.

Now, Mr. Todd, personally, knew nothing about the foundation or merits of that claim. He could not properly swear that Miss Roe ever loaned \$10,000 to the Butler Silk Manufacturing Company. Miss Roe was the proper person to make the affidavit, precisely as her agent would have been if she had not made the loan herself in person, but had intrusted it to an agent. So the claim was properly framed and verified, and it was properly stated to be a debt originally due to Miss Roe, and assigned, as to one-half, to Todd; and to my mind there was not the least perplexity or difficulty in dealing with it as such. The argument of counsel goes so far as to hold that as the claim was sworn to by Miss Roe as a debt originally due to her, and the court made a decree that the receiver pay a dividend of 20 per cent. to the several creditors who had proven their claims, the result was tantamount to a specific decree that he should pay to Miss Roe, and to nobody else, a dividend on the sum of \$10,000 mentioned in her claim, simply because she had verified it. But I do not understand such to be the effect of the proceedings. The order is to make the dividend among such persons—not naming them—as shall be found to be creditors. The language of the order, “to distribute to the creditors who have duly proved their claims to his satisfaction,” does not mean to distribute to such persons only as have personally verified their claims, but to such as have caused or procured proof to be made, etc. Todd comes within that description. Through his counsel he had caused proof to be made by Miss Roe. The duty of the receiver is to receive the claims, and see that they are properly verified and substantiated. In that he acts as a judge. If he sees anything suspicious about them, he may and should except to them. In all this he is expected to act with a fair degree of intelligence and sound judgment, and, if he is at a loss at any time, to resort to his counsel or to the court. In this case, Gov. Griggs, who prepared this claim, had a right to rely upon the fact that Mr. Meding’s counsel, Mr. Stevenson, was perfectly familiar, as shown by the pleadings in the suit of Meding v. Todd and Roe, with all the facts and circumstances attending these two claims,—the one of \$5,000, on the part of Todd, and the other of \$10,000, on the part of Miss Roe. The whole debt was \$15,000. Todd had not only the standing of an individual, unsecured creditor on his \$5,000 note, but he also held, as was well known by Mr. Stevenson, an assignment to the extent of one-half of Miss Roe’s claim of \$10,000,—claimed to be secured by mortgage,—as security for his \$5,000 unsecured debt. And the several rights of the parties were perfectly clear, simple, and well defined. The two sworn claims of Mr. Todd and Miss Roe were handed in person by Gov. Griggs to Mr. Stevenson, and by him handed to Mr. Meding. Then, if either Mr. Meding or his counsel were in doubt as to the duty of the receiver, it was open to them to apply to the court for direc-

tions in the premises, upon notice to both Todd and Miss Roe. It is quite impossible to believe that Mr. Stevenson would have advised or permitted the payment to Miss Roe, had he been consulted about it. It is here to be remarked that a receiver is not a mere unthinking machine, performing a routine duty in a perfunctory manner, but is expected to be an alert and cautious man of business, possessed of ordinary intelligence and common sense, which he is to exercise and apply in the details of the affairs intrusted to him. The familiar rule is that he is to exercise the same care and caution that an ordinarily prudent and cautious person would exercise in his own affairs. Now, it was clearly the duty of the receiver in this case to scrutinize each one of these claims submitted to him, and to ascertain their validity and freedom from suspicion, and to ascertain to whom they were severally payable. In all this work he was, as before remarked, entitled to counsel, and, if necessary, to the aid of the court. The evidence shows that, being himself a busy man of affairs, he left this work to an expert accountant, who erroneously supposed that the fact that the assignment to Todd was merely as collateral left the payment properly to be made to Miss Roe. This was, in my judgment, an inexcusable blunder, for which the receiver must be held liable. A low degree of prudence and caution would, as it seems to me, have induced him to pause when he opened and read the Roe claim, and to consult his principal, the receiver, or his counsel, before drawing a check to and a receipt from Miss Roe for the whole dividend.

The next point for the defense set up in argument is this: “If Meding made a legal error in paying money to Miss Roe which he was legally bound to pay to Todd, Todd, by his conduct of omission and commission, has barred himself from any recovery against Meding by an equitable estoppel.” It was argued that when Todd received his check for \$1,000, which had plainly stamped upon its face, “Twenty per cent. dividend,” he ought at once to have observed that it covered only a dividend on his \$5,000 note, and that a corresponding dividend was due upon the Roe claim, of which one-half should have been paid to him; that he should have at once reasoned and concluded that a mistake had been made, and should at once have inquired of the receiver, who would thus have been notified of his mistake, and in turn might have stopped payment of the check to Miss Roe, or, if too late for that, he had the chance of recovering the overpayment from her while it was still in her hands unexpended. In support of this position he relies upon the rule of implied notice, and charges Todd, contrary to the fact, with knowledge that the Roe claim had been duly presented to and allowed by the receiver, because it had been prepared and presented by Gov. Griggs, who was acting as solicitor and of counsel for both Todd and Roe. But I do not think the doctrine of implied notice can be invoked for the pur-

pose of charging Mr. Todd with actual negligence in not acting on such knowledge. As we have seen, Meding, the receiver, made the first blunder, and was guilty of negligence in paying money belonging to Todd to a person not entitled to it, and seeks to be relieved of his negligence by charging the person injured thereby with negligence in not notifying him. Now, for the purpose of charging negligence in such a case, actual, as distinguished from implied, notice, is, in my judgment, necessary. Such notice is lacking in this case. Mr. Todd left the management of the whole affair to Gov. Griggs. And while, of course, he knew of the presentation of his own claim,—for he not only swore to it in person, but received a dividend upon it,—there is nothing in the case to indicate that he actually knew that a claim had been presented for the money secured by the Roe mortgage; and, if he had known and kept in mind such presentation, it does not follow that he was bound to infer and take affirmative notice that a dividend had been declared and would be paid on it. The contention was that the claim was secured by a first lien on the plant of the insolvent corporation; and, though at the time the dividend was paid that claim of lien had been disallowed by this court, yet an appeal from that decree had been made, and the result was, of course, uncertain. And it must be observed that, if the lien was finally established, the claimants, Todd and Roe, would not be entitled to a dividend on the whole debt of \$10,000, but only upon the balance remaining due after applying the proceeds of the sale of the plant. Altogether the situation was such that Mr. Todd, even if he had known that the Roe claim had been presented and allowed, might well have failed to infer that a dividend upon it had been actually paid to Miss Roe, instead of to her and himself jointly, or in halves. He swears, in substance, that he did not suppose or expect that any dividend would be declared on it at that time. And it is further to be observed that he cannot be charged with negligence in not being alert and quick to suspect that Mr. Meding had made a blunder of the kind we have seen, resulting to his (Todd's) prejudice. He was entitled to rely upon Mr. Meding, aided as he was by competent counsel, taking care to do this duty properly and legally. But reliance in this part of the defense is principally had upon what occurred between Miss Roe and Gov. Griggs. Taking into consideration the evidence of both persons, the fair inference is that Miss Roe did show Gov. Griggs her check for \$2,000, and did, in substance, ask whether the money was hers, but that Gov. Griggs did not give the matter sufficient and serious attention to lead him to perceive that a mistake had been made. He did not observe that a dividend on the whole \$10,000 was covered by the check shown him. Undoubtedly, if he had given the affair closer attention, he would have perceived that it required a dividend on the whole claim of \$10,000 to make

the amount of the check. But he did not so observe, and the question is whether the failure to detect the error amounted, under the circumstances, to such negligence as will avail the defendant as a defense to this action. Here, again, I can find no foundation for the position that Gov. Griggs was under the least obligation to Mr. Meding to be on the alert to suspect and discover mistakes on his (Meding's) part affecting the governor's clients. He undoubtedly knew and had in mind just how the Roe claim was framed, and that it passed through the hands of Meding's counsel; and he, no doubt, relied upon Mr. Meding's well-known character as a business man, and the undoubted competency of his counsel. And I doubt if he would readily have believed the evidence of his own senses if he had observed that the whole dividend upon it had actually been included in a single check to Miss Roe's order, and delivered to her. It may be unfortunate for Mr. Meding that Gov. Griggs did not discover the mistake, and stop it right there, as he no doubt would have done; but the fact is that he did not discover it, and I think his failure so to do cannot help Mr. Meding.

Counsel for defendants relies, on this part of the case, on a line of decided cases in which admissions have been made contrary to the truth, but no positive action has been taken upon the strength of them, and yet the party making them has been held bound because they had the effect of preventing the other party from taking certain remedial measures within his reach. But in each of those cases there was a positive admission brought to the other party's notice, who rested upon it. Here there was no such admission of the correctness of the payment in question, nor was it brought to the notice of Mr. Meding, nor did he at all rest upon it. The leader of this line of cases is *Knights v. Wiffen*, L. R. 5 Q. B. 660. In that case the plaintiff had purchased and paid for a quantity of barley in store with the defendant, a warehouseman, from a party (Maris) who had a contract to purchase the same from the defendant, but was not entitled to the delivery, because he had not paid for it. Upon presentation (after such payment) by plaintiff to defendant of a delivery order for the barley, defendant admitted that the amount was in store with him to the credit of Maris, but afterwards refused to deliver because Maris had not paid him and had failed. It was held that he was estopped from setting up that defense, because, by reason of his previous admission, plaintiff had lost the opportunity to recoup himself from Maris, the insolvent dealer. At page 665 Justice Blackburn says: "In the present case the money had been paid before the presentation of the delivery order, but I think, nevertheless, that the position of the plaintiff was altered through the defendant's conduct. The defendant knew that when he assented to the delivery order the plaintiff, as a reasonable man, would rest satisfied. If the plaintiff had

been met by a refusal on the part of the defendant, he could have gone to Maris and have demanded back his money. Very likely, he might not have derived much benefit if he had done so, but he had a right to do it. The plaintiff did rest satisfied in the belief, as a reasonable man, that the property had been passed to him." This case was followed in the New York courts in *Voorhees v. Olmstead*, 3 Hun, 744; *Id.*, 66 N. Y. 113,—a case on all fours with *Knights v. Wiffen*. In the same line are *Bank v. Keene*, 53 Me. 103; *Bank v. Buffinton*, 97 Mass. 498; *Bank v. Middlebrook*, 33 Conn. 95; and *Continental Bank v. National Bank of Commonwealth*, 50 N. Y. 575. In these cases (which were followed by our supreme court in the unreported case of *Bank v. Hendrickson*, about 1886), the bank had discounted notes purporting to be indorsed by the defendant, and after such discount had shown the indorsement to the defendant, who had, contrary to the fact, admitted his signature to be genuine, thereby lulling the bank into fancied security, and preventing prosecution or any effort to recover the money from the forger until too late; and it was held that the defendant was estopped to deny his signature. In each of the cases just cited, except *Continental Bank v. National Bank of Commonwealth*, the admission was untrue, to the knowledge of the party making it. In the latter case the circumstances were these: *Cronise & Co.*, dealers in gold (then at a premium), contracted to sell \$50,000 in gold to one *Ross*, who, in payment, presented a currency check on the *Continental Bank* (where he kept a currency account), purporting to be certified by the teller of that bank. *Cronise & Co.* kept their gold account in the *Bank of New York*, and drew a check on that bank, to the order of *Ross*, for the gold, but, before delivering the check to *Ross*, sent their clerk to the *Continental Bank* with *Ross'* check, who asked the teller if it was all right. The teller, not observing or suspecting a forgery, answered that it was. But before the clerk returned with *Ross'* check to *Cronise & Co.* they had delivered the gold check to *Ross*, and he had left their office. He promptly drew the gold, and got out of the country with it. *Cronise & Co.* deposited *Ross'* check in their currency account with the *Commonwealth Bank*, and it was returned to that bank by the *Continental Bank*, through the clearing house, as not good, and the teller's certificate as forged. It was held that the loss must fall on the *Continental Bank*. It is to be observed that it was the duty of the teller of the *Continental Bank*, when *Ross'* check was presented to him, to scrutinize it, and satisfy himself both as to whether *Ross'* account was good for it, and as to the genuineness of the certificate; and the existence of that duty on the part of the teller in that case distinguishes it from the case now under consideration.

There is another line of cases between banks and their depositors, arising out of payment by the bank upon two classes of forged paper,

—one where the depositor's name has been forged, and the bank has paid the check; and another where the name of the payee in the check has been forged, and the bank has paid upon such forged indorsement. The cases are numerous, and present some apparent contrariety of decision. The general ground on which the banks have attempted to sustain such payments is that the depositor's bank book has been written up, and the forged vouchers returned to him, and he has kept them such a length of time without discovering and notifying the bank of the forgery as to charge him with the loss. The disposition of the courts seems to be to hold that, where the name of the payee of the check has been forged, no duty of scrutiny, when the forged voucher is returned, falls upon the depositor; but, where the name of the depositor has been forged to a check, the duty is cast upon him of discovering it and immediately notifying the bank. The subject is discussed in 2 *Daniel*, *Neg. Inst.* §§ 1370 et seq., 1654 et seq., and in *Rand. Com. Paper*, § 1468 et seq. From among the numerous cases I cite *Belknap v. Bank*, 100 Mass. 376; *National Bank of Commerce v. National Mechanics' Banking Ass'n*, 55 N. Y. 211; *Frank v. Bank*, 84 N. Y. 209; *Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657; *Dana v. Bank*, 132 Mass. 156; and *Shipman v. Bank*, 126 N. Y. 318, 27 N. E. 371. In several of these cases the forgeries consisted in an alteration of the checks, and in others forgeries of the signatures of the payees, and were perpetrated by the confidential clerks of the depositors; and yet the banks were held liable, and not the depositors. Justice Harlan, speaking for the supreme court of the United States in *Bank v. Morgan*, *supra*, at page 118, 117 U. S., and page 666, 6 Sup. Ct., quotes with approval from the court of appeals of New York in *Frank v. Bank*, *supra*, the following language, which has some application here: "Banks are bound to know the signatures of their customers, and they pay the checks purporting to be drawn by them at their peril. If the bank pays forged checks, it commits the first fault. It cannot visit the consequences upon the innocent depositor, who, after the fact, is also deceived by the simulated paper. So if the depositor in the ordinary course of business commits the examination of the bank account and vouchers to clerks or agents, and they fail to discover checks which were forged, the duty of the depositor to the bank is discharged, although, probably, if he had made the examination personally, he would have detected them. The alleged duty, at most, requires the depositor to use ordinary care, and if this is exercised, whether by himself or his agents, the bank cannot justly complain, although the forgeries are not discovered until it is too late to retrieve its position, or make reclamation from the forger." The point of this extract is that it recognizes the doctrine above stated, that the party who commits the first fault or blunder has no right to anything more than ordinary care on the

part of other parties to assist in correcting the mistake. An examination of the numerous authorities cited by counsel for defendant fails to disclose any which covers the case in hand. And I am unable to find any ground upon which the receiver in this case can be relieved, and credited with the overpayment to Miss Roe. And, as Miss Roe assigned the other one-half of her claim to her brother's trustee before this mistake was made, the receiver cannot retain out of what would have been her share of the next dividend anything to indemnify him in the premises.

I am unable to find any solid foundation for granting relief to Augustus C. Roe on his cross bill. He deliberately joined with his next of kin in a release to the trustee for this fund, and loaned it to the insolvent corporation, and it was advanced for his own individual interest. The mere fact that it was a trust fund cannot help him, under these circumstances. The fund lost its quality as a trust fund, and it does not lie in the mouth of Mr. Roe to claim preference on that ground. If Miss Roe had not assigned to his trustee the one-half of her claim, I should have been of the opinion that he would have been entitled to only a dividend on the \$3,070.01. I will advise a decree accordingly.

(182 Pa. St. 630)

COMMONWEALTH v. SNYDER.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

CONSTITUTIONAL LAW—PEDDLERS' LICENSE—DISCRIMINATION.

Act March 12, 1869, requiring persons who peddle or sell at auction in Perry county to take out a local license, though they may have complied with the general laws, but exempting merchants, peddlers who sell only to merchants, and all citizens of the county who peddle the products of their own growth or manufacture, violates the constitution of the United States by discriminating against citizens residing without the county on the sole ground of their residence.

Appeal from court of quarter sessions, Perry county.

Simon Snyder was convicted of the offense of peddling without a license, and appeals. Reversed.

W. H. Sponsler, for appellant. Wm. H. Kell, Dist. Atty., Jas. W. Shull, and Chas. A. Barnett, for the Commonwealth.

WILLIAMS, J. This is an appeal by the defendant from a conviction and sentence in the quarter sessions of Perry county for the offense of peddling within the limits of that county, in violation of the act of March 12, 1869. The defendant does not deny the acts of selling charged against him, nor that such acts are forbidden by the statute under which these proceedings were begun, but rests his defense upon the position that such prohibition, as applicable to him, is unconstitutional and void. The record raises but one question, viz. the validity of the act of 1869. It is to be

noticed, in the first place, that it is a local law, applicable only to Perry county. It was approved several years before the present constitution, forbidding such legislation, was adopted, and cannot, therefore, be disposed of on this ground alone. We must consider its provisions, and determine from them whether it was a valid exercise of the police power, or a mere local regulation of trade intended to discriminate in favor of dealers resident within the county. Section 1 contains a general prohibition against peddling in Perry county, notwithstanding the fact that the peddler may have complied with all the laws applicable to his business in the commonwealth generally, unless he shall have obtained the local license provided for by the act. This, for one who goes on foot, is \$30, and for one who uses a horse or a boat is \$50, together with a fee of \$2 to the county treasurer for issuing the license. Section 2 imposes an additional license of \$10 for the privilege of selling at auction, and an additional fee of \$2 to the treasurer. So far the prohibition seems to be general, and to be applicable to residents as well as non-residents of the county. There is a proviso, however, added to the second section, which exempts three classes of persons from the operation of the act. The first class is composed of peddlers who sell only to the merchants of the county, and not to their customers. The second class takes in the merchants themselves. They may peddle from house to house, or sell at auction, without lifting the burden put upon others by the act. The third class comprehends all the citizens of the county who may wish to peddle the "products of their own growth or manufacture." One living just over the line of the county is excluded from selling his own products except upon the burdensome terms imposed by the act. A merchant whose store is on the outside of the same line is excluded from the privilege of peddling in the county. A licensed peddler having a license under the general law must take care not to sell to a farmer, a mechanic, or a professional man, or he will become a criminal. He must deal only with the merchant, and never with his possible customers. This is not a police regulation. It is not intended to protect the people against fraud from traveling vendors of merchandise, but to protect the merchants and residents of Perry county against competition from those who live in any other portion of the known world. It proceeds upon the theory that Perry county merchants have a right to supply the residents of the county with all their goods, and that the law should protect this right, and punish its infraction. It is suggested that this was intended to equalize the burdens put upon dealers in goods. This is not apparent in the title of the bill, or in its provisions. Merchants in Perry pay, no doubt, for a mercantile license. So must peddlers pay a license fixed by general laws. What this bill undertakes to do is to impose an additional license and license fees on all persons who would peddle in Perry county, unless their sales are confin-

ed exclusively to merchants. This does not put them on a common footing with other dealers, but it imposes an additional burden upon them, which, added to those imposed by the general law, make a total several times as large as the average mercantile license imposed upon resident merchants; and the purpose of this is apparent. It is to secure to residents a practical monopoly of the trade of the county. It may be possible that under the constitution of Pennsylvania such a law could be enforced. We have no need to consider that subject. It is so evidently a violation of the constitution of the United States that it is unnecessary to consider any other question. It is a denial to citizens resident outside of Perry county of equal rights in business with those who live within the county, on the sole ground of their residence. It is a trade regulation for the protection of the merchants of that county against competition from all who live beyond the county lines. It is a barrier built by the state of Pennsylvania about a single county to exclude therefrom the citizens of the rest of the commonwealth, and the rest of the United States, for the benefit of merchants living within the inclosure. This cannot be done. *Welton v. Missouri*, 91 U. S. 275; *Sayre Borough v. Phillips*, 148 Pa. St. 482, 24 Atl. 76. It is unnecessary to enlarge upon this question. It is enough to state the well-settled rule, and apply it to the statute under consideration. The judgment appealed from is reversed, and a venire facias de novo awarded.

(182 Pa. St. 362)

PHILADELPHIA BALL CLUB v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

MUNICIPAL CORPORATIONS—CHANGING GRADE OF STREET—SPECULATIVE DAMAGES.

In an action by the lessee of a ball park for injury to the property caused by a change in the grade of a street, it was error to permit the jury to find a diminution in the value of the leasehold since the change, on the theory that the receipts of the business, which the evidence showed had in fact increased, would have increased much more but for such change.

Appeal from court of common pleas, Philadelphia county.

Action by the Philadelphia Ball Club against the city of Philadelphia. From a judgment for plaintiff, defendant appeals. Reversed.

R. Alexander and John L. Kinsey, for appellant. John I. Rogers, for appellee.

GREEN, J. This was a proceeding to recover damages for changing the grade of Broad street, at a point adjoining the plaintiff's ball park, situate at Broad and Huntingdon streets, Philadelphia. Changes were also made in the elevation of other streets intersecting Broad. It was claimed by the plaintiff that damages had been sustained by means of the change of grade to the amount

of \$85,215.03, and the testimony of the chief witness examined for the plaintiff was directed to the establishment of that claim. In doing this, he estimated the value of plaintiff's leasehold before the change at \$296,000; made up of cost of fixtures and improvements, \$110,000; value of business stand over rent for remainder of lease, \$186,000. He then estimated the value of the leasehold after the change at \$201,785, and claimed a depreciation in value, resulting at \$85,215. When asked to explain this sum, he said there were injuries to fixtures amounting to \$28,415.03; and injuries to business by loss of income, \$56,800,—\$85,215.03. Various items of new work were enumerated, which amounted, some by estimate, and some by actual cost, to \$28,415.03. Another item, called "loss of revenue," was stated at \$56,800. And thus the aggregate of loss was arrived at as being \$85,215.03. And this being deducted from the total valuation of \$296,000, before the change, indicated how it was ascertained that the value of the leasehold after the change of grade was finished was \$201,785. In order to test the legal correctness of this mode of estimating the damage, it is necessary to review the items. Of the aggregate injuries to fixtures, amounting to \$28,415.03, the witness admitted that the amount really expended was less than \$10,000. He was asked: "Q. What was the total amount of money which the ball club expended in 1893, 1894, and 1895 on that place to remedy any injury done by the change of grades on the highway? State it in dollars and cents. A. We spent less than \$10,000. Q. How much less? A. We spent \$9,173.39. I think that is correct. Q. What did you spend it for? A. That was including drainage connecting with the sewer at the corner of Broad and Huntingdon streets, \$206.80; regrading field for proper drainage, \$5,600; sign painting, \$237. I did not include the trees and tree boxes, because we have not put them back yet. That includes also score board, \$100, and store at corner, \$832.87. Q. That is loss of rent? A. No; that is for building. Also right field gate at Huntingdon and Carlisle, altering it, cement work, \$150; temporary fences, \$1,627.89; extra police on right field for two years, \$350; canvas, \$57.52; photographs, \$12. Q. That is these photographs here? A. Yes, sir; that is all the actual money expended, I believe. Q. That is every dollar that you have paid up to date? A. Yes, sir; to the best of my knowledge, that is right. Q. That is all that was expended because of the change of grade of the highways? A. Yes, sir. Q. The \$5,600 represents the regrading of the property? A. Yes, sir. Q. You played ball in 1893, 1894, and 1895, without that regrading, did you not? A. Yes, sir. Q. So that, without the regrading, your expenditures would be \$3,503.79? A. Yes, sir." It therefore appears that, out of all the actual and estimated expenditures which it was claimed would amount to \$28,415.03, the total amount of payments which really were made

was \$3,503.79. The change of grade of the ball park was not made until after 1895, and was not a necessary consequence of the change in the grade of the streets. It cost \$5,600, and it is not easy to see why any claim should be made upon the city to pay for it.

The principal items of the plaintiff's claim are made up of alleged losses in the plaintiff's business. Thus, for carriage tolls for 12 years, at 10 cents admission for 30 carriages each day, at 75 games each year, \$2,700; admission for two passengers in each carriage, at \$1, for 12 years, \$27,000,—total, \$29,700. Destruction of 60 seats, caused by regrading of backseats, admission thereto for 12 years, \$13,500; loss of facilities for other sports, \$3,000; incidental and general damages, \$10,000. Total damage to business by loss of revenue or income, \$56,800. It will be perceived at once that, in order to lay any foundation for such a claim as this, it would at least be necessary to show that, in point of fact, there was an actual loss of income bearing some proportion to the amount claimed. Yet in reality there was no loss of income proved at all. On the contrary, the plaintiff's chief witness testified as follows: "Q. How did the admissions during the year 1893 compare with those in 1892? A. I think we had more people in 1893 than we had in 1892. Q. Did you not have more in 1894 than you had before the change of grade? A. Yes, sir. Q. How about 1895? A. We had more then. Q. Then you have had more people in the grounds since the change of grade than before? That is true, is it not? A. Yes, sir. Q. A good many thousands more? A. Yes, sir; a few thousands more." In another portion of his testimony the witness was asked: "Q. State the number of people in attendance at the ball park in 1892. A. 197,574. Q. How many in the year 1893? A. 293,925. Q. How many in the year 1894? A. About 325,000. Q. How many in the year 1895? A. Over 400,000." Now, it is said in the appellee's counter statement, and not denied, that the work of changing the grade of Broad street was begun early in 1893, and was completed in September or October, 1894, and it was agreed on the trial "that August 1, 1893, should be taken as the date when the change took place."

We then have the undisputed fact that, instead of there being any loss in the actual business done after the change of grade, there was a very large actual gain. During the year 1893 there was a gain of 96,351 admissions over 1892. In the year 1894 there was a gain of 127,426 over 1892, and of 31,075 over 1893. In 1895 there was a gain of more than 202,426 over 1892, and more than 75,000 over 1894. As the year 1892 was the last year before the change, the proper comparison should be made with that year. In order to determine to what extent the business before the change was made was injured by the making of the change. The court very correctly charged the jury that they could only consider the change in the value of the lease-

hold as it was before the change of grade was made, and after it was made, and, while they might consider evidence as to matters of income before and after, they could allow as damages nothing but the difference in the value of the leasehold, and could not allow specific claims in loss of items of business. But the appellant's complaint is that there was no proof of actual loss of business, but, on the contrary, the undoubted proof, made by the plaintiff's own testimony, was that there was a large increase in the business, and hence the claims for loss of value of the leasehold on account of alleged loss of business should be stricken out altogether, and entirely disregarded by the jury. Now, upon comparing the business of 1893 with that of 1892, it will be found that there was a gain of very nearly 50 per cent. over the business of 1892. The business of 1894 showed a gain of just about 65 per cent. over the business of 1892, and of 10.6 per cent. over that of 1893. The business of 1895 showed a gain of more than 100 per cent. over that of 1892, and a little rising of 23 per cent. over that of 1894. In this state of the testimony, it is absolutely established by the affirmative and uncontradicted evidence of the plaintiff that there not only was no loss of business resulting from the change of grade, but a very large increase of business between the time before and after the change. If a legitimate deduction as to the value of the leasehold before and after the change was made may be derived from the condition of the business before and after, then its value must have been largely increased during that period, and in no possible sense can it be regarded as having decreased. Courts and juries must deal with facts as they find them. In this particular case we find there was a positive and large increase in the business of the club after the change. Hence it is not true that there was or could be a diminution in the value of the plant on account of a loss of business, for the simple reason that there was no loss. It is no answer to say that there was a natural increase of business from year to year, and hence the club might have done a still larger business if the grade had not been changed. The palpable answer to any such contention is that no human being could know that such would have been the fact, and hence he cannot so testify. No mortal man now knows whether the business of this club will be larger or smaller in 1898 than it is in 1897. It may be larger, or it may be smaller, depending upon numerous contingencies, which cannot possibly be foreseen. The business in which the plaintiff is engaged is a mere recreation. If times are good and general business of the whole community is prosperous, and if the public desire for this kind of recreation increases, the business of the club may be larger next year than it is in this. If, on the contrary, business depression and prostration ensue, or if the public desire for such recreation decreases, the business of the plaintiff will with almost absolute

certainty largely diminish. It is not a fixed and stable business, having definite limitations. It is a mere amusement, and nothing can be more fickle and uncertain as to their endurance than the mere amusement of a community. We all know how the skating-rink fever arose and spread at a furious pace some years ago, inducing investments of immense sums of money in its practical development, and yet in a very few years it collapsed utterly. Other instances of a similar character could easily be indicated. Even in the particular business of this club, it is notorious already, and matter of public history, that it is only in large cities that it can even now be maintained with profit. In a vast number of localities where it formerly attracted great public interest it has already died out and been discontinued. But, in a mere legal sense,—and that is the way we are obliged to view it,—the radical and fatal vice of the contention we are now considering is that it is entirely too remote, altogether imaginary, and purely speculative to the last degree. All the elements of certainty in deduction are absent. They exist only in the future, and therefore cannot be known. They depend upon the most variable and uncertain conditions, and they cannot possibly form the basis of a sound and reliable judgment.

In this particular case there was no loss of business during the period in question, and therefore no jury should be permitted to render a verdict upon a theory that there was a diminution in the value of the leasehold because of a loss of business. It was just here, we think, that the learned court below was led into error. They did caution the jury repeatedly that they could only allow for a diminution in the value of the leasehold before and after the change of grade, but they did, nevertheless, permit the jury to consider the subject, and allow damages for the change, upon a theory that there was or might be a loss of income, when, as we view the testimony, there was no evidence in the case upon which such a theory could be based. All the testimony was the other way. We cannot consider it safe to leave to a jury the determination of such a question upon such evidence as we find on this record. We are of opinion that the jury should have been instructed that there was no sufficient evidence in the case to justify them in allowing any damages whatever to the plaintiff, for alleged loss of income, whether in the three years which had already elapsed, or in the remaining years of the lease. This is most particularly applicable to the claim for \$13,500 for the loss of 60 seats, and the claim of \$29,700 for the loss of income from carriages and their occupants. There is absolutely no proof in the case that either of these matters affected the income of the club to the extent of a single dollar. But our view of the testimony affects the entire subject of alleged loss of income in estimating a diminution in the value of the leasehold before and after the change. There was no such

loss, and therefore no verdict can be allowed upon a theory that there was. We sustain both the assignments of error. Judgment reversed, and new venire awarded.

(80 Conn. 635)

MCGORTY v. SOUTHERN NEW ENGLAND TEL. CO.

(Supreme Court of Errors of Connecticut. Oct. 5, 1897.)

MASTER AND SERVANT—RISKS ASSUMED BY SERVANT—TELEPHONE LINEMEN.

A lineman in the employ of a telephone company cannot recover for an injury caused by the fall of a pole on which he was at work, notwithstanding a prior statement by the foreman that he had been up the pole, and that it was safe, where plaintiff knew that it was the rule and custom for each lineman to test the pole for himself, and that suitable appliances were at hand for making such test, and for securing the pole in case the lineman doubted its safety.

Appeal from superior court, Fairfield county; Silas A. Robinson, Judge.

Action by John McGorty against the Southern New England Telephone Company to recover damages for personal injuries. Plaintiff recovered judgment for nominal damages, and appeals. Affirmed.

The plaintiff was an experienced lineman, having worked in that capacity for 14 years. He was employed as a lineman by the defendant the day before the accident by which he was injured, having been in the service of the defendant some years before in the same capacity. The duties of a lineman are to climb poles, and work at wires and cross-arms at or near the tops of telegraph and telephone poles, and sometimes to do the work of a groundman. The work of erecting and taking down poles, and of stringing and removing wires, etc., is performed by gangs of men, usually about six in number, made up of groundmen, whose work is upon the ground, digging post holes, etc., and of linemen, and a foreman. The foreman, who is himself a lineman, gives orders to the men, directing them here and there, and keeping them all at work. He is equipped with apparatus for climbing, and climbs poles, and works at wires at the tops of poles, as occasion requires. Division superintendents oversee the work of construction, but give no instructions to the gangs as to how the work shall be performed in detail. Other officers of the defendant company are the general superintendent, having charge of all the construction work in the state, and an executive committee of the board of directors of the company. In the work of taking down and rebuilding lines, it sometimes happens that old poles have become so weak at the base as to be unsafe for the linemen to work at the top of them in removing wires and cross-arms. Poles are tested by several well-known methods to ascertain if they have sufficient strength to bear the climbers, and weak poles are made safe by braces or guy ropes. The durability of a pole

is from 3 to 17 years, depending upon the character of the soil in which it stands. The pole the falling of which injured the plaintiff had been in use about 11 years. Necessary tools for testing and supporting poles were supplied by the defendant, and at this time were in a storehouse, five minutes' walk from the place of the accident. It was the custom, rule, and practice of the defendant and of other companies operating lines of wires on poles that the foreman of a gang was not charged with the work of examining the poles to determine whether linemen might safely climb them. Each lineman was to look out for his own safety in climbing a pole. He judged for himself whether a pole should be tested, and, if so, how it should be tested. He inspected and tested for himself before climbing a pole, and from his experience was supposed to be competent to judge what could be done with reference to any part of the pole. It was his privilege, when doubting the safety of a pole, to proceed to support it, without consulting the foreman, and groundmen and teamsters would go to the storehouse for necessary tools and apparatus when called for. It was not a rule or practice of the defendant, whenever an old line of poles was being replaced by new ones, to have the old poles tested at their base before linemen were ordered or permitted to climb them. An order having been given by the defendant to a division superintendent to rebuild the defendant's line in Danbury, a gang of men, consisting of a foreman (Phelps), two linemen, and two groundmen, were engaged in the work. Before the plaintiff joined the gang, most of the new poles had been set, and the work of stripping the corresponding old poles had been largely done, and the foreman and other linemen had worked at the top of the pole in question. Plaintiff commenced labor on this work on the day of the accident. The pole in question looked well, and had been tested by one of the linemen, when it stood the test well. It did not occur to the plaintiff, nor to the lineman who tested the pole, nor to the foreman, that there was any danger in climbing this pole. In answer to plaintiff's inquiry if the old poles were all right, the foreman replied, "Yes, we have been up there, and taken off old wires, a hundred times." Plaintiff did not ask if the old poles had been tested. Plaintiff knew that this particular pole had been safely climbed by another lineman, and he had himself climbed it in safety an hour or more before the accident. The foreman sent the plaintiff up the pole in question to remove the remaining wires, and while he was removing the last cross-arm, at a place about 30 feet from the ground, the pole, which was rotted through a few inches below the surface of the ground, and which had been held in place by the frozen ground and the wires, fell, and the plaintiff, falling, received serious injuries. The court found that there was no negligence on the part of the defendant, and that, if the ac-

cident was the result of negligence, it occurred from the fault of the plaintiff.

James E. Walsh and Henry A. Purdy, for appellant. John W. Alling and James T. Moran, for appellee.

HALL, J. (after stating the facts). The substance of the plaintiff's reasons of appeal is that the court erred in deciding, upon the facts found, that the defendant was not guilty of negligence, and the plaintiff was entitled to recover only nominal damages. In support of this claim, he cites *Wilson v. Linen Co.*, 50 Conn. 469, *McElligot v. Randolph*, 61 Conn. 157, 22 Atl. 1094, and other authorities which lay down the general rule of law that it is the duty of employers to use ordinary care to provide for their employes safe places in which to work, and safe appliances with which to perform their work. An examination of the record shows that the principle stated in these cases cannot avail the plaintiff in this action. The particular acts which it is said the defendant negligently failed to perform in order to render the place where the plaintiff was working reasonably safe were the testing of the poles which were being removed, and the supporting of those which were found to be insecure, before the linemen were ordered to work upon them. The complaint avers that it was the duty of the defendant to so inspect and support the poles, and sets forth, as the facts upon which such duty is predicated, "that it was a rule and custom of said defendant company that, whenever an old line of poles was being supplanted by new poles, to have said old poles tested at their bases, for the purpose of ascertaining whether or not they were rotted and unsafe or dangerous in any way for a lineman to climb, for the purpose of removing cross-arms or wires from the same, and, in case any of said poles were found to be rotted at the base, to guy the same with wires or ropes, to prevent them from falling while the linemen were at work upon the same; that said rule and custom was known to the plaintiff, and he supposed and believed that said pole had been properly tested by the defendant company before ordering him to climb the same, and that plaintiff had no knowledge that said pole was rotted and defective at its base; that the defendant wholly failed to test said pole, as had been its custom and rule prior to that time; that said pole was not guyed by wires or ropes in any way; and that the defendant knew, or by the exercise of due care could have known, that said pole was rotted at its base, and that the same was incapable of sustaining any weight upon it." There are no facts stated in the complaint which indicate that any special mechanical skill was required to discover the defect in the pole, or that the linemen, of whom the plaintiff was one, were not competent persons to inspect and test the poles, or that any of the officers or other employes of the defendant possessed

superior qualifications or had better means or opportunities than the plaintiff to ascertain whether the condition of the old poles was such as to render it safe for the workmen to climb them. The plaintiff made no examination of the base of the pole which fell. He knew that it was not guyed or supported in any manner. He says that, by the exercise of ordinary care, its decayed condition could have been detected, but that, from his knowledge of the rule and custom of the defendant to inspect and secure the old poles before linemen were sent to work upon them, he believed that this pole had been properly tested and found to be safe, and for that reason made no examination himself. The complaint makes these facts the basis of the defendant's alleged liability.

As the testing and supporting of the old poles, from the nature of the work, might, either by the terms of the contract of employment or from other facts and circumstances, have been either a duty of the employer or one of the duties of the plaintiff, and as the plaintiff could not, in an action at law, recover compensation for an injury resulting from his own negligent failure to perform a duty which he was employed to perform, it was essential to the plaintiff's case that he should set forth in his complaint the facts showing why this duty devolved upon the defendant, and why the exercise of due care did not require the plaintiff to examine the pole in question. Whether in this case the plaintiff's injury resulted from his own or from the defendant's negligence depended, therefore, upon the truth or falsity of these averments, and the determination of the question of whether it was the rule and custom of the defendant, as alleged, to inspect and secure the old poles before they were climbed by the linemen, or whether it was one of the duties of the linemen to themselves test the poles, and, if found unsafe, to secure them, became decisive of the plaintiff's alleged right to rely upon his belief that the poles had been tested by the defendant, and found to be safe. These allegations of fact upon which the averments of duty and of negligence upon the part of the defendant depend were contested upon the hearing, and having been decided, as appears by the finding, adversely to the plaintiff, the question of negligence has thus been determined as a question of fact.

The trial court has found that it was not the rule and custom of the defendant to inspect and test the poles, but that it was the rule and custom, in this branch of the work, that "each lineman should look out for his own safety in climbing poles"; that each lineman should inspect and test the poles for himself, and judge of their safety; and that suitable appliances were at hand for testing and securing poles. That the plaintiff knew this rule, and understood that testing and inspecting were a part of his duties, must be presumed from the fact that he was a lineman of 14 years' experience, and in that capacity had formerly been in the

employ of the defendant. The finding of the trial court is thus conclusive upon the question of negligence. It shows that the plaintiff, with a knowledge, when he was ordered to climb the pole in question, that it was the duty of no one but himself to decide whether it was safe, and that, if he doubted its safety, he was at liberty to support it by appliances furnished by the defendant for that purpose, chose rather to rely upon the safe appearance of the pole and the assurances of his fellow workman, and to take the risk of the pole being sound without making a proper examination himself. If the accident occurred from the negligence of any person, it was through the plaintiff's own fault. He was the person employed by the defendant to examine the poles, and see that they were safe to work upon. As he was able to perform both the work of inspecting and climbing, the defendant ought not to be required to employ some other person than the linemen to test the poles.

We have no occasion, upon the facts found, to consider whether the foreman, Phelps, was a fellow servant of the plaintiff,—a question discussed in the briefs of counsel. The accident did not occur from the negligence of Phelps. It is true, he directed the plaintiff to climb the pole, and, in answer to the latter's inquiry, truthfully said, as might any other lineman who had tested the pole for himself, that he had been up the pole, and expressed his opinion that it was safe. But the plaintiff knew that it was not a part of the duty of the foreman to instruct an experienced lineman as to the safety of a pole he was about to climb; and, from the facts found, we must assume that he knew that notwithstanding that, in obedience to the order of the foreman, he was required to do the work upon the pole, yet he was to rely upon his own judgment in determining whether it was safe to climb it without testing it or supporting it, and that it was his right to secure the pole before climbing it if he doubted its safety. It cannot be laid down as a proposition of law, as seems to be claimed by plaintiff's counsel, that the linemen of telegraph and telephone companies have a right to rely upon the soundness and safety of the poles upon which they are working, and that it is the duty of such companies to inspect and test poles, and support such as are insecure, before permitting their linemen to climb them. Whether it is incumbent upon the master or the servant to perform such a duty is usually a question of fact depending upon the terms of the contract of employment, the servant's knowledge of the hazards of the work in which he is engaged, his ability and opportunity to discover the dangers to which he is exposed and to avoid them, and upon other circumstances. Employers have a right to decide how their work shall be performed, and may employ men to work with dangerous implements and in unsafe places without incurring liability for injuries sustained by workmen who know or ought to know the hazards of the service which they

have chosen to enter. *Hayden v. Manufacturing Co.*, 29 Conn. 548; *Dixon v. Telegraph Co.*, 68 Fed. 630; *Greene v. Telegraph Co.*, 72 Fed. 250; *Flood v. Telegraph Co.*, 131 N. Y. 603, 30 N. E. 196; *Telephone Co. v. Loomis*, 87 Tenn. 504, 11 S. W. 356. In the last-named case, which was an action for damages for an injury sustained by the fall of a telephone pole, the trial court charged the jury that "the plaintiff (defendant in error) had a right to assume that the pole upon which he was ordered to work in cutting away the dead wire was safe and suitable, and of sufficient strength to support the wires and cable suspended thereon, together with his weight, and it was not Loomis' duty, when sent to cut away dead wires, to inspect the pole. Upon an appeal from a judgment in favor of Loomis, Judge Snodgrass, in giving the opinion of the supreme court, with reference to the portion of the charge above quoted, said: "The objection to this is twofold: First, it assumes as a matter of fact, and so decides, that Loomis was not the employé who should have served as Inspector for the company, which was a disputed question of fact." From the facts in the case at bar, we are of opinion that the falling of the pole in question was one of the hazards assumed by the plaintiff by his contract of employment, and that the superior court committed no error in holding that the defendant was not guilty of negligence, and that the plaintiff was entitled to recover nominal damages only. There is no error. The other judges concurred.

(69 Conn. 626)

In re SHELTON ST. RY. CO.

(Supreme Court of Errors of Connecticut. Oct. 5, 1897.)

STREET RAILWAY—PARALLELING RAILROAD—APPLICATION FOR LEAVE TO CONSTRUCT—CONCLUSIVENESS OF FINDING.

1. Pub. Acts 1893, c. 169, § 8, forbids any street railway to be constructed or extended from one town to another in the public highways, so as to parallel other street railways or steam railroads, except on application to the superior court, or a judge thereof, and a finding that public convenience and necessity require such construction; and provides that the decision of the trier on this question shall be final and conclusive. *Held*, that a judgment on such application is not subject to review, unless the special jurisdiction conferred by the act has been exceeded, or the methods of judicial procedure essential to the due course of law have been violated.

2. The applicant's financial ability to build the proposed road, being a circumstance to be considered in determining whether public convenience and necessity require its construction, the trial court does not exceed its jurisdiction, or violate essential methods of judicial procedure, by receiving evidence upon that point, and finding as a fact that the applicant has not such ability.

Baldwin and Torrance, JJ., dissenting.

Appeal from superior court, Fairfield county; George W. Wheeler, Judge.

Application by the Shelton Street-Railway Company, under the street-railway act of 1893, for a finding that public convenience and necessity required the extension of its railway

between certain points. From a judgment denying the application, said applicant appeals. Affirmed.

George P. Carroll, for appellant. Goodwin Stoddard and William D. Bishop, Jr., for appellee.

ANDREWS, C. J. The Shelton Street-Railway Company was created by the legislature in 1893 (Priv. Acts 1893, p. 830), and authorized to construct a street railway in the towns of Derby, Huntington, Milford, Stratford, and Bridgeport, to be operated, if so desired, by electricity. Section 8, c. 169, Pub. Acts 1893, provides that: "No street railway shall hereafter be built or extended from one town to any other town in the public highways so as to parallel any other street railway or steam railroad unless * * * such railway shall have applied to the superior court or any judge thereof and shall have obtained from such court or such judge in the manner hereinafter required and provided, a finding that public convenience and necessity require the construction of such street railway." On the 22d day of March, 1897, the street railway made its application to a judge of the superior court, alleging that it intended and desired to lay and extend its tracks in and through, from and to, some or all the towns named in its charter in certain public highways, and in such manner that it would, to some extent, parallel the steam railroad of the Naugatuck Railroad Company, now leased to and operated by the New York, New Haven & Hartford Railroad Company; and alleged also that public convenience and necessity required the extension and construction of its said railroad as desired by the applicant, and praying said judge to make a finding to that effect, as is required by the said statute. The application was duly served on all the parties interested therein, who appeared, and were fully heard by the said judge. The judge thereafter made a finding that public convenience and necessity did not require the said street railway to be built and extended as set forth in said application, and thereupon dismissed the same, and the applicant now appeals to this court.

In some respects chapter 169 of the Public Acts of 1893 (page 307) is in the nature of a general act governing the incorporation of street-railway companies. It does not provide a plan for the original incorporation of such companies, and its operation involves existing organizations under special charters, and it defines the corporate powers of all, and regulates their exercise; it controls and limits the franchise granted in all such special charters; and for this purpose it is made a part of every special charter granted by the assembly which enacted it, and thereafter to be granted. By section 8 the power to construct a railroad on the lines specified in any charter is limited by excepting from that grant the power to construct a railroad in the highways from town to town so as to parallel another railroad.

This power is directly derived from the general act on the conditions named. The conditions involve a judicial finding of common convenience and necessity. It is only after such finding that the company becomes invested with the corporate power through the combined effect of the general act and the special charter. This phrase, "common convenience and necessity," has no legal meaning except when used to indicate a public necessity which justifies some act affecting the rights of person or property which would not be justifiable if that necessity did not exist. We often speak of public necessity merely as a conducive motive to legislative action, and so used it simply indicates that the legislature thought the action on the whole to be wise; but when the contemplated action depends for its validity upon a legislative finding of public necessity, the phrase has an important meaning, although necessarily a somewhat indeterminate one. Such legislative finding in many cases lies wholly in discretion. Public necessity, in this sense, is that urgent, immediate public need arising from existing conditions which, in the judgment of the legislature, justifies a disturbance of private rights that otherwise might be legally exempt from such interference. The term is, therefore, a relative one. It determines in each case that may arise the relation of the duty implied in the broad grant of legislative power to promote by appropriate action the interests of the commonwealth to the limitations of that power established for the protection of private rights. Ordinarily, this is wholly a question of public policy, to be determined by the legislature. Sometimes, however, the necessity is one which does not affect the whole body politic the same way, but may or may not exist in different localities for reasons peculiar to each. The power to put in force the legislative action is thus conferred on public or private corporations, to be exercised or not, as the conditions peculiar to each case may warrant. In some such cases the action of the corporation may be legal or void, according as an actual present public necessity exists; and in determining the property rights of persons affected by such action the question of public necessity may become involved. When so involved, it is commonly called a question of "public convenience and necessity," or "common convenience and necessity." In this incidental way courts have been called upon to decide whether conditions existing in a particular case create "a public convenience and necessity," within the meaning of some legislative act. The substantial thing to be decided retains much of the inherent indeterminate character of the original question of public policy; but is limited to the relation of the particular action asked to the legal rights of the person or persons which such action may impair. The most familiar instance of this is in the layout of ordinary highways. They are a public necessity, and by a general law the legislature so declares. No particular pro-

posed highway is affected by the general declaration unless, under all the particular circumstances of that case, in view of the relation of the local needs in the circumstances, of the local corporation bound to build and maintain necessary highways, and to the situation and circumstances of the landowners whose property is to be condemned, it is of common convenience and necessity. Towns are charged with the duty of laying out necessary highways, and the enforcement of such duty is within the general jurisdiction of the courts. They are forbidden to condemn land except for necessary highways; and the protection of a landowner against an unlawful condemnation is also within the general jurisdiction of the courts. *Fenwick Hall Co. v. Town of Old Saybrook*, 69 Conn. 32-39, 38 Atl. 1068. The process providing for a summary judicial determination of these rights has involved a considerable exercise of jurisdiction by the courts in the layout of highways. The question of public convenience and necessity is, however, left to a committee of freeholders, to be passed upon in the nature of a question of pure fact; and the court has never undertaken to state what constitutes public convenience and necessity. The relation between public convenience and the rights of landowners or of the towns on which a burden that may be disproportioned to its wealth and resources is sought to be laid cannot be stated as a legal proposition. The court is obliged to confine itself in each case to a declaration that the given conditions do or do not come within the expression. The question is, does common convenience and necessity require a highway at this place? Is a new highway needed between these termini, to accommodate public travel? And will the proposed scheme meet and supply that requirement? *City of Hartford v. Day*, 64 Conn. 254, 29 Atl. 480; *Clark v. Town of Middlebury*, 47 Conn. 334; *Terry v. Town of Waterbury*, 35 Conn. 533. And in this question of common convenience and necessity is included the expense of the proposed highway, and the financial ability of the corporation to meet that expense. See the cases above cited. Also, *Bristol v. Town of Branford*, 42 Conn. 323; *Townsend v. Hoyle*, 20 Conn. 7; *Perkins v. Town of Andover*, 81 Conn. 601; *Hoadley v. Town of Waterbury*, 34 Conn. 38; *Congdon v. City of Norwich*, 37 Conn. 414; *Howe v. Town of Ridgefield*, 50 Conn. 594. So in the statute under consideration the "public convenience and necessity" sufficient to "require the construction of such street railway" means a condition existing at the time of the application in respect to the applying railroad, the mode of public travel, the manner in which those needs are to be supplied, and the probable effect of the proposed road upon the whole question of adequately supplying those needs, as well as in respect to the road proposed to be paralleled, that in the judgment of the trier will justify the interference with private rights involved. Railroad companies chartered by the legislature have expended large sums of

money in the construction of their roads which are practically wasted unless the road can be used without loss for the transportation of passengers and freight. It is obviously for this reason that the provisions of section 8 were incorporated into the general act, and so a legal right given to existing roads to protection against a certain kind of parallel road, when the circumstances of such road are not shown to be under all the existing conditions of public convenience and necessity. For the protection of such legal rights, an existing road may apply to the courts. *New England R. Co. v. Central Railway & Electric Co.*, 60 Conn. 47-54, 38 Atl. 1061. The application authorized by section 8 is a summary method of extinguishing this legal right, and involves the question of common convenience and necessity as a fact in each special case; and the statute says that upon this question the decision of the trier on such application "shall be final and conclusive between the parties." The natural meaning of these words, used in such a connection, is to limit, as to these applications, the operation of the general statutes allowing appeals from final judgments on questions of law to the court to judgments that may be illegal because the special jurisdiction conferred has been exceeded, or the methods of judicial procedure essential to due course of law have been violated. In this case the only claim of such illegality is that the trial judge found as a fact that the applying railroad company was financially unable to build the proposed railroad. It seems very clear that in ascertaining such a fact the judge did not exceed his jurisdiction. It was one of the circumstances peculiar to the case, proper to be considered in determining whether, under all the conditions then existing, public convenience and necessity required at that time the determination in favor of this applicant of the conditional right of the Naugatuck Railroad to protection against a parallel road.

The rulings on evidence claimed to be erroneous come among the matters the statute intended to leave to the conclusive decision of the trier in determining a question so largely lying in discretion. These rulings did not exceed the jurisdiction of the judge, and did not violate the essential methods of judicial procedure. In *Appeal of Central Railway & Electric Co.*, 67 Conn. 197, 35 Atl. 32, this court decided that the order of the judge should be final and conclusive in respect to such matters only as the statute confided to his judgment, and upon which the parties were duly heard; and that as to other matters, if any were attempted to be adjudicated in such a hearing, the action of the judge was properly reviewable by this court on appeal. In a case where it appeared on the face of the appeal papers that the judge had not attempted to pass upon any matter other than such as the statute confided to his judgment, a motion to erase from the docket of this court would properly be granted. Where it does not so appear, this court must, of necessity,

retain the case, and consider it. In *Appeal of Central Railway & Electric Co.*, supra, we found that the judge had exceeded the authority conferred by the statute, and remanded the matter for further action. In the present case we find that the judge did not exceed his jurisdiction, that there is no error, and that, therefore, the order and decision is final and conclusive on the parties. There is no error.

HAMERSLEY and HALL, JJ., concur.

BALDWIN, J. (dissenting). In my opinion, the methods of judicial procedure essential to due course of law were not pursued upon the trial of the case at bar before the judge of the superior court. His finding states that he should have held that the construction of part of the railway which the applicant alleged that it desired to construct was of public convenience and necessity, had he not been of opinion that it had not the financial ability required for the undertaking. In determining whether a town should be charged by order of court with the duty of laying out and maintaining a new highway, on the ground that it is required by common convenience and necessity, it is proper to consider the probable outlay required for the improvement, and the ability of the municipality to sustain such a burden. An expensive road, to connect a city with an important suburb, might be a matter of common necessity, when it would be unreasonable to require the construction of one not costing half as much between the center of a country town and one of its outlying school districts. Common convenience is not to be promoted by any public work which must lead to oppressive taxation. In the case at bar issue was joined on the question whether public convenience and necessity required a certain extension of the petitioner's railway, but it was not one to be built at public expense. The burden was to be borne wholly by the petitioner, and the company was desirous to assume it. It was incorporated for this purpose, among others; and the legislature presumably had it in view when they prescribed the amount of its capital stock in the charter. In addition to the funds that might be thus subscribed, the general laws authorized street railways to be mortgaged for three-fourths of their cost. The contemplated extension, it is found, was likely to cost \$170,000. The authorized capital, not yet subscribed, exceeded in amount a fourth of that sum. A mortgage, therefore, might be executed which would provide for the residue. Whether such a financial scheme could be successfully carried through was not, in my opinion, a matter to be determined in this proceeding by a judge of the superior court. Obtaining a favorable finding from him as to public convenience and necessity was a condition precedent to the exercise of the franchise to build. Until the company was in a position to exercise it, it could hard-

ly be expected to enter upon the work of endeavoring to increase its capital, or borrow upon the security of a mortgage, which as yet had nothing upon which to rest. It was enough for it, I think, to show an intention and desire to build the extension, and corporate power to raise the necessary funds, in the ordinary way, by issues of stock and bonds. The evidence on which Judge Wheeler based his conclusions as to the applicant's financial ability was admitted against its objection. It was, in my opinion, wholly irrelevant to the cause, and, if it be such, the judgment which rested upon it had no legitimate foundation.

Statutes may modify methods of judicial procedure in any manner, and to any extent, provided the substantial rights of the parties are preserved. An application like that now before us presents for determination a judicial question. It was brought before a judge of the superior court, exercising the judicial power confided to that court, under the provisions of the constitution. The legislature could rightfully make his determination final and conclusive, notwithstanding any departures from the usual methods of procedure, so long as there were none from those fundamental rules which must govern every contest before a court of justice to make it such a court. One of those rules is that the judgment cannot go beyond the issue. Another is that it must rest on facts which are pertinent to the issue. I am unwilling to impute to the general assembly an intent to make any finding by a judge of the superior court, upon a judicial question between parties to a proceeding involving both important rights of property and matters of high public concern, final and conclusive, as respects the general appellate powers of this court, when it appears upon its face that the decision turned upon evidence that had absolutely no bearing on the matter in controversy. I therefore dissent from the judgment of the court.

TORRANCE, J., concurs.

(90 Me. 467)

CITY OF BATH v. PALMER.

(Supreme Judicial Court of Maine. June 30, 1897.)

EQUITY—PRACTICE—EXCEPTIONS.

1. Under the rules regulating equity practice in this state, as provided in Rev. St. c. 77, §§ 22, 25, it is irregular to bring exceptions in an equity cause to the law court before final hearing; and such hearing will not be allowed, unless the question does not admit of delay until then.

2. A demurrer to a bill was overruled, and exceptions were taken. The bill was then amended, and a demurrer interposed to the amended bill, which was overruled, and exceptions taken. Without further proceeding, the case was brought to the law court. *Held*, that this is irregular. The defendant should have answered, and, after final hearing before a single justice, and appeal taken from his decree, the exceptions to the previous interlocutory decrees would then be properly before the law court.

(Official.)

Exceptions from supreme judicial court, Sagadahoc county.

Action by the city of Bath against William B. Palmer. From an order overruling a demurrer to the bill, defendant excepts. Dismissed.

F. E. Southard, for plaintiff. J. W. Symonds, D. W. Snow, and C. S. Cook, for defendant.

STROUT, J. This cause must be dismissed from the law docket as prematurely here.

There was a demurrer to the bill, which was overruled, and exceptions taken. An amendment to the bill was then allowed, and a demurrer filed to the amended bill, which was overruled, and exceptions taken. Without further proceedings, the cause was brought here.

Both decrees overruling the demurrer were interlocutory, and not final, and left the cause for further hearing upon answer and proof. By Rev. St. c. 77, § 22, an appeal may be taken from any interlocutory decree or order, "but such appeal shall not suspend any proceedings under such decree or order, or in the cause, and shall not be taken to the law court until after final decree. Upon an appeal from a final decree, all previous decrees and orders are open for revision, renewal or approval." By section 25, exceptions may be taken to rulings, but the "allowance and hearing of exceptions shall not suspend the other proceedings in the cause."

The rule laid down in *Association v. Hamilton*, 80 Me. 99, 13 Atl. 134, is "that it is irregular to hear exceptions in an equity cause before final hearing, and that such hearing should not be allowed unless the question does not admit of delay till then."

Nothing in this cause brings it within the exception. After answer and proof and a final hearing, these interlocutory decrees may not be regarded by the parties as of sufficient importance to present to the law court.

If there shall be an appeal from the final decree, the rights of all parties will be fully preserved. Exceptions dismissed.

(90 Me. 468)

WILSON et al. v. CURTIS.

(Supreme Judicial Court of Maine. June 23, 1897.)

WILL—LIFE ESTATE—USE—OCCUPATION.

1. Upon a writ of entry to recover the lower story of a store, it appeared that the testatrix in her lifetime owned the premises in fee. The plaintiffs were her residuary devisees, and claimed title to the premises under the will. The defendant claimed title as assignee of the husband of the testatrix, to whom she made the following devise, viz.: "I give, bequeath, and devise to my beloved husband, Emery S. Wilson, the house lot and buildings thereon in Cherryfield now occupied by us together, with all personal property appurtenant and belonging to the same, except such as may hereafter be bequeathed otherwise herein; also, the use and occupancy of the lower half of the store as now occupied by him."

Held, that the husband acquired a life estate in the demanded premises.

2. Also, that a devise of the use and occupancy of land passes an estate in the land, and consequently a right to let or assign it, and is not confined to the personal use or occupancy of the property, unless the context clearly calls for a more limited construction.

(Official.)

Report from supreme judicial court, Washington county.

Writ of entry by Emerson K. Wilson and others against Edward B. Curtis to recover the lower story of a store. Plea, the general issue.

The question at issue was whether Emery S. Wilson, husband of the late Deborah S. Wilson, took an estate under the will of his wife that passed by assignment to the defendant.

The material portions of the will of Deborah S. Wilson are as follows: "I give, bequeath, and devise to my beloved husband, Emery S. Wilson, the house lot and buildings thereon in Cherryfield now occupied by us, together with all personal property appurtenant and belonging to the same, except such as may hereafter be otherwise bequeathed herein; also, the use and occupancy of the lower half of the store as now occupied by him.

"To my beloved daughters Flora and Hattie I give and bequeath the use and occupancy of the upper half of said store, together with all the goods and furniture in said upper half. I also give and bequeath to my said daughter Flora the chamber set, bed, bedding, and other furniture, and also the chamber occupied by her, also my watch and sewing machine; to my said daughter Hattie I also give and bequeath the chamber set, bed, bedding, and other furniture, and the chamber now occupied by her, also my cabinet organ; including also to my said daughters Flora and Hattie the use and occupancy of such other portions of my dwelling as they may require during their pleasure.

"Wishing to divide the remainder of my estate equally among my eight children, and having this day given to my beloved son Emerson what I — his just share of the same, I hereby will, bequeath, and devise the remainder of my estate, real, personal, or mixed, wherever situated or however described, to my children Joseph, Judson, William, Mary, Irene, Flora, and Hattie in equal shares."

By a codicil subsequently executed, the testatrix made the following change: "Whereas, by my said will, I gave and bequeathed to my husband, Emery S. Wilson, the house lot and buildings thereon in Cherryfield now occupied by us, together with all personal property belonging to the same, now I do hereby make and declare this writing to be a codicil to my last will and testament, to be annexed to and taken as a part thereof, and I do revoke said bequest, and give, bequeath, and devise to my beloved daughters Irene, Flora, and Hattie the said house lot, buildings, and per-

sonal property in equal shares, subject to subsequent provisions in said will."

Plaintiffs nonsuit.

H. H. Gray, for plaintiffs. C. B. Donworth, for defendant.

WHITEHOUSE, J. This is a writ of entry to recover the lower story of the Wilson store, in Cherryfield. The case is reported to this court on the following statement of facts:

Deborah S. Wilson, in her lifetime, owned the premises in fee. The plaintiffs are her residuary devisees, and claim title to the premises under her will. The defendant claims title as assignee of Emery S. Wilson, to whom Deborah made the following devise, viz.: "I give, bequeath, and devise to my beloved husband, Emery S. Wilson, the house lot and buildings thereon in Cherryfield now occupied by us, together with all personal property appurtenant and belonging to the same, except such as may hereafter be bequeathed otherwise herein; also, the use and occupancy of the lower half of the store as now occupied by him."

The question at issue is whether Emery S. Wilson took an estate in the store, under the will of Deborah, that passed by assignment to the defendant. It is not contended by the defendant that Emery S. Wilson took a fee in the lower half of the store, but it is the opinion of the court that he acquired a life estate in the demanded premises by virtue of the clause in Deborah's will above recited, and that this interest passed to the defendant by force of the assignment named.

The intention of the testatrix must be gathered from the whole will taken together, all its parts being construed in relation to each other, and interpreted in the light of the existing circumstances.

A comparison of the different items and clauses of the will in question reveals a clear intention on the part of Deborah S. Wilson to make a distinction between the quality of the interests given to her daughters in the dwelling house and the estate devised to her husband in the same premises, and also between the estate given to her husband in the homestead and that given to him in the lower half of the store. She gives and devises to her "beloved husband" "the house lot and buildings thereon" now occupied by them in Cherryfield; also, "the use and occupancy of the lower half of the store as now occupied by him." She gives to her daughter Flora "the chamber now occupied by her," and to Flora and Hattie the use and occupancy of such other portions of the dwelling house "as they may require during their pleasure."

It is a familiar and well-settled rule of law that a gift of the income of real estate is a gift of the real estate itself. A gift of the income for life is the gift of a life estate, while a gift of the perpetual income is a gift

of the fee. *Sampson v. Randall*, 72 Me. 109; *Fuller v. Fuller*, 84 Me. 475, 24 Atl. 946.

The absolute devise of the homestead to her husband was manifestly designed by the testatrix, and effectually operates as a gift of the fee, while the employment of the terms "use and occupancy," in the devise of the lower half of the store, as clearly indicates a purpose to give him a different estate in those premises. But a comparison of the terms of this devise with the language of the devise to the daughters above mentioned further discloses an intention on the part of the testatrix to give her husband the right to enjoy the income of the lower half of the store during his lifetime, and not to restrict his enjoyment of the use of it to the period of his personal occupancy. "A devise of the use and occupancy of land passes an estate in the land, and consequently a right to let or assign it, and is not confined to the personal use or occupation of the property, unless the context clearly calls for the more limited construction." *Jarm. Wills* (6th Am. Ed.) 759; *Whitome v. Lamb*, 12 Mees. & W. 813; *Rabbeth v. Squire*, 19 Beav. 70; *Mannox v. Greener*, L. R. 14 Eq. 456; *Schouler, Wills*, § 503.

It has been seen that, upon a comparison of the different parts of the will in question, there is nothing in the context which calls for the more limited construction; but, on the contrary, a careful examination of the several items and clauses shows a plain intention to give a life estate, and only a life estate, in the demanded premises. The entry must therefore be:

Plaintiffs nonsuit.

(90 Me. 453)

RHOADES v. COTTON.

(Supreme Judicial Court of Maine. June 18, 1897.)

SALES—DELAY TO DELIVER—ACTION—NEW TRIAL.

1. When it appears in a case submitted to the law court upon a motion for a new trial and exceptions to the rulings of the presiding justice that on the undisputed facts the action cannot be maintained, *held*, that it is unnecessary to consider further either the motion or the exceptions.

2. The defendant gave a written order, April 28, 1897, at Waterville, to the plaintiff's traveling agent for certain merchandise, to be shipped immediately. The plaintiff received the order at Syracuse, N. Y., on May 1st. The defendant stated to the salesman, at the time he gave the order, that he must have certain flags named in the order in season for Memorial Day. The other goods were adapted to campaign purposes and for the Fourth of July. The plaintiff delivered, on May 18th, the goods described in the order to the railroad at Syracuse, properly boxed, and directed to the defendant at Waterville, where they arrived by freight on June 1st or 2d. On May 28th, and as soon as the goods arrived, the defendant countermanded the order, refused to receive the goods, and they were then shipped back. The plaintiff declined to take back the goods, and brought an action. *Held*, that the delay in not shipping the goods until May 18th, under the circumstances, was unreasonable, and that the action cannot be maintained.

(Official.)

Exceptions from supreme judicial court, Somerset county.

Action by Daniel P. Rhoades against Frank M. Cotton.

This was an action of assumpsit; writ dated August 6, 1896. The writ contains two counts; one for goods sold and delivered, and one for not accepting the goods sold. And also for goods bargained and sold.

The plea was the general issue, and brief statement, as follows: "And for a brief statement of special matter of defense to be used under the general issue pleaded, the said defendant further says that the alleged causes of action set forth in plaintiff's writ arose out of an express written contract, the terms of which have not been complied with by plaintiff so as to entitle him to recover in this action."

The verdict was for the defendant.

The plaintiff took exceptions to the charge of the presiding justice as follows:

"(1) In this case, there is a contention between the parties as to whether this common carrier, which is the railroad, was the agent of Rhoades, in Syracuse, or the agent of this defendant. If the defendant, by his contract and order with Rhoades, understood that they were to be delivered to a common carrier, and if Rhoades understood that they were to be delivered by him, and that it was his duty only to deliver them to the common carrier, then I instruct you that when they were so delivered to the common carrier the title passed, and vested in this defendant.

"(2) Now I instruct you that the mere fact that a seller delivers goods which are ordered to a common carrier, when there is no contract other than to send the goods, is not a delivery such as to vest the title in the purchaser. I make a square ruling on that, and, if I am wrong, the party aggrieved will have his rights."

The bill of exceptions is reported with a full copy of the charge of the presiding justice, but the motion for a new trial was not accompanied with a full report of all the testimony. Motion and exceptions overruled.

Edmund F. & Appleton Webb, for plaintiff. Harvey D. Eaton, for defendant.

SAVAGE, J. On April 28, 1897, the defendant gave a written order to the traveling salesman of the plaintiff, at Waterville, for certain merchandise. The order contained the direction to ship "immediately." The plaintiff received the order at Syracuse, N. Y., where his place of business was, about May 1st. On May 18th the plaintiff delivered the goods described in the order to a railroad company at said Syracuse, properly boxed, and directed to the defendant at Waterville. The goods reached Waterville, by freight, on June 1st or 2d. When the defendant gave the order he told the salesman he must have certain flags referred to in the order in season for Memorial Day. The remainder of the goods

"were adapted to campaign purposes and for the Fourth of July." On May 28th the defendant wrote to the plaintiff, countermanding the order, and on June 1st or 2d, as soon as the goods reached Waterville, the defendant refused to receive the goods, and ordered them returned to the plaintiff, and they were shipped back. Plaintiff declined to receive the goods back, and insists on holding the defendant to his contract under the order.

Plaintiff's declaration is in assumpsit for "goods sold and delivered," for "goods bargained and sold," and for "not accepting the goods sold." The verdict was for the defendant.

The case comes up on motion for a new trial, under which the plaintiff relies upon the ground that the verdict was "against law and the charge of the justice," and upon certain rulings of the presiding justice in his charge as to the effect of the delivery of the goods by the plaintiff to the railroad company at Syracuse.

If upon the foregoing undisputed facts this action cannot be maintained, it becomes unnecessary to consider further either the motion or the exceptions. *Bockland v. Morrill*, 71 Me. 455; *Mathews v. Fisk*, 64 Me. 101.

The defendant contends that the shipment was not seasonable, and we think his contention must be sustained. The goods were to be shipped "immediately." The word "immediately" undoubtedly has a relative meaning, and must be read in the light of surrounding circumstances. It was understood that the defendant ordered a portion of the goods for use on Memorial Day. They were not shipped until May 18th,—18 days after the receipt of the order,—and did not reach Waterville until after Memorial Day. It is the opinion of the court that the delay was unreasonable, and that the action cannot be maintained. *Fisher v. Boynton*, 87 Me. 395, 32 Atl. 995.

Motion and exceptions overruled.

(90 Me. 448)

STATE v. GUTHRIE.

SAME v. FORD.

(Supreme Judicial Court of Maine. June 16, 1897.)

SEARCH WARRANTS—INTOXICATING LIQUORS—DECLARATION OF RIGHTS—CONSTITUTIONAL LAW.

1. It is an integral principle in our system of law and government that ministerial officers assuming to execute a statute or process upon the property or person of a citizen shall execute it promptly, fully, and precisely. The time of execution is as essential as any other element.

2. A warrant to search for intoxicating liquors remains in force for a reasonable time only.

3. What is a reasonable time within which such a warrant may be lawfully executed is a question of law for the court to determine in each case according to its circumstances.

4. An unexplained, and hence apparently needless, delay for three days in the execution of such a warrant is unreasonable, and hence unlawful.

(Official.)

Report from supreme judicial court, Hancock county.

Process for search and seizure against John W. Guthrie and Patrick W. Ford. The cases were appealed from the trial justice, and removed to the lower court on an agreed statement. The lower court was to determine what effect, if any, the fact that a warrant issued July 20, 1895, was served July 23, 1895, would have on the complaint and warrant. Respondents discharged.

E. S. Clark, Co. Atty., for the State. L. B. Deasy, for defendant Guthrie. H. E. Hamlin, A. W. King, and J. E. Bunker, Jr., for other defendants.

EMERY, J. A warrant to search for intoxicating liquors in a building occupied by the respondent was issued July 20th, the day of the making of the complaint. It is not stated on what day the warrant came into the hands of the officer who undertook to execute it, but presumably it was delivered to him at once. He held the warrant for three days, apparently needlessly, and then assumed to execute it July 23d, when he found and seized some intoxicating liquors, and arrested the respondent. Upon this warrant the respondent is now before the court, and contends in limine that, in the absence of reasons for the delay, the officer's authority to search and arrest on this warrant did not continue for three days, and had expired at the time of this arrest.

The question presented is of fundamental importance, and yet, so far as our research or that of counsel has extended, it has not before received adjudication. Either officers have hitherto served search warrants promptly, or respondents have not cared to raise the question of their duty to do so. The result is that we must base our judgment on reasoning from accepted principles, rather than on authority.

There are some fundamental and almost self-evident propositions to be stated at the outset.

When there is named in any process, or in the law authorizing it, a time within which it is to be executed and returned, the process cannot be executed after that time, but becomes *functus officio*, except perhaps for return.

When no time is thus named, the process must be executed within a reasonable time from its issuance, and becomes *functus officio* thereafter, or the time within which it may be executed is unlimited, and it never becomes *functus officio*, however long held back by the officer. We are not able to see any middle ground between these alternative propositions.

The result of a search under a search warrant, in liquor cases, at least, is not the test of the authority to make the search under the warrant. The validity of the warrant, the authority of the officer under it to enter upon the prescribed premises, does not depend upon what he finds after entry. The prior authority, or want of authority, in an officer to begin the execution of a search warrant is fixed when he begins. A corollary of this proposition is that the life of a search warrant does

not depend upon the existence or continued existence of the liquor described in the complaint. As the warrant may outlive those liquors, so it may expire before they disappear. It is an integral principle in our system of law and government that ministerial officers assuming to execute a statute or process upon the property or person of a citizen shall execute it promptly, fully, and precisely. The time of execution is as essential as any other element. This principle has been sufficiently stated and explained in former opinions of this court. *Carter v. Allen*, 59 Me. 296; *Railroad Co. v. Small*, 85 Me. 462, 27 Atl. 349.

We think the foregoing propositions are applicable with especial directness and force to the nature and purpose of a search warrant. It is a sharp and heavy police weapon, to be used most carefully, lest it wound the security or liberty of the citizen. It was unknown to the early common law, and came into use almost unnoticed in the troublous times of English history. Lord Coke denied its legality, but finally the courts and parliament, recognizing its great efficiency, contented themselves with carefully restricting and controlling its use. *Entick v. Carrington*, 19 How. St. Tr. 1030. The danger of its abuse has been so clearly apprehended in this country that constitutional barriers have been erected against it. In the declaration of rights in the constitution of this state (article 5) it is provided that the people shall be secure in their persons, houses, papers, and possessions from all unreasonable searches and seizures.

Nothing in the complaint or warrant, or in the law concerning them, indicates that, after complaint is made, the warrant is to be held by the magistrate or officer as a weapon to be used at his discretion. The very nature of the search warrant indicates that when complaint is made the warrant (if issued at all) should be promptly issued and executed. The purpose is to seize the thing alleged to be at that time in the place to be searched, to prevent its removal or further concealment.

Especially is this so when complaint is made for a warrant to issue to search for intoxicating liquors. The complaint is against the particular liquors on deposit at the date of the complaint, and the warrant, under the declaration of rights (article 5), can be issued against those liquors only; but such liquors are usually being continually disposed of and replaced, if at all, by other, and perhaps different, liquors. Unless the warrant is issued and served at once, the officer is likely to find only liquors which were deposited after the complaint was made. In any case of delay it would be difficult, if not impossible, to prove the identity of the liquors found with those complained against. The prosecution would fail, resulting only in expense to the state, and expense and annoyance to the citizen.

The legislature has recognized this necessity of immediate execution of the warrant in liquor prosecutions, and has commanded it. The officer is expressly directed by the warrant and

the statute to "make immediate return of said warrant," and to have the respondent "forthwith" before the magistrate for trial. Rev. St. c. 27, § 40. In view of the nature and history of this peculiar process, this language of the legislature fairly indicates the intention that the warrant should be executed "immediately" and "forthwith," and not in the unlimited discretion of the officer. *State v. Leach*, 38 Me. 432.

Guided by the principles and reasoning above stated, we are led to the conclusion that a search warrant for intoxicating liquors must be served within a reasonable time after issuance, or be abandoned.

What is a reasonable time within which the service of such a warrant can lawfully be made is also a question of law for the court.

The officer is not held to more than reasonable promptness. The time he may take—the reasonable time—necessarily varies with the circumstances. The hour in the day of making the complaint, the distance of the place to be searched, the state of the weather, the condition of the roads, the lack of facilities for travel, the obstructions met, and other circumstances may make a long-delayed service practically immediate and forthwith, and hence within a reasonable time.

In this case none of these, nor any, circumstances are shown. The officer lived in the immediate neighborhood of the place to be searched. Nothing appears indicating that the warrant could not have been easily executed on the day the complaint was made. No reason whatever is shown for the delay of three days. Such a delay was needless. In cases of seizures without warrant it has been held unreasonable, and hence unlawful, to delay the warrant more than 24 hours. *Weston v. Carr*, 71 Me. 356; *State v. Dunphy*, 79 Me. 104, 8 Atl. 344; *State v. Riley*, 86 Me. 144, 29 Atl. 920. An unexplained delay of three days in serving such a warrant seems clearly needless, unreasonable, and hence unlawful, and destructive of the power of the warrant.

It is urged that the conclusion reached in this case will materially impair the efficiency of one of the most useful instrumentalities for the enforcement of the liquor statutes. Even if such were the effect, we could not shrink from declaring the law as we believe it to be. But no such effect need be apprehended. No case can be stated in which a needless delay of service will aid the prosecution. Any such case, when stated, will ipso facto show the delay to have been needful, and hence reasonable, and hence remove the case from the purview of this opinion. On the other hand, the more promptly the warrant is served, the more likely the officer is to find the liquors complained of, and the more easy to prove the identity. Every hour's delay, whether from the officer's inefficiency or from his collusion with respondents, endangers the success of the prosecution.

It is suggested that the prosecution often needs to obtain search warrants in advance, in

order to have them in readiness to seize the liquors at the moment of deposit before they can be concealed; that such a procedure is very efficacious, and even essential, to circumvent the cunning of liquor sellers; and that the rule here evolved will nullify it. If such a practice obtains, it should be nullified.

No prosecution can be lawfully begun, no criminal process lawfully issued, before the offense is committed. The practice suggested, if it obtains, is a scandalous abuse of legal process, based upon the perjury of the complainant, and subjecting all concerned in it to penalties and damages.

Respondents discharged.

(20 R. I. 258)

FRAWLEY v. SHELDON.

(Supreme Court of Rhode Island. Oct. 9, 1897.)

NEGLIGENCE OF FOREMAN—LIABILITY OF MASTER.

The negligent act of a foreman, not a part of his duty as representative of the employer, will not render the employer liable to a servant thereby injured.

Action by Jeremiah J. Frawley against Frank L. Sheldon. Demurrer to declaration sustained.

George N. Littlefield, for plaintiff. George T. Brown, for defendant.

PER CURIAM. The declaration states a case merely of negligence of a fellow servant. The fact that the foreman who caused the accident was superior in rank to the plaintiff does not entitle him to sue the master, since the negligence alleged was the careless dropping of a hook by the foreman,—an act into which the element of his superiority as a servant did not enter. *Mann v. Print Works*, 11 R. I. 152. Demurrer sustained, and case remitted to the common pleas division.

(20 R. I. 256)

O'CONNOR v. O'CONNOR.

(Supreme Court of Rhode Island. Oct. 8, 1897.)

EQUITY—PLEADING AND PRACTICE—AMENDMENT—FRAUD—COSTS.

Where a bill charging actual fraud, which is not established by the proof, contains other allegations on which relief may be granted, the court may permit it to be amended by striking out the charge of fraud, on payment by complainant of respondent's costs to the time of hearing, though, under the strict rule of equity pleading, it would have to be dismissed.

Bill by Michael F. O'Connor against Bridget O'Connor for relief on the ground of fraud. An amendment permitted on payment of respondent's costs to the time of hearing.

Patrick H. Mulholland and James A. Williams, for complainant. Patrick J. McCarthy, for respondent.

PER CURIAM. The court is of the opinion, on the testimony, that the release was executed under a mutual mistake as to its

legal effect, and that it was not intended as an absolute release as between the complainant and respondent. The court does not think that any fraud was intended or proved. As the bill charges actual fraud, under the strict rule of equity pleading it would have to be dismissed, though it contains other allegations upon which relief may be granted. *Bank v. Stone*, 2 R. I. 129; *Tillinghast v. Champlin*, 4 R. I. 173. *Masterson v. Finligan*, 2 R. I. 316, was a suit to set aside a deed of partition on the ground that it was procured by the fraud of the respondent, and to have a new partition made, not only of the land embraced in the deed, but also of other land owned in common by the complainant and respondent, and the complainant failed to establish the charge of fraud. The court, nevertheless, so far relaxed the rule as to retain the bill to make partition of the land not embraced in the deed, and charged the complainant with the respondent's costs to the rendering of the decree sending the cause to the master. In the circumstances of the present suit, we have concluded to permit the bill to be amended by striking out the charge of fraud, on payment by the complainant of the respondent's costs to the time of the hearing. The practical effect of this course is to put the parties in the same position as though the bill had been dismissed and a new bill filed, and the reason of the rule requiring a dismissal of the bill will have been attained. When the respondent's costs have been paid, and the bill amended as above directed, a decree for an account may be entered.

(20 R. I. 267)

TIMONY v. CASEY.

(Supreme Court of Rhode Island. Oct. 8, 1897.)

NEW TRIAL—REARGUMENT—NEWLY-DISCOVERED EVIDENCE.

Leave to reargue a petition for a new trial on the ground that the verdict was against the evidence, where such evidence, though conflicting, was sufficient to sustain the verdict, will be denied where such leave is asked on the ground of newly-discovered evidence, and no sufficient reason is shown for the failure to produce such evidence on the hearing of the former petition, and where such evidence is merely impeaching in its character.

Action by Patrick F. Timony, Jr., against James Casey. There was a verdict for plaintiff, and defendant, having petitioned for a new trial, which was denied, asks for leave to reargue his petition. Denied, and dismissed.

Claude J. Farnsworth and Thomas F. Vance, for plaintiff. Hugh J. Carroll, for defendant.

PER CURIAM. The petitioner asks for leave to reargue his petition for a new trial. The petition which he wishes to reargue was based on the ground that the verdict was against the evidence. It did not raise any question of law. The court was of the opin-

ion that the evidence, though conflicting, was sufficient to sustain the verdict, and therefore denied the petition. To grant a reargument of a petition for a new trial which involved merely a question of evidence would be anomalous. The present petition, in so far as it is a petition for a new trial, rests on the ground of newly-discovered evidence. The plaintiff testified at the trial that he was hired by a Connecticut farmer to work for him for \$14 a month. If the defendant was surprised at this testimony, or had deemed it of sufficient importance to be rebutted, he should have asked for a continuance to enable him to procure the evidence which he now seeks to make the basis of a second petition for a new trial as newly-discovered evidence. This he not only did not do, but he did not even make it a ground of his former petition for a new trial; and no sufficient reason is shown why, in the exercise of reasonable diligence, he might not have produced the newly-discovered evidence on the hearing of the former petition. *Davidson v. Wheeler*, 17 R. I. 433, 22 Atl. 1022; *Riley v. Shannon*, Index SS, 94, 34 Atl. 989. Moreover, the purpose of the newly-discovered evidence is merely to impeach or discredit the testimony of the plaintiff, and a new trial is seldom granted for newly-discovered evidence of that character. *Dexter v. Handy*, 13 R. I. 474; *Roberts v. Roberts*, Index RR, 169, 33 Atl. 872; *Jones v. Railroad Co.*, 20 R. I. pt. 1, p. 212, 37 Atl. 1033. Petition denied, and dismissed.

(20 R. I. 252)

ROYCE et al. v. OAKES.

(Supreme Court of Rhode Island. Oct. 1, 1897.)

PLEADING—CONVERSION—SPECIFIC MONEY—DAMAGES FOR LARCENY.

1. A count, in trespass on the case, setting out property in plaintiffs in the goods described, which came to defendant's hands, and alleging a value thereof, together with the conversion thereof by defendant, at a certain time and place, is sufficient on demurrer, though the legal fiction that plaintiffs casually lost such goods, and that they thereafter came to defendant's hands by finding, is not incorporated therein, as the alleged conversion is the gist of the action.

2. Trover lies for the failure to deliver to plaintiffs money, as such, where the declaration shows that defendant received the money in question simply for safe-keeping, the same to be delivered to plaintiffs on demand, and that, instead of discharging the duty thus devolved on him, he wrongfully converted the money to his own use.

3. A cause of action *ex contractu* was not joined with a cause of action *ex delicto* in a count, in trespass on the case, simply setting out the manner in which defendant became possessed of the property in question, his duty regarding it, and his wrongful conversion thereof to his own use.

4. A count alleging the receipt of certain moneys and chattels by defendant, by authority of plaintiffs, to be delivered to plaintiffs, but which defendant fraudulently converted to his own use, is demurrable, in that it sets out facts which, if proved, render defendant guilty of larceny, under Gen. Laws, c. 279, § 16; and therefore, under Gen. Laws, c. 233, § 16, an action for damages will not lie until after complaint has been made to some proper magistrate for such crime.

Trespass on the case by Royce, Allen & Co. against Charles H. Oakes. On defendant's demurrer to declaration. Overruled as to first count, and sustained as to second count.

Irving Champlin, for plaintiffs. Van Slyck & Mumford, for defendant.

TILLINGHAST, J. This is an action of trespass on the case, in which the plaintiffs set out in the first count of their declaration that on the 15th day of January, 1894, they delivered to the defendant the sum of \$1,714.60 in money, together with three gross of napkin rings, of the value of \$49.28 (said money and goods being the property of the plaintiffs), for safe-keeping, and to be redelivered by the defendant to the plaintiffs thereafterwards on the same day; that the defendant received said money and merchandise for the purpose aforesaid, yet, not regarding his duty in that behalf, afterwards, on the same day, intending and contriving to injure the plaintiffs, fraudulently and unlawfully converted said money and goods to his own use, and, although thereafterwards duly requested, he neglected and refused to deliver said money and goods, or any part thereof, to the plaintiffs. The second count of the declaration sets out that on the 15th day of January, 1894, the plaintiffs authorized the defendant to collect and receive for them the sum of \$1,714.60 in money, and also certain goods and chattels, to wit, three gross of napkin rings, from divers persons, and thereupon to render and deliver the same to the plaintiffs; said goods, chattels, and money then and there of right appertaining to the plaintiffs. And the plaintiffs aver that the defendant, pursuant to said authority, thereafterwards, on the same day, collected and received said money and said merchandise for the plaintiffs, yet that the said defendant, not regarding his duty in that behalf, although thereunto requested, neglected and refused to render and deliver to the plaintiffs said money and goods, but then and there fraudulently and unlawfully converted the same to his own use, by expending or dissipating the same, or otherwise disposing thereof contrary to law. To the first count of the declaration the defendant demurs on the grounds (1) that the matters therein stated do not set forth a cause of action against the defendant; (2) that, whereas said action is trespass on the case, said count states no cause of action against the defendant, unless the same be an action for breach of contract; (3) that said count does not state facts constituting an action of trespass on the case against the defendant, but, if any cause of action sounding in tort is therein stated, the same is an action of trover, and not trespass on the case; and (4) that said plaintiffs join a cause of action for breach of contract with a cause of action sounding in tort. The defendant also demurs to the second count of the declaration on the same grounds.

We think the demurrer to the first count should be overruled; for, while it is somewhat inartificially drawn, yet it sufficiently states a case in trover, which is a species of action on the case. It sets out property in the plaintiffs, alleging a value thereof, together with the conversion thereof by the defendant at a certain time and place, and we think this is sufficient; for while it is customary to incorporate into the declaration the legal fiction that the plaintiff casually lost the goods and chattels described, and that the same thereafter came to the defendant's hands by finding, yet we think it is sufficient to allege that they came to his hands generally, the conversion being the gist of the action. See *Oliv. Prec.* (3d Ed.) 467; *Gen. Laws R. I. c. 235, §§ 3, 4*. But the defendant contends that trover lies only for the conversion of personal chattels, and does not lie for the failure to deliver to the plaintiffs money, as such, and that the proper form of action as to that is assumpsit for money had and received. It is true that the obligation to pay money to another is primarily within the confines of assumpsit or debt, but the cause stated in said first count shows something more than a debt. It shows a trust coupled with a specific duty, together with a breach of the trust and a fraudulent violation of the duty. It shows that the defendant received the money in question simply for safe-keeping, the same to be delivered to the plaintiffs on demand, and that, instead of discharging the duty thus devolved upon him, he wrongfully converted the money to his own use. Having received the money in specie, simply for safe-keeping, it was his duty to deliver the same specific money to the plaintiffs on demand. See *Donohue v. Henry*, 4 E. D. Smith, 163; *Worley v. Moore*, 97 Ind. 15; *Richmond v. Soportos* (City Ct. N. Y.) 18 N. Y. Supp. 433; 26 Am. & Eng. Enc. Law, 766; *Coffin v. Anderson*, 4 Blackf. 395; *Govett v. Radnidge*, 3 East, 62-70. As to the napkin rings, of course, no question is made that they are the subject of trover and conversion. But the defendant contends that the plaintiffs have joined in the same count a cause of action *ex contractu* with a cause of action *ex delicto*, and hence that it is demurrable. As we construe the count, there is no such misjoinder. It simply sets out the manner in which the defendant became possessed of the property in question, his duty regarding the same, and his wrongful conversion thereof to his own use. In short, it states a case wholly sounding in tort and not in assumpsit.

As to the second count, we are of the opinion that it is demurrable, in that it sets out facts which, if proved, render the defendant guilty of the crime of larceny, under *Gen. Laws R. I. c. 279, § 16*. And, this being so, the action will not lie until after complaint has been made to some proper magistrate for said crime. *Gen. Laws R. I. c. 233, § 16*; *Baker v. Power Co.*, 14 R. I. 531. For a full discussion of the distinction between actions

of tort and assumpsit, where money has been wrongfully converted, see *Orton v. Butler*, 2 Chit. 343. The demurrer to the first count is overruled, the demurrer to the second count is sustained, and the case is remitted to the common pleas division for further proceedings.

(30 Me. 487)

BENNETT v. DAVIS.

(Supreme Judicial Court of Maine. June 19, 1897.)

QUITCLAIM DEED — COVENANT — AFTER-ACQUIRED TITLE.

Under a quitclaim deed containing a covenant of special warranty "against the lawful claims and demands of all persons claiming by, through, or under" the grantor, a title or interest subsequently acquired by the grantor does not inure to the grantee.

(Official.)

Report from supreme judicial court, Cumberland county.

Petition by H. Winfield Bennett against Charles C. Davis for partition.

The petitioner claimed one undivided sixth of the premises described. The defendant denied the title of the petitioner, and claimed to own the whole premises.

Three brothers, Elbridge, Henry, and Joseph, were once selsed of the premises, one-third each.

Elbridge gave a deed to Henry, wherein he says: "I do hereby remise, release, bargain, sell, and convey, and forever quitclaim unto the said Henry, his heirs and assigns, forever, a certain lot of land with the buildings thereon [describing the premises of which partition is sought,—a copy of the deed made a part of the case is given below], to have and to hold," etc., and warranting the premises against all claims "by, through, or under him."

Thereafterwards, Joseph, being selsed of one-third, died, and Elbridge and Henry inherited one-twelfth each, and purchased all the interest of the other heirs in Joseph's lands, giving them one-sixth each in the premises described. This one-sixth Elbridge conveyed to the petitioner, and he now holds the same unless it inured to Henry, the grantee of Elbridge, under the deed before mentioned, purporting to convey the whole land, in which case the petitioner had no title, and the defendant owned the whole; otherwise five-sixths.

Upon the above statement the case was reported to the law court for decision. Judgment for petitioner.

Deed: "Know all men by these presents, that I, Elbridge G. Bennett, of Deering, in the county of Cumberland, and state of Maine, in consideration of the sum of one dollar, paid by Henry P. Bennett, of said Deering, the receipt whereof I do hereby acknowledge, do hereby remise, release, bargain, sell, and convey, and forever quitclaim unto the said Henry P. Bennett, his heirs and assigns, forever, a certain lot of land, with the buildings thereon, situated in said Deering, on the southwesterly

side of the road leading from Stroudwater village to Portland; being the same premises conveyed to Henry P. Bennett, Joseph J. Bennett, and Elbridge G. Bennett, by Andrew Gray, by deed dated March 24, 1864, recorded in Cumberland Registry of Deeds, Book 326, page 534, to which reference may be had for a particular description.

"To have and to hold the same, together with all the privileges and appurtenances thereunto belonging, to him, the said Henry P. Bennett, his heirs and assigns, forever. And I do covenant with the said grantee, his heirs and assigns, that I will warrant and forever defend the premises to him, the said grantee, his heirs and assigns, forever, against the lawful claims and demands of all persons claiming by, through, or under me.

"In witness whereof, I, the said grantor, and Sarah S. Bennett, wife of the said Elbridge G., in testimony of her relinquishment of her right of dower in the above-described premises, have hereunto set our hands and seals this ninth day of March, in the year of our Lord, one thousand eight hundred and seventy-eight.

"Elbridge G. Bennett. [Seal.]

"Sarah S. Bennett. [Seal.]

"Signed, sealed, and delivered in presence of Andrew Hawes."

M. P. Frank, P. J. Larrabee, and I. W. Park-
er, for plaintiff. Geo. Libby, for defendant.

EMERY, J. One Elbridge G. Bennett acquired by inheritance and deed a title to one undivided sixth of the premises sought to be divided. After acquiring that title, the only conveyance he made of the premises was by his deed to the petitioner. But before he acquired any title to this one-sixth he executed and delivered to Henry Bennett the deed set out in full in the case. This last-named deed was recorded on the day of its date, but it does not appear that the petitioner had any notice of it other than what constructive notice such record would impose upon him. Which grantee is protected under our laws? The petitioner, the later grantee, relies upon the principle of the registry law. The respondent, claiming under the earlier grantee, relies upon the principle of estoppel.

The two principles certainly conflict. This conflict is frankly acknowledged in forcible language, but ingeniously avoided, in *Society v. Cutting*, 50 Conn. 118. The court said: "If we were called upon to decide this question, we should regard it as one of very serious difficulty, inasmuch as in sustaining the later deed we should have to deny the controlling application to the case of the well-settled principles of estoppel, while in sustaining the prior deed we should have to violate the entire spirit of our registry system, which it is the policy, and we may say, in every other case, the unyielding policy, of the law to sustain."

The spirit of the system of registry of deeds in this country is that, when a title has been

traced to a party, the search for conveyances or incumbrances made by him may begin at the date of his accession to the title. *Calder v. Chapman*, 52 Pa. St. 359; *Loan Co. v. Maltby*, 8 Paige, 361; *Bingham v. Kirkland*, 34 N. J. Eq. 229; *Doswell v. Buchanan*, 3 Leigh, 365; *Buckingham v. Hanna*, 2 Ohio, 551, 557; *Wade*, Notice, § 214; *Rawle*, Cor. 428; *Hare's* notes to the *Duchess of Kingston's Case*, 2 Smith, Lead. Cas. p. 626; note to *Society v. Cutting*, 50 Conn. 122. In *McCusker v. McEvery*, 9 R. I. 528, the court felt constrained by authority to give effect in that particular case to the doctrine of estoppel, but said, "We think a statute is called for in view of this state of the law in order to carry into full effect the policy of our recording act, and to prevent its operating in cases of this kind as a snare, rather than as a protection, to purchasers."

On the other hand, it has been several times held in this state, rather upon authority than reason, that where one has assumed to convey by what is known as a full warranty deed, with warranty against all the world, a parcel of land he did not own, any title afterwards coming to him will inure at once to his former grantee. *Lawry v. Williams*, 13 Me. 281; *Baxter v. Bradbury*, 20 Me. 260; *Crocker v. Pierce*, 31 Me. 177; *Powers v. Patten*, 71 Me. 583. In the last case cited the court said the rule had been severely criticised in some quarters, but it had become the settled law of this state.

In *Fairbanks v. Williamson*, 7 Me. 96, the rule of estoppel was applied to the case of a deed containing a covenant of nonclaim; i. e. a covenant that the grantor, his heirs and assigns, should never have or make any claim to the conveyed premises. In *Pike v. Galvin*, 29 Me. 183, however, the court, in an elaborate opinion, overruled in terms the former case of *Fairbanks v. Williamson*, and held that the rule of estoppel should not be applied to a deed with a covenant of nonclaim, although the covenant embraced all persons claiming under the grantor or his heirs. The decision in *Pike v. Galvin* has been repeatedly and distinctly affirmed. *Partridge v. Patten*, 33 Me. 483; *Loomis v. Pingree*, 43 Me. 314; *Harriman v. Gray*, 49 Me. 538; *Read v. Whittemore*, 60 Me. 481.

There are also cases holding that the rule does not apply to any covenants, however full and strong, in a deed purporting to convey only the grantor's present right, title, or interest. *Coe v. Persons Unknown*, 43 Me. 432; *Ballard v. Child*, 46 Me. 152. The covenants in these cases were held to apply only to the particular right, title, or interest then conveyed, and not to any after-acquired title.

Thus we find the law settled in this state as to three classes of deeds: (1) Those of full warranty against all the world; (2) those with the covenant of nonclaim; and (3) those which purport in terms to convey only the grantor's existing right, title, or interest. Under deeds of the first class, an after-acquired

title inures to the grantee. Under deeds of the second and third classes, an after-acquired title does not pass to the grantee.

But there seems to be a criterion which, for the purpose of this opinion, may reduce the above-named three classes to two: (1) Those in which appears an intent to convey an actual estate, and protect it against all the world; and (2) those in which appears the intent to merely transfer whatever estate the grantor then has, with a guaranty against any then conflicting conveyances or incumbrances. A grantor in a deed of the first class, having assumed to convey an actual estate, and to make it good in the grantee, cannot afterwards acquire and hold that estate against his grantee, nor convey it to the detriment of his grantee. He is bound by his covenant to transfer it to his grantee, and the law, as settled in this state, to save circuity of action, holds it to be thus transferred *ex vigore legis*, even against a subsequent grantee, where the first deed was recorded. A grantor in a deed of the second class, not having assumed to convey an actual estate, and to make it good against all claims, but only to relinquish whatever estate he may have with a guaranty that he has not given any one else any claim to it, is not bound to make any other title or estate good to the grantee. If at the time of his deed he has suffered no one else to acquire any rights or claims under him, there can be no breach of his covenant. After such a deed, he is free to acquire other titles or estates in the same land, and hold them against his grantee, for he never covenanted against such titles or estates, but only against the title or estate he conveyed, whatever it was.

The particular deed in this case clearly is within the second class last above described. In it there appears no intent to convey and make good an actual estate. It contains the usual language of a deed of quitclaim. It contains no assertion that the grantor has or will convey any actual estate. There is no covenant for such an estate. The covenant is that the grantor had not then given anybody any inconsistent right or claim; that the grantee need not look for prior conveyances or incumbrances, but could look to his grantor to protect him from such.

The grantor is not bound by that covenant to acquire or extinguish for his grantee any title, estate, or incumbrance outstanding in other persons, not created or suffered by him. If the grantee should be obliged to buy them in, or extinguish them, to protect his estate, that would be no breach of the covenant. Such outstanding claims in other persons, not created by the grantor, are without the purview of the covenant. Either party may acquire them. If the grantor acquire them, he is not obliged to transfer them to his grantee, and the law does not so transfer them.

The only case in Maine that we find with a deed like this is *White v. Erskine*, 10 Me. 306. There one Moody conveyed to one Young "by deed of quitclaim with special

warranty," but he had prior thereto mortgaged the premises to Stebbins and Otis. Subsequently to his deed to Young he acquired the interest he had before conveyed to Stebbins. It was held that this interest inured to his grantee, Young. It was an interest he had himself created, and one he had warranted against. It was a "lawful claim by, through, or under him." The grantor in the deed in the case at bar could not acquire or hold or convey an estate or interest he had himself created before his deed, but any other estate or interest he was free to acquire and convey.

Judgment for the petitioner for one undivided sixth part of the land, and for partition accordingly.

(90 Me. 468)

WHITEHOUSE v. WHITEHOUSE et al.

(Supreme Judicial Court of Maine. July 1, 1897.)

TRUST—CONSIDERATION—DELIVERY—CONTRACT—GIFT—AMENDMENT OF PLEADING.

1. The defendants' testate agreed with the plaintiff that, if she would renew an engagement of marriage with him, which he had broken without just cause, he would, in case he died without marrying her, provide her at his decease with property enough to support her for her lifetime without the necessity of any labor on her part. Some time afterwards, while in failing health, not having married her, and deeming that his indebtedness to her on that account would be \$5,000, he made a check to her for that sum, depositing the same in his safe in his office, in a sealed envelope, addressed to an uncle of hers, in trust for her benefit. After that he said to the uncle, in his office, where the safe was: "There is a sealed package in my safe assigned to you, placed there for safe-keeping, and that package I deliver to you in trust for Dora M. Whitehouse [plaintiff]. I have not mentioned her in my will for the reason that what that package contains belongs to her. My brother knows all about this, and at my death he will open the safe, and deliver the package to you, and I intrust you to give the contents to Dora, for the contents belong to her." The uncle assented, and, upon communicating the fact to his niece, she also assented thereto. The package addressed to the uncle, with an indorsement to "deliver at once," contained an envelope directed to the plaintiff containing the check in suit. *Held*, that the transaction amounted to a declaration of trust founded upon a valuable consideration, with a symbolical or constructive delivery.

2. The doctrine that the donor's own check may not be the subject of a donation *causa mortis* does not apply when such check is given for a valuable consideration received by the donor in his lifetime. In such case there is a contract as well as a trust.

3. It is immaterial that the check bore a date, whether by design or mistake, several months later than the date of the death of the person executing it.

4. Objection to the amendment of a declaration becomes immaterial when the verdict is sustained without any aid from the amendment.

(Official.)

Exceptions from supreme judicial court, Kennebec county.

Action by Dora M. Whitehouse against Eugene Whitehouse and another. Verdict for plaintiff, and defendants move for a new

trial on exceptions. Motion and exceptions overruled.

This was an action of assumpsit, the original writ containing three counts,—one upon an account annexed for services, amounting to \$1,057; the second to recover the sum of \$5,000, for money had and received; and the third upon an account annexed for \$988 for board.

At the March term, 1896, the plaintiff filed an amendment to said writ, the allowance of which was seasonably objected to by the defendants, but the court allowed the same, subject to defendants' objection.

To the ruling of the court in allowing this amendment the defendants excepted. No evidence was introduced in regard to the two accounts annexed, and no claim was made to recover upon either of them.

The defendants requested the court to instruct the jury as a matter of law that this action could not be maintained upon the evidence, and that the jury were not authorized to give a verdict for the plaintiff upon the evidence in relation to the action as it stood upon the pleadings. The court declined to give such instruction, but instead thereof instructed the jury as follows:

"I instruct you, as a matter of law, that if these parties were engaged; if the time of their marriage was fixed, and postponed at his request, and, in consideration of her assenting to the postponement, he made the arrangement which has been testified to, that he would give her of his estate sufficient for her support, without work, for the rest of her life; and if for the purpose of fulfilling in whole or in part the obligation that rested upon him by reason of that special promise he did draw this check, and placed it in that envelope, drawing it in favor of the plaintiff, directing the envelope to Mr. Taylor, explaining to him the object and the beneficiary of whatever was contained in that envelope, and if the check was retained, as it is admitted to have been retained, by the executors, after they came into possession of his estate,—then there is money to the extent of the amount of this check in the hands of the executors, as a part of the estate of Dr. Tibbetts, which in equity and good conscience belongs to the plaintiff, and which she can recover in this action, and in this form of action."

To the ruling of the court declining to give the instruction above requested, and giving the instruction above quoted, the defendants excepted.

The jury returned a verdict for the plaintiff, and the defendants also filed a general motion for a new trial. The defendants offered no evidence.

The case is stated in the opinion.

Amended declaration: "Also, for that said Tibbetts, in his lifetime, on the 22d day of November, 1896, being then sole and unmarried, at said Vassalboro, to wit, at said Augusta, in consideration that the plaintiff, then also sole and unmarried, then and there promised said

Tibbetts that she would marry and take him to husband, promised the plaintiff to marry her and take her to wife on New Year's Day,—meaning the 1st day of January, 1897,—and afterwards said marriage was by mutual consent postponed until Thanksgiving Day, 1899, being the 28th day of November, 1899; and afterwards, prior to said 28th day of November, 1899, at the request of said Tibbetts, in consideration that the plaintiff would not insist on the performance of his said contract on the date agreed, but would again defer the date of their marriage, and would not cancel their said engagement, but would permit it still to subsist, said Tibbetts then and there promised the plaintiff that, if he should die before marriage to the plaintiff, he would leave her enough of his property to support her abundantly throughout her life, without any necessity for labor on her part.

"And the plaintiff avers that, in reliance upon said agreement by said Tibbetts, and solely because thereof, she waived the performance of his said contract on the date agreed, and assented to this last-named postponement of her said marriage to said Tibbetts, and did not cancel her said engagement of marriage, but suffered the same still to subsist down to the time of said Tibbetts' death. And the plaintiff avers that said Tibbetts died on the 19th day of September, 1892, and that he did not marry the plaintiff at any time before his death, and that the amount necessary for her abundant support, without labor, during her life, was \$5,000; and that, in consequence of the promise of said Tibbetts herein recited, the estate of said Tibbetts in the hands of the defendants as his executors, became liable, and in consideration thereof promised to pay the plaintiff said sum on demand, but has never paid the same, and said executors still neglect and refuse so to do. And the plaintiff avers that, in pursuance of said Tibbetts' agreement as hereinbefore set forth, and in part performance thereof, he did, in his lifetime, leave for her use and benefit, at his death, a check for \$5,000, signed by him, and payable to her, being the same check set forth in the specification under the second count of this writ, which check came into the possession of said executors; but that said defendants refused to deliver her said check, but converted the same, and the proceeds thereof, to the use of said estate, and have retained the same, and refused to pay over any part thereof to the plaintiff; whereby the plaintiff says that said defendants hold said sum of \$5,000, and the interest thereon, as money which in equity and good conscience belongs to the plaintiff, and should be paid to her."

O. D. Baker and F. L. Staples, for plaintiff.
L. C. Cornish, E. W. Whitehouse, and W. H. Fisher, for defendants.

PETERS, C. J. The plaintiff presents a very meritorious claim in this equitable action of money had and received for the recovery of

the amount of a check on a Waterville bank running to her for the sum of \$5,000, and executed by Dr. Benjamin L. Tibbetts, of whose estate the defendants are executors. The consideration for the check was an indebtedness for that sum or more, due her from him in his lifetime, the indebtedness growing out of their relations while engaged to be married to each other. The matrimonial engagement had existed between them for 16 or more years, commencing in her earliest womanhood, and ending when he died, September 19, 1892. He was a widower during the period of their engagement, and much her senior in years.

During their engagement a day for their marriage had been several times appointed by them, and when such day arrived he had habitually made some excuse for requesting its postponement. Finally, on Thanksgiving Day in 1889, upon his again failing to keep his agreement to be married on that day, feeling that her self-respect would no longer permit such repetitions of broken promises, and being strongly influenced thereto by the wishes of her mother, she resolved to discontinue further relations with him, and refused to again renew or continue their engagement of marriage. Shortly afterwards, however, beset by his apparently sincere promises and protestations, she became induced to consent to a renewal of the engagement, in consideration of his agreement, expressly declared in the presence of her mother, that, if she would consent to a renewal of the engagement, and a reasonable postponement of the marriage, and he should die before a marriage between them took place, he would provide her with an amount out of his estate which would be enough for her support for the rest of her life without labor. Thereupon the engagement continued, for better or worse, until he died, and they never were married to each other.

The sequel is told by Mr. Taylor, an uncle of the plaintiff, whose testimony we quote: "I am an uncle to Dora M. Whitehouse. I am knowing to the fact that for sixteen or seventeen years before his death Dr. Tibbetts was understood to be engaged to Miss Whitehouse, and during all that time was on intimate terms with her and her family; that in the summer of 1892, during hot weather, I called one day on Dr. Tibbetts, and he said to me, when I went into his office, and passed the time of day, 'Good morning; I am very glad you called, for I have some important business with you;' and I replied, 'All right.' Then the doctor said to me: 'There is a sealed package in my safe, assigned to you, placed there for safe-keeping, and that package I deliver to you in trust for Dora M. Whitehouse. I have not named Dora's name in my will for the reason that what that package contains belongs to her. My brother knows all about this, and at my death he will open the safe, and give the package to you, and I intrust you to give the package to Dora, for the contents belong to her.' I said, 'All right.' Just previous to the words above stated, I asked Dr. Tibbetts,

when I entered his office, how he was, and he said: 'Well, poorly. If something don't take place in my favor pretty soon, I can't stand it a great while.' That is all the conversation we had on that subject.

"On the morning just after Dr. Tibbetts' death I was at the house, and saw the doctor's brother, Samuel Tibbetts, one of the executors, in presence of Dr. Mabry, and I said to Mr. Tibbetts, 'There is a package in that safe belongs to me,' and he replied: 'I have not time to get it now, for we are in a hurry laying out the doctor.' Said he: 'I am coming down in a short time after the funeral to open the safe, and then I will hand it to you. I will notify you when I am coming. What is your post-office address?' and I told him it was South Vassalboro. Said I, 'Give me a piece of paper, and I will write it down,' and then Dr. Mabry said: 'I know his post-office address, and if you forget it I can tell you.' I answered, 'All right,' and that ended the conversation with us there. I received no notice of the time the safe was opened, and Tibbetts never did deliver to me the package which was in the safe. Afterwards, on or about the 3d of April, 1893, I had a talk with Tibbetts, the executor, in the office and in the presence of E. W. Whitehouse, and then demanded the package and check, but I never got it, as he declined to give it to me.

"Dr. Tibbetts died September 19, 1892.

"The same day that Dr. Tibbetts delivered to me the package in trust, when I got home I said to Dora, 'I have got something to tell you,' and she replied: 'What is it?' I said: 'Dr. Tibbetts has left a package delivered to me in trust for you.' She replied: 'The doctor told me that if he died before we were married I should be well provided for.' Neither Dora nor I knew what the package contained until after the death of Dr. Tibbetts.

"Dr. Mabry, S. S. Brown, Samuel Tibbetts, and S. S. Lightbody were present when the safe was opened, and saw Brown take and break open the package."

Upon the interpretation to be given to the testimony of Mr. Taylor, in connection with the other facts previously stated, depends the question whether the present action is maintainable. It may not be amiss, however, to add that the plaintiff, for all the time she was engaged to the doctor, was attentive to his welfare and interests by a continual service expended in keeping his books and drawing off his accounts, doing his washing, mending, and making clothes for him, and other like services.

When the interview was had with the uncle of the plaintiff by the doctor, only about a month before his death, the doctor evidently believed his last sickness was upon him, and he knew that the contemplated marriage was then a most improbable, if not impossible, thing. There may be some doubt if he ever intended to consummate the engagement by marriage, but her faith in him never failed, although it faltered at a time. But he no

doubt sincerely intended to keep his promise to provide sufficiently for her out of his estate. He calculated in his own mind that \$5,000 would be equal to the provision promised her, and he drew the check for that amount as payment of that sum, or as security for its payment. The act speaks for itself with no uncertainty. He says, "This package belongs to her," thereby admitting his indebtedness to her for that amount.

There was, according to this evidence, at least a most significant constructive delivery of the package and its contents to Mr. Taylor, while he was in the office where the safe was in which the package was deposited, he assenting to the confidential instructions imparted to him; and, although not knowing exactly what the package contained, believing that the contents were valuable, and appreciating the nature of the trust committed to him. The package thereafter remained in the safe until the doctor's death, the latter intending to make, and undoubtedly supposing he had made, a sufficient and legal delivery of the package to the trustee. The plaintiff approved of the transaction when informed of it.

We might, no doubt, safely stop at this point in the discussion, allowing the validity of the check to depend on a declaration of trust which is exhibited by the case, according to the principle in equity settled in the late cases of *Savings Inst. v. Hathorn*, 88 Me. 122, 83 Atl. 836, and *Bank v. Merriam*, 88 Me. 146, 83 Atl. 840. But we think this case has stronger grounds to rest upon than those cases have, and that, while he resorted to some of the forms of a trust in order to effectuate his intention, the doctor was endeavoring, by what he did, to secure to the plaintiff the payment of \$5,000, which he conceived would be due her under his agreement that he would provide her with enough out of his estate to support her without labor on her part during her lifetime. The sum due her from the nature of such a contract would be a claim against his estate after his death, but the contract was a subsisting obligation binding him while he lived. An action would lie on the original contract, or on the check tendered by him as a settlement and payment of such contract, and accepted by the plaintiff accordingly.

To be sure, the check did not come to her hands in the lifetime of the drawer. Nor did it need to, in order to be valid by delivery. The delivery to the uncle inured to the benefit of the niece, on the principle that where a deed or other instrument of title is delivered by a grantor in his lifetime to a third person, with directions to deliver the same to the grantee after the grantor's death, and such after-delivery is made, the title under such deed or instrument takes effect at the date of the first delivery. This is because of the effect of the relation between the two acts of delivery. Says Chief Justice Shaw, in *Foster v. Mansfield*, 3 Metc. (Mass.) 412, where the principle is clearly discussed: "When the future delivery is to depend on the payment of money or

the performance of some other condition, it will be deemed an escrow. When it is merely to await the lapse of time, or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently." In the case cited it was a deed of land which received a first and a second delivery. But the doctrine is just as logically applicable in the case of the delivery of a bond, check, note, certificate of stock, or any other instrument or muniment of title.

It is argued that the second delivery never took place, inasmuch as the check did not at any time, even after the doctor's death, come into the hands of the plaintiff. The answer to such suggestion is that her demand for the check and the defendants' refusal to deliver it was, in effect, equivalent to a second delivery. Equity would have compelled any person having the check to surrender it to the plaintiff, and the law would allow an action for its conversion against any persons who had secreted or despoiled the same. The defendants are estopped from asserting such a point of defense.

Nor can the defense successfully rely on the doctrine that a check cannot be the subject of a *donatio mortis causa* unless the check be presented and paid in the lifetime of the donor; a check, not supported by value received, being considered under such circumstances as of a testamentary character. That is, a man may not donate what is merely his own naked promise. The objection does not lie here, because the check in the present instance was not a gift of any kind, but a contract founded on a full, and even overwhelming, consideration. Mr. Perry, in his book on *Trusts* (volume 1, § 95), says: "Where an agreement is entered into for a valuable and legal consideration, and a trust is intended, the mere form of the instrument is not very material, for, if the trust is not perfectly executed or created by the instrument, a court of equity may enforce it as a contract." The case of *Merrill v. Peaslee*, 146 Mass. 460, 16 N. E. 271, in some of its features bears a resemblance to the present case. It appeared there that a married woman had separated from her husband for extreme cruelty practiced upon her by him, and had applied for a divorce and alimony. During the pendency of the divorce proceedings, she was induced to return to cohabitation with him on his giving a note for \$5,000 to a trustee for her benefit, the note not to be collected during his lifetime, but afterwards, out of his estate, provided she cohabited with him thereafter so long as he lived, and she did so. A majority of the court refused to sustain an action brought by the trustee on the note against the executors of the husband, but only on the ground that there was no consideration for the note, inasmuch as it was her duty to return to her husband if she could live with him. Three members of the court dissented in a separate opinion, which Mr. Perry, in the section of his work before cited, characterizes as "far weightier" than the opinion of the court.

The plaintiff was the legal owner of a check, or, if not the legal, surely the equitable, owner, which amounted to an appropriation of \$5,000 for her use by the drawer of such check, according to the case of *Emery v. Hobson*, 63 Me. 32, and in equity was an assignment of so much of the drawer's funds as amounted to that sum, according to the case of *Bank v. McLoon*, 73 Me. 498; and those funds have been wrongfully covered into the estate of the drawer of the check by his executors. Those funds should be restored to the true owner, and the law and equity conspire together in requiring such restoration.

It is immaterial that the check turned out, either by design or mistake, to bear a date some months later than the date of the death of the person executing it.

The amendment to the declaration, to which an exception was taken, becomes of no consequence, as the verdict is sustained without the aid of any amendment.

Motion and exceptions overruled.

(69 N. H. 87)

CITY OF CONCORD v. BOSTON & M. R. R.

(Supreme Court of New Hampshire. Merrimack. March 12, 1897.)

RAILROADS—DUTY TO PROVIDE SUITABLE CROSSINGS.

Under Pub. St. c. 159, § 1, making it the duty of railroads to provide "suitable crossings" for the accommodation of the public, a railroad must furnish lights for an overhead bridge, which public safety requires to be lighted.

Action of debt by the city of Concord against the Boston & Maine Railroad for money paid for lighting a covered bridge on a highway in Concord. Facts agreed. Prior to the building of the bridge, Bridge street crossed the defendant's tracks at grade. The bridge was erected by the defendant about 1860 as an overhead railroad crossing, and it has maintained it and kept it in repair. Within one-half mile from the bridge there are living 100 inhabitants, and it is necessary that the bridge should be lighted. In June, 1895, the parties agreed that for the safety of the public the bridge should be lighted, that the expense of lighting should be paid in the first instance by the plaintiff, and that the defendant would repay the same to the plaintiff in case the court should determine that the expense should be borne by the defendant. Judgment for plaintiff.

Sargent & Hollis, for plaintiff. J. M. Mitchell and F. S. Streeter, for defendant.

CARPENTER, C. J. "It shall be the duty of the proprietors of every railroad to provide suitable crossings * * * for the accommodation of the public." Pub. St. c. 159, § 1. The bridge is a crossing. Until it is made reasonably safe and convenient for the public use, it is not suitable. It being agreed that the public safety requires the bridge to be lighted, there must be judgment for the plaintiff. All concurred.

MARSTON et al. v. OSGOOD.

(Supreme Court of New Hampshire. Hillsboro. March 12, 1897.)

ACCEPTANCE OF SEISIN—BOND FOR TITLE—INTEREST OF OBLIGEE—NOTICE—WRIT OF ENTRY—EQUITABLE DEFENSES.

1. A creditor's subsequent conveyance, with warranty, of property acquired by levy, is sufficient evidence of his acceptance of seisin.

2. Where defendant took possession of land under a bond conditioned that upon the payment of \$1,500 the obligor would convey the land to him, he obtained an interest therein.

3. His possession was constructive notice of that interest, and a creditor of his obligor, levying on the property, took the legal title, subject to the obligation to convey upon the performance of the conditions of the bond by defendant.

4. Performance of the conditions of the bond before levy, in the absence of fraud, could afford no defense in an action at law, defendant's remedy being in equity.

Exceptions from Hillsboro county.

Writ of entry by Ella M. Marston and others against A. C. Osgood. Trial by the court, and verdict for the plaintiffs. Defendant brings exceptions. Overruled.

May 12, 1882, Charles Sanborn owned the demanded premises, and on that day gave the defendant a bond to convey the same to him, at any time within three years, upon the payment of \$1,500, together with interest thereon, to be paid every three months, and all taxes. By the terms of the bond the defendant was entitled to take, and took, immediate possession of the premises, and has ever since remained in possession. He paid the interest to May 12, 1883, and the taxes, but has paid nothing since. May 28, 1883, T. G. Sanborn caused the premises to be attached on his writ against Charles Sanborn, and, having obtained judgment, caused the execution issued thereon to be levied on the premises December 19, 1884, and in April, 1886, conveyed the same, with warranty, to George Marston, since deceased, whose heirs at law the plaintiffs are. The officer returned that he delivered seisin to the creditor's attorney. The defendant objected to the levy because the return does not show that the creditor accepted seisin. The court found that the creditor accepted seisin, and, subject to exception, overruled the objection. The defendant claimed that the levy was void as against him, but the court ruled otherwise, and he excepted.

G. K. Bartlett and D. Cross, for plaintiffs. A. C. Osgood and D. A. Taggart, for defendant.

CARPENTER, C. J. The levying creditor's conveyance of the land with warranty was competent and sufficient evidence of his acceptance of seisin. The defendant was, in equity, entitled to a conveyance upon the performance of his part of the contract. He owned an interest in the land. Pub. St. c. 233, § 19; *Edgerly v. Sanborn*, 6 N. H. 397, 399. Of this interest his possession of the premises was constructive notice. *Pritchard v. Brown*, 4 N. H. 397; *Cutting v. Pike*, 21 N. H. 347. His equitable right to a conveyance was not af-

fected by the levy. Under it the creditor took the legal estate, subject to the equitable obligation to convey the land to the defendant on his performance of the conditions of the bond. Story, Eq. Jur. §§ 784, 788. But the defendant's remedy for a denial of his right is in equity. A full performance of the conditions of the bond before the levy or attachment could, in the absence of fraud, afford him no defense to the present action. *Ela v. Pennock*, 38 N. H. 154. Exceptions overruled.

CLARK, J., did not sit. The others concurred.

(87 N. H. 545)

WOODBURY et al. v. BUTLER.

(Supreme Court of New Hampshire. Hillsboro. March 16, 1894.)

LANDLORD AND TENANT—ACTION FOR POSSESSION
—NOTICE TO QUIT—WAIVER BY TENANT—ESTOPPEL—DAMAGES.

1. Where, in an action for possession under the landlord and tenant act, plaintiff (a purchaser of the property at auction) testified that, at the sale, defendant, in answer to an interrogatory, stated that he would leave the premises, which the tenant denied, the only issue was such fact, and instructions as to estoppel by silence were properly refused.

2. The effect of a sale of premises in the possession of a tenant was to subrogate the grantees to the rights and remedies which the grantor would have had, under Pub. St. c. 246, § 22, if the estate had not been conveyed, and thereby make such tenant the tenant of the grantees.

3. Where a tenant at will from year to year agreed, as a part of the terms of sale of the premises in his possession, that such tenancy should terminate in four weeks thereafter, it was a waiver of his right to three months' notice under the landlord and tenant act, and estopped him to set up his tenancy from year to year in an action for possession by the purchasers at such sale.

4. Under Pub. St. c. 246, § 20, providing that "if a defendant files a plea of title or appeals, and the plaintiff recovers judgment against him, the court shall cause his damages, exemplary or otherwise, * * * to be assessed by the jury who try the issue," plaintiff's damages were properly assessed by the jury in connection with the trial of the issue on the right of possession.

Exceptions from Hillsboro county.

Action by Frank M. Woodbury and another against George C. Butler for possession under the landlord and tenant act. Transferred from the police court on the filing by defendant of a plea bringing in question the title to the demanded premises. Trial by jury. Verdict for plaintiffs. Defendant excepts. Overruled.

Jesse Gibson and others formerly owned the demanded premises, and sold them at auction, December 9, 1891, to the plaintiffs. The defendant was then in possession as tenant at will from year to year of Gibson and others, under an agreement by which his rent was payable at the end of each year, which was May 1st. Before calling for bids the auctioneer stated, as a part of the terms of sale, that the defendant was to have a reasonable time in which to vacate the premises, and, upon inquiry being made as to what

would be considered a reasonable time, replied, "Four weeks." He asked the defendant, in the presence and hearing of those present, if that was satisfactory to him, and the evidence tended to show that he assented. The defendant testified that he heard the inquiry, but denied that he assented. There was also evidence tending to show that about the time the four weeks expired an agreement was made between the plaintiffs and defendant by which the defendant was to occupy as tenant of the plaintiffs until April 1, 1892, at a stipulated monthly rental. On March 8, 1892, the plaintiffs gave the defendant notice to quit April 11th. On April 1st they presented to him a bill of the rent from the date of their purchase to April 1st, according to the agreement above referred to; and, the defendant refusing to pay it, they gave him another notice to quit on April 11th. As he did not then quit, they brought this action April 12th. He continued to hold possession until November 29th. He did not claim a right to occupy after May 1st. May 2d, one of the plaintiffs urged him to vacate, stating that it would cause them serious damage if he did not. He declined for the reason that a woman to whom he had sublet the house was sick and unable to move out. He did not offer any excuse for not vacating after the woman got better, which was in a few weeks. There was ill feeling between the defendant and one of the plaintiffs. The plaintiffs claimed that the defendant held possession maliciously, with a purpose of injuring them, and that they were much annoyed by his conduct. The defendant requested the following instructions to the jury: "(1) That there was no duty upon the defendant to assent to any terms made by the auctioneer; (2) that a tenant is not estopped by his silence at an auction from setting up his rights as a tenant; and (3) that if the jury are satisfied that he did assent to the terms of the auction sale, in regard to his getting out upon a month's notice, he did not thereby become the tenant of a subsequent purchaser, and did not waive his right to a three-months written notice to quit, under the landlord and tenant act." These instructions were not given, except as embodied in instructions of which the following is the substance: "If the jury find that the defendant assented to the terms stated by the auctioneer, and the plaintiffs acted upon such assent in purchasing the property, the defendant is estopped from claiming possession in conflict with such assent. If the defendant assented that his tenancy should terminate in four weeks after the sale, and the plaintiffs bought the property in view of such assent, the defendant is bound by it, and had no right to occupy after the expiration of four weeks, unless the plaintiffs extended the time by a new agreement, although his tenancy would not otherwise have expired until May 1st. If the defendant made an agreement with the plaintiffs, at the end of about four weeks after the

sale, by which he was to occupy the premises as their tenant until April 1st at a stipulated monthly rental, the notices to quit were sufficient, and the defendant had no right to occupy after April 11th." The defendant excepted because the instructions requested were not given. The defendant also excepted because the court caused the plaintiffs' damages to be assessed by the jury in connection with the trial of the issue upon the right of possession. The damages were assessed in two sums,—one (\$115.41) for all elements of damage except those pertaining to what is termed "exemplary damages," and the other (\$154.26) for exemplary damages. As to the latter the jury were instructed that, if the defendant's withholding of possession from the plaintiffs was malicious,—if he was governed by malice and a desire to injure the plaintiffs,—they were entitled to recover compensation for the injury to their feelings, and for their mental annoyances and troubles growing out of his malicious acts. There was no exception to the charge, but the defendant claimed that the plaintiffs were not entitled to exemplary damages in such a case, and moved that the sum assessed by the jury on that account be stricken from the judgment.

George B. French, for plaintiffs. E. S. & H. A. Cutter and J. P. Bartlett, for defendant.

BLODGETT, J. The first and second instructions requested by the defendant were not pertinent to the issue, and therefore were properly denied. The issue was not whether it was the duty of the defendant to assent to the terms stated by the auctioneer, nor whether his silence at the auction would have estopped him from setting up his rights as tenant, but whether he did expressly assent to those terms, as he might lawfully do. *Currier v. Perley*, 24 N. H. 219, 226.

The third instruction requested was not correct, as matter of law. The effect of the sale was to subrogate the grantees to the rights and remedies which the grantor would have had if the estate had not been conveyed (Pub. St. c. 246, § 22), and thereby make the defendant the grantees' tenant; and if the defendant, as a part of the terms of sale, agreed that his tenancy should terminate in four weeks thereafter, it was a waiver of his right to three months' written notice to quit, under the landlord and tenant act. Having voluntarily contributed to the inducements which led to the sale, and the plaintiffs having presumably acted upon such inducements, the defendant became estopped from setting up his tenancy from year to year. "Where one, by his words or conduct, intentionally causes another to believe in the existence of a certain state of things, and to act on that belief, so as to alter his previous position, he shall be concluded from denying their existence, provided such denial will operate to the prejudice of the other party." *Davis v. Sanders*, 11 N. H. 269, 281; *Davis v. Handy*, 37 N. H. 65, 75; *Drew v. Kimball*, 43 N. H. 262,

285. And, whatever one's real meaning or purpose may be, if he so conduct himself that a reasonable man would take the representation to be true, and to be acted upon, and it is believed and acted upon, the same principle of estoppel applies. *Simons v. Steele*, 36 N. H. 73, 79, and authorities cited.

The plaintiffs' damages were properly assessed by the jury in connection with the trial of the issue upon the right of possession. "If a defendant files a plea of title or appeals, and the plaintiff recovers judgment against him, the court shall cause his damages, exemplary or otherwise, including a just compensation for the use or detention of the property, and for any injury thereto, to be assessed by the jury who try the issue, or otherwise, and may issue execution therefor, or the same may be recovered on the recognizance as before provided." Pub. St. c. 246, § 20. The contention of the defendant that under this statute the jury must first come in and report to the court their finding upon the issue of title, and then, if the finding is for the plaintiff, must return to their room, assess the damages, and report again, has no merit, except that of novelty, and, if adopted, would occasion merely useless circuitry and delay.

The exception that exemplary damages are not recoverable in this action is settled adversely to the defendant by the statute last cited, and, as the instructions upon this branch of the case were not excepted to, it must be presumed they were satisfactory to the defendant. *Walker v. Walker*, 64 N. H. 55, 57, 5 Atl. 460. Exceptions overruled.

CHASE, J., did not sit. The others concurred.

(68 N. H. 549)

LAWSON v. KIMBALL et al.

(Supreme Court of New Hampshire. Hillsboro. July 31, 1896.)

MECHANICS' LIENS—WAIVER—PARTIES—DISCRETION OF COURT.

1. Pub. St. c. 141, §§ 10, 13, 15, require a person who performs labor and furnishes material in the construction of a building, after giving notice that he will claim a lien thereon for the same, to render an account to the owner or his agent, "as often as once in thirty days," of the labor performed and material furnished during the 30 days, and make the owner liable therefor to the claimant. *Held*, that the failure to render such account is a waiver of the lien for the preceding 30 days, but does not preclude the assertion of a lien for work performed and material furnished thereafter.

2. The allowance of an amendment bringing in new parties defendant is a matter within the discretion of the trial court, to which no exception lies.

Assumpsit by Harry J. Lawson against Frank P. Kimball and others, to enforce a lien for \$562.45, the balance due the plaintiff for ironwork furnished by him for the building of defendant Clark's block. The writ is dated January 20, 1894. Facts found by the court. Kimball was Clark's agent.

and had charge of the construction of the block. Early in 1893, Clark entered into a written contract with the defendants Maurise & Dufrane to construct for him a brick block. March 25, 1893, the plaintiff agreed with Maurise & Dufrane to furnish and put in place on the block skylights, wall caps, and bay windows of galvanized iron for \$1,162. September 19, 1893, the plaintiff, who had then partially performed his contract, notified Clark and Kimball in writing that he should claim a subcontractor's lien. Previous to or on December 6, 1893, Maurise & Dufrane paid the plaintiff \$500, which was all that was due him for labor and materials furnished up to that time. After December 14, 1893, the plaintiff furnished the remaining labor and materials necessary to finish his work, and January 12, 1894, completed his contract. The next day he gave to Clark an account in writing of the labor performed and materials furnished within the preceding 30 days, amounting to \$562.45. It was not questioned that this sum was due to him from Maurise & Dufrane. They failed January 12, 1894, before they had finished the block. Clark finished it at a cost exceeding the contract price. He advanced to them, before their failure, some thousands of dollars more than was due to them under the contract. He paid them nothing after he received the account rendered by the plaintiff January 13, 1894. The plaintiff brought the action originally against Clark and Kimball only, seeking to charge them personally for his claim. Subject to their exception, he was afterwards permitted to amend by making Maurise & Dufrane parties defendant for the purpose of establishing and enforcing his alleged lien. Judgment for plaintiff.

J. W. Center and Drury & Peaslee, for plaintiff. Andrews & Andrews and Burnham, Brown & Warren, for defendants.

CARPENTER, C. J. A person who performs labor or furnishes materials to the amount of \$15 or more for erecting, altering, or repairing a house or other buildings or appurtenances, by virtue of a contract with an agent, contractor, or subcontractor of the owner, has a lien thereon, and on any right of the owner to the lot of land on which the house, buildings, or appurtenances stand, if he gives notice in writing to the owner, or to the person having charge of the property, that he shall claim such lien before performing the labor or furnishing the materials for which it is claimed. The person giving the notice "shall, as often as once in thirty days, furnish to the owner or person having charge of the property on which the lien is claimed, an account in writing of the labor performed or materials furnished during the thirty days; and the owner or person in charge shall retain a sufficient sum of money to pay such

claim, and shall not be liable to the agent, contractor, or sub-contractor therefor, unless the agent, contractor, or sub-contractor shall first pay it." Pub. St. c. 141, §§ 10, 13, 15. The requirement of an account once in 30 days is designed for the protection of the owner. If within 30 days after notice of the claimant's intention to assert a lien he receives no account, he is entitled to understand that within that period nothing has been done for which a lien is claimed, and to act accordingly. But this does not warrant him to assume that a lien may not be asserted for work done or materials furnished during the succeeding 30 days or afterwards. The claimant's failure to render an account in 30 days is not a waiver or withdrawal of his notice. He is not required to furnish an account for which he has been already paid by the contractor. Such an account would be useless. The account is a prerequisite to the maintenance of a lien for the work done and materials furnished during the preceding 30 days. If no lien is claimed, no account need be rendered. Whether the owner can take advantage of a failure to render an account by which he is not injured is a question that need not now be considered. The principal objection urged against the maintenance of the plaintiff's lien is that his contract with Maurise & Dufrane was entire, and cannot be apportioned; in other words, that the sum due to him for labor and materials furnished after a partial performance of the contract cannot be determined. The objection has no foundation in fact. The court finds that the plaintiff was, on the 6th day of December, 1893, paid by the contractors the sum of \$500, which was all that was due him for labor and materials by him furnished before that time. This is a finding that on the completion of his contract he would be entitled to receive \$662 more from the contractors. It is conceded that for the part of the contract which the plaintiff performed after December 14, 1893, he is justly entitled to \$562.45. This is an apportionment by the act of the parties. What the law would do in the absence of the parties' agreement, it is not necessary to consider. Whether justice required that the amendment making the contractors parties to the suit should be granted was a question of fact for the trial court, to whose decision no exception lies. Whether the plaintiff's suit was properly framed for the purpose of enforcing his lien (*Bryant v. Warren*, 51 N. H. 213; *Jacobs v. Knapp*, 50 N. H. 71, 79; *Hill v. Callahan*, 58 N. H. 497), and, if not, whether the defect was or could be cured by the amendment, are questions not submitted and not considered. Judgment for the plaintiff.

WALLACE, J., did not sit. The others concurred.

(69 N. H. 98)

SCHMIDT et al. v. ELLIS et al.(Supreme Court of New Hampshire. Hillsboro.
March 12, 1897.)**INSOLVENCY—PARTNERSHIP—NONRESIDENT PARTNER—JURISDICTION.**

1. Pub. St. c. 201, § 46, providing that the insolvency of a firm shall render each partner insolvent, and his property shall pass to the messenger and assignee in the insolvency proceedings, is applicable to such partners only as reside in the state.

2. Though the insolvency court has no jurisdiction of nonresident debtors, under Pub. St. c. 201, §§ 6, 42, such exemption of a nonresident partner and of his private property from the operation of the law does not deprive the court of jurisdiction over the resident partner, his individual property, and the partnership property in his possession.

Appeal from probate court, Hillsboro county.

Attachment by Schmidt and another against Ellis and another. From a decree of the probate court adjudging defendants insolvent, plaintiffs appeal. Facts agreed. Dismissed.

In 1892 the defendants, Ellis, of Manchester, and Tirrell, of Boston, in Massachusetts, began business in Manchester as co-partners under the name of Ellis & Co. All the business of the firm has been done in Manchester, and they have had elsewhere no partnership property. In August, 1895, their property was attached by the plaintiffs, and in September following, upon their own petition, the firm was decreed insolvent. The plaintiffs assign as the reason for their appeal that the decree is invalid, because one of the defendants is not a resident in the state.

Burnham, Brown & Warren and Drury & Peaslee, for appellants. D. A. Taggart, for appellees.

CARPENTER, C. J. The statute providing that "the insolvency of a partnership shall render each partner insolvent within the meaning of this chapter, and his property * * * shall pass to the messenger and assignee in the partnership proceedings" (Pub. St. c. 201, § 46), is applicable to such partners only as reside in the state. The insolvency court has no jurisdiction of nonresident debtors. Pub. St. c. 201, §§ 6, 42; *Ayer v. Weeks*, 65 N. H. 248, 18 Atl. 1108; *Smith v. Stanley*, 67 N. H. —, 36 Atl. 254; *Smith v. Hammond* (Coos, June, 1895).¹ Tirrell individually and his private property are not affected by the decree. But his exemption from the operation of the law does not deprive the court of its jurisdiction over Ellis, his individual property, and the partnership property in his possession. No more does the circumstance that Tirrell's separate property cannot be here administered and distributed among his creditors afford any reason why the property of Ellis and of the firm should be "screened from the operation of the insolvent law." *McDaniel v. King*, 5 Cush. 469, 476. Appeal dismissed. All concurred.

¹ The opinion had not been filed October 25, 1897.

(68 N. H. 561)

HINDS et al. v. HEATH.(Supreme Court of New Hampshire. Hillsboro.
July 31, 1896.)**INSOLVENCY—PETITION—EXECUTION BY CREDITOR'S AGENT—DEBTS PAYABLE IN FUTURE.**

1. A creditor's petition in insolvency may be executed by one specially authorized to act for him.

2. In Pub. St. c. 201, § 42, providing that a petition of creditors in insolvency proceedings must show that the debtor is "owing" them \$300 or more, and that his property within the state, not exempt from attachment, is, in their belief, insufficient to pay his "debts," the amount required to be owing to petitioners may include claims payable at a future date.

3. In estimating the amount owing to petitioners, a note made by a firm, since dissolved, of which the debtor was a member, may be included.

Appeal from probate court, Hillsboro county.

Petition by O. L. Hinds and others to the probate court for a decree adjudging G. M. Heath insolvent. From a decree for petitioners, defendant appeals. Dismissed.

Facts agreed: A salesman of one of the plaintiffs subscribed the plaintiff's name to the petition, and made oath to it as his agent, at his request, communicated by telegraph. A part of the defendant's indebtedness to the plaintiffs consists of a promissory note made by a firm now dissolved, of which the defendant was a member, and the other member of which is solvent, and of a promissory note which did not become due and payable until September, 1895. If either note is deducted from the plaintiffs' claims, the defendant's indebtedness is less than \$300.

J. B. Parker, for appellant. E. S. & H. A. Cutter, for appellees.

CARPENTER, C. J. The creditor's execution of the petition by the salesman, his authorized agent, was sufficient. *Flint v. Clinton Co.*, 12 N. H. 430, 436. The fact that another is equally liable with the defendant upon one of the demands of the plaintiffs does not make the debt any the less an indebtedness of the defendant. Upon the debtor's assignment, he may be declared insolvent, although none of his debts are due and payable. It is sufficient if it "shall appear to the satisfaction of the judge that" he "is not able to pay his debts in full." Debts not due are provable against his estate. Pub. St. c. 201, §§ 6, 7, 13. A petition of creditors in insolvency proceedings must show that the debtor is "owing" them \$300 or more, and that "his property within the state, and not exempt from attachment, is in their belief insufficient to pay his debts." If these allegations "are found to be true, the judge shall adjudge the debtor insolvent." Pub. St. c. 201, § 42. By the word "debts" the legislature intended all debts, as well those that are not as those that are presently payable. If this were otherwise doubtful, it is made certain by the provision that debts not due may be proved. In ordinary and popular speech, if not in a strict and tech-

nical sense, one is properly said to be indebted to another, or to be "owing" him a debt, though it is payable at a future day. U. S. v. Bank, 6 Pet. 33, 36, 37. In this sense "owed" is used in the statute providing that the commissioner to allow claims against the estate of a person deceased "shall allow all just demands which the deceased owed, * * * although such demands may not then be payable." Pub. St. c. 192, § 8. Any other construction would, in some cases, defeat the purpose of the statute. A creditor whose demand is due, and sufficiently large, could, by attachment and levy, appropriate to its satisfaction the entire property of the debtor, in spite of all the other creditors, if their debts do not fall due within three months from the time of the attachment. Appeal dismissed. All concurred.

(68 N. H. 546)

VALLEY v. CONCORD & M. R. R.

(Supreme Court of New Hampshire. Hillsboro. July 31, 1896.)

NEGLECT—PLEADING—DUE CARE—FRIGHTENING HORSES—OUTSIDE OF HIGHWAY—EVIDENCE—SUBSEQUENT CONDUCT—INJURIES—DIFFERENT DRESS—CROSS-EXAMINATION—SUGGESTION—REBUTTAL.

1. Where plaintiff's horses were frightened by lumber negligently piled, an allegation of due care is not necessary in an action for injuries occasioned thereby.

2. As evidence that her horses were frightened by a pile of lumber likely to frighten horses, plaintiff may show their conduct on the same day, on being driven by the pile, after they were frightened.

3. The kind of dress that a plaintiff is obliged to wear after her injury may be shown, on the question of the extent of the injury.

4. Where defendant, by questions propounded on cross-examination, suggests or insinuates that plaintiff's relations with a certain man are illicit, she may rebut the suggestion by evidence that it was without foundation.

5. The fact that lumber was negligently piled outside the limits of a highway does not relieve one from liability for injuries occasioned by horses in the highway being frightened thereby.

Exceptions from Hillsboro county.

Action by Flora L. Valley against the Concord & Montreal Railroad. There was a judgment for plaintiff, and defendants bring exceptions. Overruled.

The court, subject to exception, overruled a demurrer to the declaration, the allegations of which were, in substance, that the defendants "so negligently and carelessly placed, piled, and scattered about, close to" a public highway, certain planks, timbers, and lumber, that the plaintiff's horse, attached to a wagon, while she was lawfully driving it on the highway near the timbers and lumber, was thereby frightened, and caused to run and upset the wagon, whereby the plaintiff was injured. The accident occurred near a highway crossing, and the horse was afterwards, on the same day, twice driven by the same place. The plaintiff's counsel, in his opening, stated that on approaching near the lumber the horse "became uneasy, excited, and pricked up her

ears," and that on the first occasion "a person took her by the bridle and led her past the ties and planking, after which she was willing to go along, and resumed her usual pace." To these statements the defendants excepted. Subsequently the plaintiff, without objection, introduced evidence tending to show that the conduct of the horse was as stated by counsel. Subject to exception, the plaintiff testified that she wore a Mother Hubbard dress the summer after the accident; that she could not bear clothing around her, or wear corsets; that she had worn them only twice since the accident, and always wore them before; that prior to the accident her clothes were suspended from her corsets, and since by suspenders over her shoulders. The plaintiff's evidence tended to show that for five years prior to the accident she was employed as housekeeper in the hotel of one Condon. She was cross-examined in respect to her relations with Condon, for the purpose, apparently, of showing that they were improper. On re-examination she was permitted, subject to exception, to state what persons composed Condon's family and employes, and to name some of his boarders. A physician called to the plaintiff soon after the accident testified that he found her in bed; that she was nervous, flinched under examination; and, subject to exception, that he considered her hardly capable of making correct answers. Another physician testified that he examined the plaintiff, and found the coccyx displaced, and, subject to exception, that, if she were thrown from a wagon and dragged feet first, she might strike against something and fracture the coccyx; that, if she was dragged by the hands, there would be a possibility of striking against something, and fracturing it; that it is pretty well protected, still a fall upon the back frequently fractures it. The court declined to instruct the jury that, if the ties and planks were outside the limits of the highway, the defendants were not liable.

Burnham, Brown & Warren and G. W. Prescott, for plaintiff. F. S. Streeter, O. E. Branch, and J. W. Fellows, for defendants.

CARPENTER, C. J. The demurrer was properly overruled. An allegation of due care on the part of the plaintiff, or that the lumber was within the limits of the highway, was not necessary. *Corey v. Bath*, 35 N. H. 530; *Gordon v. Railroad*, 58 N. H. 396.

The conduct of the plaintiff's horse after the accident, and on the same day, on being driven by the pile of lumber, was competent evidence on the question of the cause of the accident. It tended to show that the horse took fright at the lumber, and also that the lumber was likely to frighten horses. *Darling v. Westmoreland*, 52 N. H. 401. The remarks of the plaintiff's counsel on the subject in his opening statement were therefore unobjectionable.

The plaintiff's testimony regarding the kind of dress that she was obliged to wear after

the accident was competent on the question of the extent of her injury.

The plaintiff's relations with Condon were not relevant to any issue in the case. A suggestion or insinuation, made by questions put upon cross-examination, or in any other manner, that their relations were illicit, could have been made for no purpose except to affect the weight of her testimony as a witness, or to prejudice the jury against her. Whichever may have been the defendant's purpose, justice required that the plaintiff be permitted to rebut the suggestion by evidence tending to show that it was without foundation.

No ground of objection to the testimony of the physicians has been suggested, and none is perceived.

The instruction to the jury requested by the defendants was properly refused. One who negligently places near a public highway an object calculated to frighten horses lawfully traveling thereon, or who negligently conducts his lawful business in such a manner as to frighten them, is liable for the consequences. *Gordon v. Railroad*, 58 N. H. 396; *Lewis v. Railroad*, 60 N. H. 187, 189; *House v. Metcalf*, 27 Conn. 631, 640; *Knight v. Manufacturing Co.*, 38 Conn. 438. Exceptions overruled. All concurred.

(67 N. H. 334)

LACONIA SAV. BANK v. TOWN OF LACONIA.

(Supreme Court of New Hampshire. Belknap.
March 17, 1893.)

TAXATION—PROPERTY SUBJECT—GUARANTY FUND OF SAVINGS BANKS.

Pub. St. c. 65, §§ 5, 11, 12, require every savings bank to pay to the state treasurer annually, on October 1st, a tax of 1 per cent. on the amount of the deposits on which it pays interest, and its capital stock, less the value of all its real estate; and provide that the real estate shall be taxed to the corporation in the town where situated, and that "the taxes assessed as aforesaid upon savings banks * * * shall be in lieu of all other taxes against the corporation and against their stockholders and depositors on account of their interests therein." Chapter 165, § 16, requires such banks to keep a guaranty fund, which cannot be used for dividends. *Held*, that the guaranty fund cannot be taxed in the town where the bank is located under the designation of "surplus capital."

The Laconia Savings Bank appeals from an assessment of taxes made by the selectmen of the town of Laconia. Case heard on an agreed statement of facts. Tax abated.

Facts agreed: April 1, 1892, the selectmen of Laconia assessed state, county, town, and school taxes, amounting to \$1,216, and school-house taxes amounting to \$89.60, on the sum of \$64,000, as surplus capital of the plaintiff, a savings bank located in Laconia. The plaintiff had a guaranty fund of that amount, which the defendant claims and the plaintiff denies is to be deemed surplus capital of a banking institution, and subject to taxation.

E. A. & C. B. Hibbard, for plaintiff. Jewell & Stone, for defendant.

SMITH, J. Every savings bank is required to "pay to the state treasurer, annually, on the first day of October, a tax of one per cent. upon the amount of the general and special deposits on which it pays interest, and its capital stock, less the value of all its real estate wherever situated." Pub. St. c. 65, § 5. The real estate of savings banks "shall be taxed to the corporation in the town where situated, as real estate of other parties is taxed." Id. c. 65, § 11. "The taxes assessed as aforesaid upon savings banks * * * shall be in lieu of all other taxes against the corporations and against their stockholders and depositors on account of their interests therein." Id. c. 65, § 12. The principal statutes relating to the taxation of savings banks, anterior to the Public Statutes, are noted in the margin.¹ The word "accumulations," inserted in the statute of 1804 (chapter 4028, § 1), and in the revisions of 1867 and 1878 (Gen. St. c. 58, § 12; Gen. Laws, c. 65, § 7), disappeared in the revision of 1891 (Pub. St. c. 65, § 4). The report of the commissioners of revision (page 187, § 4) subjected the guaranty fund and undivided profits of saving banks to the state tax. But the legislature struck out all that related to the taxation of the guaranty fund and undivided profits. Pub. St. c. 65, § 4. By this action the legislature indicated its intent not to tax the guaranty fund and undivided profits. The keeping of a guaranty fund is made compulsory, and it cannot be used for dividends. Id. c. 165, § 16. This fact furnishes a reason for the omission of the legislature to include it with deposits for taxation. If the intent was to impose the state tax of 1 per cent. upon the guaranty fund and undivided profits, we should not have expected the legislature would strike out words from the commissioners' report which would have made the intent clear beyond controversy, and leave its intent to be gathered from such terms as "special deposits" or "capital stock," especially when other corporations are named in the same section to which such terms may more properly be applied. Still less is it reasonable to suppose that by striking out those words the intent was to permit towns in which savings banks are located to impose a tax upon the fund and profits at a rate almost certain to be much higher than the state rate, for the exclusive benefit of the towns, and whereby other towns in which depositors reside would be deprived of their proportionate shares. We discover no intent to depart from the uniform mode of taxation heretofore in force for a mode which would be inequitable in its operation. There

¹ Rev. St. c. 39, § 3; Id. c. 40, §§ 1, 4; Id. c. 41, § 7; Id. c. 42, § 8; Laws 1848, c. 737; Laws 1861, c. 2493; Laws 1864, c. 2873; Laws 1865, c. 4072; Gen. St. c. 49, § 5, par. 5; Id. c. 58, §§ 12-14; Laws 1869, c. 4; Laws 1872, c. 17, § 2; Laws 1873, c. 2; Laws 1874, c. 71; Gen. Laws, c. 65, §§ 6-9; Id. c. 170.

is no evidence that the purpose was to subject one portion of the deposits to taxation by the state at one rate, and another portion by a single town at another rate. The reasons which led to the enactment of the provision that the towns where the depositors reside shall share proportionately in the tax paid to the state (Pub. St. c. 65, § 6) are equally strong against excluding them from sharing in the tax assessed by the town. If, however, the construction of sections 4, 5, c. 65, Pub. St., is that the guaranty fund is taxable, it is plain that the tax is payable to the state treasurer at the rate of 1 per cent. The language of section 5 is, "Every such corporation * * * shall pay to the state treasurer, annually, on the first day of October, a tax of one per cent," etc. No authority for the assessment of such a tax is given to the town where the bank is located. But the decisive answer to the claim of the defendant is the statute itself. Section 12 expressly provides that "the taxes assessed as aforesaid"—that is, 1 per cent. upon deposits and upon capital stock, if any (section 5), and upon real estate in the town where it is situated as real estate of other parties is taxed (section 11)—"shall be in lieu of all other taxes," etc. The statute subjecting to taxation "the surplus capital on hand of banking institutions" (Pub. St. c. 55, § 7, par. 4), "in the towns wherein such banking institutions are located" (Id. c. 56, § 6), was originally enacted in 1849. Laws 1849, c. 848. At that time the whole amount of deposits in all the savings banks of the state was only \$1,564,540.95. The common understanding has been that the statute of 1849 was aimed at banks having a capital stock, and authorized to issue bills for circulation as money; and the uniform practice has been against the taxation in the towns of any part of savings banks deposits as surplus capital. They have no capital stock separate from their deposits, which fluctuate from day to day, as deposits are withdrawn or new deposits made. In 1849 there was no guaranty fund. If there was any surplus not annually divided among the depositors, it was distributed as an extra dividend at stated periods, varying from two to five years, and undoubtedly was so inconsiderable in amount that it was omitted from property subject to taxation, as carriages are whose value does not exceed \$50, or horses and cattle not over 18 months old, and sheep unless over 6 months old. The guaranty fund is limited in amount to 5 per cent. of the deposits. Pub. St. c. 165, § 16. In view of the provisions of chapter 65, subjecting at least 95 per cent. of the deposits to a state tax of 1 per cent., which, with the tax on real estate, is declared in section 12 to be "in lieu of all other taxes," it is not reasonable to hold that the legislature intended to authorize the taxation of the balance of the deposits, which cannot exceed 5 per cent. thereof, denominated in chapter 165, § 16, a "guaranty fund," in the town where the bank is located, under the designation of "surplus capital," in chapter 56, § 6. No reason appears for taxing a part of the

deposits at one rate and another part at another rate. In this case, the rate in Laconia in 1892 was more than double the state rate. The plaintiff is entitled to have the tax abated. All concurred.

(97 N. H. 298)

RIDER v. CITY OF PORTSMOUTH.

(Supreme Court of New Hampshire. Rockingham. March 17, 1893.)

MUNICIPAL CORPORATIONS—COUNCIL COMMITTEES
—EXPENSES—ALLOWANCE OF CLAIMS—
ACTIONS—SPLITTING CAUSES.

1. Where members of a board of aldermen are appointed a special committee, with authority to do what in their opinion would "best subserve the interest of the city" in relation to a bill pending in the legislature, they are entitled to be reimbursed by the city for personal expenses necessarily incurred in the discharge of their duty.

2. Each may maintain his separate action for the recovery of such expenses.

3. When a committee of a board of aldermen consists of two members, the action of both is necessary in order that expenses incurred in committee work may bind the city.

4. A member of the city council cannot lawfully vote upon the question of the allowance of a disputed claim against the city, in which he has a direct personal and pecuniary interest.

Assumpsit by John E. Rider against the city of Portsmouth for money paid. Facts found by the court: February 4, 1891, the board of mayor and aldermen of Portsmouth authorized the mayor to employ counsel to look after the interests of the city, as affected by a bill then pending in the legislature, and which afterwards became a law. Laws 1891, c. 209. February 19th the board reconsidered its action, and appointed a special committee, consisting of two of its members, of whom the plaintiff was one, with the same authority, and with "additional powers * * * in all matters where they are of opinion it will best subserve the interest of the city or its citizens." The plaintiff went to Concord for the purpose of obtaining changes in some objectionable provisions of the bill, expending for car fares and hotel expenses \$11.56. He also paid the further sum of \$21.50 for the expenses of three other citizens incurred in going to Concord at his request for the same purpose. The plaintiff seeks to recover these sums. April 23, 1891, the board of mayor and aldermen ordered certain bills, classed as contingent, to be paid, including the plaintiff's, "when approved by the proper committee." The plaintiff, as chairman of the committee on legislative matters, approved his own bill. Five of the aldermen, including the plaintiff (five being necessary to make a quorum), also approved the bill. The city ordinances (chapter 2, §§ 8, 10-12) provide that the committee on accounts, consisting of two aldermen and one member of the common council, shall examine all claims against the city, and certify the allowance of the same when found correct; that after bills have been certified by the committee, and been ordered by the board of mayor and aldermen to be paid, the mayor shall make his draft for the amount required, from which the bills shall be paid by

the treasurer. Verdict for the plaintiff for \$11.56 and interest, which the defendant moved to set aside. The plaintiff moved to increase the verdict by including the item of \$21.50 and interest. Judgment on the verdict.

Samuel W. Emery and John Hatch, for plaintiff. Ernest L. Guptill and Calvin Page, for defendants.

SMITH, J. The vote appointing the plaintiff and another alderman a committee gave them authority to do what in their opinion would "best subserve the interest of the city or its citizens" in relation to the bill then pending in the legislature. For personal expenses necessarily incurred in the discharge of their duties each member is entitled to be reimbursed by the city, and each may maintain his separate action for the recovery thereof. The motion to set aside the verdict must therefore be denied.

The vote authorized the committee to act jointly, and, if the committee had consisted of more than two members, the consent of a majority would have been necessary to bind the city by its action; but, consisting of only two members, the action of both was necessary for the employment of persons at the expense of the city. It was entitled to action governed by the combined wisdom of both members. The item of \$21.50 was authorized by the plaintiff alone. If the other member had been consulted, the plaintiff might have been convinced of the inexpediency of the expenditure.

The next inquiry is whether the action of the plaintiff has been ratified, or the claim approved. It has not been certified by the joint standing committee on accounts, as required by the city ordinances. It is said in the plaintiff's brief that the committee on accounts had been abolished before the plaintiff's bill was rendered to the city, and that the then existing ordinance required all claims to be laid before the aldermen for approval. The plaintiff presented his claim to that board, and April 23, 1891, the aldermen ordered the plaintiff's bill to be paid when approved by the proper committee. It was not approved by the committee on accounts, nor by a majority of the aldermen, without the plaintiff, who was a member of the board. In *Dorchester v. Youngman*, 60 N. H. 385, it was held that a citizen's pecuniary interest in a question of town affairs does not disqualify him from voting upon it. The municipal affairs of the city of Portsmouth are managed by a city council consisting of a board of aldermen and a board of common councilmen, chosen by the legal voters in their respective wards to represent and act for them in all business intrusted by law to the councils. The plaintiff, in his capacity as alderman, acted as the representative of the people of the city. In all matters where his interest was the same as that of any other citizen, his right to vote cannot be questioned. But in a matter where he had a direct personal and pecuniary interest, and upon which he was required to act judi-

cially, he was, according to well-recognized legal principles, disqualified from acting. He claimed to be a creditor of the city. His claim had never been adjudicated, and the question before the board was whether his claim should be paid. Without his vote, there was not a majority in favor of paying it. In *Holderness v. Baker*, 44 N. H. 414, it was held that a selectman cannot act for the town, in making a loan of its money to himself. We think the doctrine of *Dorchester v. Youngman* does not apply to the facts in this case. The item for \$21.50, not having been authorized by the committee, nor approved by any committee nor by the aldermen, cannot be recovered. Judgment on the verdict.

CHASE, J., did not sit. The others concurred.

(69 Conn. 651)

SMITH v. HALL.

(Supreme Court of Errors of Connecticut. Oct. 5, 1897.)

BREACH OF MARRIAGE PROMISE—EVIDENCE—DAMAGES—INSTRUCTIONS—JUDGMENT—COLLATERAL ATTACK—NEW TRIAL—ASSIGNMENT OF GROUNDS—APPEAL—REVIEW—WEIGHT OF EVIDENCE—HARMLESS ERROR.

1. In an action of tort and for services, a new trial, for excessive damages, will not be granted unless the court can say that the damages awarded are flagrantly excessive.

2. In an action for breach of marriage promise, and for services rendered while the engagement existed, it appeared that, when the parties first became acquainted, plaintiff was a married woman, and that she procured a divorce on defendant's suggestion. *Held*, that it was not error to admit evidence of what took place between them prior to the divorce, to show the relations of the parties at that time, as bearing on the question whether a promise was afterwards made, and as showing the circumstances under which the services were rendered.

3. In an action for breach of marriage promise, evidence of a witness other than plaintiff that defendant, in referring to certain property owned by him, "frequently spoke of it as being worth between \$50,000 and \$60,000," was objectionable as hearsay.

4. In an action for breach of marriage promise, it was harmless error to admit hearsay evidence that defendant said to witness that certain property owned by him was worth between \$50,000 and \$60,000, when he testified that he told the witness substantially what she said he had.

5. Where defendant, in his answer and by his evidence, attacks plaintiff's reputation and character for chastity, evidence of her good character and reputation for chastity is admissible in rebuttal.

6. In an action for breach of marriage promise, by a woman who was married when she first became acquainted with defendant, and procured a divorce so that she might marry defendant, he cannot attack the decree of divorce, and claim that it was void because obtained by fraud and false testimony given by her.

7. When the charge on certain points is correct in law, is adapted to the case as it is presented to the jury, and is sufficient for their guidance in coming to their verdict, it is not error to refuse correct instructions asked on such points.

8. Where plaintiff sued defendant in one count for breach of marriage promise, and in another count for the reasonable value of services rendered by her in taking care of defendant while sick, during the existence of the engagement, and

relying on such promise, it was error to charge that, if the jury found the issues for plaintiff on both counts, she was entitled to recover on both, since a recovery of damages for breach of the promise would include satisfaction for the services rendered in reliance on such promise, and in expectation of becoming defendant's wife.

9. Plaintiff sued defendant in one count for breach of marriage promise, and in another count for a specific sum for services rendered defendant by her in reliance on such promise, and interest. Under an erroneous instruction that, if the jury found the issues for plaintiff on both counts, she was entitled to recover on both, they found for her a sum greater than that claimed for services. *Held*, that a new trial should be granted only on condition that plaintiff refused to remit the amount claimed for services and interest.

Andrews, C. J., dissenting.

Appeal from superior court, Litchfield county; Ralph Wheeler, Judge.

Action by Mary E. Smith against Addison T. Hall to recover for the value of services rendered, and to recover damages for a breach of promise of marriage. Verdict and judgment for the plaintiff for \$5,310.34 damages, and appeal by the defendant for alleged errors in the rulings and charge of the court. Error and new trial nisi.

The defendant also filed in the superior court a motion for a new trial on the ground that the verdict was against the evidence, and the amount of damages awarded therein excessive, and, this motion being denied, filed a similar motion for the consideration and action of this court. Motion denied. The complaint contained two counts; the first consisting of the common counts, and the second being a special count setting forth a breach of promise of marriage. Under the first count the following bill of particulars was filed:

Addison T. Hall to Mary E. Smith, Dr.

To services rendered and time expended in nursing, caring for, and attending to said Hall, at his request, from November 1st, 1892, to January 1st, 1894, sixty and four-sevenths weeks, at thirty dollars per week	\$1,817 12
To interest	

The answer consisted of a general denial of all the allegations of the complaint, and the three following special defenses to the second count, namely: "(1) The defendant has paid to the plaintiff all that there was ever due from him to her upon the matters stated in the first count. (2) The plaintiff has been a person of immoral character and habits, and has been the keeper of a bed house, which facts became known to the defendant subsequently to, and were not known by defendant previous to, the making of the pretended promises in said second count alleged, if any such were made. (3) At the time of the alleged promise of the defendant, he was of unsound mind, and mentally incapable to make or enter into the contract or promise alleged." The reply denied the truth of the matters contained in these special defenses.

Upon the trial the plaintiff offered evidence to prove, and claimed to have proved, in substance, the following facts: She first met the

defendant in September, 1892. She was then about 30 years of age, and the defendant about 43. She had resided in Woodbury, in this state, all her life, except as hereinafter stated. She had been married in 1883 to Dudgeleigh Smith, then of Woodbury, and had a son living, the issue of that marriage, born in December, 1883. Her husband, in the early part of 1885, left Woodbury for Colorado, to seek employment, and she was to join him there with her boy as soon as her husband was so situated as to be able to receive them. In the spring of 1886, as she was about to set out for Denver, Colo., to join her husband at his request, she received from him a postal card dated June 9, 1886, telling her not to start till she heard from him again, as he had been called to Leadville, and did not know just when he should return to Denver. She resolved to go on and visit some friends in the West until she should further hear from her husband (writing him to this effect), and thereupon proceeded to Galesburg, Ill. She never heard from her husband thereafter, nor obtained any tidings whatever concerning him. After a time she went to Minneapolis, and rented a house having 16 rooms, and rented the same to lodgers. She finally sold out this business, and returned to Woodbury in March, 1888, where she has since resided. In the course of two weeks after she first met the defendant, he became quite personal in his attention to her, whereupon she informed him of the above facts, and said to him that, while she had every reason to believe her husband was dead, she had no actual or positive proof of the fact. The defendant then told of his past experiences, having been married twice; that he was in ill health, retired from business, and anxious to have a home. He asked her to marry him, stating that he was worth \$50,000, consisting of real estate on Crown street, New Haven, and some bank stock. She declined to accept his offer then, but assented to his request that he might call upon her in Woodbury. In October, 1892, the defendant wrote to her the letters set forth in the record, and on the 25th of that month came to Woodbury, spending some days there, mostly in her company; and during this visit she showed him some, and read to him others, of the letters from her husband, including the postal card aforesaid of June 9, 1886. Defendant, during this visit, said he agreed with her in the belief that her husband was probably dead, and again asked her to marry him and go South for the winter, but she refused to consent to this without obtaining a divorce. Defendant thereupon "urgently insisted that she should begin divorce proceedings at once, and, yielding to his importunities in this regard, she applied for a divorce, which was granted May 2, 1893," on the ground of desertion. Afterwards the defendant called upon the plaintiff in Woodbury several times, and wrote her the several letters set forth in the record, and in December,

1892, came to Woodbury, and requested the plaintiff to obtain board for him at her grandmother's, with whom the plaintiff resided, and this was done. The defendant continued to board there from that time, with some few brief absences, till the latter part of November, 1893. At the time the divorce was granted a building was being erected for the defendant on his Crown street property; and in May, 1893, shortly after the divorce was granted, the defendant promised to marry the plaintiff as soon as the building was erected and rented, and she agreed to marry him. "The defendant testified that he promised to marry her when the block was completed, but that this promise was made by him in July, 1893, instead of in May, as the plaintiff claimed." The building was completed and rented in October, 1893. While defendant was thus boarding in Woodbury, he was sick and nervous a good deal of the time; and the plaintiff cared for and waited upon him in his sickness, bathed him in alcohol and salt water, gave him his medicines day and night, and in general performed all the offices of a nurse. It was for these services that plaintiff sought to recover under the first count. "The plaintiff did not claim that there was any express agreement that the defendant should pay her for services rendered, but did claim that the services were rendered at his request, and in reliance upon, and as a consideration for, the promises of marriage made by the defendant." In November, 1893, the plaintiff requested the defendant to fulfill his promise of marriage, but he then and ever after, without any sufficient reason, refused to do so, and in June, 1896, married another woman.

The defendant was a witness in his own behalf, and a portion of his testimony was to the effect following, to wit: That he could not and would not marry the plaintiff, because of the stories he had heard after leaving her grandmother's house, just before Thanksgiving time, reflecting upon her moral character; that he had heard from a stranger, a drummer, whose name he could not ascertain, that she had, while in Minneapolis at the time referred to, kept a house of ill fame; that he had also heard the same story from one George H. Ford, who resided in Waterbury, but who had for many years resided in Woodbury, and who was well acquainted with the plaintiff and her reputation; that his sister had informed him that she had heard that the plaintiff was a crooked woman; that one of his sisters at one time called the plaintiff a vile woman in his presence; that he believed the story told him by George Ford, because Ford had been out West; that Woodbury people laughed at him because he was boarding there with the plaintiff; that the stories that he had heard as to her conduct aforesaid worried him so he could not sleep, and that, therefore, he went and called upon her, thinking that she would deny the stories; that he told her (the plaintiff) of the stories he had heard con-

cerning her aforesaid, and that she admitted to him that such stories were true of her (this was denied by the plaintiff); that he had been informed that her boy was born in about eight months after she and its father had been married (the defendant admitted, however, in the course of his examination, that the plaintiff had told him that the birth of the boy was hastened by a fall which she sustained); that he said to her at the time he reported to her the stories he had heard of her conduct aforesaid, referring to one Dr. Ketchum, who had formerly resided in Woodbury, that: "I believe Dr. Ketchum has slept with you more times than I have got hairs on my head. Now, I am sorry to say it, for you and your boy's sake. I shall not marry a crooked woman, unless I am married asleep;" that subsequently, on two occasions, without his consent and against his protest, the plaintiff entered his room, and got into bed with him, with nothing but her night clothing upon her. Said George H. Ford was produced as a witness on the part of the plaintiff on rebuttal, and denied that he had ever said to the defendant anything of the kind aforesaid, or anything reflecting upon the character or reputation of the plaintiff, but upon the contrary, in the fall of 1892, that he met the defendant in Waterbury, and was informed by the defendant that he had recently met the plaintiff at his sister's house in Wallingford, that he liked her, and inquired of the witness Ford what kind of a lady she was; that thereupon Mr. Ford told him that she was a lady of very high standing in Woodbury. The defendant also offered evidence to prove, and claimed to have proved, that the plaintiff's services to him were of a trivial nature, and had been fully paid for by him; that the plaintiff never told him till February, 1894, about her keeping the house in Minneapolis; that he never told her he owned any bank stock, and never had owned any; and that, after the completion of the Crown street building, he had no other property save the Crown street property. He further claimed to have proved that he had been, and continued to be, actually insane, and was at least a large part of the time incapacitated for attending to business. The plaintiff offered testimony to prove, and claimed to have proved, that the defendant was of sound mind, and of full capacity for transacting business.

Upon the trial the defendant objected to the evidence as to what was said between the plaintiff and defendant, and as to what took place between them, by correspondence or otherwise, prior to the granting of the divorce, on the ground that plaintiff was then a married woman. The plaintiff claimed it to show "the relations between the parties, and also the circumstances under which the plaintiff had performed the services" for the defendant, and for no other purpose, and expressly stated to the court and jury that she did not claim it as tending to show any promise of marriage prior to the granting of the divorce. The court admitted the evidence.

The plaintiff called as a witness one Alice Martin, who, referring to the property of the defendant upon Crown street, and to what the defendant had stated to her in 1894 concerning its value, was asked the following question: "State whether or not at any time he said anything to you in regard to what he considered it worth." The defendant objected to this question "as not being an admission against interest." The objection was overruled, the defendant excepting, whereupon the witness answered: "He frequently spoke of it as being worth between \$50,000 and \$60,000." The defendant subsequently testified, upon the question of the value of this property, that its value in 1894, in his opinion, was \$25,000 or \$28,000, perhaps, but that he did not think it was worth as much now. The defendant also testified, and offered evidence to prove, that the property was incumbered by a mortgage for \$17,000, and that his entire indebtedness was \$19,000 or \$20,000. He admitted, however, on cross-examination, that in writing in 1894 to Alice Martin, referring to this same property, he had stated in his own handwriting as follows: "The broker that I wrote about from Barrington offered me \$45,000 for my block to-day, but I laughed at him. I am sure he would give \$50,000, but that can't buy it."

The defendant called as a witness his wife, who stated that she married the defendant on June 2, 1896, and had been acquainted with him since June 21, 1895; that her family consisted of Mr. Hall, herself, her two children by a former husband, and her mother. The following question was asked by the defendant (referring to the Crown street property): "Have you any means of support other than the income from this building?" Counsel for the plaintiff objected to the question, and the court sustained the objection in effect, the defendant excepting. The defendant claimed that the testimony was admissible upon the question of punitive damages, which the plaintiff claimed. The same witness was also asked by defendant the following question (referring to the defendant): "Do you know whether he is and has been assisting in the support of his father, and, if so, to what extent?" This was objected to by the plaintiff, and excluded, the defendant excepting. The defendant was allowed, however, to testify upon this subject as follows: That in 1893 and 1894, and for years previous thereto, he had supported his father, bought his clothing, and paid his board; that in 1894 he was paying \$10 a month for his board; that his father was 83 years old.

The defendant, having testified as to the reasons why he did not marry the plaintiff, and to his relations with her during the summer and fall of 1893, and that he had intended to marry her, was asked upon cross-examination the following question (referring to the plaintiff): "Didn't you love her?" This was objected to on the ground that it was not germane to the direct examination. The objection was overruled, the defendant ex-

cepting. The witness answered, "I thought well of her; yes, sir." He subsequently testified on cross-examination, without objection, as follows: "Did you intend, Mr. Hall, by anything you said, or by your conduct, to give her to understand that you loved her? Why, of course I did."

The plaintiff introduced the evidence of one Charles A. Baldwin, one of the assessors of the town of New Haven, as to the value of the Crown street property aforesaid in 1893, and that it was then worth, in his opinion, from \$35,000 to \$40,000. The defendant called as a witness in his behalf one William H. Hewitt, of New Haven, who testified that in his opinion the value of the property in question in 1894 was "about twenty-five thousand dollars, not to exceed that," whereupon he was asked by counsel for the defendant: "How long a time would it take, in your judgment, to sell it for that price?" This question, on objection of the plaintiff, was excluded, the defendant excepting. The same witness, Hewitt, having described the property in question, gave his reasons for his opinion that the rents would decrease, and the cost for repairs would increase, whereupon he was asked the following question by counsel for the defendant: "What, in your opinion, would be the probability of the net income from that building realizing the expectations of a man who, without experience in that class of property, figures on the gross rent?" This question, on the objection of the plaintiff, was excluded, the defendant excepting.

The plaintiff offered in rebuttal evidence of her good character and reputation for chastity, to which the defendant objected. The court admitted the evidence, the defendant excepting.

In the course of the testimony of the defendant's wife, the following testimony from her was offered: "Q. State whether, since you have known about this building of your husband, there has been any change as to the amount of rents paid. A. There has. Q. In what direction? A. They have gone down." The plaintiff objected to the testimony, and asked to have it excluded, on the ground that it appeared from the testimony of the witness that her acquaintance with the husband did not begin until June 21, 1895. No claim being made on the part of the defendant that the witness had any knowledge in regard to the matter except such as she had gained since that time, the court excluded the testimony, the defendant excepting. In this same connection the witness, Mrs. Hall, was also asked on the part of the defendant: "Do you know whether the amount necessary for repairs has increased of late?" To this question the plaintiff objected, and the same was excluded, the defendant excepting. Also, in the same connection, the same witness was asked: "Now, will you state whether Mr. Hall gave you any estimate of the prospective value and income of that building." To this question the plaintiff ob-

jected. The court excluded it, the defendant excepting.

The requests to charge which the defendant, in his reasons of appeal, claims the court refused to give, are these: "(2) Even if the defendant was capable of attending to his ordinary matters of business, yet, if his mind was weak, and he was easily excited and led, and the plaintiff, supposing him to be a wealthy man, took advantage of his condition to obtain a promise of marriage, your verdict should be for the defendant. (3) If defendant had sufficient reasons for not marrying the plaintiff to justify an honorable man in declining to marry her, the plaintiff cannot recover. * * * (6) If the plaintiff, being the superior in intellect and ability of the defendant, designedly obtained an influence over him, and exercised this influence to obtain a promise of marriage, your verdict should be for the defendant. (7) In actions for breach of promise of marriage a less degree of mental incapacity will suffice as a defense than would be requisite in matters of ordinary business. (8) If the defendant's mental and physical condition was such that marriage, on his part, would be contrary to public policy, or a crime against society, and plaintiff knew this condition, your verdict must be for the defendant. (9) If defendant's mental and physical condition was such that no prudent or sensible woman, knowing it, would have married him, and plaintiff knew this condition, she cannot recover. (10) If the plaintiff has been a person of immoral character, or has kept a house resorted to for immoral purposes, defendant, upon learning these facts, or upon being convinced that they were facts, was justified in refusing to marry her. (11) If the defendant was under an insane delusion as to the character of the plaintiff for chastity, or as to her having kept a house resorted to for immoral purposes, and on that account refused to marry her, your verdict should be for the defendant. * * * (13) If defendant was not actually insane, but his mental capacity was such that it would be inequitable to enforce against him a contract of marriage with the plaintiff, and this mental capacity was known to the plaintiff, your verdict should be for the defendant. (14) If plaintiff has suffered no actual damage for the failure of defendant to marry her, your verdict should be for the defendant. (15) The record of plaintiff's divorce shows that she obtained it on the ground of willful desertion on March 4, 1885, the time of his leaving this state. She now testifies that she received affectionate letters from her former husband in 1886, that he left this state with her approval and consent, and that she did not and does not believe that he deserted her, but believed and believes that he died after sending her the last communication here placed in evidence. Under these circumstances, plaintiff was not entitled to a judgment of divorce until seven years from the time of said last communication. The obtaining a

divorce on the ground of willful desertion in 1885 was a fraud and an imposition upon the court, and your verdict should be for the defendant."

The court complied with these requests to charge only so far as appears from the charge itself, the material parts of which bearing upon these requests are as follows: "If you find it proved that the plaintiff had kept a bed house, and was a person of immoral character and habits, which facts became known to the defendant subsequently to, and were not known by him previous to, the making of his engagement, then he was justified in breaking his engagement, and your verdict on this count must be for the defendant. In the third defense to this count the defendant alleges that at the time of the alleged promises the defendant was of unsound mind, and mentally incapable to make or enter into the contract or promise alleged. Upon this subject I should say to you that every person is presumed to be sane until the contrary is shown, and so the burden of proving insanity in this case is upon the defendant. When once a state of insanity, however, is established by the proof, the burden is upon the other party to show a restoration to sanity. To render a contract void on this ground, it must be shown that the person had not understanding sufficient to comprehend or know the nature, extent, and consequences of the contract he was making. If it appears and is found in any case that a person's reason, memory, and judgment are so overwhelmed by mental disease that he is unable, as I say, to understand the nature, extent, and consequences of the contract into which he appears to have entered, then such contract was or is invalid. You will weigh the evidence presented on the one side and upon the other on this subject. If you find the defendant was insane at the time he promised to marry the plaintiff, and that, therefore, there was no valid engagement of marriage existing, your verdict should be for the defendant upon this count. If the jury find that there was a valid engagement of marriage between the plaintiff and the defendant, and that the defendant refused to perform his promise therein as alleged in the complaint, without justification, then the verdict would be for the plaintiff for at least nominal damages, as some damages are implied necessarily from a violation of the plaintiff's rights. If the plaintiff has been a person of immoral character, or has kept a house resorted to for immoral purposes, the defendant, upon learning such facts, was justified in refusing to marry her. If the defendant, after his promise of marriage, became or was mentally or physically unfit for marriage, and has so continued since that time, and the jury so find, then these facts may be taken into consideration in fixing the amount of damages sustained by the plaintiff. If the defendant was under an insane delusion as to the character of the plaintiff, or as to her having kept a

house of ill fame, or if he investigated fully in reference to those subjects, and was in good faith satisfied of the truth of the charges made, and the jury so find, they may consider those circumstances in relation to the question of damages."

With reference to the first count the court charged the jury as follows: "Upon this part of the case I would advise you that, if you find the facts to be as claimed by the plaintiff, she would be entitled to recover on the first count such sum of money as her services were reasonably worth. How much the services were thus reasonably worth, if anything, is a question for the jury, entirely, upon the evidence adduced; they remembering that the burden of proof as to the facts upon which a recovery on this count depends, both as to the services and their value, is upon the plaintiff. If you find the issues on the first count in favor of the plaintiff, you will determine the value of the services, and add thereto the interest on the sum at 6% per annum from the date when you find the plaintiff broke his promise of marriage, if he did break it, up to the present time, and render your verdict accordingly on that amount." The court did not charge the jury that they could not render a verdict both for compensation for services under the first count and for damages for breach of promise of marriage under the second count, nor was it requested so to charge. The verdict was a general one, upon both counts. The errors assigned relate to the rulings of the court upon the evidence as set forth in the record, to the refusal of the court to charge as requested, to parts of the charge as given, and to its failure to charge that there could be no recovery upon both counts.

Henry F. Hall, Henry G. Newton, and Clifford Gilbert, for appellant. William H. Williams, for appellee.

TORRANCE, J. (after stating the facts as above). This case comes before us upon a motion for a new trial for a verdict against evidence, and upon an appeal for alleged errors of the court in its rulings upon evidence and in its charge to the jury. So far as the motion for a new trial is concerned, testing the claims of the defendant thereunder by the principles heretofore laid down by this court in the cases cited below, we are of opinion that the damages awarded to the plaintiff are not so flagrantly excessive, nor the verdict in other respects so manifestly against the evidence, as to entitle the defendant to a new trial. *Clark v. Pendleton*, 20 Conn. 495, 509; *Waters v. Bristol*, 26 Conn. 398, 405; *Johnson v. Norton*, 64 Conn. 134, 29 Atl. 242; *Brooks' Appeal*, 68 Conn. 294, 36 Atl. 47.

Upon the appeal the reasons assigned are 28 in number, 12 of which relate to rulings upon evidence. The first two relate to the admission of evidence as to what took place between the plaintiff and defendant prior to

the divorce in May, 1893. The defendant objected to this evidence because the plaintiff was then a married woman. If this evidence had been offered and admitted to prove a promise of marriage prior to the decree of divorce, as a basis of recovery, there would be force in the defendant's objection. Such a promise made while the woman, to the knowledge of both, is married, would be void. *Nolce v. Brown*, 38 N. J. Law, 228; *Paddock v. Robinson*, 63 Ill. 99. But the evidence was not admitted for any such purpose, but for the purpose merely of showing the relations which existed between these parties prior to the divorce, as bearing upon the question whether a promise of marriage had been made after the divorce, and as showing the circumstances under which the plaintiff had rendered services to the defendant. Limited as it was in its effect in this way, we think the evidence was admissible. *Ray v. Smith*, 9 Gray, 141; *Hook v. George*, 108 Mass. 324.

The answer of the witness Alice Martin, which was objected to, was hearsay, and inadmissible when given; but it is difficult to see how it can have harmed the defendant, under the circumstances, or how this point could avail him upon a new trial. The defendant himself testified that he had told this witness substantially what she said he had. The answer would have been clearly admissible in contradiction of the defendant after he had testified as he did to the value of this property, and upon a new trial would be admissible for a like purpose. Under these circumstances, we think a new trial should not be granted on account of this ruling.

The plaintiff was permitted, against the defendant's objection, to offer evidence of her good character and reputation for chastity, in rebuttal. In his answer the defendant alleged that the plaintiff was a person of immoral character and habits, and had been the keeper of a bad house, and he introduced evidence in support of these allegations which directly attacked the reputation of the plaintiff for chastity. Under these circumstances the ruling was correct. In cases of this kind the character of the plaintiff for chastity, when attacked, can always be sustained by evidence of reputation. *Dent v. Pickens*, 34 W. Va. 240, 12 S. E. 698; *Sprague v. Craig*, 51 Ill. 288; *Jones v. Layman*, 123 Ind. 569, 24 N. E. 363; *Haymond v. Saucer*, 84 Ind. 3.

As to the other rulings upon evidence, it is sufficient to say that most if not all of them are correct, and that, even if some of them are not, a new trial should not be granted on account of them.

The defendant requested the court, in effect, to charge the jury that the decree of divorce obtained by the plaintiff in May, 1893, was, as to the defendant, void, on the ground that it had been obtained by fraud, in the shape of false testimony given by the plaintiff. It is undoubtedly true that a stranger to the record, who is prejudiced as to some pre-existing right

by a judgment, may attack it collaterally on the ground that it was obtained by fraud. *Freem. Judgm.* (3d Ed.) par. 335; 1 Black, *Judgm.* par. 260; *Michaels v. Post*, 21 Wall. 398, 426; *Kinnier v. Kinnier*, 45 N. Y. 535; *Ruger v. Heckel*, 85 N. Y. 483; *Baugh v. Baugh*, 37 Mich. 59; *Webster v. Webster*, 54 Iowa, 153, 6 N. W. 170. But the defendant is not such a stranger. No right of his was prejudiced by the judgment of divorce. His promise of marriage was made, according to his own testimony, some months after the divorce was granted. Even then, if it be conceded that there was any evidence at all tending to show that the divorce had been obtained by fraud, the defendant could not avail himself of it to collaterally attack the judgment, and his request to have the jury charged to that effect was properly refused. Upon comparing the charge as given with the other requests made, we think the court, in substance, complied with all those to which the defendant was properly entitled. These requests, in substance, related to the effect of insanity and want of sufficient mental capacity upon the ability of the defendant to make a binding promise, to the effect of certain claimed insane delusions on his part, and to the conduct and character of the plaintiff which would justify the defendant in refusing to carry out his promise of marriage. The charge upon all these points was correct in law, was adapted to the case as it was presented to the jury, and was sufficient for their guidance in coming to their verdict, and this is enough. *City of Hartford v. Champlin*, 58 Conn. 268, 276, 20 Atl. 471.

With reference to one part of the charge, however, we think the court erred; and that was in charging the jury, in effect, that, if they found the issues for the plaintiff upon both counts, she was entitled to recover upon both. Whether, upon the undisputed evidence in the case, the plaintiff was entitled to recover anything at all on the first count, even if it had been the only count in the complaint, is a question which we deem it unnecessary to consider, and upon which we express no opinion; but, under the circumstances, she was certainly not entitled to recover upon both counts. The compensation which the plaintiff agreed to take for her services was the performance of the promise of marriage. If that promise had been performed, her claim for services would have been fully satisfied and discharged. But the damages recovered for the breach of an agreement are the legal equivalent of performance. Under the instructions of the court upon the second count, the plaintiff in the verdict got the legal equivalent of performance, namely, full damages for the breach of promise; and having thus, in legal effect, got what she agreed to take as full compensation for her services, she is not entitled to the value of those services in addition. No request to charge upon this point appears to have been made, nor does it appear that the attention of the court was called to it in any

way, and the failure to notice it doubtless occurred through inadvertence on the part of the court; but still it was the duty of the court to charge the jury correctly upon this point, and the charge as given upon it was clearly erroneous. This entitles the defendant to a new trial, but we do not think in this case that a new trial ought to be granted unconditionally, if the amount which the verdict gave the plaintiff under the first count can be separated from the amount given under the second count. Under the first count the plaintiff claimed to recover the amount stated in her bill of particulars, to wit, \$1,817.12, with interest; and the jury were told that she was entitled to recover under that count such sum as they found her services to be reasonably worth, with interest thereon from the date of the breach of promise to the date of the verdict. As the jury, under the charge of the court, may have given her upon the first count the full amount of her bill of particulars, with interest, and could not legally have given her more, the damages to which she is entitled upon the second count would be the amount of the verdict, less the amount of the bill of particulars, with interest, as aforesaid. The date claimed by the plaintiff for the breach of the promise of marriage was the last day of November, 1893. Unless the plaintiff will remit upon the record from the sum awarded her by the verdict a sum equal to the amount of her bill of particulars, with interest thereon from December 1, 1893, to the date of verdict, a new trial is granted. The other judges concurred, except *ANDREWS, C. J.*, who dissented.

(59 Conn. 611)

Appeal of *HALE*.

(Supreme Court of Errors of Connecticut. Oct. 5, 1897.)

INTESTATE ESTATE—MINOR CHILDREN—DEATH BEFORE DISTRIBUTION—HEIRSHIP.

Revision 1875, tit. 18, c. 11, art. 2, § 6, provided that, in case of an intestate leaving children, the right of property in the personal estate should vest in the children, and that, when any real estate could not well be divided, the court might order the whole to be set over to the eldest son, he paying to the other children their proportionate shares. Section 7 provided that, "if any minor child die before marriage and before any legal disposition of the estate, the portion of such deceased child shall be equally divided among the surviving children and their legal representatives." *Held*, that section 7 was not a statute of descent, but was only supplemental to section 6, and hence, where a mother died intestate, survived by two children, who died, minors and unmarried, before any distribution of the estate, the estate went to the heirs of the minor child last deceased, and not to the next of kin of the mother.

Appeal from superior court, Hartford county; William T. Elmer, Judge.

Appeal by Ruby C. Hale from an order and decree of the court of probate ascertaining and determining the heirs at law and distributees of the intestate estate of Susan M. Welles, deceased, taken to the superior court, and reserved by that court, on an agreed statement

of facts, for the consideration and advice of the supreme court of errors. Judgment affirming the decree of the court of probate advised.

The facts, as agreed upon by the parties and found by the court, are as follows: "(1) Susan M. Hale, daughter of John M. Hale, married Thomas G. Welles, of Hartford, Conn., January 15, 1873, and died intestate December 18, 1880, leaving said husband surviving her, and also two sons, John M. H. Welles and Hubert G. Welles, minor sons, and no other children. (2) John M. H. Welles died April 4, 1882, a minor, and intestate and unmarried; Hubert G. Welles died March 24, 1892, a minor, intestate and unmarried; and Thomas G. Welles died March 19, 1892, leaving Hubert G. Welles surviving him, and also a widow, Maud C. Welles, and two sons, Thomas and Samuel Welles. (3) The Security Company of Hartford was duly appointed administrator on the estate of Thomas G. Welles March 29, 1892, and was also duly appointed administrator on the estate of Hubert G. Welles March 30, 1892. Upon the death of said Susan, said Thomas G. Welles was duly appointed her administrator, but did not take any steps to settle her estate, and no distribution of her estate has ever been made. (4) Thomas G. Welles, partly during Susan's lifetime, and partly after her death, as her husband, and therefore statutory trustee, received large sums of money belonging to her estate, amounting to some \$20,000. After his death there was no administrator upon her estate until November 10, 1893, when the Connecticut Trust & Safe-Deposit Company of Hartford was duly appointed administrator de bonis non upon her estate, and received from said Security Company, as administrator of said Thomas G., the said sums, which it now holds. The said money came to Susan from the estate of her father, John C. Hale. (5) Susan had sundry brothers and sisters, one of whom, Reuben C. Hale, died intestate March 9, 1879, leaving a widow and one child, Ruby C. Hale, the appellant, a minor. (6) On the — of October, 1896, the Connecticut Trust & Safe-Deposit Company, as such administrator of Susan, applied to the court of probate for the district of Hartford for an order, under section 628 of the General Statutes, to ascertain and determine who were the heirs and distributees of said intestate estate of the said Susan, in which proceeding said Ruby C. Hale appeared, having a guardian ad litem duly appointed, and claimed to be an heir and distributee of said Susan and her estate, but the court of probate decreed that she was not an heir or distributee of said Susan or of her estate, from which decree this appeal was taken; and the question reserved for the supreme court of errors is whether said Ruby C. Hale was or was not an heir of said Susan, and entitled to have a share of said Susan's estate distributed to her, upon the facts as above found."

Charles E. Perkins, for appellant. George G. Sill and Arthur L. Shipman, for appellee.

HAMERSLEY, J. (after stating the facts). In the case of Connecticut Trust & Safe-Deposit Co. v. Security Co., 67 Conn. 438, 35 Atl. 312, we held that the fund of \$20,000 belonging to Thomas G. Welles as statutory trustee of the personal property of his first wife, Susan M. Welles, vested upon his death in those entitled by law to succeed to the intestate estate of his said wife, and that, for the purpose of ascertaining the heirs and distributees of that intestate estate in accordance with the method provided by statute, the administrator de bonis non upon the estate of said Susan M. Welles was entitled to recover possession of the fund from the administrator of Thomas G. Welles. After that decision the administrator de bonis non of Susan M. Welles applied to the court of probate in pursuance of section 638 of the General Statutes, to ascertain who were the heirs and distributees of that intestate estate; and the court ascertained the heirs to have been the children of Susan M. and Thomas G. Welles, viz. John H. Welles, who died in 1882, a minor, intestate and unmarried, and Hubert G. Welles, who died five days after the death of his father, in 1892, a minor, intestate and unmarried; and ascertained the distributee to be the administrator on the estate of Hubert G. Welles. Thereupon the court ordered the administrator de bonis non on the estate of Susan M. Welles to deliver possession of the same to the administrator on the estate of Hubert G. Welles, and from this order the appeal to the superior court was taken. The question of who may be Hubert's heirs is not involved. The only question is, are Hubert's heirs entitled to the estate now in the hands of his mother's administrator? It will serve the purpose of clearness to treat the question as if the estate had belonged absolutely to Mrs. Welles at the time of her death. The heirs of an intestate are to be determined by the provisions of the statute in force at the time of his death, and each distributive share, as determined by such provisions, vests immediately in the person who has a right to it. *Reeve*, Des. p. 62; *Griswold v. Penniman*, 2 Conn. 564, 567; *Roorbach v. Lord*, 4 Conn. 347, 349; *Kingsbury v. Scovill's Adm'r*, 26 Conn. 349, 353; *Hewitt's Appeal*, 53 Conn. 24, 37, 1 Atl. 815; *Messer v. Jones*, 88 Me. 349, 34 Atl. 177. Since the organization of our government, the law of descent and of administration has been derived from our own statutes, and the practice under them which has become a part of our common law. The law of descent, as to real and personal property, has been substantially the same, derived from the same General Statutes, and such distinctions as exist arise mainly from legislation specially affecting real estate passed since the general law of descent was settled, in 1639. 1 Col. Rec. p. 38. So our statute de distribution of intestate estates is at the same time

a statute of descent and of administration. As a statute of descent, it defines the heirs of an intestate, and vests in those heirs the right of property in his estate at the time of his death. As a statute of administration, it prescribes the mode by which possession of the property may be obtained, and postpones the vesting of the strictly legal title in personal property until possession is given through the process of distribution. The right of property, however, pending distribution, may pass by sale, bequest, or descent.

The statutes in force at the death of Mrs. Welles are to be found in Revision 1875, tit. 18, c. 11, art. 2. The first nine sections of this article are a re-enactment, in slightly different form, of provisions contained in an act "For preventing of fraud in concealing any part of the estate of any deceased person," enacted in October, 1699. 4 Col. Rec. p. 306. The few additions appearing in article 2 do not affect the question before us. Section 6 of article 2 establishes the law of descent in case of an intestate leaving children, and by force of that law the right of property in the personal estate of Mrs. Welles vested at her death in her two children then living. The last part of the section provides that, when it appears to the court that any real estate cannot be divided among all the children without great inconvenience, it may order the whole to be set to the eldest son; he paying to the other children their proportionate shares of the appraised value of such estate, or giving security to such children that he will pay the same, with interest, in the time limited by the court. Section 7 is as follows: "If any minor child die before marriage, and before any legal disposition of the estate, the portion of such deceased child shall be equally divided among the surviving children, and their legal representatives." The appellant, Ruby C. Hale, claims that this section is a statute of descent, constituting an exception to the law of descent as established in the preceding and following sections, and by force of this exception the property which upon the death of Mrs. Welles in fact descended to her children does, upon the death of the last survivor, descend to the next of kin to Mrs. Welles, as of the date of her death, in the same manner as if her children, in whom for 12 years the right of property has been vested, had never been born. The administrator of Hubert Welles claims that section 7 is not a statute of descent, and that, if a statute of descent, it does not apply to this case. Upon careful examination of our statutes and the cases cited, we think the section, if a statute of descent, does not apply to this case. The section "is only supplemental" to section 6 (Terry's Appeal, 28 Conn. 339, 341), and by its terms applies alone to a case where there are surviving children, or at least one surviving child, of the intestate, or representatives of such child or children, to whom the estate can descend. An exception to the general rule of descent cannot be extended be-

yond its terms. *Goodrich v. Adams*, 138 Mass. 552. But we are also satisfied that section 7 is not a statute of descent, and our decision should therefore rest upon this ground.

Sections 6 and 7 are largely identical in language, and, so far as affects the meaning of section 7, wholly identical in substance, with provisions in the act of 1699. The language of section 7, as it appears in that act, has never acquired a practical construction, and its meaning has never been determined by any utterance of this court; the nearest approach being a dictum of Judge Waite in a personal concurring opinion, when the opinion of the court held that the statute did not apply to, and its meaning was not involved in, the case decided. *Howard v. Howard*, 19 Conn. 313, 317. The meaning of the language must therefore be that attached to it as used in the act of 1699. That act followed an act of 1693, by which probate jurisdiction (which from 1639 to 1666 had been exercised by the general court through the particular court endowed for that purpose with the plenary power of the general court, and since 1666 by the general court, the court of assistants, and the county courts) was for the first time committed to a separate probate court, and the judges of the county courts were constituted as such court, "with full power to act in all matters proper for a prerogative court." 4 Col. Rec. 268. The act of 1699, as well as other acts passed at the same session, was probably framed by one of the committees which since 1696 had been engaged in "making new laws and altering former laws" for incorporation in a new revision of the laws, which at this time, or shortly after, was submitted to the general court, although the printing was delayed until 1702. While drafting the act the committee doubtless had before them the English statute of distributions passed in 1670 (22 & 23 Car. II. c. 10), as well as an act for the purpose of establishing the descent of land when any person is "lawfully seized of lands in his own proper right in fee simple" upon the same rules established for the distribution of personal estate, passed in Massachusetts in 1692, shortly after the charter by which that colony became a royal province went into effect. While the language of the act of 1699 in some provisions follows that of these acts, especially of the latter one, the act as a whole differs in material respects, and cannot be treated as an adoption of either. It is simply a fuller and more careful statement of the law of descent and administration as established by the first order on that subject, and the practice under that order, passed more than 30 years before the English statute of distributions existed; and the most important, if not the only practical, change wrought, lies in the denial to the new probate court of that plenary discretion belonging to the general and particular court while in the exercise of probate jurisdiction. Within six months after the organization of a general court under the "fundamental

orders" of 1639, it passed an order establishing the law of descent and administration. Land and personal property were treated alike. The townsmen or selectmen in each town were charged with the duty of causing an inventory to be taken when any person died intestate. The general court, acting ordinarily through the particular court, granted administration to the next of kin. Intestate estate descended to wife and children or next of kin; distribution to be made by the court "as in equity they shall see meet." The custom was, after a session of the general court, for the magistrates of the court to attend to distributions, notice thereof being given by deputies in their respective towns. 1 Col. Rec. 38, 308. The decisions on these distributions settled the rule determining the proportion in which the estate descended to wife and children or next of kin. The wife received one-third of the land for life, and one-third of the personal estate. 4 Col. Rec. p. 167. The children, including representatives of deceased children, inherited lands and goods in equal shares, except the eldest son, who had a double portion; this in accordance with the scriptural, not the English, law of primogeniture. (In the New Haven laws, authority is cited: Deut. xxi. 17; 1 N. H. Col. Rec. 614.) The next of kin were determined by the rule of civil law. Later, stringent laws were passed for calling administrators to account, and for requiring bonds. While these general rules of descent and administration were determined by the decisions of the court in administering the original order of 1639, and had the force of law, they were nevertheless subject to that discretion to act as in equity they shall see meet which inhered in all administration of law by the general court, and, as appears by the record of distributions, were followed more or less closely, according to the equities of each case.

The act of 1699, nominally enacted for preventing fraud in concealing the estate of a deceased person, collates the rules thus established for administration by the new prerogative court constituted the year before, and states them with the detail and precision deemed appropriate for that purpose, and, to exclude any implication of discretion in execution, follows its statement of the law with the express prohibition, "and in no other manner shall any such estate be distributed to any wife, children or kindred whatsoever." The act, however, while giving the probate court no discretion in determining the heirs or amount of inheritance, does authorize it to exercise a discretion, as formerly practiced in the manner of distributing to the heirs the ascertained portions. After stating the laws of descent where the intestate leaves children, the act of 1699 provides that the division of the estate in accordance with that law shall be made by three freeholders, unless where all the parties interested shall agree upon a division, and present the same, under their hands and seals, to the court of probate, which agreement shall be accepted

and allowed by the court, accounted valid in law, and put upon record: "Provided, nevertheless, that where any estate in housing and lands cannot be divided among the children without great prejudice or spoiling of the whole, being so represented and made to appear unto the said court of probates, the said court of probates may order the whole to the eldest sonne, if he accept it, or to any other of the sonnes successively, upon his refusal, he paying unto the other children of the deceased, their equal and proportionable parts or shares of the true value of such houses and lands upon a just apprizement thereof, to be made by three sufficient freeholders upon oath to be appointed and sworn as aforesaid, or giving good security to pay the same in the sonnes convenient time as the said court of probates shall limit making reasonable allowance in the interim not exceeding six per cent. per annum. And if any of the children happen to dye before he or she come of age or be married, the portion of such child deceased shall be equally divided among the survivors." In copying this act in the record of the October, 1699, session, the secretary has placed a period, and not a semicolon, before the last clause, "and if any of the children," etc.; but in the revision of 1702, for which the act had been prepared, printed under the supervision of William Pitkin, John Chester, and the same secretary, the clause is preceded by a semicolon, as also in the edition of 1715. It is printed with a semicolon in the Massachusetts act of 1692. Acts, etc., Province Mass. vol. 1, p. 43. In the revision of 1750 the clause remains unchanged, but is printed as a separate paragraph following the proviso. In the revision of 1784 the language is altered to read as follows: "And if any of the children die before he or she come of age, and before marriage, or before any legal disposition thereof and before marriage, the portion of such child deceased shall be equally divided among the surviving children and their legal representatives." In the edition of 1808 the chapter "De Settlement of Estates" is arbitrarily divided into sections, and the clause appears as a separate section following the proviso. It appears in the same manner in subsequent revisions, and in that of 1875 in the condensed form above quoted. We do not think these changes in successive revisions have altered the meaning of the clause.

It is very plain that the proviso in the act of 1699 was not intended to, and did not, alter the law of descent as existing and stated in other parts of the act. It is simply a device for avoiding an inconvenience in apportioning land among those to whom it had descended in accordance with the law. In effect, it authorized the court of probate, at its discretion, upon application of those interested, and with consent of the eldest son, to sell the real estate for the purpose of dividing the proceeds among the persons to whom it had descended upon the terms mentioned (i. e. pay-

ing the value of the land as appraised, either in cash, or in deferred payment protected by good security, in proportionable shares, to those entitled to the land), and included in the terms of the transaction the provision that upon the death of one of the parties, being a minor (whether before the time of the deferred payment, or at any time, is perhaps doubtful), his share (not of any intestate estate, but of the proceeds of the sale of land paid for that purpose, and standing in the form of a secured obligation, or cash in the hands of his guardian) should go to his surviving brothers and sisters, the other parties to the transaction. It is altogether unlikely that the general court contemplated a possibility of the surviving brothers and sisters not being all the next of kin to such deceased minor; but, under one construction of the language, it is possible that the division of such sum among the deceased minor's brothers and sisters, children of his father, might not include some half-brother on his mother's side, who at that time, and for nearly a century afterwards, were next of kin equally with brothers of the whole blood. The existence of such a possibility in a particular case might induce the court to exercise its discretion in not authorizing the transaction, but it does not turn the provision into a statute of descent, made in the alternative, depending for its operation on the discretion of the court of probate, and the assent of a possible heir. This power of authorizing a sale of land for the benefit of all the children and the survivors of those who might die in infancy was the only remnant given to the court of probate of that discretionary power to provide for the equities of special cases so freely exercised by the general court and particular court. It had been a not infrequent practice in distribution of intestate estates, where there were minor children, to transfer to one of the heirs, and sometimes to a stranger, a portion of the estate, in consideration of his obligation to pay, at times limited, the share belonging to each child, dividing among the survivors the share of a deceased minor. In 1640 the particular court, on application of the administrator of an intestate, distributed real estate amounting to £130 to the five children, the amount specified "to be paid into court when each comes to the age of 16 years," and authorized the widow, charged with their support, to sell the land, provided she give sufficient security for payment of the children's portions, and "provided also if any one or more of the children depart this life before they come to the age of 16 years, his or their portion is to be divided equally among those that survive." *Estate of Brundish*, 1 Col. Rec. 45. In 1645 the court settled the land of an intestate on Nathaniel Willette (not an heir), "in consideration whereof he is to pay £40 to the eldest son when he shall attain 21 years of age, and £20 apiece to the three daughters when they shall attain the age of 18 years; if any die in the

meane the portion is to be divided betwixt the survivors; the land to stand ingaged for the performance thereof." *Estate of Wakeman*, 1 Col. Rec. 135. It was doubtless such ancient practice that suggested the proviso in the act of 1699. In accordance with the strong conservatism which has characterized our legislation, this remnant of a prevailing practice when probate jurisdiction was administered by the omnipotent general court has been continued through successive revisions, and in that of 1875 appears unchanged in meaning in the proviso contained in sections 6 and 7, under discussion.

This is not a statute of descent. Any practice that may have grown up under it, of including in every case of distribution the portion of a minor child dying between the death of the intestate and distribution, in the estate divided between the surviving children, must be confined to cases where such surviving children are the next of kin to the deceased minor. It is significant that the proviso now claimed as altering the law of descent is not mentioned by Chief Justice Swift in his Digest, and is not referred to by Chief Justice Reeve in his careful treatise on Descents; that such claim has not been brought to the attention of the court of last resort during the two centuries the proviso has remained on our statute book; and that, so far as known, the general course of descent has never been altered by an application of this proviso, except in a single instance. Some 20 years ago the court of probate of the district of New Britain distributed the estate of an intestate minor equally to a brother of the whole blood and two brothers of the half blood, justifying such distribution under this proviso. The case furnished a harsh illustration of the rule preferring kindred of the whole blood, first adopted by our law in 1784. The probate judge, in pursuance of the statute, called to his assistance in the trial a judge of the superior court, selecting Judge Carpenter, who at that time was also a judge of this court. A brief memorandum of the grounds of the decision appears in a supplement consisting of two nisi prius cases printed in 48 Conn. 584. As appears by the opinion, the learned judges based their conclusions mainly on a number of decisions of courts of other states, and a mistake naturally followed a misapprehension as to the application of these decisions to our law. The Massachusetts act of 1692, before mentioned, contained a proviso in the same language as that used in our act; but that language did not remain substantially unchanged, and in 1805 an act was passed, different from the law of 1692, and plainly a statute of descent. In *Nash v. Cutler*, 16 Pick. 492, Chief Justice Shaw bases his opinion upon the clear and precise language of this statute, dismissing from consideration the provincial statutes as "obscure and ambiguous." In 1839 the territorial legislature of Wisconsin adopted the Massachusetts stat-

ute of 1805, and the Wisconsin court held that, with the statute, the construction which had been placed upon it by the Massachusetts courts was also adopted. The New Hampshire statute in the revision of 1842 resembles the Massachusetts statute of 1805, and is plainly a statute of descent, and has been so treated by the New Hampshire court. The Maine statute, in the revision of 1841, is somewhat similar to the Massachusetts statute of 1805, and plainly a statute of descent, and has been so treated by the Maine court. We have examined the cases in these states with care, and deem unnecessary any comment on their conclusions,—not wholly accordant. They all deal with statutes enacted since 1805, which by their terms, and without doubt, are statutes of descent, and establish an exception—unwise, perhaps—to the general law of inheritance. Historically, they all may have been developed from the old provincial act of Massachusetts, the same in language as our act of 1809; but we find nothing in these decisions to raise any doubt as to the meaning which attached to our law at the time it was enacted. That law remains unchanged in our revision of 1875, and must have the same meaning. Some change in the language of the statute de intestate estates was made in the revision of the probate law in 1885, incorporated into sections 630 and 631 of the General Statutes of 1888. Counsel on both sides claim that the changes in these two sections involve no departure from the meaning of the former law. Their claim may be right, but we express no opinion on the question. This case must be governed by the law as it stood in 1875.

We have discussed the case as if the estate left by Mrs. Welles consisted of property owned by her absolutely. In fact, it did not. Her estate consisted in an equitable interest in property, the legal title of which was vested in her husband as statutory trustee of her personal property under the statute of 1849. This equitable interest upon her death passed to those entitled to succeed to her intestate estate, either by force of the general statutes of descent, or by force of the express trust established on the marriage of Mr. and Mrs. Welles, under the statute of 1849. Counsel for Hubert's administrator claim that Mrs. Welles' interest passed to her children, as beneficiaries of the trust, in accordance with the terms of the trust, under the law of 1849. It is immaterial for the purposes of this case whether the claim is correct or not. In either event the equitable interest passed to her children, and became vested in Hubert, who, on the termination of the trust, was entitled to the whole estate; and so, in either event, the probate order directing the delivery of possession of the estate to the administrator on Hubert's estate should stand. The superior court is advised to render judgment affirming the decree of the court of probate. The other judges concur.

(89 Conn. 644)

DALY v. CITY AND TOWN OF NEW HAVEN.

(Supreme Court of Errors of Connecticut. Oct. 5, 1897.)

PLEADING AND JUDGMENT—VARIANCE—MUNICIPAL CORPORATIONS—GOVERNMENTAL DUTIES—LIABILITY FOR BREACH—DRAWBRIDGES—OFFICERS.

1. Where the complaint states no cause of action, the supreme court must reverse a judgment for plaintiff, though the facts found show a good cause of action.

2. The duty of a municipal corporation to build and operate a draw in a bridge, for the benefit of the highway up and down the river, is public and governmental.

3. A town constructed a drawbridge shaft without boxing it, and when the draw was operated the shaft revolved rapidly, and was dangerous. The draw was so constructed that the bridge tender, while operating it, could not see persons near the shaft. *Held* not to show a defective highway, as the duty to operate a draw is distinct from that of keeping the bridge safe for travel.

4. A town is not liable for a breach of its governmental duty to provide a draw that can be safely operated, where the defects in it no wise affect its use as a bridge and a part of the public highway, as there is no statute imposing such liability.

5. A town is not liable for the negligence of its bridge tender, performing the governmental duty of operating a draw.

Appeal from superior court, New Haven county; Milton A. Shumway, Judge.

Action by James Daly against the city and town of New Haven to recover damages for personal injuries to the plaintiff's intestate, claimed to have been caused by the defendants' negligence. After demurrer overruled, the case was heard in damages to the court. Facts were found, and judgment was rendered for the plaintiff for \$1,000, and defendants appealed for alleged errors in the rulings of the court. Reversed.

Wm. B. Stoddard and Wm. H. Ely, for appellants. James P. Pigott and David E. Fitzgerald, for appellee.

TORRANCE, J. The question raised by the demurrer is whether the complaint states any cause of action at all against these defendants. If it does not, the judgment must be reversed, even if the facts found show a good cause of action; for the finding in a case like the present must be founded upon the allegations of the complaint, and the trial court cannot legally find a cause of action if the complaint alleges none. "It is not enough that a party proves facts constituting a cause of action. He must also have alleged them, before he can recover." *Ives v. Town of Goshen*, 63 Conn. 79, 26 Atl. 845; *Atwood v. Welton*, 57 Conn. 514, 18 Atl. 322; *Taylor v. Keeler*, 50 Conn. 346. As we think the complaint does not set forth any cause of action, the question raised by the demurrer is decisive of the case upon this appeal, and it becomes unnecessary to consider the other questions raised upon the record. The material parts of the complaint are these: "(1) On July 10, 1896, the defendants were in the joint ownership, use, and control of a bridge over the

Quinnipiac river, in said town, connecting Ferry street, in the city of New Haven, with Meadow street, in the town of New Haven; and the repair and maintenance of said bridge was on said day in the care and charge of the defendants. (2) The said bridge was daily used by a large number of persons in crossing said river at said place. (3) On said day there was a draw in said bridge, which opened for the passage of vessels. Said draw was operated by steam power, located in an engine house above and over the floor of the draw. From said engine house a vertical shaft descended through the floor of the draw to the gearing under said draw, and within a short distance of the sidewalk on the east side of said bridge. (4) On said July 10, 1896, said shaft was not boxed up or inclosed so as to prevent contact with it by persons crossing said bridge. (5) On said day it was not possible for the servant of the defendants who operated said draw by means of the engine in said engine house to see persons located on said draw, and adjacent to said shaft, while he was engaged in opening and closing said draw. (6) The said shaft revolved with great rapidity when said draw was being opened and closed. (7) Said draw was operated by steam power for about two years prior to and on said July 10, 1896, it having previously been operated by horse power; and when said steam power was to be first applied to said draw the defendants' plans and specifications for said engine and shaft required that said shaft should be boxed up to a sufficient height to prevent contact with it by persons using said bridge. (8) On said day, between 5 and 7 in the afternoon, the plaintiff's intestate, a child under eleven years of age, was crossing said bridge, when the engine and shaft were put in motion to swing said draw around, and she was close to said shaft when it was thus put in motion. (9) Her clothing became entangled with said shaft, and her body was violently hurled against the trusses of said bridge and against an iron pipe running from said engine house through the floor of said draw and near to said shaft, and because thereof both of her thigh bones were broken and crushed, and her collar bone was broken, from which said injuries she died on July 12, 1896. (10) During the whole time that the plaintiff's intestate was on said bridge on said July 10, 1896, she was in the exercise of due care. (11) It was the duty of the defendants to have had said shaft so boxed up on said day that the clothing of the said Margaret Daly could not have come in contact therewith while in motion; and to have had such an opening in the floor of said engine house, or other arrangement, that the operator of said engine, while operating said engine and shaft, could have seen the said Margaret Daly, deceased, while she was on the floor of said draw, and near said shaft; and the defendants were negligent and careless in accepting said shaft, and in constantly using the same without boxing up, which the original specifications and plans for said engine and shaft called for, and which or-

dinary care and prudence demanded. (12) The injuries thus sustained by the said Margaret Daly, deceased, were caused by the negligence and carelessness of the defendants, as above set forth."

The complaint does not, in express terms, allege that the bridge in question was a public bridge forming part of a public highway; nor does it expressly allege that it was the duty of the defendants to keep it in repair; but it does allege facts which clearly show that it was a public bridge connecting two public streets, forming part of a public highway, and in substance it alleges that the duty to keep it in repair rested upon the defendants. It is also alleged that this bridge had a draw in it for the passage of vessels, and it thus appears that there was a highway, of which the bridge formed a part, over another highway up and down the river. Under these circumstances, if any duty whatever rests upon these defendants either to keep the bridge in sufficient repair for public travel or to open and operate the draw, it is imposed by statute, or it does not exist; and if any liability for a breach of either of these duties, in favor of an individual injured thereby, rests upon them, it is imposed by statute, or it does not exist at all. And the duty to provide and maintain this bridge as part of a public highway over the river, and the duty to build, maintain, and operate a suitable draw in the bridge for the benefit of the public highway up and down the river, are public governmental duties. *Chidsey v. Town of Canton*, 17 Conn. 478; *Borough of Stonington v. States*, 31 Conn. 214; *Beardsley v. City of Hartford*, 50 Conn. 529; *Lounsbury v. City of Bridgeport*, 66 Conn. 360, 34 Atl. 93; *French v. City of Boston*, 129 Mass. 592; *McDougall v. City of Salem*, 110 Mass. 21; *Butterfield v. City of Boston*, 148 Mass. 544, 20 N. E. 113. The case of *Greenwood v. Town of Westport*, decided in the United States district court for the district of Connecticut (62 Conn. 575, 53 Fed. 824, and 63 Conn. 587, 60 Fed. 560), one of the cases upon which the plaintiff relies, is not in conflict with the foregoing authorities upon the point that the duties aforesaid are public and governmental; for that decision rests upon the somewhat peculiar and exceptional state of facts of that case, and upon principles of maritime law that have no application here. Whatever, then, the defendants negligently did or omitted to do, as charged in the complaint, was done or omitted in the performance of a public governmental duty. The duty to keep the bridge in sufficient repair for public travel is quite distinct from the duty to provide and properly operate the draw. The former relates to the bridge as and when it forms part of a public highway open for the passage of persons, animals, and vehicles; the latter to the movable part of the bridge, when it has in aid of navigation temporarily ceased to be a part of such highway; and it does not necessarily follow that the party charged with the former duty is also charged with the lat-

ter. It is somewhat difficult to determine from the complaint whether the pleader intended to charge a breach of the former or of the latter duty; but we think the complaint must and can only be regarded as charging a breach of the latter, and not of the former, duty. It does not allege that the bridge, as a highway, was defective, dangerous, or unsafe for public travel. The negligence which it alleges is mainly the failure to box the shaft, and the failure to construct the house at the draw so that the bridge tender, when operating the draw, could see persons who might be near the shaft; and these matters relate solely to the construction and use of the draw as draw, and not to the draw as part of the highway. The only defect complained of is the danger from the shaft when revolving to operate the draw. This danger exists only when and so long as the draw is being operated, and is caused solely by such operation. When and so long as the draw is in place as a part of the highway, open for public travel, the bridge appears to be perfectly safe for such travel.

Regarding the complaint, then, as charging a breach of the duty to provide a suitable draw, or of the duty to properly operate the draw as such, we think it fails to show that any liability to the decedent rested upon these defendants for the alleged breach of these duties. The act (7 Sp. Laws, p. 370, of which our courts are by statute bound to take judicial notice) under which this bridge appears to have been built imposed upon the city of New Haven and the town of East Haven the duty to build and maintain this drawbridge, and imposed upon them also the expense "of opening the draw therein." It was provided that the bridge should be built by seven commissioners, and it was made their duty "to locate said bridge, and to direct in regard to the materials and manner of its construction and to superintend the same." Afterwards, in 1881 (9 Sp. Laws, p. 270), the duties resting upon East Haven with reference to this bridge devolved upon the town of New Haven. But the act under which this bridge was built does not impose upon these defendants any liability to a private individual injured by a breach of the duty to provide a suitable draw, or to properly operate the same; nor are we aware of any statute, public or private, which does impose upon them any such liability for any such breach. If we assume, then, that at the time the injury complained of it was the duty of these defendants to provide a draw that could be safely operated, and also to properly operate the same, and that the complaint shows this, and also a breach of that duty, still the complaint utterly fails to show that these defendants are liable for such breach at the suit of a private individual injured thereby. Nor, under such circumstances, would the defendants be liable for the negligence of their servant and agent, the gate tender, assuming that he was such. *Judge v. City of Meriden*, 38 Conn. 90; *Jewett v. City of New Haven*, Id. 368.

If, on the other hand, the complaint can, by any possibility, be regarded as charging a breach of the statutory duty to keep the bridge, as a highway, in a reasonably safe condition for public travel, then it is defective, in that it does not show any breach of that duty. It does not allege in terms that the bridge, as a highway, was defective, out of repair, or dangerous to public travel; nor does it state any facts which necessarily show this to be its condition. On the contrary, we think it fairly shows that, so long as the draw is a part of the highway, open for public travel, the shaft is not dangerous to such travel, and the bridge, for such travel, is perfectly safe. Under such circumstances these defendants would not be liable, under the statute, as for a defective highway, when it appears that the injury was caused in operating the draw. *Butterfield v. City of Boston*, 148 Mass. 544, 20 N. E. 113. We think the complaint in either aspect fails to state any cause of action. There is error in the judgment complained of, and it is reversed. The other judges concurred.

(183 Pa. St. 473)

ROGERS v. PHILADELPHIA TRACTION CO.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

NUISANCE—OPERATION OF MACHINERY—SPECIAL INJURY.

A street-railway corporation authorized to construct and operate motors and cables, but not invested with the power of eminent domain, is liable for special injury to the property of another caused by the jarring and vibration of machinery operated by said corporation on its own premises, though no actual negligence be proved.

Appeal from court of common pleas, Philadelphia county.

Action by John I. Rogers against the Philadelphia Traction Company to recover for damage to plaintiff's buildings, depreciation in their rental value, etc., caused by the jarring and vibration of machinery operated by defendant in its power house. From a judgment for plaintiff, defendant appeals. Affirmed.

The assignments of error are as follows, to wit: "First. The court below erred in overruling the demurrer to the amended declaration. Second. The trial judge erred in not charging the jury as requested in the first point presented by the counsel for the defendant: '(1) The defendant, by its letters patent in evidence, and the acts of assembly by virtue of which the same were issued, had full authority to build, construct, and operate a cable for the traction of cars, and for that purpose to erect and operate upon its own land such stationary engines as are necessary to furnish power to said cable, without liability to the plaintiff for consequential damages to his property; the uncontradicted evidence being that no part of plaintiff's property has been taken, nor is any portion of the two buildings in contact, there being no use by the defendant of a party wall, but, on the contrary, its wall hav-

ing been built upon its own land, leaving a space between it and plaintiff's wall all the way from the bottom of the foundations to the top of the walls, so designed especially to prevent contact; the machinery and its foundations having been further isolated by being surrounded by an air space, and the best precautions known to the state of the art having been taken by defendant to prevent the transmission of noise or vibration, excepting as they may be conveyed by the bed of the earth beneath all foundations, or by the atmosphere. The verdict should be for the defendant.' Third. The trial judge erred in not charging the jury as requested in the second point presented by the counsel for the defendant: '(2) The defendant is incorporated for the purpose of, and is engaged in, operating a public work, to wit, the carriage of passengers along the public streets in cars drawn by an endless cable. The necessities of this operation and the character of the business compel it to seek the heart of the city, as much for the convenience of the public as for its own. Hence the maintenance of a power house and stationary engines as near the center of its line through the center of the town as possible is in the direct line of its duty, and is part of the lawful enjoyment of its property and franchises; and, as it appears by the evidence this was done without negligence or malice, it entails no legal liability. If unavoidable inconvenience falls upon neighbors, the same is *damnum absque injuria*, and your verdict should be for defendant.' Fourth. The trial judge erred in not charging the jury as requested in the third point presented by the counsel for the defendant: '(3) The injury complained of is alleged to be exclusively due to the operation of the machinery, not to the construction of it or the power house. As the operation is lawful and without negligence, and conducted upon the defendant's own land, without contact or encroachment upon plaintiff's, there can be no recovery, and your verdict should be for defendant.' Fifth. The trial judge erred in not charging the jury as requested in the fourth point presented by the counsel for the defendant: '(4) This is not the case of a private individual maintaining upon his premises, in the heart of a dwelling quarter of the city, objectionable machinery, which could be equally well placed in a more secluded spot, but it is the case of a cable railway authorized by law to maintain a cable road in one of the most important and busy thoroughfares of Philadelphia; and as it appears that this machinery must necessarily be placed upon that thoroughfare, and has been built upon the company's own property, and isolated from adjoining buildings, its maintenance is lawful, and your verdict should be for the defendant.' Sixth. The trial judge erred in not charging the jury as requested in the fifth point presented by the counsel for the defendant: '(5) Under all the evidence, the verdict should be for the defendant.' Seventh. The trial judge erred in his instruction to the jury as shown in the bill of

exceptions: 'I do charge you that if there was any such special damage resulting to the plaintiff from the operation by the defendant of the defendant's works in that building, whereby the plaintiff lost rent, or suffered in some other ways that have been described, he is entitled to a verdict for the amount representing that injury.'"

David W. Sellers, for appellant. George P. Rich and Henry C. Boyer, for appellee.

STERRETT, C. J. Defendant company's fourth point for charge was affirmed, and all the others, which contained binding instructions for defendant, were refused. In thus refusing to affirm either of the latter points the learned trial judge was so clearly right that neither of the questions involved therein requires discussion, and they are accordingly dismissed without further comment.

In view of the testimony of plaintiff's witness Hogan, and the admissions made on cross-examination by defendant's witness Craig, the learned judge might well have submitted to the jury the question of defendant's negligence in the construction and operation of its machinery, and sustained a verdict on that ground; but, instead of doing so, he stated to the jury that he recalled no evidence of negligence on the part of the defendant, and proceeded to instruct them that if, in consequence of the operation by defendant of its machinery in the building, there was necessarily a special damage or injury suffered by the plaintiff apart from what was common to the neighborhood and to people generally, the plaintiff might recover to the extent of the injury thus specially sustained. The correctness of this instruction is challenged in the seventh specification. In addition to that, the defendant demurred to the second and third counts of the statement because neither of them contained any averment of negligence either in the construction or operation of defendant's machinery, etc. Refusal to sustain the demurrer is the subject of complaint in the first specification. Under that ruling and the foregoing instructions, the jury found, on quite sufficient evidence, that plaintiff was specially damaged by the operation of defendant company's machinery, and a general verdict for the amount of the damages thus sustained by him was accordingly rendered, and judgment entered thereon. This necessarily involves the question of defendant's liability in the absence of evidence of actual negligence, and that is the controlling question in this case. By its charter act of incorporation of June 13, 1883, § 6 (P. L. 123), the defendant company was created "for the construction and operation of motors and cables, and the necessary apparatus and mechanical fixtures for applying and operating the same." So far as relates to this case, that is the extent of its powers. Its authority to hold real and personal estate necessary for its purposes does not in any way extend its char-

ter power or privileges, and it is conceded that it is not invested with the power of eminent domain. There is certainly nothing in its charter to relieve the defendant from liability for the special injury which the plaintiff has suffered in consequence of its operations on its own land, as determined by the verdict. As an artificial person, it cannot, any more than a natural person, escape liability for special injury done to others, unless it can be shown that, because it is a mere creature of the law, it enjoys immunity from liability which natural persons do not; but no such proposition as that has ever been recognized in any well-considered case. No authority for it can be found in *Railroad Co. v. Lippincott*, 116 Pa. St. 472, 9 Atl. 871, *Railroad Co. v. Marchant*, 119 Pa. St. 541, 13 Atl. 690, or any of that line of cases. It is not only untenable in law, but it is lacking in reason. If several individuals had purchased defendant company's lot, and erected thereon the machinery and appliances that it did, and had operated the same as it has done, to the great and manifest special injury of the plaintiff, no one would venture to question their liability to respond in damages. In several cases, among which are *Gas Co. v. Murphy*, 39 Pa. St. 257, and *Hauck v. Pipe-Line Co.*, 153 Pa. St. 366, 26 Atl. 644, it has been held that, where a corporation has no right of eminent domain, the operation of its works, causing special physical injury to another's property, is virtually an actionable nuisance. The first of these was the case of an incorporated gas company, authorized to supply gas to the borough and such individuals and corporations as might desire the same; to produce, sell, and distribute gas for the production of artificial light; to make and erect the necessary apparatus and manufactory introducing the same; to construct the necessary machinery; to purchase and prepare the necessary materials, with the right to enter upon any public street, lane, or highway, for the purpose of laying the necessary pipes, etc. The company, having purchased real estate necessary for carrying on its business, erected its works, and put them in operation. The fluids percolated through the soil from the gas works, contaminated the water in plaintiff's well, and injured his property, for which he brought suit. The defense was that the gas company, being authorized by law to erect and operate its works for the purpose of manufacturing gas for the public, was not responsible for the injury, unless shown to have been caused by its negligence. It was held that this defense could not be sustained. Mr. Chief Justice Lowrie, speaking for the court, said: "The defendants think that, as a corporation authorized by statute to carry on this business, and to purchase in fee simple such real estate as may be necessary for it, they are not answerable for such consequential damages as are complained of here. We cannot adopt this view. No such exemption is involved in the fact of incorporation, or in

the privilege of buying land. The principle they invoke applies only where an incorporation clothed with a portion of the state's right of eminent domain takes private property for public use on making proper compensation, and where such damages are not part of the compensation required." This case was afterwards cited with approval, and the principle thereof reaffirmed, in *Hauck v. Pipe-Line Co.*, supra. In the latter the defense was that the business of the defendant company was not only lawful, but it was conducted with due care, and that, in the absence of evidence that the escape of the oil was due to the negligence of the company, the latter was not liable. In holding that this defense was untenable, this court, approving and adopting that portion of the learned trial judge's charge embraced in the tenth specification, said: "If the mere fact that the business is a lawful business, and has been conducted with care, would be a defense where a neighbor's land has been injured in consequence of the business carried on there, —the escape of gas, for instance, or the escape of oil,—the result would be that a man might lose his farm, might be compelled to leave it, and have no compensation, simply because the business which brought about this loss was a lawful business, and was carried on carefully. This is not the law. No man's property can be taken, directly or indirectly, without compensation, under the law of this state. Hence there are cases, and a great many of them, where a defendant is held liable in damages although his business is lawful, and he has exercised care in carrying it on." Other authorities to the same effect might be cited, but in view of the evidence, and the facts established by the verdict, enough has been said to show that the defendant company has no just reason to complain of the ruling of the learned trial judge, or his instructions to the jury. Neither of the specifications of error is sustained. Judgment affirmed.

(183 Pa. St. 38)

BROWN et ux. v. PINE CREEK RY. CO.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

RAILROADS—NEGLIGENCE—EXTRAORDINARY FLOOD
—CONDEMNATION OF LAND FOR RIGHT OF WAY
—RELEASE AND DISCHARGE—BURDEN OF PROOF.

1. Whether the Johnstown flood of 1889 was extraordinary on a particular stream was a question for the jury, there being evidence that within 42 years there had occurred four other floods of almost equal force and volume of water.

2. In determining what is an extraordinary flood on a particular stream, the jury must consider what should be expected in such stream from its character, the adjacent territory, and the fact that there had been several previous floods of equal force and volume.

3. A railroad company is liable for injury to the adjoining property of one whose land it had appropriated, caused by the construction of an embankment and bridge insufficient to vent the water of a stream during an ordinary flood.

4. An agreement by one whose land has been appropriated by a railroad company, releasing "all

claims for damages which we have sustained or shall sustain by reason of the location, construction, and operation of the road," releases only the damages which the viewers are authorized by statute to assess, and does not include damages caused by subsequent negligence of the company in constructing a bridge and embankment on the appropriated land.

5. In an action to recover damages caused by the negligent construction of such bridge, the burden is on defendant to show that the bridge was built before the release was given.

Appeal from court of common pleas, Lycoming county.

Action by Simon B. Brown and wife against the Pine Creek Railway Company to recover for injury to plaintiffs' property, caused by the negligent construction of a bridge. From a judgment for plaintiffs, defendant appeals. Affirmed.

J. Harrison, John J. Reardon, and S. R. Peale, for appellant. Henry C. McCormick and Seth T. McCormick, for appellees.

DEAN, J. The plaintiffs were, and for many years had been, the owners of a farm, containing 66 acres, in Cummings township, Lycoming county. Its northern boundary was Pine creek. In September, 1882, the predecessors of what is now the Pine Creek Railway Company appropriated for railroad purposes, under its right of eminent domain, a roadbed 90 feet in width, and in quantity about $4\frac{1}{4}$ acres, running through the farm. The parties could not agree upon the amount of damages, and viewers appointed to assess them awarded to plaintiffs \$593.75. From this award the railroad company, on October 5, 1882, appealed. On November 2d following, issue was framed on the appeal. On January 18, 1883, the parties, by agreement in writing, settled the issue. The material parts of the agreement, as concerns the present contention, are as follows: "Know all men by these presents, that we, James Ramsey, of Watson township, and Simon B. Brown and Sarah Jane, his wife, in right of Sarah J. Brown, of the township of Cummings, county of Lycoming, and state of Pennsylvania, for and in consideration of the benefits and advantages which will result to us from the location and construction of the railroad of the Jersey Shore, Pine Creek and Buffalo Railway Company and its branches, and the further consideration of twelve hundred dollars, paid by the said railway company, the receipt of which is hereby acknowledged, have granted, bargained, sold, released, and quitclaimed unto the said railway company, and to their successors and assigns, the right to enter upon, use, and appropriate a strip of land ninety-nine feet in width, said strip of land to be sixty-six feet wide on the west side and thirty-three feet on the east side of the center line of said railway, for the construction and use of said railway as the same is now located over our lands in the township of Cummings, county of Lycoming, and state of Pennsylvania.

* * * And we, the grantors, do hereby release to the said railway company all claims for damages which we have sustained or shall sustain by reason of the location, construction, and operation of its said railroad or branches." In the fall of 1882, the winter of 1882 and 1883, and spring of 1883 the railroad company constructed a fill or embankment for its roadbed on the land appropriated, from a point on the rising ground 1,100 feet distant from Pine creek, which latter it crossed by a bridge. At the bridge, the embankment was about 23 feet in height. The bridge was constructed on piers and abutments. The company, having finished the construction of its road in 1883, operated it until June 1, 1889, when a flood swept away the embankment and bridge, also plaintiffs' barn and outbuildings and orchard. The top soil of the bottom land, between the embankment and the creek, was also washed off. Plaintiffs, alleging their injury was caused by the negligent and defective construction of the embankment and bridge; that the two together were so planned and built that they formed, in time of freshets, a dam for the water of the creek, causing it to back, and sweep over their buildings and land,—brought this suit for damages. At the trial in the court below defendant offered no testimony, but relied on two grounds of defense: (1) The flood of June 1, 1889, was an extraordinary flood, an act of God, for which defendant was not answerable. (2) The agreement of January 18, 1883, was an effectual bar to plaintiffs' action. The court submitted to the jury three questions on the evidence: First. Was the flood an extraordinary one, which could not reasonably have been foreseen and provided for? If it was, then defendant was not answerable. If it was but an ordinary flood, then, second, were the embankment and bridge so negligently constructed that they caused the damage? If they were negligently constructed, and caused the damage, then, third, were they constructed before the release of 18th of January, 1883? The last question was to be answered by a special finding, the effect to be determined by the court on a question of law reserved, to wit, the interpretation of the written release. The jury found for plaintiffs, and the court afterwards, in opinion filed, entered judgment on the verdict. Defendant appeals, assigning eight errors.

The first to fifth, inclusive, have nothing to sustain them. The complaint in the first—of the improper admission in evidence of the record showing the appointment of viewers—is not well founded, in view of the purpose of the offer; that is, to show the appropriation of the land by defendant, and the date of it. The remaining four assume there was no evidence for the consideration of the jury; therefore a verdict should have been directed for defendant. This is a mistaken assumption. The court was clearly right in deciding the case was one principally of fact, to be determined

by the jury from the evidence. The sixth, seventh, and eighth suggest three propositions: (1) Did the evidence establish indisputably the flood was an extraordinary one, and therefore one which defendant was not bound to anticipate in the construction of the embankment and bridge? (2) If it did not, then was there evidence of negligence in construction which was the approximate cause of the damage? (3) Was there any evidence to submit to the jury that the release was executed before the construction of the embankment and bridge?

As to the first: The flood of the 1st of June, 1889, generally known as the "Johnstown Flood," extended nearly over the entire area of the state. At many points it was unquestionably extraordinary in its force and destructiveness; at others it was not. Whether it was extraordinary on Pine creek, a tributary of the Susquehanna, was, on this evidence, a question of fact. The testimony was somewhat conflicting; some of it tending to show it was of such an exceptional character that a builder could not reasonably have anticipated it; some of it, however, tending to show it did not exceed in force and volume of water the ordinary spring flood. Much of the apparent conflict arose from the difference in language adopted by witnesses to express the same idea. For example, it was established that in a period of 42 years, including the flood of 1889, there had occurred five floods in this creek of about equal force and volume of water. Some of the witnesses termed these floods "big floods," "extraordinary floods"; others said the one in 1889 was about the same as other floods,—meaning the three or four previous ones, which they remembered particularly because of their destructiveness. That an extraordinary flood may occur more than once in a series of years cannot be questioned, and the repeated occurrence does not, of itself, warrant the conclusion that it was only ordinary. Nevertheless, as said by this court in *Railway Co. v. Gilleland*, 56 Pa. St. 445: "But the frequent recurrence of what was supposed to be extraordinary was some evidence that the real character of all these floods had been mistaken by those who testified as to their extraordinary character, and that they were really only ordinary freshets, though measuring up to the highest altitude of that class. It was proper, therefore, to submit this question to the jury, with instructions, if they so found the fact, to apply the rule as to ordinary freshets." The learned judge of the court below embodied exactly this idea in his language to the jury, thus: "I would say to you, gentlemen of the jury, that if there had been no floods at any time on Pine creek approaching in height the quantity of water of the flood of 1889, that it would be an end of this case. The plaintiff could not recover, because then it would be clearly an extraordinary flood, against which the company were not bound to provide. But the question is whether, in view of the facts

of these other floods that have been testified to by the witnesses as having occurred previously, and the number of times that they have occurred, together with the other circumstances that I have mentioned,—whether, under all this testimony, this flood of 1889 was really an extraordinary flood on Pine creek. * * * In considering what is an extraordinary flood in a particular stream, you must take into consideration what should be expected in that particular stream from the character of it, the adjacent territory, and the other circumstances that I have mentioned of the previous floods, all taken together." This same instruction was more than once repeated. It was correct, and the jury could not have failed to understand it. They found this was just such a flood as residents of that neighborhood might, from their observation, expect, and therefore was not extraordinary.

As to the second: Was there negligence in construction? There was abundant evidence from which the jury was warranted in finding that if this 1889 flood was an ordinary one, then the construction of the embankment and bridge made no provision for it. The vent was wholly insufficient for the escape of that quantity of water, and the structure served but as a dam to aggravate the destructiveness of the accumulated water. The constructing engineers of defendant were bound to know the ordinary high-water mark of the stream, and make provision for it, because ordinary inspection of water shed and fall, as well as inquiry of those who lived near the stream, and were familiar with its history, could have shown them what should be the design and capacity of their proposed structure. The rule applicable is stated in *Railway Co. v. Gilleland*, supra: "We must conclude, therefore, that, though the state's right of eminent domain is committed to the company, and it may lawfully enter and build all such structures proper to accomplish the purpose of its charter without liability for damages, further than is provided for in its charter, yet this does not justify unskillfulness and unnecessary injury in the mode of performing the work, or in the character of the structures erected. The company is bound to bring to their execution the engineering knowledge and skill ordinarily known and practiced in the construction of such works. * * * If the culvert was so unskillfully and negligently constructed as to be insufficient to vent the ordinary high water of the stream, the railroad company building it would have been liable for the injury thereby caused. The apparent facts indicated the duty." But it was scarcely pretended at the trial that the defendant had not failed in duty if the flood was an ordinary one. The whole strength of its contention was in the averment that the flood was extraordinary; therefore could not, when the work was planned, reasonably have been anticipated. The fact, according to the finding of the jury, being otherwise, negligence, as an inference, almost necessarily followed.

As to the third question: Was there any evidence to submit to the jury which would warrant the finding that the work was done after the execution of the release? While the testimony on that point is meager, nevertheless it did not clearly appear the work was done on the 18th of January, 1883, the date of the writing. The land was first appropriated by defendant under its right of eminent domain. It took only the land. The character of the structure which would be put upon it was wholly in the future. Then the proceedings to assess damages for the taking were instituted. While this issue was pending, it was settled by the agreement. There is not a word in the writing necessarily indicating an intention to include other damages than those within the jurisdiction of the viewers. We concur with appellant that it was a very material fact in the interpretation of the agreement whether the embankment and bridge were constructed before or after its execution. If the work was then completed, it might very fairly be assumed that the words, "We do hereby release to the said railway company all claims for damages which we have sustained, or shall sustain, by reason of the location, construction, and operation of said railroad," covered the claim now sued for. The agreement should be interpreted in view of the surroundings of the parties at the date of it. If this plaintiff who had for years lived on this land, had witnessed all the floods in the stream which bounded it, had before his eyes the structure, which was obviously, as he now avers, insufficient to pass the water by ordinary floods, it certainly would be only a reasonable inference that the damages he intended to release were those which might result from the structure then before him. But the date of the construction was no part of plaintiff's case. If there were surroundings dehors the agreement, which were important to an ascertainment of the real intention of the parties from their words, the burden was on defendant to show such surroundings. But it offered no evidence whatever. It now relies on plaintiff's vague statements to establish a most material fact in its case. Nothing, however, is to be gathered from his testimony except the fact that he did not certainly know when the work was done. To repeated questions he answered he did not know when the bridge, abutments, and piers were erected. He says they were working there in the winters of 1882 and 1883, and commenced running the next spring. Whether the narrow vent of the bridge for the waters of an ordinary flood existed on 18th of January, 1883, could not be determined as an established fact from plaintiffs' testimony or that of any other witness. The court was therefore bound to submit the evidence to the jury to find the fact, and they have found the agreement "was executed and delivered before the construction of the embankment, bridge, abutment, and piers in controversy." It was, doubtless, in the power of defendant to prove beyond controversy the exact date of the com-

pletion of the work. It did not choose to do so. There being nothing in the agreement to indicate otherwise, the fact must be taken as the jury has found it. Therefore, from its words, at the date of the agreement the plaintiff intended to release just such damages as the jury of view had the authority to assess under the act of assembly. All the assignments of error are overruled, and the judgment is affirmed.

(182 Pa. St. 418)

PHILADELPHIA & R. R. CO. v. POTTSVILLE WATER CO.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

RAILROADS—EMINENT DOMAIN—RIPARIAN RIGHTS.

1. A riparian owner has no ownership of running water, and no right to divert it for other than ordinary domestic purposes.

2. A railroad company owning riparian lands, or holding them by lease, and diverting water for the purpose of supplying its locomotives, does not thereby exercise its right of eminent domain, and consequently its right to the water is the same as that of any other riparian owner. Therefore, regardless of the needs of its business, it cannot enjoin the taking of the water by a water company duly proceeding under the power of eminent domain.

Appeal from court of common pleas, Schuylkill county.

Bill by the Philadelphia & Reading Railroad Company (by Joseph S. Harris, Edward M. Paxson, and John Lowber Welsh, receivers) against the Pottsville Water Company, to restrain defendant from constructing a dam on Indian Run stream, in Branch township, Schuylkill county, that would interfere with and destroy the dam thereon owned by complainant railroad company, and the pipes leading thereto, and deprive complainants of the use of the water in said stream. A preliminary injunction was granted, but it was afterwards dissolved, and the bill was dismissed, and complainants appeal. Affirmed.

After first purchasing the entire watershed of the Indian Run valley, situate in Branch township, Schuylkill county, on the 23d day of November, 1895, the Pottsville Water Company, the appellee herein, duly acquired the title to 37 acres of land situate in Branch and Manheim townships, Schuylkill county, over which flows a stream of water known as "Indian Run," at its confluence with the West Branch creek. The land was owned by the heirs of Dr. Samuel H. Shannon, and was condemned by the Pottsville Water Company, under its right of eminent domain, in proceedings to No. 110, July term, 1893, duly perfected by location, by the approval by the court of a bond to the owners in the sum of \$30,000, and the taking possession of the property for the purpose of building a dam and completing preparations to connect the waters of said Indian Run stream with its water supply from other sources, so as to supply its consumers, the inhabitants of the borough of Pottsville and neighboring boroughs, with an abundant and pure supply of water, as required by its

charter. On the 9th day of October, 1896, an injunction was issued by the court, at the instance of the Philadelphia & Reading Railroad Company, the appellant, restraining the appellee from constructing a dam at any place on Indian Run stream, and from extending pipes to this water and removing the waters thereof so as to destroy or impair certain water rights in the said stream claimed by appellant by virtue of certain leases executed between Dr. Shannon and appellant. The first of these leases was dated January 10, 1866, was duly recorded, had 10 years to run, and provided, *inter alia*, that, for an annual rental of \$360, Dr. Shannon granted, demised, and let unto the appellant the right to lay water pipes from the said dam (an old powder-mill dam erected prior to the date of the lease) on Indian Run to a certain water station to be erected near by, and, by means of a pipe introduced therein, to take and convey to said water station as much of the water in the said dam as appellant might want for the use of the locomotives running upon the Mine Hill Railroad. The second lease was dated December 28, 1875, and was duly recorded in the recorder's office in Schuylkill county on July 13, 1876, had 20 years to run, expiring on December 31, 1895, and provided, *inter alia*, that, for an annual rental of \$400, Dr. Shannon "granted, demised, and let" unto appellant so much of the water of the said reservoir or dam or stream known as "Indian Run" as appellant might want to supply the locomotives running upon said Mine Hill Railroad, and also "the right to take and lead away and convert the said water to the use of" appellant by means of a line of water pipes laid in a strip of ground formally described. These leases contained also an option to purchase, Dr. Shannon having covenanted that "if, at any time during this term, appellants would pay to him the sum of \$6,000 in cash," he "will thereupon, by good and sufficient deed, grant and convey unto the appellants, their successors and assigns, forever, and free and clear of all charges and incumbrances whatsoever, the right and privilege to lay and maintain their water pipes, and to take water for the use of their engines from said Indian Run, upon this property, as this lease provides." Appellant claimed also that, under the purchasing clause of the said lease, it had tendered a deed and \$6,000 to the heirs of Dr. Shannon, and, although it held no deed, it was entitled to one from the owners, granting the perpetual right to take water from Indian Run, and that proceedings to enforce the specific performance of said contract were pending in the orphans' court of said county. The deed tendered in September or October, 1895, by the appellant to the Shannon heirs, contained objectionable features; and the owners, by the advice of their counsel, refused to execute it. The tender of \$6,000 was made, and the written notice that the appellant company proposed to purchase the perpetual water rights under the lease was served December 12, 1896, on the Shannon heirs. On October

26, 1896, the preliminary injunction was dissolved, and the bill was dismissed with costs, and upon this action of the court error was assigned.

John F. Whalen and James Ellis, for appellants. Geo. M. Roads and D. O. Henning, for appellee.

GREEN, J. It must be conceded that the title of the appellant company was not acquired by an exercise of the right of eminent domain, but by voluntary leases from the owners. Hence it follows, clearly, under our well-settled decisions, that the right acquired under the leases, having been obtained from a riparian owner, has no greater dignity than the right of the riparian owner himself. It is just as clear that riparian owners have no ownership of running water, no right to divert it and sell it to strangers for general use, and are limited in their own use of it to ordinary domestic purposes. A very few of our cases easily determine all matters in controversy here. Thus, in *Railroad Co. v. Miller*, 112 Pa. St. 34, 3 Atl. 780, it was held that where a railroad company owns the land in fee, through which a stream flows, and it takes water from the stream, at a point on its own land, for the purpose of supplying its locomotives, such taking is not under the right of eminent domain, but by virtue of its rights as a riparian owner. The case, on its facts, was much stronger than the case at bar. The company owned the land in fee through which the stream ran, and they only used the water to supply their own locomotives. They increased the quantity of water to be used for that purpose by erecting an engine on their own land along the edge of the stream, and pumping from the pool of the plaintiff's dam water enough to flow through a six-inch pipe, whereas they had only used a four-inch pipe prior thereto. The owner of the mill property immediately below on the same stream complained that the supply of water necessary for his mill was materially diminished, and brought an action to recover damages for his injury, and this court sustained his right to recover. The same arguments were made there as here,—that the company owned the water and the right to use it, by virtue of its right of eminent domain,—but we held that they did not hold by such a right, but only as riparian owners, and therefore could only use it as such. Paxson, J., delivering the opinion, said: "It was contended upon the trial below, and it was urged here, that the proceeding should have been by a jury of view, under the act of May 16, 1857, and not by a common-law action. We do not regard this point as tenable, for the reason that the water was not taken by the company under the right of eminent domain, but by virtue of its right as a riparian owner. As before stated, it owns the land in fee simple, at the point where the water is taken, and has precisely the right of every other riparian owner on that stream. It may use

the water as other owners use it, without responsibility to any one therefor, provided such use is not of a character to injure other riparian owners on the same stream. The principle established by a long line of decisions is that the upper riparian owner has the right to the use of the stream on his land for any legal purpose, provided he returns it to its channel uncorrupted, and without any essential diminution; that in all such cases the size and capacity of the stream is to be considered; and that any interruption of or interference with the rights of the lower riparian owners is an injury for which an action will lie, unless too trifling for the law to notice." After stating the general doctrine that a riparian owner has the right to use the water of the stream passing over his land for ordinary domestic purposes, the opinion proceeds: "But where the upper riparian owner diverts or uses the water, not for ordinary domestic purposes, such as are inseparable to and necessary for the use of his land, but for manufacturing, or other purposes having no necessary relation to his use of his land, the case is different. In *Wheatley v. Chrisman*, 24 Pa. St. 298, it was held that: 'A proprietor of land over which a stream of water runs has, as against a lower proprietor, the use only of so much of the stream as will not materially diminish its quantity. His right is not to be measured by the reasonable demands of his business.'" The principal value of this case is that it determines that when a corporation clothed with the right of eminent domain takes the water of a stream for its corporate use, not by an exercise of its right as such, but by virtue of its right as a riparian owner, it has no other or higher right in the water than an ordinary riparian owner, and it matters not what the needs of its business are for the water so used.

In the case at bar the appellant company held its right to the water of the stream in question only by virtue of leases from the riparian owner, Dr. Shannon, and it does not matter in the least that it had an option to buy the land through which the stream runs. If it had actually made the purchase and taken the conveyance in fee simple, it would have been in no better condition in this respect, under the decision last cited. Another very forcible illustration of the doctrine is found in the case of *Haupt's Appeal*, 125 Pa. St. 211, 17 Atl. 436. There an incorporated borough bought a tract of land through which a creek flowed, constructed a reservoir on the tract, and conveyed the water therefrom several miles, to the borough, for the use of its inhabitants. Another borough was located about two miles above on the same creek, and certain private parties, whose rights were subsequently acquired by a private corporation, started a plant to pump the water of the stream for the use of the upper borough. The lower borough filed a bill to restrain the pumping and diversion of the water, and we sustained an injunction on the

express ground that the lower borough had acquired its rights by an exercise of its right of eminent domain as well as by a purchase of the land. We said: "If the authority of the plaintiff were measured by its rights as riparian owner, it would be slender enough. It might, indeed, use the water for domestic purposes incident to the said ten acres of land. If there was a tenant thereon, he could use it for watering his stock and for household purposes; for any useful, necessary, and proper purpose incident to the land itself, and essential to its enjoyment. But that the rights of a riparian owner would justify the plaintiff in carrying the water for miles out of its channel to supply the borough of Ashland with water is a proposition so palpably erroneous that it would be a waste of time to discuss it." In *Lord v. Water Co.*, 135 Pa. St. 122, 19 Atl. 1007, a water company had acquired by purchase an acre of ground, upon which there was a strong spring, causing a stream of water to flow from it and over the lands of a lower owner. The water company undertook to divert the water of the spring to supply the inhabitants of Meadville with water for their necessary use. The lower owner brought an action to recover damages for the loss of the water, and recovered a verdict and judgment, which we sustained. The water company had the right of eminent domain, but did not exercise it. We said: "It was conceded upon the argument that the company had the right to divert it [the water] under its power of eminent domain. But it had never exercised such right. To do so involves compensation to those who are or may be injured by such diversion. Compensation was not made, nor security tendered. While a city or borough, or a company having the right of eminent domain, may take a spring or stream of water to supply a municipality, it can only do so by making compensation to those who are deprived of the use of the water, as provided by the constitution. A taking without compensation is a trespass, as much so as the taking of land by a railroad company to construct its road without making compensation or filing a bond with security as provided by law. Where the power to take exists, it must be exercised according to law. If it is not, the corporation so taking becomes a trespasser, and may be proceeded against as such. It is a mistake to assume that the purchase of this acre of land gave the company an absolute right to the spring of water. The water did not pass by the deed beyond its reasonable use by the vendee as a riparian owner." The foregoing principles were all repeated in *Clark v. Railroad Co.*, 145 Pa. St. 438, 22 Atl. 989, and are not at all in dispute. It remains only to apply them to the facts of this case. The defendant is clothed with the power of eminent domain, and is endeavoring, by a strict compliance with the law, to exercise its right to supply the citizens of Pottsville with an adequate quantity of water for their consump-

tion. It is met by the claim of the plaintiffs to a right to use the water of the stream in question to supply water for the use of their locomotives, and this right, they say, will be interfered with, and perhaps destroyed, if the water company is permitted to divert the water of the stream. They claim title to the water under a lease from the riparian owner. Such right as he was able to give them they hold, but it was not more than the right of a riparian owner, and as such it was liable to be appropriated by the water company in proper proceedings. We cannot see that the plaintiffs, who never exercised any right of eminent domain in obtaining the water, hold by any better title than their grantor, and we are therefore of opinion that the learned court below did not err in dissolving the injunction and dismissing the bill. We say nothing as to the right of the plaintiff company to compensation for loss of the water to which it may be entitled, as no such question arises on this record. Decree affirmed and appeal dismissed, with costs.

(182 Pa. St. 457)

FISHER v. PAXSON et al.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

PASSENGER CARRIED BY STATION—INJURY ON TRACK—NEGLIGENCE—EVIDENCE.

1. The fact that a culvert on a railroad was covered after a person walking along the track had fallen into it is immaterial on the question of the company's negligence.

2. A passenger who, being carried beyond his station because asleep, is permitted to alight at a place other than a station, and who, after walking some distance on the track, falls into a culvert thereon, cannot recover for the injury therefrom from the railroad company.

Appeal from court of common pleas, Lycoming county.

Action by Jacob Fisher against Edward M. Paxson and others, receivers of the Philadelphia & Reading Railroad Company. Judgment for defendants. Plaintiff appeals. Affirmed.

The opinion of the court below is as follows: "The plaintiff in this case, who resided at Treverton, some time in August, 1894, purchased a ticket to Williamsport, and took the train that leaves Shamokin about 9 p. m., arriving at Williamsport at about 11 p. m. Before reaching this station, the conductor took up his ticket, after which the plaintiff fell asleep, and did not awaken until the train had left Williamsport station, and was under headway. After the train was some distance past the station, the plaintiff awoke, and the conductor and brakeman came into the smoking car where he was. The conductor asked him if he did not want to get off at Williamsport, to which he replied, 'Yes, to be sure,' and then the conductor said, 'Well, we have passed Williamsport.' The plaintiff then said that 'it was too bad'; that he had a letter that his sister was dying, and asked where he could get off, and was told

by the conductor that when they got up a place they could let him off. In answer to a question by the conductor whether he was acquainted in Williamsport, he said, 'Yes, and in Newberry,' and soon after this conversation the train stopped at a place which seems to have been at or near Maynard Street Station. When the train stopped, the conductor said to him, 'Come on,' and he went with the conductor through the cars to the rear end, and got off, the conductor saying to him, 'Go on.' It appears from the evidence that the conductor did not attempt to put him off the train, nor did he order him off, nor did he ask him for any fare. After getting off the train, the plaintiff, it appears from the testimony, started to walk down between the tracks, and after going some distance fell into a culvert, and was injured. In the absence of any evidence to the contrary, it cannot be pretended that the train did not stop at the station at Williamsport a sufficient time to allow the plaintiff to leave it; neither is it pretended that the name of the station was not called in the cars, nor that the station at Williamsport is not a sufficiently safe and convenient place for passengers to alight. These facts are not disputed. The only reason that can be given for the plaintiff not getting off at the station at Williamsport, which was the place of his destination, is the fact of his being asleep when the train arrived at that point, and the fact that he did not awaken until the train had left the station, and was under headway. Under this state of facts the question arises whether the employees of the defendant company were guilty of any negligence which was the proximate cause of the injury received by the plaintiff. The presumption is that the employees did their duty, and the plaintiff therefore is bound by evidence to rebut this presumption by showing that they were negligent, and that such negligence caused the injury, and that no negligence on his part in any degree contributed to it. The company cannot be charged with negligence by reason of the fact that the plaintiff did not get off at the station which was his destination. The fault for his not doing so was entirely his own. If, therefore, the company is liable, it must be by reason of the fact that the conductor let him off after they had passed the station of his destination at the place where he got off. It is true that, though he was to blame for being on the train after it left the station at which he should have gotten off, yet the conductor, or those in charge of the train, would not have been justified in ejecting him from the train, nor in ordering him off the train against his consent; and it may be said that a conductor has no right to compel any one on a train to get off at a dangerous place; and, if he does so, and the party is injured by reason thereof, the company is liable. In this case, however, there is no pretense that the plaintiff was compelled to leave the train, or that he left the train

against his will, or that he was injured at the place where he got off the train by reason of its being unsafe at that point. The most that can be said is that the plaintiff, after expressing his desire to get off, got off at the point at which he did at the suggestion of the conductor. It appears from the evidence that the plaintiff was not a stranger in Williamsport, and he certainly knew, after alighting, that it was dangerous for him to walk on or between the railroad track; and he had no right to do so, even if the conductor had given him directions to that effect. Not having been put off the train against his consent, he is not in the same position as one would be who had been placed on the railroad track by the employees of the company against his will. We can see very little difference in principle between this case and that of *Deery v. Railroad Co.*, 163 Pa. St. 403, 30 Atl. 162, in which the plaintiff was injured in jumping from the door of a baggage car of the defendant, to which act she was invited and urged by the conductor of the train. A nonsuit was entered, and sustained by the supreme court in that case, which said, in the opinion of Mr. Justice McCollum, *inter alia*, 'Something more is required to render a company liable than its employees' consent to the passenger's negligent act.' In that case there was a regulation that passengers should leave the cars at the door at the end of the same. Instead of leaving by that door, the plaintiff jumped from the door of the baggage car at the invitation and request of the conductor. The court further say in that case: 'That nothing short of paramount and justifying necessity would excuse a departure from these regulations, or render the company liable for an injury caused by it.' If the company was not liable because a passenger did not obey a regulation of the company, we cannot see why a company should be liable where a passenger does not obey the legal duty not to alight except at or upon a station or platform, and the still greater duty not to walk on the roadbed or right of way of a railroad company. The case might be otherwise if the employees of the company had been in any manner to blame for his neglect to alight at the station which was his destination. His getting off at that point was the result of his anxiety not to pass Williamsport by reason of the information he had of the sickness and expected death of his sister. This undoubtedly led to the suggestion that he could be let off a piece further up the road. The case of *Rothstein v. Railroad Co.*, 171 Pa. St. 620, 33 Atl. 379, we think is also in point. That was a case in which the plaintiff boarded a wrong train. After getting on it, and asking for a berth, he discovered the mistake, and asked to have the train stopped to let him off. He was told that the train would not stop, but that it was going slow, and he could jump from it. The train had started, and it was running at some speed. It was

dark, and he could not see where he was jumping, but he jumped, and he was injured. Justice McCollum, in delivering the opinion of the court, says, *inter alia*: 'The sole attempted extenuation of the act lies in the conversation with a person called by the plaintiff a "trainman"; but whether the person was the conductor of the train, the brakeman, or Pullman car porter does not appear. It does appear, however, that he did not order the plaintiff to jump from the car, and that what was said amounted at most to a suggestion or expression of opinion that he might do so.' It was even said in that case that his presence on the train through the negligence of the company furnished no warrant or excuse for jumping from it as he did. In the case we are now considering it is not pretended that he was on the train by the negligence of the company. He was, in fact, there by his own negligence, if any one can be said to have been culpable. Neither was he ordered off the train, nor was any fare demanded, nor anything done by the conductor, or any other person connected with the defendant company, to indicate to his mind that he must or should get off. His inquiry as to where he could get off, and his expressed anxiety resulting from the condition in which he supposed his sister to be, were all matters which would induce the conductor, if possible, to favor him; and at most, therefore, it could only be said he got off at the place he did by the consent of the conductor. It may be observed, also, that he was not injured in getting off the train, or at the place he alighted, but at some distance therefrom, and at a place on the railroad he had no right to be. Therefore, now, to wit, January 14, 1897, the rule to take off the compulsory nonsuit is discharged; to which order plaintiff excepts, and requests that a bill be sealed, which is accordingly done."

The first assignment of error is as follows: "The court erred in sustaining the objection of defendant's counsel to the following question asked Samuel M. Bubbs, a witness on the stand, by plaintiff's counsel: 'Q. Has this culvert been covered since the accident?' By Mr. Reading: I object to the question, because it is incompetent, irrelevant, and immaterial. By Mr. Whitehead: This offer is for the purpose of showing that the company defendant was negligent in allowing this culvert to remain open, as has been testified to by witness on the stand. By Mr. Reading: It is objected to for the reason that the company defendant owes no duty to the plaintiff, or to the public generally, in any regard in reference to the culvert in question, and therefore it is irrelevant, incompetent, and immaterial. By the Court: We will sustain the objection, and exclude the evidence."

H. W. Whitehead and Ames & Hammond, for appellant. John G. Reading, for appellees.

STERRETT, C. J. We are far from being convinced that there is any error in the ruling

complained of in the first specification. The question propounded to the witness was irrelevant, and the evidence sought to be elicited thereby was rightly rejected as incompetent and immaterial. There is nothing in the question presented that requires discussion. The two remaining specifications relate to the compulsory nonsuit, and refusal of the court to take it off. A careful consideration of the testimony sent up with the record has satisfied us that the case is not one that should have been submitted to the jury. While the accident which unfortunately befell the plaintiff is greatly to be regretted, we find nothing in the evidence that tends to prove, or would have warranted the jury in finding, it was due to any negligence of the defendants or their employes. A review of the evidence for the purpose of fortifying this conclusion would serve no useful purpose. The rulings of the court below are so well sustained by the opinion of its learned president that further elaboration is wholly unnecessary. Judgment affirmed.

(182 Pa. St. 543)

STUART v. STUART et al.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

HUSBAND AND WIFE—DEBT DUE WIFE FROM HUSBAND—PRESUMPTION OF WAIVER.

A bond secured by mortgage on a farm, and containing the usual promise to pay interest, was bequeathed by the mortgagee in trust for his daughter (the mortgagor's wife) during her life. The legatee never demanded the mortgage interest from her husband, nor did he promise her to pay the same; and the income from the farm was, with her assent, applied to the support of the family, said farm being all the property owned by the husband. *Held*, that the presumption was that the wife did not intend to claim her interest money, and hence a subsequent purchaser of the farm under judgments against the husband was only liable for interest on the mortgage from the time of his purchase.

Appeal from court of common pleas, Cumberland county.

Action by Walter Stuart, trustee, successor of Joseph A. Stuart, surviving executor of the estate of John Stuart, deceased, against Joseph A. Stuart and another, upon a feigned issue, to determine the amount of interest due on a mortgage. From the judgment, plaintiff appeals. Affirmed.

The trial court rendered the following opinion on a reserved point of law:

"The facts of this case may be briefly stated as follows: John Stuart, who was the father of Mrs. Geo. P. Searight, lent Mr. Searight \$5,000 in February, 1863, securing the loan by two bonds and the mortgage now in suit; each instrument containing the usual promise to pay interest. One bond was for \$3,000, and was bequeathed by Mr. Stuart, who died in 1870, 'in trust to and for the use of my daughter, Martha Ann Searight, during her natural life; and at her death I direct that the same shall be divided so that each of her children shall receive the same sum when it arrives at

the age of twenty-one years, and, if none of them live to that age, this legacy shall lapse.' Mr. and Mrs. Searight were living upon the mortgaged farm in 1870, and continued to live thereon until 1881, when they removed to Carlisle. Mr. Searight owned little other property, and from this farm his wife and family were largely supported, not only while they lived upon it, but afterwards, until the farm was sold by the sheriff, in September, 1891. At that sale it was bought by the defendant Joseph A. Stuart, who is now in possession, and admits his obligation to pay interest from the date of his purchase. But Mrs. Searight claims interest also from April, 1872 (choosing that date for a reason not now important), to the time of the sale, and the controversy is about this item. The validity of the claim was reserved at the trial, and all the facts relevant to its determination have now been stated, except the fact specially found by the jury, namely, that although Mr. Searight paid interest to his wife to April 1, 1877, he never promised her that he would pay. The payments were voluntary, and not in pursuance of a contract made with her.

"Under the decisions in Pennsylvania, it is clear that, if it were not for the formal promise to pay interest contained in the bond given to John Stuart, there is not even a color of support for this claim. A promise to pay might indeed have been inferred from the fact of payment, but there was no other evidence of a promise than this, and the jury have distinctly declared that the inference is not to be drawn. On the contrary, the fact is positively found that no such promise was made, and therefore (aside from the bond and mortgage) Mrs. Searight could not recover this interest from her husband, because he did not owe it, or from the purchaser at the sheriff's sale, because his obligation is not greater than Mr. Searight's. It is argued, however, with much urgency, that the bond and mortgage contain a positive promise to pay interest, and that although the promise was not made to the wife, but to John Stuart, nevertheless it must be treated as a promise made to her, because during life she is the equitable owner of the bond, and therefore may enforce every one of its terms. This is an assumption of the point in dispute. In our opinion it does not follow that, because her husband promised to pay interest to John Stuart, Mrs. Searight may sue upon the promise and recover as if it had been actually made to her. On the contrary, we think that when John Stuart bequeathed this mortgage to his daughter the effect was, in substance, as if he had bequeathed to her a sum of money of like amount, and she had lent it to her husband. With reference to the mortgage her husband had had no dealings with her. He had promised to pay interest, not to her, but to her father, and to suppose that she necessarily succeeded to her father's right to enforce this promise is wholly to ignore the effect of the family relation upon the interest which she acquired. In substance, the situation is the

same as if her money had come, in actual cash, into her husband's hands, and its income had been used by him for the support of the family.

'The precise point was decided by Judge Pearson in *Bachman v. Killinger*, 55 Pa. St. 414. The facts were these: John W. Killinger was guardian of Emma Bachman, and lent \$3,000 of her money to C. L. Bowman, taking from him a bond for this amount, with sureties. Afterwards Bowman married Emma Bachman, and two or three years after the marriage her husband's bond was delivered to her, in the settlement of Mr. Killinger's trust. Suit was afterwards brought upon the bond for the use of the wife, and Judge Pearson instructed the jury upon the subject of interest as follows: 'Does this bond bear interest from its date? As a general rule, the obligation of a husband to his wife will not. If the husband receives the interest due on his wife's money, the inference is that it is for their mutual support, and that of their family. In several reported cases it has been held that the husband's notes or acknowledgment of indebtedness to his wife did not bear interest; in one reported case, that it will, where such appears to have been the contract. This bond is drawn with interest, but that was because the guardian might be called on to pay interest to his ward. After the bond went into her hands, it would cease, as against the husband. Had he died, and the wife sued his representatives, she could not have recovered interest during his lifetime, but would from his death. Her claims are the same against his sureties. If, therefore, you find a verdict for the plaintiff, it will be without interest.' It is quite true that these instructions were not assigned for error, and were not discussed by the supreme court; but the case is cited as an authority upon the subject of interest in *Powell's Appeal*, 98 Pa. St. 403, where the facts were essentially the same, and we understand this to be an approval of Judge Pearson's decision. Upon reason, also, it seems to be correct; for it is a mere extension of the equitable principles upon which the court has put the husband's exemption from liability to pay interest. These principles have been announced in a line of cases from *McGlinsey's Appeal*, 14 Serg. & R. 64, to *Moore v. Moore*, 165 Pa. St. 464, 30 Atl. 932. For example, in *Hamill's Appeal*, 88 Pa. St., on page 366, it is said: 'But she permitted the use of the money without stipulation as to terms. She was living with her husband, in the usual family relation, and she derived her support from the proceeds of the business. In the absence of proof of some agreement, a return of the principal only can be enforced.' And in *Hauer's Estate*, 140 Pa. St. 420, 21 Atl. 445, where the subject is fully considered, the rule is thus stated by Mr. Justice McCollum: 'It lies on [the husband] to show the agreement which relieves him from payment of the principal, and on her to show the agreement which entitles her to interest, but the agreement in either case may be implied from the circumstances attending the transaction.'

In that case a wife who permitted her husband to receive and use as his own the rents of her separate property was not allowed to recover them from his estate without proof of an agreement that he was to account for them; the presumption being that they were used to maintain the family, and had been given to the husband for that purpose. It was distinctly said that express or direct proof of her acquiescence was unnecessary; that acquiescence would be implied from circumstances, and from a course of conduct consistent with it and opposed to any other conclusion; and that it was sufficiently shown when it appeared that the receipt of the rents was with her knowledge, and could have been prevented by her if she had desired to do so. In *Wormley's Estate*, 137 Pa. St. 101, 20 Atl. 621, the court refused to permit a wife to claim interest on her money because she permitted her husband to have the use of it without any claim for interest, and indirectly, at least, had shared in the benefit derived from its use. The subject was again examined in *Re Kittel's Estate*, 156 Pa. St. 454, 26 Atl. 1116, and the rule is repeated in this language: 'In settlements between husband and wife, in the absence of proof to the contrary, equity presumes that interest money on the wife's separate estate which has been received by the husband has been expended by him, with her consent, for the support of herself and her family. * * * Neither the statute of 1848 nor that of 1887 has worked any change in this particular. As the reason grows out of the duties incident to the domestic relation, so long as these remain unchanged, unless there be express statutory enactment, the presumption will continue.' The most recent case is *Moore v. Moore*, 165 Pa. St. 464, 30 Atl. 932, where the wife was refused interest upon her money contributed to the purchase of the property in which the family lived, and as long as they continued to use it as the common home. In the present case it is certain that Mrs. Seagrigh acquiesced in the use which her husband made of his income from the mortgaged farm; and it is certain, also, that she did not intend to make any claim for interest against her husband, for she testified to that effect in positive terms. Under these circumstances, it would be most inequitable to allow a recovery now. She has enjoyed the benefit of the income during the years in question, without requiring any part of it to be applied to the payment of interest on her mortgage; and, under the ruling in *Hauer's Estate*, she cannot recover without proof of an agreement that her husband was nevertheless to pay the money which she now claims. Without further discussion, we hold that no interest can be recovered for the period from April, 1872, to September 11, 1891; and, in accordance with the authority given by the jury, we reduce the verdict to the sum of \$824, being the interest from September 11, 1891, to May 19, 1896, the date of verdict. July 22, 1896, in accordance with said decree, judgment is entered in favor

of the plaintiff for \$824, an exception being sealed for the plaintiff on the point reserved in reference to the interest."

W. Trickett and W. F. Sadler, for appellant. John Hays and H. S. Stuart, for appellees.

MCCOLLUM, J. There was no agreement between the husband and wife that he should pay to her or her trustee interest on the mortgage. The jury found that he actually paid interest on it to April 1, 1877; but this finding was based on an inference from the testimony in regard to the receipts given by her, and her declarations to the effect that she used her interest money to buy clothes for the family. The finding, however, was flatly opposed to the direct and positive testimony of the husband, his wife, and her trustee. The receipts did not actually represent payments of interest on the mortgage. They were given for the purpose of protecting the trustee and strengthening the husband's credit. The declarations of the wife concerning her interest money, and the investment of it in clothing for the family, were seemingly, but not absolutely, inconsistent with her testimony. They were reconcilable with the uncontradicted testimony of her husband that he furnished her the money with which the clothing for the family was purchased. Possibly she may have referred to the money thus provided as her interest money, but she emphatically denied that she ever made to any person a declaration or statement of this nature. Assuming that the declarations were made as claimed, there was no necessary sequence from them which discredited the testimony of the husband and wife in relation to the payment of interest money. On the contrary, the declarations, considered in connection with this testimony, tended to show that the husband always supplied his wife with the money needed for the purchase of clothing for herself and family, and that she regarded the same as in lieu or satisfaction of interest on the mortgage. The husband distinctly testified that he had never given her money "in the way of interest," and there is nothing in the evidence which shows that she or her trustee ever demanded or requested payment of it prior to 1891. In corroboration of the view that no interest was paid, we have the wife's admission that she never intended to push her husband for it, and undisputed evidence that the income from the farm incumbered by the mortgage was devoted to the maintenance of the mortgagor and his family. The fair inference from all the testimony is that the entire income derived from the labor and property of the husband was required for their support, and that the farm incumbered as aforesaid was all the property he had. Under the circumstances, and the well-settled principles applicable to them, the conclusion of the learned court below must be sustained. It is the only conclusion authorized by the testimony and consistent with justice. It is

in accord with, and it gives effect to, the obvious intention and understanding of the parties prior to 1891, when the farm was sold for the husband's debts. From that time the court below properly charged the purchaser with interest on the mortgage for the benefit of the mortgagor's wife. The testimony referred to, and the decisions in the following cases, furnish a complete vindication of the judgment: *McGlinsey's Appeal*, 14 Serg. & R. 64; *Bachman v. Killinger*, 55 Pa. St. 414; *Hamill's Appeal*, 88 Pa. St. 366; *Powell's Appeal*, 98 Pa. St. 403; *Hauer's Estate*, 140 Pa. St. 420, 21 Atl. 445; *Warmley's Estate*, 137 Pa. St. 111, 20 Atl. 621; *Kittel's Estate*, 156 Pa. St. 454, 26 Atl. 1116; *Moore v. Moore*, 165 Pa. St. 464, 30 Atl. 932. Judgment affirmed.

(183 Pa. St. 581)

BOROUGH OF MT. JOY v. LANCASTER, E. & M. TURNPIKE CO.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

STATUTES—TITLE OF ACT.

The title of Act April 24, 1871 (P. L. 1096), "An act entitled, 'A supplement to an act erecting the villages of * * * into a borough to be called the borough of M.,' passed the 10th day of February, 1851," gives no notice of, and is insufficient to support, provisions in the act imposing burdens on a company having a turnpike extending through the borough, no reference to which was made in the original act.

Appeal from court of common pleas, Lancaster county.

Action by the borough of Mt. Joy against the Lancaster, Elizabethtown & Middletown Turnpike Company. Judgment for plaintiff. Defendant appeals. Reversed.

George Nauman, A. F. Hostetter, and Edw. P. Brinton, for appellant. Brown & Hensel, for appellee.

STERRETT, C. J. This action of assumpsit, to recover the cost of repairing defendant company's turnpike within the limits of plaintiff borough, is grounded solely on the act of April 24, 1871 (P. L. 1096), the constitutionality of which is assailed by the defendant. If it is successful in that contention, which is its main ground of defense, this action fails, and other questions raised by the record become unimportant. The defendant company, incorporated by the act of March 5, 1804 (P. L. 131), owns and operates a turnpike road extending westerly from Lancaster, through Elizabethtown, to Middletown,—a distance of over 20 miles. That act of incorporation, after providing, among other things, for the location and construction of the turnpike between the points designated, contains elaborate provisions, involving the forfeiture of tolls and the imposition of fines and penalties, designed to compel the company to keep its road in good repair. By the act of February 10, 1851 (P. L. 44), the plaintiff borough was incorporated out of territory extending along both sides of the defendant turnpike within the limits of the borough.

By the act of March 24, 1852 (P. L. 178), the said borough became subject to the provisions of the general borough act of April 3, 1851 (P. L. 320). The act of 1871, under which this suit was brought, after reciting in its preamble the charter acts of the plaintiff borough, and that defendant company since 1851 "hath charged and collected toll or tolls on and upon that portion of their turnpike way passing through the limits of the said borough, but, nevertheless, do not keep the said portion in good repair, but refuse to do so, and to keep the same repaired, graded and regulated according to the ordinances of said borough," proceeds to authorize the borough to make all needful repairs to the turnpike within the limits of said borough, and to collect the cost thereof by suit, in a method entirely different from that theretofore existing. The act also contains this drastic provision: "In all action or actions, or suits brought to recover said costs or expenses, it shall be only lawful for the defendant to deny that the work was done or material furnished, or to prove that the price charged is greater than the value thereof, or that the amount claimed has been paid and released." Under this provision the court permitted the plaintiff to call numerous witnesses who testified that the repairs were needful, but refused the defendant the privilege of denying it. The amount claimed by plaintiff for repairs was \$2,808.50. In closing the plaintiff's case it was stated that the borough had "no ordinance by which the street or road here in controversy was ever ordained as a street by the borough, so far as the plaintiff has been able to find."

The fundamental question is whether the act of 1871 is a valid statute, authorizing a recovery in this case. Its title is, "An act entitled, 'A supplement to an act erecting the villages of Mount Joy and Richland and their vicinity, in the county of Lancaster, into a borough to be called the borough of Mount Joy,' passed the tenth day of February one thousand eight hundred and fifty-one." As was said by this court in *Re Phoenixville Road*, 109 Pa. St. 44: "While it may be difficult to formulate a rule by which to determine the extent to which the title of a bill must specialize its objects, it may be safely assumed that the title must not only embrace the subject of proposed legislation, but also express the same so clearly and fully as to give notice of the legislative purpose to those who may be specially interested therein. Unless it does this, it is useless." The decisions relating to the titles of supplemental legislation do not depart from the foregoing rule. They can be sustained only on the ground that they give notice of the legislative purpose, to those specially interested, by reference to the original act. Accordingly, in *Re Pottstown Borough*, 117 Pa. St. 538, 12 Atl. 573, Mr. Justice Clark said: "In the case of a supplement, where the subject of the original act is sufficiently expressed in its title, and where the provisions of the supplement

are germane to the original, the true rule is that the subject of the supplement is covered by a title which contains a specific reference to the original by its title, and declares it to be a supplement thereto." In the supplemental act of 1871, under consideration, the title of the original act is quoted verbatim; but this title, as well as the body of the original act, will be searched in vain for any reference to the rights or duties of the defendant corporation, or any intimation that they are to be affected in the slightest degree. The supplemental act does in fact impose serious burdens upon the defendant corporation which did not theretofore exist. Not the least of these is the provision as to evidence above quoted. It also provides a new mode of collecting the cost of repairs. While the act itself provides for notice to the defendant corporation before the borough shall undertake repairs (and the same would be required of any ordinance which might affect the rights of the property owners), the legislature undertook to pass the act, seriously affecting the rights of defendant corporation, without notice or opportunity to be heard. This the constitution does not permit. This conclusion is warranted not only by the reason and application of the rule above cited, but also by the authority of several carefully considered cases. In *Ridge Ave. Pass. Ry. Co. v. Philadelphia City*, 124 Pa. St. 219, 16 Atl. 741, the title of the act under consideration was, "An act relating to the Ridge Avenue Passenger Railway Company." After providing for the use and maintenance of the lines of railway as they were then laid, constructed, and used, that act, by its repealing clause, in effect, relieved the company from its original charter obligations to repair and repave the streets occupied by it in the city of Philadelphia. In an opinion by the then learned president of common pleas No. 2 of Philadelphia, which was adopted by this court, it is said: "The effect was to give the bill a double aspect,—on one side relating to the railway company, and releasing them, and on the other to the city of Philadelphia, and not only depriving her of the needful control provided for when the company was originally chartered, but of the right to require the company to keep the streets in order. Can such an act be said to have only one subject, clearly expressed in the title? Had it been entitled 'An act relating to the Ridge Avenue Railway Company and the city of Philadelphia,' it might justly have been said to have a single, clearly-defined subject, namely, the relations between the two specifically defined bodies; and had the people of Philadelphia and their representatives at Harrisburg failed to inquire what these relations were, and how they were affected by the repealing clause, it might have been just to regard them as in default, although the notice, even then, would have been scant, in rendering it necessary to examine the charter of the railway company in

order to ascertain the truth. But, as the matter actually stood, there was nothing to put them on inquiry, or suggest the idea that a bill denoting an intention simply to regulate the railway bore hardly on the city." In *Philadelphia v. Ridge Ave. Ry. Co.*, 142 Pa. St. 484, 21 Atl. 982, the same act was again considered, and it was held that the title gave no notice of an intention expressed in the act to reduce the tax on dividends of the company payable to the city; and as to such tax the act was held unconstitutional. In *Re Phoenixville Road*, supra, an act entitled "An act relating to boroughs in Chester county," repealing certain provisions of a general act respecting the proceedings for laying out and opening roads within the boroughs of Chester county, the effect of which was to relieve the property owners in the boroughs, and to shift the burden upon the county, was held to be unconstitutional because the title failed to give notice of the legislative purpose, so far as the county was concerned. On principle, as well as authority, we think the act in question is clearly unconstitutional, and no action can be maintained thereunder. In this view, as already observed, the subordinate questions require no further notice. It follows that the judgment cannot be sustained. Judgment reversed.

(182 Pa. St. 535)

THOMAS v. NEW YORK, C. & ST. L. R. CO.
(Supreme Court of Pennsylvania. Oct. 11, 1897.)

RAILROADS—FIRES—EVIDENCE.

1. Evidence that defendant's engine set eleven other fires at about the same time of day, within a distance of three miles, some of the sparks therefrom being thrown from three to four rods beyond the right of way, and that an engine provided with an improved spark arrester and properly run will not set fire upon land outside the right of way, warranted submitting the question of defendant's negligence to the jury, notwithstanding the testimony of an employé that he had inspected the arrester the day of the fire, and found it all right.

2. It was competent to show that the engine set other fires in the neighborhood on the same trip.

Appeal from court of common pleas, Erie county.

Action by Adoniram Judson Thomas against the New York, Chicago & St. Louis Railroad Company to recover for damages from fire negligently set by defendant's engine. From a judgment for plaintiff, defendant appeals. Affirmed.

S. A. Davenport and J. M. Sherwin, for appellant. Theo. A. Lamb and J. C. Thomas, for appellee.

McCOLLUM, J. The plaintiff was the owner of a farm in Springfield township, Erie county, consisting of about 60 acres of improved land and about 80 acres of timber land. The defendant located and constructed its road across the improved land, and from 20 to 40 rods from the timber. On the 12th of Oc-

tober, 1893, a fire was set, in a field of the farm near the railroad, by a spark or sparks from the defendant's locomotive. The fire rapidly spread over the field and into the timber, destroying a considerable portion of the latter, and otherwise damaging the farm. For the damage done to the farm by fire this suit was brought, and it resulted, on the trial of it in the court below, in a verdict for the plaintiff. It is now before us on appeal from the judgment entered in it.

While it was not denied on the argument at bar, or in the paper book, that the fire was set as above stated, it was strenuously contended that it was not caused or contributed to by any act or omission of the defendant. In support of this contention, evidence was introduced to show that engine 73, from which the sparks were thrown, was provided with an approved spark arrester, which was in good condition on the day the fire was set. The witnesses who testified to this effect were Lilly, whose duty it was to inspect the spark arresters in the smokestacks of the locomotives, and Shurtz, who on the day of the fire was fireman on 73. Lilly testified that he inspected the spark arrester in 73 on the day of and the day after the fire, and found it all right. His testimony, however, was not based on his recollection of the inspection, but on the entries in the book in which he noted them, which entries were, "73 ditto." Shurtz testified that he did not examine the spark arrester on 73 on the day of the fire, but that he saw nothing which led him to think it was defective. This was the nature and scope of the testimony presented by the defendant as a sufficient answer to the evidence introduced by the plaintiff to show that the fire was caused by the negligence of the former. It was shown by the evidence submitted by the plaintiff, and bearing on the question of negligence, that the fire was set, in his field adjoining the defendant's right of way, by sparks from engine 73; that the same engine, on the same day, and within a distance of three miles, set eleven other fires on farms adjoining or crossed by the railroad; and that some of these fires were set by sparks thrown from three to four rods beyond the right of way. All of these fires were set about 1 o'clock in the afternoon. Alvin Van Gorder testified that he was about 80 rods from the railroad track when the second freight train passed; that the engine (73) hauling it appeared to be laboring hard, and was pouring out smoke and fire; that he saw sparks flying from it, but could not tell, from where he stood, how large they were. He also testified that very soon after the train went east he saw three fires on lands adjoining the railroad,—two on Allen's land and one on Shear's land. He was then standing about three-quarters of a mile from the west line of the plaintiff's farm. Loren Whitney testified that he was about a third of a mile from the railroad when the second freight passed, and that he saw black smoke and a blaze issuing from the engine, and soon after it passed he saw

four fires on lands adjacent to the road, one of them being on the land of the plaintiff. It is proper to state in this connection that the testimony of the defendant's engineers clearly supports the view that an engine provided with an approved spark arrester and properly run will not set fires upon lands outside of the right of way, as the evidence we have referred to shows that 73 did. We are clearly satisfied that, upon all the evidence in the case, the question of the defendant's negligence was for the jury. *Van Steuben v. Railroad*, 178 Pa. St. 367, 35 Atl. 992, and cases cited therein.

It remains to inquire whether the court below erred in its rulings upon offers of evidence, or in its instructions to the jury. The first and second assignments relate to the admission of evidence of the fires set by engine 73 on the same day the fire was set on the land of the plaintiff. The question raised by the assignments does not require discussion. It has been considered and passed upon in numerous decisions of this court. The rulings to which the assignments relate are in accord with those decisions. It is sufficient to refer to the following cases for the law on this point: *Huyett v. Railroad Co.*, 23 Pa. St. 373; *Railroad Co. v. Schultz*, 93 Pa. St. 341; and *Henderson v. Railroad Co.*, 144 Pa. St. 461, 22 Atl. 851. The third assignment is without merit, because the objection to the question embraced in it was practically withdrawn by the plaintiff, and the defendant was allowed to introduce all the evidence on the subject to which the question referred that it desired to. There was no evidence in the case of any contributory negligence on the part of the plaintiff, and the court was clearly right in saying so in answer to the defendant's sixth point. See *Railroad Co. v. Hendrickson*, 80 Pa. St. 182, and *Railroad Co. v. Schultz*, *supra*. We have carefully examined and considered the charge, and are satisfied that it furnishes no ground for reversing the judgment. The assignments are not sustained. Judgment affirmed.

(183 Pa. St. 1)

KUNSELMAN et ux. v. STINE.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

DOWER—EFFECT OF PARTITION—EXECUTION—SALES—VALIDITY.

1. The interest of the widow of an intestate in the lands of her deceased husband, after the sale of the lands in partition, remains the same as before the sale,—that of a tenant for life.

2. Act Oct. 13, 1840, regulates the manner of seizure and sale of life estates. Section 6 authorizes the court, on the application of a lien creditor, to appoint a sequestrator with power to take the "rents, issues, or profits" of the life estate, and apply them on the liens. Act Jan. 24, 1849, provides that, where no lien creditor applies for appointment of a sequestrator, the sale of "life estates yielding rents, issues, and profits" may be made upon a writ of venditioni exponas after advertisement. Section 4 declares that no venditioni exponas shall issue for the sale by the sheriff of a life estate "unless by direction of the proper court; and on the application of any lien creditor

for a writ of venditioni exponas the tenant for life shall have at least ten days' notice of application for such writ." *Held*, that a sale of a life estate yielding rents, etc., under an execution, without an order of the court allowing the writ, made under the act of 1849, and without notice to defendant, is void.

Error from court of common pleas, Northumberland county.

Action by D. C. Kunselman and Lavina Kunselman, his wife, for the use of Lavina Kunselman, against W. Nelson Stine. There was a judgment for defendant, and plaintiffs bring error. Reversed.

S. B. Boyer, for plaintiffs in error. C. B. Witmer, N. Heblch, and W. A. Marr, for defendant in error.

WILLIAMS, J. The important question in this case is not free from difficulty. It involves the nature of the interest of the widow of an intestate in the lands of the deceased husband after a sale of the lands in partition. The general rules applicable to an estate in dower are well settled. Dower consummate is a life estate. After it has been assigned by metes and bounds, the title and the possession are in the widow, and she has the same absolute ownership and control of her estate as though her title had accrued by deed or will. She may alien, incumber, or otherwise dispose of it, and it may be seized and sold for her debts. Is the nature of her estate or interest changed by proceedings in partition under our statutes? In this case the decedent was the owner of a valuable farm. Soon after his death, proceedings were instituted by his heirs for making partition. The appraisers appointed by the court made return that the farm could not be divided without injury, and fixed its value as a whole. The heirs thereupon declined to take it at the valuation, and requested that an order be made for its sale. The widow joined in this request. The court then made the order of sale usual in such cases, and directed that one-third of the price at which the land should be sold should remain in the hands of the purchaser until the death of the widow, and be then paid to the heirs at law of the former owner, and that meantime the interest on said sum at the rate of 6 per cent. should be paid to the widow during her life. After this sale was made, a creditor of the widow obtained judgment against her for about \$400. Assuming that her interest in the land was a life estate after as well as before the sale in partition, the creditor levied upon it and sold, as he would have levied and sold an estate in fee simple, without any application to the court, and without a special writ, and became himself the purchaser for the sum of \$25. Did this sale vest in the purchaser a title to the interest or estate of the widow? That must depend upon what her interest or estate was, and whether it was sold in the manner required by law. It would seem to be quite clear, under our cases, that the interest of the widow was that of a ten-

ant for life. It was unquestionably a life estate before the proceedings in partition were instituted. The object of this partition was not to destroy or divest her estate, but to make division among the heirs at law subject to her dower. A decree making partition by purparts among the heirs would not have prevented her from asking an assignment of her dower by metes and bounds, nor did the decree of sale qualify her estate except as to the manner of its enjoyment. She could not require the purchaser to assign her dower upon the land after the sale, for the decree had assigned her dower by a different method of admeasurement, viz. by valuing her estate, and requiring her to accept 6 per cent. upon such value in lieu of actual possession of the surface. The return of sale was, therefore, in effect, of a sale subject to her estate in dower, to be enjoyed by her in the manner provided by the statute and the order of sale, instead of by assignment by metes and bounds on the surface. Mann's Appeal, 50 Pa. St. 375. It is not converted into a lien by proceedings in partition. Zeigler's Appeal, 35 Pa. St. 171; Schall's Appeal, 40 Pa. St. 170. But such proceedings are, in legal effect, an assignment of dower, and her estate after such proceedings continues to be a life estate. Gourley v. Kinley, 66 Pa. St. 270. Her interest is changed by a sale in partition, not in its quantity or character, but simply in its method of use and enjoyment.

The other question remains to be considered, viz. was the sale made in conformity with the laws of this state? This must depend upon the construction of the act of October 13, 1840, by which the manner of the seizure and sale of life estates in execution is regulated. Section 6 of that act authorizes the court, upon the application of a lien creditor, to appoint a sequestrator, with power to take the "rents, issues, or profits" of the life estate, and apply them upon the liens against it, or, if the life tenant is in the actual possession of the land, to enter upon such possession, and "rent or sell such lands or tenements for such term during the life of the persons upon whom such estate shall depend as shall be sufficient to satisfy all the liens against the same, together with all charges for taxes, repairs, and expenses," and make application of the same to the payment of the liens under the direction of the court, and according to their priority as liens upon the life estate. The sequestrator is entitled to the possession of the life tenant. If, before the entry of the liens, a valid lease had been made to one who was in actual possession of the land and paying rent therefor, we do not understand that the sequestrator would have any legal right to dispossess, or enter upon, such tenant. He could, however, seize and apply the rents paid by him. He would, as to such prior valid lease, be clothed with the rights and powers of the life tenant, and authorized to collect and apply all the "rents, issues, or profits" until the purposes of his appointment were fully met. But what if

no lien creditor applied for the appointment of a sequestrator? Then the execution creditor might proceed under the provisions of the third section of the act of January 24, 1849, which authorized the sale of "life estates yielding rents, issues, or profits" in the same manner as estates of inheritance may be sold upon execution process, viz. upon a writ of venditioni exponas after advertisement. The defendant was, however, permitted to have an appraisement made by a sheriff's inquest of the yearly value of the land, and to elect to retain possession, and pay the rental fixed by the inquest in semiannual payments to his creditor. A proviso to the fourth section of this act expressly declared that no venditioni exponas should issue for the sale by the sheriff of the life estate "unless by the direction of the proper court; and on the application of any lien creditor for a writ of venditioni exponas the tenant for life shall have at least ten days' notice of the application for such writ." Thus it will be seen that the right to sell a life estate in the same manner as estates of inheritance are sold, upon a writ of venditioni exponas, is subject to two conditions: First, the right of the defendant to an appraisement of its annual value by an inquest, and to elect to retain possession at the rental fixed; second, the consent or order of the proper court, made after 10 days' notice to the defendant that such writ is asked for. These conditions, like the provision for the appointment of a sequestrator, are really in aid of the tenant for life, whose estate is of such uncertain duration as to make it of little value to ordinary purchasers, and render its sacrifice at a public sale practically certain. Not only would its sale be ordinarily disastrous to the life tenant, but equally so to the lien creditor, since the proceeds of such sale would ordinarily be much less than could be realized by sequestration, or by an appraisement and election to pay the rental by the defendant. But it is not necessary to rest our ruling on general principles alone, since the construction of the act of 1849 seems to have been settled in several cases. In *Com. v. Allen*, 30 Pa. St. 49, it was held that a life estate cannot be sold upon a *fi. fa.*, but must be sold, as provided by the act, upon a venditioni exponas.

The further point that no writ of venditioni exponas could issue without the order of the proper court, made after 10 days' notice to the defendant, was distinctly ruled as early as 1853 in *Kintz v. Long*, 30 Pa. St. 501, and it was also said a sheriff's sale of a life estate "under a venditioni exponas issued without such notice is void, and confers no title upon the purchaser." The invalidity of such a sale was again distinctly ruled in *Snyder v. Christ*, 30 Pa. St. 499, in which our late Brother Strong said: "We think, therefore, the court should have affirmed unqualifiedly the fifth point proposed by the defendants below, which was that, if Snyder's interest in the land was a life estate only, the sale did not divest the title unless the venditioni ex-

ponas on which it was sold was issued by the order of the court of common pleas on ten days' previous notice of the application for such writ to said Snyder." To the rule thus stated three exceptions are recognized: First, where the life tenant has no possession, but the person in possession claims to hold in hostility to the life tenant; second, when the defendant alleges his interest to be a fee, and not a life estate; third, when the creditor has reasonable ground to believe that the debtor is the owner of the fee and proceeds upon that theory. In the first case the creditor merely buys a right to litigate with the person in possession over the existence of the life tenancy. In the second he takes his debtor at his word, and sells the interest he claims to have in the land. In the third he acts upon his own judgment as to the defendant's title, and takes the risk of its correctness. Substantially this was held in *Gordon v. Inghram*, 32 Pa. St. 214, and the existence of the exceptions was again recognized in the opinion of this court in *Snyder v. Christ*, 39 Pa. St. 490. But, "exceptio probat regulam." The rule applies with full force when the existence of the life estate is asserted by the defendant, and acknowledged by the person in possession of the land, charged with the payment of the ascertained "rents, issues, or profits" of the life estate to the holder thereof. In the present case it is conceded that the life estate was sold without an order of the court allowing the writ made under the act of 1849, and without notice to the defendant. The sale so made was, in the language of *Kintz v. Long*, *supra*, "void, and confers no title upon the purchaser." With what he acquired under the attachment in execution, there seems to be no controversy. He obtained a judgment in that proceeding, which has not been complained of, but which has been fully paid. Judgment should therefore be entered upon the case stated in favor of the plaintiff for the amount of her claim less the amount secured by the attachment execution. The case stated appears to adjust that amount at \$429. Upon that understanding we adjust the amount due to the widow, as the parties seem to have adjusted it, at \$3,700, with the interest from August 6, 1894, the day of demand made in this case. Judgment will be entered accordingly.

(183 Pa. St. 24)

KEPNER v. HARRISBURG TRACTION CO.
(Supreme Court of Pennsylvania. Oct. 11, 1897.)

NEGLECT—PRESUMPTION.

Plaintiff's horse became frightened by the breaking of defendant's trolley wire, and plaintiff, alarmed by the noise and electric flashes, and by the plunging of the horse, jumped from the vehicle, and was injured. *Held*, that no presumption of negligence on defendant's part arose from the unexplained breaking of the wire.

Appeal from court of common pleas, Dauphin county.

Action by Edward A. Kepner against the Harrisburg Traction Company to recover for personal injuries. The court entered a nonsuit, which it refused to take off, and plaintiff appeals. Affirmed.

Jas. A. Stranahan and Benjamin M. Nead, for appellant. Wolfe & Bailey, for appellee.

MCCOLLUM, J. While the plaintiff and Montgomery were riding in a piano wagon on Market street, in the city of Harrisburg, their horse was frightened by the breaking of a trolley wire, and the plaintiff, alarmed by the noise and electric flashes occasioned by it, and by the plunging of the horse, jumped or was thrown from the wagon to the ground, and was seriously injured thereby. Neither the wagon or the horse, nor the plaintiff or his companion, was struck or touched by the wire, or injured by the sparks emitted from it. It is not claimed that the occurrence can be attributed to any defect in the wagon, or to the negligence of either of the persons in it. The wire was an essential appliance of the defendant in the operation of its road, and it is contended that the breaking of it raised a presumption of negligence which, unanswered, furnished adequate ground for a recovery in the suit in accordance with the plaintiff's claim. The learned court below thought that the circumstances shown by the evidence did not authorize the presumption contended for, and accordingly entered a nonsuit, which it refused to take off. The question presented by the appeal from the refusal to take off the nonsuit is whether the court erred in so holding.

The general rule is that the plaintiff whose suit is grounded upon the alleged negligence of the defendant must not only establish the negligence by competent evidence, but he must show that it was the cause of the injury for which he sues. The exceptions to the rule are rare. The majority of our own cases which have been held to be within the exceptions were suits by passengers against railroad companies for injuries received by the former while being conveyed on the trains under the control and management of the latter. "Authority need scarcely be cited to establish that, where an injury occurs to a passenger in consequence of something done or not done, connected with the appliances of transportation, there arises the presumption of negligence, which the carrier is required to rebut. The presumption necessarily arises from the contract of carriage, under which the passenger passively trusts himself to the safety of the carrier's means of transportation, and to the skill and diligence and care of his servants; and by which the carrier, in consideration of the fare, undertakes to carry safely, and, to do so, to furnish the best means and appliances for the purpose, and competent, skillful, and diligent servants." *Thompson, J., in Fleming v. Railway Co.*, 153 Pa. St. 135, 27 Atl. 858. So the happening of an accident

to a passenger on a street car, if the accident is connected with the means of transportation, raises a presumption of negligence on the part of the company. *Clow v. Traction Co.*, 158 Pa. St. 410, 27 Atl. 1004, *Dixey v. Traction Co.*, 180 Pa. St. 401, 36 Atl. 924, and *O'Connor v. Traction Co.*, 180 Pa. St. 444, 36 Atl. 866. In *Shafer v. Lacock*, 188 Pa. St. 497, 32 Atl. 44, it was held that the circumstances shown by the evidence authorized an inference or presumption of negligence which cast on the defendants the burden of showing their freedom from fault in connection with the destruction of the plaintiff's house. In the case last cited, as in the cases previously referred to, there was a contract relation between the parties, which required of the defendants the use of proper appliances and the employment of careful and skillful workmen to carry out their agreement with plaintiff. "The occurrence was not in the ordinary course of things, and the circumstances connected with and surrounding it put on them the duty of showing that it was at least consistent with the exercise of proper care in the performance of their work." Besides, there was evidence that the workmen declared, while the fire was in progress, that it was caused by their carelessness. Not one of the cases to which we have referred affords any support to the plaintiff's contention in the case before us. It is not a case in which there was a contract relation between the parties, or in which the plaintiff was directly injured by the breaking of one of the appliances used by the defendant in the operation of its road. It closely resembles the case of *Yingst v. Railway Co.*, 167 Pa. St. 438, 31 Atl. 687, in which "the plaintiff's injuries resulted from the upsetting of a wagon in which she was riding, occasioned exclusively by the fright of the horse drawing the wagon. The horse took fright upon seeing an approaching street car on the defendant's track, and, turning suddenly away from the road, the wheel of the wagon struck a stone or other obstacle, and this caused the overthrow of the vehicle. There was no collision of any kind; the wagon was not on the track, but was being drawn upon the highway on which the defendant's track was laid." In that case the negligence complained of was the speed of the car, and in this it is the breaking of the trolley wire. In that the horse was frightened by the rapid approach of the car, and in this by the noise made by the breaking of the wire. In that case it was held that, "as the plaintiff was not a passenger, the burden of proof was on her to establish the truth of her allegations by affirmative testimony, failing in which she must fall in her suit." We need not add anything to what was said by the court below respecting other cases cited by the plaintiff from the reports of this and other states. It is clear that the plaintiff's proposition cannot be sustained without a wide departure from the well-settled rule, in cases of this nature, supported by numerous decisions of this

court. We find nothing in the evidence which warrants such a departure. The nonsuit is therefore sustained. Judgment affirmed.

(188 Pa. St. 22)

COMMONWEALTH v. FRY, Clerk of Court.
(Supreme Court of Pennsylvania. Oct. 11, 1897.)

CLERKS OF COURT—FEES—STATUTES—CONSTRUCTION.

1. Act March 10, 1810 (P. L. 79), provided that, where the same person held two or more of the offices enumerated therein (among which were clerks of the quarter sessions and of the oyer and terminer courts), the fees should be added, and 50 per cent. of all in excess of \$1,500 be paid into the treasury for the use of the commonwealth. Act April 2, 1868 (P. L. 11), increased the amount which might be retained by the officer to \$2,000, and directed 50 per cent. of the excess to be paid into the treasury, after deducting clerk hire and office expenses, but did not mention clerks of oyer and terminer. Any law "which is supplied by, or is inconsistent with this act" was repealed. *Held*, that the fees of the clerk of the quarter sessions, who held any of the offices enumerated in Act 1868, were governed by that act, but that, when said clerk was also clerk of oyer and terminer, Act 1810 applied.

2. The sum paid to the clerk of quarter sessions in liquor license cases, though designated in the law directing its payment as for "expenses," is a payment which the clerk is authorized to keep, taking credit against it for actual expenses, and hence is a "fee," within the acts requiring a percentage of the fees received by that officer to be paid into the treasury.

Appeal from court of common pleas, Dauphin county.

Proceedings by the commonwealth to settle the account of Martin S. Fry, clerk of oyer and terminer and clerk of quarter sessions of Lancaster county. From the judgment of the common pleas on defendant's appeal from the settlement made by the auditor general and state treasurer, defendant appeals. Affirmed.

H. M. North, for appellant. J. P. Elkin, for the Commonwealth.

GREEN, J. There is no doubt that under the act of March 10, 1810 (P. L. 79), the appellant would be liable to the taxation in question. That act specifically provided that, where the same person holds two or more of the offices mentioned in the first section, the fees of the two offices should be added together, and for all excess over \$1,500 of receipts the officers thus circumstanced should be charged by the auditor general 50 per cent. of the excess. Thus, during nearly 50 years, it was the express statute law, and manifest policy of the state, that persons holding two of the enumerated offices at the same time should be subject to the taxation in question. The act of April 2, 1868 (P. L. 11), increased the amount which might be retained by the officer from \$1,500 to \$2,000, and directed the payment into the treasury of 50 per cent. of the excess, after deducting also the expense of necessary clerk hire and office expenses. The change made in the act of 1810 by this act was the increase of \$500 in the salary, and the allowance of clerk hire

and office expenses to be deducted from the gross receipts before the 50 per cent. division of the remainder was to be made. The act of 1868 contained a general repeal of any law then in force "which is supplied by, or is inconsistent with this act." Under the act of 1810 the officers enumerated in the first section were prothonotaries or clerks of the supreme court, of the courts of nisi prius, of the courts of common pleas, of the courts of oyer and terminer and general jail delivery, of the courts of quarter sessions of the peace, and of the orphans' courts, the registers of wills, and the recorders of deeds. Of these, if any one person held two or more of them, the fees received from all were to be added together, and all in excess of \$1,500 was to be divided between the officer and the commonwealth in the proportion of 50 per cent. to each. Under the act of 1868 the clerks of the oyer and terminer were not mentioned in the enumeration, and the case of a clerk of the quarter sessions holding that office, and holding also the office of clerk of the oyer and terminer, was not provided for, although, if he held any of the other offices, he would be subject to the operation of the act. As there was nothing in the later act to indicate a change of policy as to the effect of holding two offices, and no reason is to be derived from a reading of the text of the act for any such change of policy, it is almost, if not quite, impossible to regard the omission of clerks of the oyer and terminer from the enumeration of the act of 1868 as anything else than an unintentional omission, arising from the carelessness of the draftsman of the act or the copyist. For if a clerk of the quarter sessions, who was also prothonotary or clerk of the orphans' court, as is frequently the case, would be bound to pay the tax, it is quite unreasonable to think that the legislature intended to provide that, although he was clerk of the sessions and clerk of the oyer and terminer, he should not be subject to the tax. The conclusion seems to be irresistible that the omission from the second act was accidental, and not intentional. But, in any point of view, the omission simply leaves the act of 1810 in force, as to this omitted case, unless it was repealed by the act of 1868. Now, there is no express repeal of the act of 1810, and under the act of 1868, as always before, the combination of these two particular offices, in point of fact, continued. The only repealing clause contained in the act of 1868 applies alone to legislation which was supplied by or inconsistent with the act of 1868, being larger than that allowed by the act of 1810; if the two acts covered the same cases, it is not inconsistent if the one act regulates the combination of the two clerkships, and the other act simply makes no regulation on the subject. It would then follow that, as to all the combinations provided for in the act of 1868, that act would control, and as to any combinations provided for by the act of 1810, and not changed by the act of 1868, the act of 1810 would still prevail. The doc-

trine of implied repeal of statutes is only applicable when the two statutes in question are so inconsistent that they cannot possibly stand together. *Erie v. Bootz*, 72 Pa. St. 196; *Wright v. Vickers*, 81 Pa. St. 122. Applying this test, we do not discover any necessary and fatal inconsistency between the two acts. The only practical difference between them would be that in the case of a clerk of the quarter sessions, when he held any one of the other enumerated offices under the act of 1868, he would receive \$2,000 a year, and 50 per cent. of the receipts of the two offices after deducting clerk hire and office expenses, while, if he held the office of clerk of oyer and terminer, he would receive \$1,500, and 50 per cent. of the excess, without deducting clerk hire and office expenses. We are not able to perceive any difficulty in administering both of these acts. It is simply a matter of arithmetical computation. The act of 1868 merely fails to provide for this particular combination of offices. The act of 1810 does provide for it, and can easily be administered. It is far less inconsistent with the true meaning of both acts to hold this construction than it is to hold that a clerk of the quarter sessions shall be at liberty to hold both offices, and be free of all taxation on the receipts of one, when, if he holds any of the enumerated offices, he must be taxed on both. As there is no express repeal of the act of 1810, and as that act can easily be administered in this particular combination of these two offices, it follows that there is no repeal by implication, and that the act of 1810 is still in force in this one particular combination. The later legislation does not change the situation in this regard, and need not be noticed.

As to the question whether the sum paid to the clerk of the sessions in liquor license cases is to be regarded as "fees," within the meaning of the acts which tax fees, we think there is no doubt. While the acts of 1887 and 1891 both designate the payment as being made for "expenses," it is a payment to the clerk, which he is at liberty to keep, taking credit against it for actual expenses paid; and the balance is therefore an emolument of the office, and, under the taxing laws, must be regarded as a part of the income of the office. Any other construction would produce the absurd result that a large part of the purely official income of the clerk would be held free of all taxation, which cannot be endured consistently with the obvious purpose of the legislature. It would be a very narrow and constrained construction to hold that, because the taxing acts use the word "fees" in describing the official income subject to taxation, they thereby intended to exclude all sorts and kinds of income which did not come within the technical designation of "fees." We are clearly of opinion that receipts from this source are a part of the official receipts of the office, and are subject to taxation as such. Judgment affirmed; and appeal dismissed at the cost of the appellant.

(55 N. J. E. 686)

In re KENNEDY.

(Court of Chancery of New Jersey. Oct. 8, 1897.)

INSANE PERSONS—LUNACY—INQUISITION—COMMISSIONERS—CHARGE TO JURY—ABSENCE OF LUNATIC—CONSENT OF COUNSEL—CONSTRUCTION.

1. A finding of lunacy will be set aside where it appears that the commissioners remained in the jury room with the jurors while they were deliberating as to their finding, in the absence of the alleged lunatic or his counsel, especially where, under such circumstances, they gave directions to the jury, and informed them of the issue.

2. The consent of an alleged lunatic's counsel that the commissioners might be present with the jury while deliberating on their finding is not a consent to their giving directions in the nature of a charge in his absence.

Motion to set aside a return to an inquisition finding J. F. Kennedy a lunatic. Sustained.

B. C. Frost and H. S. Harris, for the motion. William H. Morrow, opposed.

PITNEY, V. C. The commission issued out of this court on the 25th of August, directed to three gentlemen, of whom one is a master of this court, directing them, in the usual form, to inquire as to the lunacy of John Frelinghuysen Kennedy, of the county of Warren. The commissioners issued their precept to the sheriff, returnable at the house of the alleged lunatic, a farmer living a few miles from Phillipsburg; and that officer returned 24 men as jurors, who all appeared. Counsel appeared for the petitioners, and also for Mr. Kennedy. The commissioners sat in a room in the house, and Mr. Kennedy was present, with his counsel. Witnesses were sworn, and the cause summed up by counsel on each side; and then, according to the affidavit of the chairman of the commission, the counsel and all parties except the commissioners, the jury, and Mr. Kennedy, were directed to leave the room, and did so. Then the jury were told by the commissioners that they might ask Mr. Kennedy any questions they chose. The chairman of the commission asked him if he had anything to say, and he said, "Nothing, except that he wanted to take care of his own property." He then left the room. Then the chairman of the commission charged the jury, stating that they were to find whether or not Mr. Kennedy was of unsound mind, and by reason thereof unable to take care of himself and his property. Then—the commissioners still being in the room—the jurors had a conference, and asked the commissioners if they might take a vote by ballot. The commissioners answered in the affirmative. Then it was agreed among the jurors that the question should be whether or not Mr. Kennedy was capable of taking care of his property or not. The chairman of the commission explained to the jury that a vote on that question would be proper, provided it was understood that they were voting upon the question whether he was of unsound mind or not, and by reason of such unsoundness incapable of

properly taking care of his property. Blank ballots were then prepared, and each juror voted "Yes" or "No," as he thought Mr. Kennedy was or was not capable of taking care of himself and his property. The result was that 15 voted "No," and 9 voted "Yes." The 15 voting "No" then signed the inquisition, which had already been prepared in blank. I find the foregoing facts from a reading of the several affidavits of the chairman and one juror. The affidavit of the juror states that he understood the question upon which the jurors voted was whether Mr. Kennedy was or was not capable of taking care of his property. And that this was the view of the individual jurors is inferable from the fact that those who voted that he was so incapable voted "No," and those who thought he was capable voted "Yes." For, if the question was whether he was of sound or unsound mind, the vote of "No" would seem to be in favor of his sanity, rather than of his insanity.

The principal ground relied upon for setting aside the return was the conduct of the commissioners in charging the jury in the absence of the alleged lunatic and his counsel, and remaining in the jury room with the jurors while they were deliberating as to their finding. The chairman of the commission in his affidavit swears that he understood that they so remained with the jurors by the consent of the counsel for Mr. Kennedy. This is denied by that gentleman, and, as no other person seems to have understood him to say anything of the kind, I must infer that the chairman of the commission is mistaken. Be that as it may, the consent by the counsel of the alleged lunatic that the commissioners might be present while the jury were deliberating cannot be construed as a consent to their giving directions in the nature of a charge to the jury in his absence. It was held in *Lindsley's Case*, 46 N. J. Eq. 357, 19 Atl. 726, that the commissioners and jury might lawfully examine the alleged lunatic privately and apart from his counsel, and therefore the commissioners here were warranted in staying in the room with the jury while that examination was made; and it is probable that they inferred that, if they had the right to be present at a private examination of the alleged lunatic, they also had the right to be present in the absence of counsel and the alleged lunatic, while the jury were deliberating and determining what should be their finding. But in this I feel constrained to say that I think they fell into an error which is fatal to this return. The very idea of a jury—whether a grand jury, or inquest, or a petit jury—is that their conference and deliberation in determining what shall be their finding or verdict shall be held either alone, with no person present, or, if in the presence of the court, then also in the presence of counsel, so that the counsel may hear all that is said, and make objections and take exceptions if they shall see fit. It is, I be-

lieve, well settled that, while the public prosecutor has the right to be present while the evidence is being laid before the grand jury, he has no right to be present while the jurors are conferring together and considering the effect of the evidence. Their deliberations are, of right, strictly private. In the present case it appears not only that the commissioners remained in the room after the counsel and the alleged lunatic had left the room, but also that they proceeded to charge the jury, and inform them of the issue, and that they answered questions and made suggestions as to the mode of ascertaining their sentiments on that subject in the use of the ballot. I can find no authority for such practice, and I think it would be dangerous to give it the approval of the court. One reason why the deliberations of a jury are had in private is that each one may express his views without restraint, and that there may be a free and full interchange of views and arguments. In *Ex parte Arnhout*, 1 Paige, 498, the sheriff, who had charge of the jury, remained in the room with them while they were deliberating, and the return was set aside on that ground. And I know of no distinction in this respect between a grand jury, a petit jury, and an inquisition of lunacy. I think it would be making a dangerous precedent to permit this return to stand, though I am well satisfied that the commissioners were entirely innocent of any attempt to influence the jury. From the statement of counsel for the petitioners, and from the fact that only 15 out of 24 jurymen joined in the return, it is plain that it is not so clear a case of lunacy as to be outside the range of debate. I will advise that the return be set aside.

MERCHANTVILLE BUILDING & LOAN ASS'N v. ZANE et al.

(Court of Chancery of New Jersey. Oct. 11, 1897.)

LOAN ASSOCIATIONS — MORTGAGES — COLLATERAL SECURITY — SUBSTITUTION — POSTPONEMENT OF LIEN — MARSHALING SECURITIES — NOTICE — KNOWLEDGE OF DIRECTOR.

1. A holder of 25 shares of stock mortgaged certain premises to a building and loan association, and pledged the stock as collateral. The condition of the bond required the loan to be paid through monthly payments of interest, dues, and premiums for such period as would be required to mature the 25 shares; the by-laws providing that every member, for each share of stock he held, should be entitled to the loan of \$200, and that the premium paid for the prior right to a loan of \$200, or the multiple thereof, should be at a rate per share payable monthly by the borrower. Subsequently the borrower executed a second mortgage on the same premises to a third person. After the second mortgage was executed the association allowed the borrower to withdraw the 25 shares and substitute 25 shares of the current series, which were then of little value, and paid him the withdrawal value of the shares first hypothecated. *Held*, that there was no payment of the first mortgage, so as to postpone it to the second mortgage.

2. Under the rule of marshaling securities, the association was required to reduce its demand

by the amount of the withdrawal value of the shares, if it had notice of the second mortgage, and the premises proved insufficient to pay both debts.

3. The fact that the borrower was a director of the association did not charge the association with knowledge of the second mortgage, since in the transactions he was acting independently of the board, and for himself individually.

Bill by the Merchantville Building & Loan Association against Charles E. Zane and others to foreclose a mortgage. Decree for complainant.

This bill is filed to foreclose a mortgage made on May 9, 1890, by Charles E. Zane and wife to the Merchantville Building & Loan Association, to secure the payment of the sum of \$5,000. The condition in the accompanying bond was that the obligor should pay to the complainant, its successors or assigns, the sum of \$5,000, with interest thereon at the rate of 6 per cent. per annum, and the premium thereon; said principal, interest, and premium to be paid at such times, in such places, and in such installments as now or hereafter may be provided for or required by the constitution and by-laws of said association. The mortgagor, at the time of the execution of the mortgage, assigned to the complainant 10 shares of stock in the seventh series, and 15 shares in the eighth series, in the association, as collateral security for the payment of the mortgage debt. On February 1, 1894, Zane, the mortgagor, executed another mortgage upon the mortgaged premises to one Edward B. Sudbury to secure the sum of \$1,000, and on the same day still another mortgage to the same party to secure the sum of \$4,000; both sums so secured being pre-existing debts due from Zane to Sudbury. On June 5, 1894, Zane withdrew, by permission of the association, the 10 shares of stock in the seventh, and the 15 shares in the eighth, series, which he had assigned to the association as collateral security. The association paid him their withdrawal value, which was \$1,907.40. Zane substituted for the collateral securities thus withdrawn 25 shares of stock in the thirteenth series of the stock of the association, being the current series, of that date, and then of little or no value. On August 28, 1895, the last-mentioned shares were withdrawn; Zane receiving, as their withdrawal value, the sum of \$409.75. He substituted in their stead 25 shares of the fourteenth series of the stock of the said association, which shares have now a withdrawal value of \$382.81.

M. V. Bergen, for complainant. T. E. French, for defendants.

REED, V. C. (after stating the facts). The insistence made upon the part of Mr. Sudbury, the second mortgagee, is that the mortgage of the association is paid, and therefore his mortgages have precedence. The way in which the mortgage of the association was paid, as it is insisted by the counsel of Mr. Sudbury, is this: The condition of the bond

(to secure which the mortgage was given) was that the mortgagor should pay the principal, the interest, and the premium at such times and in such places as were provided for by the constitution and by-laws of the association. The by-laws provide (section 7) that every member, for each share of stock held, shall be entitled to the loan of \$200; and in section 6 that the premium paid for the prior right to a loan of \$200, or the multiple thereof, shall be at a rate per share, and shall be payable monthly by the stockholder borrowing. Now, the point made is that, inasmuch as this loan of \$5,000 was made originally to Zane by virtue of his holding the original 25 shares thereof, therefore the condition of the bond in respect to the payment of premiums, etc., refers to the premiums to be paid upon those shares. In connection with this insistence it is also pointed out that the substitutions of shares in the two instances mentioned, viz. on June 5, 1894, and August 28, 1895, were made upon applications for a loan, as if the loan of \$5,000 was regarded as a new transaction occurring at those dates, and as made to Zane as the holder of the new series of stock held by him at the times of the respective applications. Inasmuch as the original shares have ceased to exist, and with their extinguishment has ceased the duty to pay the dues and premiums upon them, it is argued that the condition of the bond has not been broken, or, rather, has been performed, and the mortgage satisfied. I am unable to assent to this proposition. A part of the scheme provided by the by-laws of this association, like that of all such organizations, was to enable the shareholder to receive, in anticipation, the matured value of his shares. The loan so received, it was expected, would be paid by the application to it of the value of the shares when the value of each should amount to \$200. The language of the condition in the bond was employed in view of this well-understood purpose. The \$5,000 was to be paid through the monthly payments of interest, dues, and premiums for such period as would be required to mature 25 shares of stock. The substantial feature of the condition was that the mortgagor should have the right to pay by the application of the matured shares. The shares upon which the payments were to be made were originally the 10 shares of the seventh series and 15 shares of the eighth series. When, however, on June 5, 1893, the association consented to release the original shares, and accept others in their stead, thereafter the condition in the bond, by the very quality of the transaction, required the payment of the interest, premiums, and dues upon the new shares until they matured. The same consequence followed the second substitution. The condition thereafter required the payment of the interest and dues upon the shares in the fourteenth series until they became

worth \$200 each. There never was a performance of the condition of the bond, nor a satisfaction of the mortgage.

But there is another question involved in the cause. This question is whether, as between the second mortgagee and the association, the former is entitled to have the withdrawal values of the shares released deducted from the amount due to the association. This query is not propounded upon the notion that the value of the shares was to be applied as pro tanto payment of the mortgage; for it is entirely settled that payment of dues upon the stock is not a payment upon the mortgage debt, and does not, ipso facto, work an extinguishment pro tanto of the mortgage. 2 Am. & Eng. Enc. Law, 639; Association v. Conover, 13 N. J. Eq. 219; Herbert v. Association, 17 N. J. Eq. 497; Association v. Martin, 13 N. J. Eq. 428; Association v. Vandervere, 11 N. J. Eq. 382; Association v. Hornbaker, 42 N. J. Law, 635. The question is one involving the doctrine of marshaling. The position of the parties at the time of the release of the shares was this: The association held the first mortgage, with the subsequently released shares as collateral security, the defendant holding a second mortgage. Here there was, then, the association, the older creditor, holding two securities, viz. the mortgaged premises and the shares of stock, and a second mortgagee, the junior creditor, with a lien upon the mortgaged premises alone. The right of the latter to demand of the former that he should apply the security peculiar to himself was clear, and the rule seems equally clear that if the older creditor, having knowledge of the junior incumbrance, released his peculiar security, he ran the risk of having its value charged against him if the common security is insufficient to pay both debts. Reilly v. Mayer, 12 N. J. Eq. 55; Association v. Beaghen, 27 N. J. Eq. 99. But the junior incumbrancer can successfully complain only when it appears that the security was released after the older creditor had notice of the existence of the junior incumbrance. There is nothing to prove that the association was chargeable, at the time of the substitution of the shares, with knowledge of the existence of the mortgages to Sudbury. Zane himself was a director, and he, of course, had notice, as the maker of the subsequent mortgages; but he took no part, as a director, in the transaction of which the substitutions were a part. In these transactions he was acting independently of the board. He was acting for himself, and the other directors were acting for the association. He was asking of the association that they should pay him the value of the shares which he individually held. Knowledge of his private transactions cannot, under these circumstances, be imputed to the association. Bank v. Christopher, 40 N. J. Law, 435. I will advise a decree for the complainant.

(56 N. J. B. 441)

**TITLE GUARANTEE & TRUST CO. v.
TRENTON POTTERIES CO.**(Court of Errors and Appeals of New Jersey.
Sept. 20, 1897.)**FOREIGN LAWS—EVIDENCE—CONSTITUTIONAL PRO-
VISIONS.**

1. In conformity with the general rule which admits in evidence the opinions of skilled witnesses on all subjects of science, the existence and meaning of the laws, as well written as unwritten, of another state, may be proved by calling professional persons to give their opinions on the subject.

2. The federal constitution (article 4, § 1), supplemented by the act of congress of May 26, 1790, does not provide an exclusive method for proving the public acts of the various states of our Union.

(Syllabus by the Court.)

Appeal from court of chancery.

Suit by the Title Guarantee & Trust Company against the Trenton Potteries Company. From an order dissolving an injunction the complainant appeals. Affirmed.

Corbin & Corbin, for appellant. James Buchanan and Howard R. Bayne, for respondent.

GUMMERE, J. The appellant, the Title Guarantee & Trust Company, is a corporation organized under the laws of the state of New York, and the respondent, the Trenton Potteries Company, is a corporation organized under the laws of the state of New Jersey. On the 27th day of September, 1895, the potteries company commenced an action against the title company in the New York supreme court upon a policy of insurance issued to it by the latter company. On October 16, 1895, the title company, after having been served with process and a copy of the complaint in the New York suit, filed its bill in the court of chancery of this state, alleging a mistake in said policy, and praying that the same be rectified and reformed, and that the potteries company might be restrained from further prosecuting the suit then pending in the New York supreme court, on the ground that, if it was permitted to proceed with said suit before the policy was so reformed as to set out the true agreement of the parties, a judgment would necessarily go against the appellant. A preliminary injunction having been ordered pursuant to the prayer of the bill, the potteries company filed its answer, setting up, among other things, that under the law of the state of New York the title company was entitled to all the relief and remedies, as defendant in the action brought against it in the New York court, that it sought to obtain by the bill filed by it in the court of chancery. This allegation in the answer was verified by the affidavit of a New York counsel, learned in the law of that state, who testified "that the defendant in the New York action is entitled, under the New York law, to all the relief and remedies as defendant in that action that it could obtain or has prayed for as complainant in its New

Jersey suit. The formal distinction between law and equity having been abolished in this state [New York], the defendant in an action at law here is entitled to plead as many defenses as he may have, whether they are legal or equitable, whether he pleads simply a defense or bar without asking affirmative relief, or whether he pleads new matter constituting a counterclaim, or equitable set-off, or recoupment, or matter in the nature of a cross bill under the old system, and asks affirmative relief. These rights and remedies are given to defendant by express legislative enactment, and have for many years been repeatedly recognized and enforced by all the courts in this state." Upon the coming in of the answer and accompanying affidavits, the preliminary injunction was dissolved, and from the order of dissolution this appeal is taken.

The respondent, having selected a court of the domicile of the appellant as the forum in which to try the matters in issue between them involved in the suit brought by it, is entitled to have those matters finally determined in that forum, provided the appellant can, in its defense in that suit, show the real agreement between the parties as fully as it would be permitted to do in its suit brought here for the reformation of the written contract. It was because of the allegation in its bill that it could not successfully defend in the New York court until there was an actual reformation of the policy of insurance, that the chancellor granted the injunction, and it was because of the denial of this allegation by the respondent in its answer, supported by the affidavit of New York counsel, that the injunction was dissolved. But it is said by the appellant that, admitting it to be true that the respondent is entitled to have the matters involved in the New York suit disposed of in the New York court, provided appellant can, in its defense in that suit, show the real agreement of the parties, there is nothing in the case as it stands before us to justify the conclusion that the statement of the answer in that regard is true. The argument in support of this contention is as follows: In the absence of proof to the contrary, it will be presumed by the courts of this state that the common law is in force in the state of New York; that by the rules of the common law the appellant could not, in an action at law brought against it for breach of a written contract, show that by mistake of the parties the writing did not set forth the real agreement between them; and that the presumption that the common law prevails in New York is not overcome by the affidavit of the New York counsel, annexed to the answer, for the reason that it attempts to show that the rule in question has been abrogated by statute, and that the only legal method of proving the existence of a statute of a foreign state is not by the testimony of counsel of that state, but by the production of a duly-authenticated copy of the instrument

itself. While it is entirely true that, in the absence of proof to the contrary, the courts of New Jersey will presume that the common law prevails in a sister state, I cannot agree to the proposition that the only method of rebutting this presumption is the production of a copy of the statute which abrogates the common-law rule, the existence of which is challenged. Mr. Taylor, in his work on Evidence (volume 2, § 1423), in dealing with this question, says: "In conformity with the general rule which admits in evidence the opinions of skilled witnesses on all subjects of science, the existence and meaning of the laws, as well written as unwritten, of foreign states, may be proved by calling professional persons to give their opinions on the subject." That this is the correct rule seems to me to be plain both on principle and on authority. In order to know what the law of a foreign state is on a given subject, we need something more than the production of the statute, for that only gives the words in which the law is written. The question to be determined is not what the language of the law is, but what the law is altogether, as shown by exposition, interpretation, and adjudication; and this, I take it, can only be ascertained by the testimony of a professional witness whose special knowledge enables him to speak as to that fact. Lord Langdale, in the well-considered case of *Nelson v. Lord Bridport*, 8 Beav. 535, uses the following language in discussing this subject: "The foreign law, and its application, like any other results of knowledge and experience in matters of which no knowledge is imputed to the judge, must be proved, as facts are proved, by appropriate evidence; i. e. by properly qualified witnesses, who can state from their own knowledge and experience, gained by study and practice, not only what are the words in which the law is expressed, but also what is the proper interpretation of those words, and the legal meaning and effect of them as applied to the case in question." Coleridge, J., in *Baron De Bode's Case*, 8 Q. B. 265, considering the same questions, says: "What, in truth, is it that we ask the witness? Not to tell us what the written law states, but, generally, what the law is. The question is not as to the language of the written law, for, when that language is before us, we have no means by which to construe it. How many errors might result if a foreign court attempted to collect the law from the language of some of our statutes which declare instruments in particular cases to be 'null and void to all intents and purposes,' while an English lawyer would state that they were good against the grantor, and that the courts have so expounded the statutes. It is no answer to say that other evidence by word of mouth may be added for the purpose of giving the interpretation of the written law. I am merely showing that our courts require, not the actual written words of a foreign law, but the law itself; for which

purpose a professional witness is required to expound it." Lord Denman, in the case last cited, says: "It is objected that this [i. e. permitting a professional witness to testify concerning the written law] is a violation of the general principle that the contents of a written instrument can be shown only by producing the instrument or accounting for its nonproduction. But there is another general rule: that the opinions of persons of science must be received as to the facts of their science. That rule applies to the evidence of legal men, and I think it is not confined to unwritten law, but extends also to the written law, which such men are bound to know. Properly speaking, the nature of such evidence is, not to set forth the contents of the written law, but its effect, and the state of law resulting from it. The mere contents, indeed, might often mislead persons not familiar with the particular system of law. The witness is called upon to state what law does result from the instrument." Shortly after the decision of *Baron De Bode's Case* in the queen's bench, the house of lords, in the *Sussex Peerage Case*, 11 Clark & F. 114, adopted the rule laid down by Lord Langdale in *Nelson v. Lord Bridport* and by the judges of the queen's bench in *Baron De Bode's Case*, and held that the existence and meaning of written as well as unwritten laws of a foreign state could be proved by calling professional witnesses to give their opinion on the subject.

The reasoning of the distinguished jurists from whose opinions I have quoted seems to me to be unanswerable. But we are told that the rule established in England has no place in the jurisprudence of this country, because (as it is said) the federal constitution, supplemented by the act of congress of May 26, 1790, provides the exclusive method of proving an act of the legislature of a sister state. The constitutional provision invoked is found in article 4, § 1, of that instrument, and provides that congress may, by general laws, prescribe the manner in which the public acts of a state shall be proved; and the act of congress of 1790, passed in pursuance of this provision, declares "that the acts of the legislature of any state or territory shall be authenticated by having the seals of such state or territory affixed thereto." Rev. St. U. S. c. 17, § 905. Conceding that, by virtue of the constitutional provision referred to, congress has power to fix an exclusive method for proving the public acts of the various states, it does not seem to me that they have done so by the act of 1790. Prior to the passage of that act, and notwithstanding the existence of the constitutional provision, the only method of proving the written law of another state was that pointed out by the common law. By the act of 1790, congress provided another method by which this could be done, namely, by the production of a copy of the act sought to be proved, duly authenticated by having the seal of the state affixed; but surely, if it had been intended to abolish the common-law rule, and

substitute another in its place, rather than to provide an additional method for proving the statutes of the several states, very different language would have been used,—words which would have at least suggested the idea that such an intent existed. That it has not been supposed, either by the bench or the bar of this state, that the act of congress of 1790 provided the only mode of proving the written law of our sister states, is shown by the inveterate practice of the past half century. On March 2, 1847, our legislature enacted "that the printed statute books and pamphlet session laws of any of the United States, printed and published by the direction or authority of such state, shall be received as evidence of the public laws of such state, in any court of this state" (Gen. St. p. 1401, § 22); and ever since the enactment of that statute the ordinary method of proving, in our courts, the statutes of other states, has been the method provided thereby; and yet, if it be true that congress, in pursuance of the authority vested in it by the federal constitution, has prescribed the only manner in which the public acts of a state can be proved, our statute of 1847 is a nullity, and the mode of proof which has so long prevailed in our courts is altogether irregular and illegal. Even if I had doubts on the subject, I should be unwilling, in view of the long-established practice in our courts to which I have adverted, to say that congress had, by the statute of 1790, provided the only method of proving the written law of a sister state, and had abolished the common-law rule which had theretofore existed. But, as I have already said, in my view the statute referred to merely provided an additional method of proof, and did not abrogate the common-law rule.

The conclusion reached is that the chancellor was clearly right in considering that the affidavit of the New York counsel annexed to the answer in this case was competent evidence to show the state of the law in New York on the right of a defendant in an action at law to prove that the written contract sued upon did not, by reason of mistake of the parties, show the real agreement between them; and, further, to prove what the real agreement was. This being so, there was no error in his ordering the injunction to be dissolved. The order of dissolution is affirmed, with costs to the respondents.

ELLISON et al. v. GRAY.

(Court of Errors and Appeals of New Jersey. Sept. 9, 1897.)

APPEAL—FINAL ORDER.

Where one of two claims was disallowed in insolvency, the finding was interlocutory, and not a final order. Per Collins, J.

For majority opinion, see 87 Atl. 1018.

COLLINS, J. If the appellants had been adjudged to have no valid claim against the insolvent corporation, and therefore had been

dismissed from the cause, I should concur in opinion, with the majority of this court, that the order appealed from was in the nature of a final decree. Such, however, was not the case, and a different situation is presented. The appellants had two claims, of which one only was disallowed. They therefore retain a standing until final distribution. An adjudication that a claimant is a creditor, and even definitely fixing the amount of his debt, is just as much interlocutory as is, for example, an adjudication establishing a mortgage lien, and fixing the amount, but not decreeing foreclosure or sale. No one would think an appeal from such an interlocutory decree permissible after 40 days. The parties would be driven to raise their objections by appeal from the final decree. Such, also, I think, would be correct practice in the case in hand. Certainly expedition and economy would be subserved by treating the order for distribution as the final decree, and all previous orders as interlocutory only. The receiver may think that the determination of the chancellor as to various creditors or classes of creditors should be reviewed. He represents creditors generally, and they have a right to such review. He ought not to be driven to separate appeals as from separate decrees, but should have the right to bring before this court, in one appellate proceeding, all questions with creditors arising during the administration of his trust. I think, therefore, that this appeal should be dismissed as brought too late, and that the appellants should be left to an appeal from the order for distribution, which order, of course, will necessarily involve the interlocutory adjudication, and bring it within the scope of the appeal. *Crane v. De Camp*, 22 N. J. Eq. 614; *Decker v. Ruckman*, 28 N. J. Eq. 614.

On the merits of the controversy, I agree with the determination of the receiver.

(56 N. J. E. 775)

SIEDLER et al. v. SYMS et al.

(Court of Chancery of New Jersey. Sept. 20, 1897.)

PERPETUITIES—GIFT IN TRUST DURING CORPORATE EXISTENCE OF NATIONAL BANK.

Testator gave national bank stock to the bank's cashier, in trust to distribute the dividends to designated employees during the corporate existence of the bank, "either under its present charter, or by virtue of any renewals or extensions thereof." The bank was incorporated on June 19, 1863, for the period of 20 years, and its existence was extended 20 years under the federal law of 1882. Testator died in November, 1891, and no law then or has since existed authorizing any further extension. *Held*, that the gift violated the rule against perpetuities, and was void, in that the trust might not be completely performed in 21 years.

Bill by Grace Siedler and others against Parker Syms, executor of the estate of Samuel R. Syms, deceased, and others, for the construction of a will.

Washington B. Williams, for complainants, Charles L. Corbin, for trustees.

STEVENS, V. C. The controversy arises over the sixth clause of the will of Samuel R. Syms, who died in November, 1891. The clause, so far as material, reads as follows: "Sixth. I direct my executors to transfer to such person as shall at the time of my death be the acting cashier of the First National Bank of Hoboken, New Jersey, eighty shares of the capital stock of said bank, now in my name, to be held and used by said cashier and his successor and successors in office in trust for the following uses and purposes, to wit: To collect and receive during the corporate existence of said bank, either under its present charter, or by virtue of any renewals or extensions thereof, the dividends made and declared payable from time to time thereon, and upon the first days of January in each and every year thereafter to divide and distribute such dividends equally among all the clerks and employes (including the cashier and janitor) of said bank who shall at the time of such distribution be actually employed therein, and whose employment in said bank shall have continued for a period of at least two years. * * * In case said bank shall, by dissolution or otherwise, cease to exist, then and in that event I give and bequeath the said eighty shares of stock, together with any increase of shares thereon as aforesaid, or the money payable in lieu thereof, to the Bank Clerks' Mutual Benefit Association of the City of New York, to be held and invested by said association as a part of its permanent fund, and the income arising therefrom to be used and employed as may be directed by the constitution and by-laws of said association." It is plain that neither the bequest to the cashier of the First National Bank nor the bequest over to the Bank Clerks' Mutual Benefit Association is charitable. Not being charitable, the objection made to these bequests is that they violate the rule against perpetuities. The gift, in the first instance, is to the cashier of the bank and his successors, in trust to collect and receive during the corporate existence of the bank, either under its present charter, "or by virtue of any renewals or extensions thereof," the dividends received, and "on the first days of January of each and every year thereafter to divide" them among the employes designated. If this is a trust which is to continue more than 21 years from the death of the testator, it is invalid. The bank was incorporated on June 19, 1865, for the period of 20 years. Its corporate life would have ceased on June 19, 1885, had it not been extended for a further period of 20 years under the provisions of the federal law of 1882. Its charter will therefore expire on June 19, 1905. It is admitted that at testator's death there was no act of congress under which any further extension was authorized, nor is there now. If the testator had limited the gift to the corporate existence of the bank, I should have thought—as we could only deal with the facts as they were at the time of

testator's death, and as one of those facts was that the charter of the bank would expire within 21 years, and could not be extended beyond that time—that the gift was unobjectionable for the reason that the trust must have been completely performed within the legal period. But the testator has not limited the trust to the legal period. He has expressly declared that it shall continue during all renewals and extensions of its present charter. He has thus, in terms, provided for its indefinite prolongation,—for a prolongation which might perpetuate it far beyond the legal period. It is true that the life of the bank might terminate in 1905, either because of the refusal of congress to legislate further on the subject, or because of the refusal of the bank to continue its existence. But in the class of cases we are dealing with the question is not whether in the event that has happened or may happen the gift will have complete effect within the time prescribed, but, in the language of Baron Rolfe in *Dungannon v. Smith*, 12 Clark & F. *575, whether the gift, in all its different contingencies, must have such effect. It is an invariable principle in applying the rule in those cases, says Mr. Jarman, that regard is to be had to possible, not to actual, events; and the fact that the gift might have included objects too remote is fatal to its validity, irrespective of the event. 1 Jarm. Wills, *233. The decision in the case of *First Presbyterian Church v. National State Bank*, 57 N. J. Law, 27, 29 Atl. 320, affirmed in error, seems to me to have some pertinency to this part of the argument. There the bank had given to the church a sealed instrument in which it was agreed that, so long as the church would refrain from extending its buildings westward so as to obstruct the light on the south side of the bank building, "we [the bank] will pay to them [the trustees of the church] the yearly sum of \$700, in quarter yearly payments, commencing on the first day of July next, and after that rate for any portion of a year." It appears from the record in that case that the bank was organized in 1865, and was to continue for 20 years. The covenant was made in 1872, and before any act of congress had authorized banks to prolong their existence. The bank took advantage of the act of 1882, and extended its corporate life for 20 years. One of the questions was whether the covenant was binding after the expiration of the original charter. I was counsel for the bank, and, both in the supreme court and in the court of errors, strenuously contended that this covenant must be read in connection with the charter and the act of congress, and that, so read, it was a contract to pay only during its original charter life; that at the time the covenant was entered into the law provided that at the end of 20 years the bank must terminate its existence, and that it must not thereafter perform any corporate act, except the act of winding itself up. But both courts, in ad-

judging the covenant binding on the bank in the year 1892, necessarily adjudged that it was a covenant to pay, not only during the period of the bank's existence under the original charter, but during such further extension of that existence as congress might thereafter authorize, and the bank choose to accept. This case decides that it was lawful to make, and that the parties did in fact make, a contract which was to operate beyond the time prescribed by the charter, and by the law as it then was, for the bank to exist, and that, too, without any words which in terms provided for such a continuance. In the face of this decision, it seems impossible to assert that it was not competent for the testator to provide, in terms, that his gift should be enjoyed by the employes of the bank under future extensions of the charter, if they should be authorized by congress. That he has done so is clear. The words, "by virtue of any renewals or extensions thereof," cannot be rejected without materially changing the scope of the bequest,—a bequest as much intended for the benefit of those employed by the bank 25 years hence, if the bank is then in existence, as now. His gift, therefore, being for the benefit of those who may be employes after as well as before the expiration of the legal period, will not, in all its different contingencies, have complete effect within the time prescribed.

It seems impossible, in the light of the adjudications, to split the bequest into two by reading it as a gift in trust—First, for such persons as might be employed by the bank under its present charter; and, secondly, for such as might be employed under future renewals and extensions of that charter. "When," says Baron Rolfe in the case I have mentioned, "a testator has made a general bequest embracing a great number of possible objects, there is no authority for holding that a court can so mold it as to say that it is divisible into two classes, the one embracing the lawful and the other the unlawful objects of his bounty." And that case, decided by the house of lords after hearing the opinions of 11 of the judges, affords the strongest possible illustration of the stringency of the rule. In the present case the court would give more effect to the testator's intention to confer a benefit on the employes of the bank, of which he had been so long president, if it declared that the gift was good, not only for the 14 years subsequent to testator's death (during which it would exist under its present charter), but also for such further period as would, with this 14 years, make up a term of 21 years, than it would if it declared that the gift was valid during the 14 years only. It would hardly be contended, however, that this could be done. If it could, it might with equal propriety have been done in the case of *Detwiller v. Hartman*, 37 N. J. Eq. 347, and in all those cases in which the testator has attempted to create a trust, not charitable, to continue indefi-

nately, or for a period beyond the legal one. As the first trust is void because it may endure too long, of course the gift over, which is not to take effect until the first trust is completely performed, must be void also.

STERLING IRON & ZINC CO. v. SPARKS MANUF'G CO.

(Court of Errors and Appeals of New Jersey. Oct. 7, 1897.)

WATER COURSE—POLLUTION BY MINE OWNER.

A nonriparian mine owner may not artificially cause the injurious discoloration of a natural water course by water from his mine, if, by the use of practicable means within his knowledge, he may carry on his mining operations without injury to the rights of others.

(Syllabus by the Court.)

Appeal from court of chancery.

Bill by the Sterling Iron & Zinc Company against the Sparks Manufacturing Company. Decree for plaintiff, and defendant appeals. Affirmed.

Charles D. Thompson and Gilbert Collins, for appellant. Thomas N. McCarter, for respondent.

GARRISON, J. The complainant owned and operated a paper mill situated on the Walkill river, the water of which it used in the process of paper making. The defendant owned a mining property upstream from the mill, lying near, but not extending to, the river. Upon its land the defendant sank a shaft for the purpose of reaching a vein of Franklinite ore, estimated to be 1,000 feet below the surface. When about half that depth had been reached the shaft became flooded with colored water flowing from a subterranean stream liberated in the progress of the work. To reduce the level of the water in the shaft, pumps were used; and, in order to prevent the water from running back into the shaft, a device was adopted by which it was conducted to a distance from the shaft, and discharged upon the surface of the defendant's land, whence it naturally found its way into the Walkill river, whose water it at times so discolored as to render it unfit for the purpose for which in its normal state the complainant was lawfully using it. At a later period, and from causes not connected with the sinking of the shaft, a like discoloration occurred from the operation of the mine, with a like injurious result to the complainant.

These facts being established, the defendant, upon final hearing, was enjoined from discoloring the water of the Walkill by discharging into it from its mine any colored matter in any quantity so as to discolor or injuriously affect the water as it flowed across the mill premises of the complainant.

The first point made by the defendant is that there was no occasion for the injunction at the time of the final decree, because (I quote from the brief of counsel) "at the time of the

hearing the large sand seam had been crossed, valves inserted, the water brought under perfect control, and the shaft had reached a depth of 750 feet." The brief also stated that (presumably at the time the brief was prepared) the shaft had been sunk to its full depth, that mining was going on, and that upon but one occasion since the filing of the bill had the processes in use failed to obviate the objectionable discoloration of the waters of the stream. A further statement is thus made on behalf of the mine owner, to wit, that after the issuance of the preliminary injunction, "to secure themselves against the remote possibility of having to stop their operation, the defendant bought a tract of land along the Walkill, to construct thereon a settling basin." For the system for which provision has thus been made the defendant claims entire efficacy in preventing the discoloration complained of; and as this claim is amply fortified by testimony, and is not in any wise controverted by the complainant, the case presented is one of extreme simplicity, and involves none of the difficult questions that arise when it is impracticable for a landowner to get out his minerals without doing some injury to the rights of others. When it is further considered that the defendant's mine is not riparian property, the nice questions arising from that source are also eliminated. In fine, the only proposition presented by the state of facts before us is that a nonriparian mine owner may not artificially cause the injurious discoloration of a natural water course, if, by the use of practicable means within his knowledge and under his control, he may carry on his mining operations without injury to the rights of others,—a paraphrase of the maxim, "*Sic utere tuo ut alienum non lædas.*"

Upon this ground the decree of the court of chancery is affirmed.

RENK v. RENK.

(Court of Chancery of New Jersey. Oct. 4, 1897.)

DIVORCE—GROUNDS—DESERTION—SUFFICIENCY OF EVIDENCE.

In an action by a wife for divorce for desertion, in which no defense was made, it appeared that she had abandoned him, and she justified her act on the ground of cruelty. The evidence showed that he was not inclined to quarrel, and that she had become very nervous. She testified that, two or three years before the separation, he threatened to shoot her, and drew a pistol. Her brother-in-law, who was present, testified that they had a violent word quarrel; that the husband got a pistol, which was not loaded, and tried to load it; and that he at no time pointed it towards his wife, or threatened to shoot her, but declared he would shoot himself, and that he could not endure living with her longer. On the morning before separating they had a violent quarrel, during which she struck him with an iron stove-lid lifter. Their son testified that she hit her husband in the forehead, and threw, or attempted to throw, a cup at him, and that he did not strike her, but caught her and held her up against the wall, and asked witness to go for an ambulance and have her taken to an in-

sane asylum. She supported the family largely by dressmaking, and his acts of violence resulted from quarrels arising mostly from her complaints that he did not contribute more to such support. *Held*, that she was not entitled to a decree.

Petition by Hedwig G. Renk against John Renk for a divorce. Heard *ex parte* by a special master. There was a report by the master refusing to advise a decree in favor of petitioner, and she excepts. Exceptions overruled.

McEwan & McEwan, for petitioner.

PITNEY, V. O. The ground of the petition is desertion by the defendant. The admitted fact is that the petitioner and defendant were living together in a flat in New York City, and on the 3d of January, 1893, she deliberately rented a house in Jersey City, and moved all her belongings from the New York flat to her new home in Jersey City, and has there resided ever since. In other words, the actual abandonment was by the wife, of the husband. The proof is that the husband remained in the New York house two or three days after his wife left, and then also left it. The wife justifies her conduct, and seeks to charge her husband with constructive desertion, on the ground that he treated her with such cruelty as substantially to drive her away from their home, relying upon the principle illustrated by the line of decided cases which had their culmination in this state in *McVickar v. McVickar*, 46 N. J. Eq. 490, 19 Atl. 249. The parties were married in 1881, and lived together until 1893, a period of nearly 12 years; the wife bearing five children, of whom two are living,—the oldest, a boy, born in 1882, who was sworn as a witness. The wife supported the family, in whole or in part, by following the trade of a dressmaker. The husband was a cigarmaker, and, according to her account, furnished very little towards the expenses of living. During the last two or three years of their cohabitation, the wife, by reason of the drain upon her vital energies due to child-bearing, and her exertions to support the family, became very nervous. The husband was of an excitable disposition, but not inclined either to drink or to associate with other females; and, according to the testimony of the son and of the petitioner's brother-in-law, he was an honest, "square" man, and by no means inclined to quarrel. The son said that his father would rather run out of the house than fight. The wife testifies to a series of acts of physical violence committed by the husband upon her as the result of quarrels arising between them, mostly, as appears, on the occasion of complaints on her part that he did not contribute more money to the support of the family. On one occasion, about two or three years before the separation, she swears that he threatened to shoot her, and drew a pistol for that purpose. But her brother-in-law, who was present, swears that they had a violent word quarrel, and that the husband did get a pistol out

of the closet, which was not loaded, and attempted, without success, to load it; that he at no time pointed it towards the petitioner, or threatened to shoot her, but did declare that he would shoot himself, and that he could not endure living with her any longer. On the morning before the final separation they had a violent quarrel, arising, as I infer from the wife's evidence, from the same cause,—failure on his part to contribute sufficient towards the family expenses. She admits striking him at that time with an iron stove-lid lifter. The son says that she hit him in the forehead, and she also threw, or attempted to throw, a cup at him, which was broken; that the father did not strike her, but that he was struck with the iron implement, caught her and held her up against the wall, and asked the boy to go for an ambulance and have her taken to an insane asylum. Taking all the evidence together, I think the master was entirely justified in coming to the conclusion that the wife was more to blame than the husband for the quarrels, and that there was no such treatment on his part as justified her in abandoning him. When served with notice of this action the husband stated, as he had previously stated, that he was glad to be rid of the petitioner, and admitted that he had himself abandoned her. This is clearly untrue, and cannot avail the petitioner in this case. The exceptions will be overruled.

(90 N. J. L. 171)

WILSON v. STATE.

(Court of Errors and Appeals of New Jersey.
Sept. 20, 1897.)

Dissenting opinion. For majority opinion, see 37 Atl. 954.

GARRISON, J. (dissenting). The question upon which this court is divided is whether the intoxication that may be considered by the jury upon the degree of murder must be such as rendered the defendant incapable of forming an intention to kill, or whether it may be such as satisfies the jury that, as matter of fact, such an intention did not exist.

The trial judge adopted the former of these views, and charged the jury that the intoxication that might be considered with reference to the existence of premeditation was a condition of the defendant in which "his faculties were prostrated, and he was rendered incapable of forming a specific intent to take life." This view has been, in almost identical language, embodied in the opinion that speaks for the majority of this court.

I think that the other view is the correct one, and that, upon the question of degree, the issue was whether, as matter of fact, the defendant had formed a specific intent to take life, and not whether he had proved that he could not have formed it. The burden of proving the defendant's guilt, and the quantum of such proof, were in no wise shifted or varied by the introduction of the defendant's

testimony as to his intoxication. The fact of intoxication was merely an added circumstance, which, if proved by the weight of evidence, should have been considered by the jury in connection with the question of intent, the burden of proving which beyond a reasonable doubt was on the state.

Such "a reasonable doubt," as was said in the case of *Warner v. State*, 56 N. J. Law, 686, 29 Atl. 505, "might spring out of the drunkenness of the defendant." And it must be apparent to every mind that there are states and stages of intoxication that would excite the gravest doubts as to the existence of deliberation and a premeditated purpose, and yet would not warrant the conclusion that the formation of such a purpose was beyond the capacity of the individual. To deny this efficacy to the defendant's testimony was to do him a legal injury. And in this connection it should be borne in mind that intoxication is not a defense, as insanity is; and hence the doctrine of *Graves' Case*, 45 N. J. Law, 203, does not apply.

But, apart from this, the effect of the substitution of the mental capability of the defendant for his actual mental state was an injurious shifting of the issue. By its indictment and by its proof the state said to the defendant, "You formed a specific intent to take human life." To this the direct and obvious traverse is, "I did not," and upon this issue all relevant testimony would be considered. But if the only answer permitted to the defendant were, "I could not," a totally different issue was presented, and the defendant was denied all benefit from the testimony going to show that "he did not," unless he also proved that "he could not."

A yet more fundamental injury to the defendant in thus shifting the issue was that it relieved the state from the burden of proving premeditation beyond a reasonable doubt, and compelled the defendant, in that respect, to prove his innocence beyond all doubt. That this was the practical and logical effect of requiring the defendant to prove that his faculties were so prostrated that he was incapable of premeditation is clear. For if, in addition to proving by weight of evidence the fact of his intoxication, he must also, by like proof, satisfy the jury that the state of mind engendered by this fact was one that rendered him incapable of premeditation, he must establish by preponderance of proof the negative of that which the state was bound to prove beyond a reasonable doubt; and, if he thus proved that he could not have formed the specific purpose ascribed to him, it followed beyond all doubt that he did not form it.

Briefly outlined, these are the considerations that constrain me to dissent from the majority of my brethren.

The only case in this court that has been cited gives strong support to the view for which I contend. I refer to *Warner v. State*, 56 N. J. Law, 686, 29 Atl. 505.

In the Warner Case, which was affirmed in this court, the trial judge charged the jury that "if the defendant was mentally capable of conceiving a design to take the life of the woman, and if he did conceive such a design, and if you are satisfied that, in pursuance of a design thus conceived, he purposely inflicted the fatal blow, then he was guilty of murder of the first degree; whereas, if you find that he was incapable, from the condition of his mind, of conceiving such a purpose, or that in point of fact he had not fully conceived such a purpose, then he is not guilty of murder of the first degree." See citation made by Mr. Justice Reed in his opinion. 56 N. J. Law, 687, 29 Atl. 506. The distinction thus made was carried into the abstract of his opinion by the careful justice who prepared it. See the syllabus, page 686, 56 N. J. Law, and page 506, 29 Atl.: "If an intoxicated person has the capacity to form an intent to take life, and conceive such intent, it is no ground for reducing the degree of his crime to murder of the second degree that he was induced to conceive it, or to conceive it more suddenly, by reason of his intoxication." And in the body of the same opinion the general answer to the defendant's assignments of error is that "the point was clearly presented to the jury that the question was whether there existed a design to take life."

In the case of Marshall v. State, 59 Ga. 154, it is impossible from the opinion to tell what question was before the court, or how it arose. The only reference to a record is contained in the judicial declaration, "The record which the counsel has brought to us drips with blood." Under this sanguinary influence the law with respect to intoxication is thus announced: "The degree of drunkenness shown by the evidence * * * was not great, but, had it been the utmost possible degree consistent with the power of discharging a pistol, the law of the transaction would have been the same." I am unable to see how the power to discharge a pistol becomes a test of the formation of a specific intent to take human life, but the proposition logically paves the way for the general rule with which the opinion concludes, viz.:

"To be too drunk to form the intent to kill, the slayer must be too drunk to form the intent to shoot." I cannot join with the court that in Hanvey v. State, 68 Ga. 614, "cited this utterance with approval."

In Martin v. State (N. J. Sup. Ct.; Nov. Term, 1883) no opinion is reported or on file; but, inasmuch as error was not assigned upon the charge of the trial court with respect to the effect of intoxication, the propriety of the charge in that respect could not have been judicially considered, and hence was not affirmed.

In the well-considered case of Halle v. State, 11 Humph. 154, the precise point is discussed as the psychological question that it is, and the judgment of the trial court was

reversed because of a charge substantially identical with that now before us. The conclusion there reached was that "the degree of drunkenness that may shed light on the mental state of the offender is not alone, that excessive state of intoxication which deprives a party of the capacity to frame in his mind a design deliberately and premeditatedly to do an act. All murder of the first degree must be perpetrated willfully, deliberately, maliciously, and premeditatedly. The jury must ascertain, as a matter of fact, that the accused was in this state of mind when the act was done."

I have not found an authority that shakes the soundness of this conclusion, and my attention has not been directed to any line of reasoning that tends to the opposite result.

I am authorized by the CHANCELLOR, and by Justices DIXON, LIPPINCOTT, and COLLINS, and by Judge BARKALOW, to state that they concur in the views here expressed.

(55 N. J. E. 608)

NELDON v. ROOF et ux.

(Court of Chancery of New Jersey. Sept. 30, 1897.)

EQUITY—PLEADING—CONVERTED ALLEGATION—PROOF—MORTGAGES—OWNER OF EQUITY OF REDEMPTION—TENDER—RECORD—NOTICE TO COMPLAINANT—ORDER OF CHANCELLOR.

1. Where an answer is prayed under oath, and defendant denies a material allegation of the bill, complainant must plead further, or offer proof in behalf of the allegation.

2. An allegation that "defendant now brings the money into court" is equivalent to an allegation that defendant, either in person or by solicitor, walked into the court with his answer, and brought the money with him, and, with the answer, delivered it to the clerk.

3. In a bill to foreclose, where defendant has pleaded a tender into court of the amount due, and the case has been on the docket for several years after the pleadings were settled, the record of the moneys paid into court may be inspected to ascertain whether defendant's money was actually received and disposed of in accordance with the statute and the court rules.

4. Where the amount due is voluntarily paid into court by the owner of the equity of redemption in a bill to foreclose, and the payment itself and its purpose is pleaded in the answer, there need not be a special order of the court by the chancellor on notice to the complainant, rule No. 84 requiring the clerk to give immediate notice to the chancellor of all moneys paid into court.

Bill by John H. Neldon against James Roof and wife to foreclose a mortgage. Decree for defendants under the defense of a tender of the amount due.

C. J. Roe, for complainant. C. M. Woodruff, for defendants.

PITNEY, V. C. This is an ordinary bill to foreclose, by an assignee of the mortgage against the owner of the equity of redemption by conveyance from the mortgagor. The mortgage is dated November 24, 1886, payable in one year, with interest from April 1, 1886. Complainant's title as assignee accrued

October 20, 1887. Defendant became the purchaser of the equity of redemption about the 1st of March, 1888. The bill was filed May 25, 1888, and the answer on the 17th of July, 1888, since which, and until the present year, the cause has slept, and then was stirred by the defendant. It is inferable from the statements of the bill and answer that the amount originally in controversy was two dollars. The bill alleges that the complainant took an assignment of the mortgage by request of one Taylor, then the owner of the equity of redemption, and that a parol contract was then entered into between him and Taylor, by which the payment of the mortgage was extended to the 1st day of April, 1888. Taylor, the party with whom the contract was alleged to be made, was not made a defendant. Answer is prayed for under oath, and the defendants, by their answer, deny the making of the contract with Taylor, and all knowledge thereof on their part. This puts the allegation in issue, and, no replication having been filed or proof offered in behalf of the allegation, it must, for present purposes, be held that there was no contract of extension. This renders it unnecessary to consider the question—well argued by defendants' counsel—whether such a contract, if proven, would have been binding on defendants, who purchased the premises without notice of it. The bill alleges that the amount due is the principal sum of \$600, and interest thereon from the date of the bond and mortgage, which would be from November 24, 1886. But the bill also alleges that the bond which the mortgage was given to secure provided for the payment of interest from the 1st of April, 1886. This discrepancy is immaterial, because defendant, in his answer, admits that when he purchased the premises, about the 1st of March, 1888, the amount due was \$600, with interest from April 1, 1886, amounting on the 10th of March, 1888, to the sum of \$70, making \$670 in all; and alleges that on the 9th of March, 1888, he offered to pay and tendered the same, to wit, the sum of \$670, to the said complainant, as and for the payment in full satisfaction of all moneys then due on the said mortgage, and the said complainant then and there wholly refused to receive the same. The answer further sets up that on the 5th of April, 1888, and before the commencement of the suit, the defendant, at the place of business of the complainant, again offered to pay and tendered to the complainant said sum of \$670, being the said principal sum of said mortgage, and all the interest due thereon to the said 9th day of March, 1888, being the date of the first tender, as and for the payment and full satisfaction of the said mortgage, and all money, both principal and interest, due thereon; and the complainant again then and there wholly refused to receive the same. Then follows this allegation, "And this defendant further says that ever since said 9th day of March, 1888, the time of the said offer to pay and tender, he has at all

times been ready to pay the same, and is still ready so to do, and now brings the same into court." The allegations of the answer in this respect are not put in issue, and must be taken to be true.

The points made against the defendant's position are:

1. That the tender was not good, because not made by the original mortgagor and obligor. I am unable to see any point in this. It was made by the owner of the equity of redemption, against whom this foreclosure is sought. It was made for the purpose of freeing and discharging his premises from the lien of the mortgage, and, if properly followed up, is a clear defense to this action. In cases where the party making the tender has, under the English practice, demanded a reconveyance, the question has sometimes arisen whether he was the party entitled to redeem and have the reconveyance. No such question arises here.

2. That there is nothing by which it appears that the money has been actually paid into court. Admitting, for present purposes, that payment into court is a necessary part of defendant's case, the question is whether the allegation in the answer above set forth, which, for present purposes, must be taken to be absolutely true, is sufficient, viz. that "the defendant now brings the money into court." The fair construction of that language is that the defendant, either in person or by solicitor, walked into the court with his answer, and brought the money with him, and delivered it with the answer to the clerk. The answer could not state that the money was received by the clerk, and disposed of according to the rules and practice of the court. That this was done in the regular course of the business of the office, it seems to me, should be presumed. But I think that in the present posture of the case we may and should resort to the record of the moneys paid into court, exhibited in the accounts of the clerk and court's depositary of its moneys, to ascertain whether in this case the moneys were actually received and disposed of in accordance with the statute (section 102 of the chancery act) and the standing rules of the court (Nos. 33 and 34). Such inspection shows that the sum of \$670 was actually received by the clerk from the defendant at the filing of the answer, paid in to the court's appointed depositary for moneys under the statute, and credited to the proper account; it thus appearing that the money was actually paid into court, and there remains, subject to the power and disposition of the court.

The next objection made is that there could be no efficient payment of the money into court without a special order of the court by the chancellor, upon notice to the complainant. This contention raises an important question of practice, which has been carefully considered. In my judgment, the object of all of the rules on this subject, as shown by the discussion in *National Docks & N. J. Junction Connecting Ry. Co. v. United New Jersey Railroad & Canal*

Co., 52 N. J. Eq. 366, and Pennsylvania R. Co. v. National Docks & N. J. Junction Connecting Ry. Co., 52 N. J. Eq. 555, 30 Atl. 580, is: First, to make sure that the money is brought within the power and disposition of the court; and, second, that the object and purpose of the payment be clearly defined. It was held by the court of appeals in that case that payment to the clerk was, in effect, payment into court. In point of fact, in this court, by a long and well settled practice, the clerk is the cashier of the court in that respect, as shown by the statute and rules above stated. But it was also said by the court of appeals in that case that there should be, in addition to such simple payment, some other action taken by which the court itself, as distinguished from the clerk, shall be "apprised of and sanction" such payment; and that the uniform procedure was to obtain a rule or order of the court permitting its payment. But it was also said that each court had the power to establish its own rules and practice on this subject, with the result that a special rule or order in each case might be dispensed with. In this court the practice has been not to require any order of leave or sanction to be signed by the chancellor, or rule to that effect to be entered in the minutes, where money is voluntarily paid into court by a party to a suit, and the payment itself and its purpose are mentioned in a pleading—bill or answer—of the party paying. The pleading, in such case, stating the object and purpose of the payment, gives notice of the payment to the opposite party; and then rule No. 34 requires that the clerk shall give immediate notice to the chancellor of all moneys paid into court. No other written rule on the subject has ever been found necessary, although the actual payment of money into court under the circumstances above stated are numerous, and the aggregate amount large. This provision of rule No. 34 for the notice of payment to be given by the clerk to the chancellor, and the absence of any other rule on the subject, is a clear indication that the money may be effectually paid in, and actually received by the clerk, without any special order signed by the chancellor. In bills of interpleader, accompanied by payment into court, in order to obtain an injunction, or in case of a bill for an injunction to stay execution on a judgment, and a payment into court to satisfy the requirement of section 80 of the chancery act, it has never, as I understand, been the practice to obtain an order by way of sanction giving the complainant leave to pay the money into court. But the money is paid and received by the clerk as a matter of right and of course. And the order for the injunction merely recites such payment, the clerk's receipt for the money being exhibited to the judge or master granting the injunction; or, if payment has not been made before the application, the order states that an injunction shall issue upon condition that the complainant do pay into court, etc. The same practice has prevailed in the case of a bill to redeem, by mortgagee against mortgagor, or for specific performance by a vendee against vendor,

where the bill alleges the tender of the amount due on the mortgage or contract; and also in the case in hand, where the defense is a tender of the amount. In all these cases I am informed—and such was my own experience at the bar—that it has not been the practice for the party paying to obtain special leave of the chancellor to make such payment. It is made as a matter of course, and so received by the clerk, and, in the regular routine of the business of the office, is credited to a particular account, and then mingled with the other funds of the court by deposit in the duly-designated bank. It seems to me that this practice answers all the essential requisites of the canon laid down by the court of errors and appeals. It is difficult to perceive any reason why litigants, in the class of cases mentioned, should be burdened with the trouble and expense of a special order. In this connection I think it worth while to state that I have seen the brief of the counsel for the appellant in the case of Pennsylvania R. Co. v. National Docks & N. J. Junction Connecting Ry. Co., 52 N. J. Eq. 555, 30 Atl. 580, and he there cited numerous instances where moneys had been paid into this court, and received by the clerk, without any order of the court, in cases arising under different special statutes for condemnation of private property for public purposes. The case reported was one of payment of money into a common-law court having no fixed place, under authority of statute and rule, for the deposit of its moneys, and is, in that respect, in marked contrast with this court.

An examination of the English practice (2 Daniell, Ch. Prac. 1770 et seq.) shows why the strict rule there prevailing (Id. 1786) can have little or no application here. There, ever since the act of 12 Geo. I. c. 32 (1725), establishing the office of accountant general, moneys are not, in point of fact, paid into court, but are paid into the Bank of England to the credit of the accountant general, and must be placed to a particular account designated by him. That officer, unlike our clerk, has nothing to do with the actual pleadings and proceedings in court, and acts, and must of necessity act, in the receipt of money, entirely by special directions of the court. Any other practice would lead to inextricable confusion.

In considering the force and bearing of the authorities on this question of tender and payment of money into court, it is necessary, in my judgment, to consider the particular circumstances of each case. For instance, whether the question is as to the effect of the tender in divesting and destroying a lien upon land or chattels, or whether the effect is to stop the running of interest merely, and whether the question arises at law or in equity. In the majority of the cases in equity the question has arisen upon either the claim of absolute discharge of a lien, upon a bill to enjoin proceedings in ejectment (see *Shields v. Lozear*, 34 N. J. Law, 496, in an action of ejectment); or in the matter of inter-

est and costs on a bill to redeem, as in *Shields v. Lozear*, 22 N. J. Eq. 447; or, as in *National Docks & N. J. Junction Connecting Ry. Co. v. United New Jersey Railroad & Canal Co.*, supra, on a question of the actual divesting of title in condemnation proceedings; or in defense to a simple foreclosure suit, as in *Stockton v. Manufacturing Co.*, 22 N. J. Eq. 56. In *Shields v. Lozear*, supra, the court occupied itself wholly with the question of whether or not a payment or tender of the money due on a mortgage, after the day when, by its terms, it became due, had the effect in New Jersey of discharging the lien of the mortgage. In *National Docks & N. J. Junction Connecting Ry. Co. v. United New Jersey Railroad & Canal Co.*, supra, the real question was whether the money had been paid into court in such a manner as to be within the easy reach of the landowner.

With regard to the payment of the money on a bill to redeem, an examination of the authorities found in 3 *Pow. Mortg.*, by Rand, p. 933 et seq., 2 *Jones, Mortg.* § 890, shows that formerly the English chancellors treated a mortgagor coming in to redeem after the day fixed for the payment of the mortgage had passed as a suppliant to the court to be relieved of the effect of a forfeiture at law, and therefore properly subjected to equitable terms; and those were that he should not suddenly, in such case, pay off his mortgage, but should give at least six months' notice; and then, as reconveyances were required, the mortgagee was entitled to know that the person asking to redeem was the proper party to whom a reconveyance should be made; and oftentimes the mortgagee was in possession, and bound to account for the rents and profits, so that a variety of matters were required to be settled before the amount to be paid could be fixed and the reconveyance made. In all this the chancellors acted upon the idea that they were granting a mere favor to the complainant who asked to redeem, and imposed strict, and somewhat severe, terms upon him. These, however, as the authorities show, have been much ameliorated in later days, in accordance with advanced notions of justice and equity. In case of tender and payment of money to divest title on condemnation proceedings constitutional rights are met, and the courts are well justified in requiring that the amount found by the commissioners or the jury, as the case may be, should be put fully and completely within the control of the landowner before it should be held that compensation has been made to him, and the title passed to the condemning corporation. In a simple case of foreclosure and tender and payment into court by the defendant, it seems to me that the considerations above mentioned do not apply. The question—where, as here, there is no cross bill asking for the delivery and cancellation of the mortgage, and that question is not before the court—is not whether the lien of the mortgage shall be divested, and the debt

considered as paid, but simply whether or not the complainant, when he came into court, had just cause and reason so to do; for, in order to entitle him to come into a court of equity to ask for foreclosure, there must have been a substantial failure of the owner of the equity of redemption to pay the debt. The statement found in bills to foreclose that complainant had demanded payment, which was refused, is not, in my judgment, a mere meaningless form. And if, in good faith, the money has been tendered and refused, and the defendant has not been put in default by a subsequent demand of payment, and the amount tendered was, in point of fact, sufficient, and the tender was made at a time and place when and where the complainant should have received it, and no reasonable excuse is made for his not receiving it, it does seem to me that in such a case the defense of tender is a meritorious one, and that a court of equity should not apply to it the strict rules that have been applied in other cases. And, speaking for myself as a judge of a court of equity, I wish to protest against the application in this court of those strict rules of the common law on this subject which drew from Lord Tenderden the remark that "the plea of tender is, in practice, so seldom successful that I am always sorry to see a plea of tender on the record, because I know from experience that it is very seldom made out." It seems to me that the severe rule adopted by the English common-law courts on this subject, up to within a comparatively recent period, was a blemish—small, indeed, but quite distinct—upon the symmetry of the English common-law practice.

My conclusion on the case here made is that the complainant had no ground of equitable action when he filed his bill, and that it must be dismissed, with costs, but without prejudice to his right to apply to the court to have the money in court paid out to him.

Since writing the foregoing, my attention has been called to, and I have read, the opinion of Vice Chancellor Grey in *Whittaker v. Roller Mill* (filed since this cause was argued) 38 Atl. 289. The learned vice chancellor there dealt with the case of a tender to the complainant, with the demand of an assignment of the bond held by complainant, made after suit brought, and payment into court without any order of the court or notice to the complainant, and unaccompanied by any pleading. What the allegations of the answer in that behalf were does not appear. In the meantime other persons holding other bonds secured by the same mortgage had been made parties complainant. The original complainant waived the defects, if any, in the tender by asking—but, for some undisclosed reason, without success—to have the money paid out to her, and the question seems to have been whether the tender and payment into court terminated the suit, so that the new parties complainant could not proceed with it. The learned vice chancellor, in speaking of the

effect of the attempted tender and payment into court, merely reiterated the rule laid down in *National Docks & N. J. Junction Connecting Ry. Co. v. United New Jersey Railroad & Canal Co.*, supra, and held that the tender and payment into court did not affect the proceeding, nor stop the interest running to the original complainant. The case of a tender after suit brought, and payment into court, as shown by *Wright v. Behrens*, 39 N. J. Law, 413, and *Levan v. Sternfeld*, 55 N. J. Law, 41, 25 Atl. 854, stands on an entirely different footing from that of a tender before suit brought. By the well-settled practice in the law courts, in such a case there must be a special order of the court made. Besides, in *Whittaker v. Roller Mill*, there was no unconditional tender, but an offer of payment, with the money produced, accompanied with the demand of an assignment, which the vice chancellor held, under the circumstances, was inefficient, because not made to the proper party, or by a party showing that he had any equity to the assignment. It was eminently a case where the remedy of the party making the tender was to apply to the court, showing his right to subrogation, and ask for an order that the complainant accept the amount due her, with costs, and assign the claim to him, or that he be subrogated to her rights. I see nothing in the case to vary the result I have above stated.

(56 N. J. E. 333)

CLAFFEY v. LEDWITH.

(Prerogative Court of New Jersey. Oct. 19, 1897.)

WILLS—INCAPACITY—SENILE DEMENTIA—UNDUE INFLUENCE—BURDEN OF PROOF—UNSUSTAINED

1. A testator will be deemed to have had capacity to make a will if he comprehended his property, the natural objects of his bounty, the character of the business in which he was engaged, and the disposition he resolved to make of his property, when he gave instructions for the will, and when he executed it, though there were periods before and after the making of the will when he was so mentally unsound as to be incapable of making a will.

2. After the death of a child's father, its grandfather made a will, leaving it \$1,000 only, and the balance of his estate, of \$40,000, was devised to two daughters living with him. The grandfather was quite old and feeble, and his daily comfort was dependent upon the ministrations of his daughters, who were hostile to said child's mother, and had expressed a purpose that she should have none of their father's money, and often represented her to their father as being unduly extravagant, and not in need of assistance, and should work, and they did not permit her to see their father after her husband's death. They declared a determination to have a will made, and procured the scrivener, upon whom one of them called to cause him to hasten the work, and requested their physician to prepare the will while the scrivener delayed. They were present and participated in every stage of the preparation and execution of the instrument. Their father proposed to leave his grandchild \$100, and it was at their suggestion that the bequest was made \$1,000. Held such indicia of undue influence as to throw the burden upon the proponents to show that undue influence was not exerted.

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3. Where the proof of undue influence was so strong as to cast upon the proponents of a will the burden of showing that such influence had not been exerted, such burden was not sustained by the opinions of the subscribing witnesses that the testator had not been influenced, and the fact that the testator, during the months covered by the process of will-making, had echoed the arguments of the favored heirs for partially disinheriting a proper object of his bounty, where the favored heirs did not testify and explain their participation in the production of the will, and deny the exertion of undue influence.

Appeal from orphans' court, Bergen county; Van Valen, Judge.

In the matter of the estate of James Ledwith, deceased. From a decree of the orphans' court on appeal of Mary Ledwith, as guardian of Vincent Ledwith, a minor, reversing the order of the surrogate admitting the will to probate, Annie Claffey appeals. Affirmed.

James F. Minturn and Michael J. Kelly, for appellant. Milton Demarest and Thomas F. Magner, for respondent.

McGILL, Ordinary. James Ledwith died in the township of Saddle River, in Bergen county, on the 9th of July, 1894, at the age of 84 years, leaving a paper which was executed as his will on the 15th of May, 1890, the validity of which is the subject of the present contest. His wife died many years ago. He had three children,—a son, James, who died in Brooklyn, N. Y., on the 13th of January, 1890, leaving a wife and two children, one of whom was born after his death, and died within a few months after its birth; and two daughters, Julia, who, after a lingering illness, died of consumption in July, 1892, and Annie, who married one Claffey, from whom, during the time in question in this controversy, she was separated. In early life, Mr. Ledwith lived in New York City, and was there engaged in the business of selling liquors, from which, and through economy, he amassed enough money to enable him to own two tenement houses, built upon a single city lot, which fronts upon East Twelfth street, near Avenue A, in New York City, to buy a few building lots at Saddle River, and to purchase and stock a small farm which lies partly in Bergen county, in this state, and partly in Rockland county, N. Y., upon which he lived from 1868 until his death, in 1894. The dwelling house upon the farm is in New Jersey, and hence his legal residence at his death was in Bergen county. The proofs indicate that his yearly income was in the neighborhood of \$2,500, and that his estate was worth something approximating \$40,000. The disputed will contemplates this disposition of his estate: The payment of his debts; a bequest of \$1,000, charged upon his entire estate, to his brother Thomas and his two daughters, who are the executor and executrices, in trust, to be divided into as many parts as there shall be children of his son James, and invested and paid to those children, respectively, upon their reaching 21 years of age, together with accumulations of interest,

the mother of the children to take the \$1,000 in case they should all die before reaching 21 years of age; and the gift of the residue of his estate to his two daughters, or to the survivor of them at distribution, and, should they both predecease him, to "their heirs or next of kin." Power to sell land is given to the executor and executrices. Prior to the residuary clause of the will, provision is made that the daughters shall have the right to continue to "use and keep" the farm so long as they or either of them shall continue to live on the place. The will was proved *ex parte* before the surrogate of Bergen county, and admitted to probate, on the 10th of July, 1894. On the 24th of September in the same year, an appeal was taken to the orphans' court by Mary Ledwith, as the guardian of her infant son, Vincent Ledwith, who was the surviving son of the testator's deceased son James; and thereupon such proceedings were had that in 1896 it was decreed that the paper admitted to probate by the surrogate was not the will of James Ledwith, and that the order of the surrogate admitting it to probate be reversed. The matter is now heard upon appeal from such decree of the orphans' court, upon voluminous proofs taken in that court. The appellant is the testator's daughter Annie, and the respondent is his daughter-in-law, Mary, widow of the deceased son, in her capacity as guardian of her infant son, Vincent.

The insistence upon which the contest is based, primarily, is that, at the time of the execution of the will, James Ledwith, suffering from senile dementia, lacked capacity to make a will, and, in that condition, had the disputed paper imposed upon him by his daughters, his brother, and the subscribing witnesses; and, secondarily, is that, even if the proofs should be held to be insufficient to establish incapacity to make a will under favorable circumstances, they, at least, exhibit an intellect so far enfeebled as to present a fit subject for the imposition which the proofs establish; and, thirdly, is that, if actual fraud by imposition be not shown, the proofs warrant the rejection of the will as a product of undue influence.

It is admitted that prior to his death, in 1894, Mr. Ledwith completely, or almost completely, lost his mind. It is not disputed that he suffered from senile dementia. The inquiry through the evidence has been as to the stage the disease had reached when instructions for the will were given and the instrument was executed. The respondent here and appellant in the orphans' court insists that she noticed a change in Mr. Ledwith as early as 1886. Charles H. Armstrong and William Kruse testify that in June, 1886, Mr. Ledwith came to their houses, some eight miles from his home, and insisted, first at one, and then at the other, that he lived there, and, being refused admission, that he remained in the neighborhood all the night, and was taken by them to the poor house the next morning. They attribute his conduct to mental derangement. In the fall of the same

year, William W. Oldfield, a restaurant keeper of Spring Valley, says that Mr. Ledwith got off a train of cars from New York, and was so bewildered that he started to go home the wrong way. The witness attempted to send him home, but failed to do so, and, as a result, he was again taken to the poor house. Mr. Oldfield entertains the opinion that Mr. Ledwith was not under the influence of intoxicants, but, for the time, was mentally deranged. George Saarosy, a merchant of Spring Valley, and Peter J. Christopher, a near neighbor of Mr. Ledwith, both witnesses for the respondent, testify that in 1887 Mr. Ledwith was in possession of his mental faculties. Jennie Gillespie, on the contrary, who had frequent opportunity to see Mr. Ledwith, thinks that his mind was giving way in 1887; and John Christopher, a son of Peter J. Christopher, expresses the same opinion. In support of his opinion, John Christopher gives an instance which appeared to him to indicate mental impairment in 1887 or 1888. He, then being 17 years old, drove Mr. Ledwith to Spring Valley, and there, among other things, stopped at an express office to get a bundle for Mr. Ledwith. He says that he got out, and tried to get the bundle from the express agent, but, because the agent did not know him, he was sent out to bring Mr. Ledwith in the office. He tried to induce the old man to get out of the wagon, but failed; whereupon the express agent came out, and saw Mr. Ledwith, who got out of the wagon, and went into the express office. There the agent wanted him to sign his name in a book, and, upon Mr. Ledwith's saying that he could not do so, the agent asked him to make his mark, and the old man took up a pen, and made a cross in the place indicated by the agent. It seems to be well doubted whether the instance, instead of supporting young Christopher's opinion, does not evince intelligence in Mr. Ledwith. The old man would not obey the boy's direction to get out of the wagon, but when the agent came, and he saw the necessity of it, he went into the office. When he was asked to sign his name, he shrank from a task which he had rarely performed, taking refuge in a falsehood; and, when told to make his mark, with an intelligence which exhibited an appreciation of that which was required, took a pen, and made the cross which is usually adopted for a mark. As to the year 1888, the respondent testifies that Mr. Ledwith then exhibited mental enfeeblement by carrying about brush, pieces of wood, and other things from place to place, uselessly, and apparently without object. Mr. Saarosy remembers that then Mr. Ledwith, inanely, as it seemed to him, would repeat, "Aye, Aye," in reply to questions, and that in the summer of that year he saw Mr. Ledwith making his way barefooted through underbrush and briars. Peter J. Christopher says that, after harvest in that year, Mr. Ledwith occupied himself in the aimless transfer of things from place to place, as the re-

spondent says she noted the year before; and Jennie Gillespie, with some uncertainty as to the time, corroborates him in this particular, and recollects also that Mr. Ledwith was then continually watched, as though a child, by his daughters, and that she, at the instance of the daughters, took him to the village of Spring Valley to be shaved. The respondent testifies that in the summer of 1889 she saw Mr. Ledwith wear a fur cap on the hottest days, and two or three vests at once, and heard him express fear that the vests would be stolen, and also that she saw him put eggs in his pocket, and aimlessly carry things from place to place, and that he then wandered away from home, without knowing where he was going. Emma Christopher testifies that upon an occasion, in 1889, she saw Mr. Ledwith come in his house, and, after walking about restlessly, take a cushion from a chair, and throw it on the floor, and, after looking at the chair, throw it also upon the floor, and then throw a shawl and some papers off a lounge, and go to the water pail, evidently to throw that also upon the floor, when his daughter Julia called out to him, "You crazy old fool, let that be!" Also, that she then saw him go to the fireplace, and take a clock from the mantel, and put it on the stove, and then dip his hands in some pots of cream behind the stove, and saw his daughter wash his hands, and heard her say, "He is a crazy fool." She further says that the day after this, while she was churning at his house, he put rotten apples in the churn. She further testifies that in the same year, apparently unconscious of the impropriety of his conduct, he used the floor of his house in answer to the calls of nature. The father of this witness states that upon two or three occasions, in 1889, the old man was so far demented that he failed to remove his clothing when he relieved his bowels.

Speaking of the year 1889, Peter S. Van Orden, a witness for the appellant, says that several times as he drove past Mr. Ledwith's place, and stopped for a short time with the old man, he failed to notice anything irrational in his conduct or speech. To the same effect, a Mr. Tallman, who was postmaster at Spring Valley, says that during the years 1889, 1890, and 1891 Mr. Ledwith was in the habit of coming to the post office, a distance of three miles, sometimes alone, for his mail, and during those years would call the witness correctly by name, and ask for his mail, and otherwise so conduct himself as to impress the witness that he was in possession of his mental faculties. Another witness, James Crouter, instances that in April, 1889, he was engaged to build a garden fence at Mr. Ledwith's, and, when the lumber with which he was to do the work was brought, it proved to be hemlock, and Mr. Ledwith refused to permit it to be used, insisting that it should be pine. The witness says that Mr. Ledwith was right, and he consequently had the lumber changed. At the same time the witness

was called upon to fix the hinges of a cellar door, and explained that he could not do the work because the hinges should be leaded into the stone on one side; whereupon Mr. Ledwith suggested a plan for securing the hinges, which was adopted, and proved successful. During this work the witness says that he ate with Mr. Ledwith, and from time to time talked with him, and was satisfied that he was intelligent. This witness remembers also that in the year 1890 Mr. Ledwith called him correctly by his name, and appeared to him to be in possession of his mental faculties.

It is remembered that Mr. Ledwith's son died in Brooklyn on the 13th of January, 1890. He was buried on the 16th of the same month. The funeral was at Brooklyn. The proofs show that Mr. Ledwith and Mrs. Claffey went to the funeral, leaving home on the 15th, so that they might be at the wake that night. They reached Brooklyn at 2 or 3 in the afternoon, and later went to New York, to Mr. Ledwith's property, on East Twelfth street. There they visited Margaret Keenan, the janitress of the houses, and took supper with her. Mrs. Keenan says they came at 7 o'clock in the evening; that she expressed sympathy for Mr. Ledwith in the loss of his son, and that he replied that he knew her feeling; that he inquired for her husband and son; that he ate supper, but did not talk much until her husband came, and that he then talked with her husband; that, when he went away, he told her not to give any of the rents she should collect to his son's wife. Simon Keenan corroborates his wife, and says that Mr. Ledwith talked intelligently with him about some old neighbors. Mary Keenan corroborates the testimony of her parents. It appears that an elderly woman, named Brown, who had been one of Mr. Ledwith's tenants for some 20 years, was living in the building above the rooms of Mrs. Keenan, and that Mr. Ledwith went alone upstairs to her rooms to see her, and knocked at her door, and, when he was admitted, asked her how she was, remarked that her room was very warm, asked for her son, naming him, told her of his son's funeral, and invited her to attend it. Mrs. Brown says that he stood talking intelligently for about 15 minutes. She is corroborated by her daughter, who adds that, as she went to raise the window after Mr. Ledwith's remark about the warmth of the room, he said, "You are just as stout as you ever was;" that her mother spoke of the suddenness of his son's death; and he replied that it was a great blow, that he had been so encouraged by the physician that he believed his son would recover. The daughter, as the mother, thought that Mr. Ledwith was intelligent and in possession of his mental faculties. At about 9 o'clock he started back to Brooklyn with his daughter and Jennie Gillespie, who had accompanied them. Mary Keenan went with them to the street car. She says that the old man suggested the propriety of their standing upon the lower corner of the street, the proper stopping place of a

down car. As no car came, they walked down a block to Eleventh street, and, in doing so, passed a florist's, where he suggested they might purchase some flowers for the funeral, but he was persuaded that it would be more convenient to buy them in Brooklyn. She says that, when the car came, he shook hands with her, and said, "We will see you in the morning?" and she replied in the affirmative. The only other witnesses who speak of the evening of the 15th of January are Jennie Gillespie and the respondent. Jennie Gillespie says that the old man was very quiet in going from Spring Valley to Brooklyn, but in returning from New York to Brooklyn, at night, he acted so eccentrically in the street car as to attract the attention of the other people, and give her trouble to quiet him. The respondent says that during the night in Brooklyn, as Mr. Ledwith sat up, he failed to express grief for the loss of his son, and, when some man came in during the night with a silk hat, Mr. Ledwith claimed it as one he had lost years before. The funeral took place early in the morning of January 16th. Mr. Ledwith attended it in a carriage, accompanied by his daughter Annie and James and Jennie Gillespie. He had breakfast before he went, but during the remainder of the day, and until he got home to his house, three miles from Spring Valley, at night, he was without food. James Gillespie says that, at one place where the parties stopped to drink, the old man had a glass of hot lemonade, but that that was all. The night's vigil and the day's starvation exhausted him. Both the Gillespies say he did not realize where he was going when he went to the funeral, and that late in the day, while he was still in the carriage, he became violent, and tried to break out. It appears that, after he reached home, he so acted that one of his daughters said that he was out of his mind. Later in the evening, after he had his supper, he became more quiet.

For three or four years before the son died, he took the general management of his father's tenements in New York City. He deposited the moneys collected from tenants from time to time in bank to the credit of his father. After the son's death, John Van Benschoten was employed to do this work, and he continued to act as agent until Mrs. Claffey discharged him. Mr. Van Benschoten appeared as a witness called by the respondent. He testified that about the 1st day of February, 1890, he called at Mr. Ledwith's, to arrange the terms of his employment, and first saw Mr. Ledwith's daughters, the father being outside of the house. The daughters called their father, and, when he came in, they asked what percentage upon the collections the witness would charge, and he replied to Mr. Ledwith that the charge would be 5 per cent., and asked if that would be satisfactory. The daughters replied in the affirmative, but the father, after waiting for a time, which seemed to the witness long, replied, "Too much," repeating several times; and then added, "Well, I hope

you'll do you duty." The witness said, "I hope so;" and the old man replied, "I hope you'll earn the money." Mr. Van Benschoten further says that after that time he shrank from dealing with Mr. Ledwith, because the latter rambled, and he feared they could not reach an understanding. He thought that Mr. Ledwith's mind was not clear. He says: "He was honest; his intention was right; but you couldn't converse with him long enough." He therefore avoided Mr. Ledwith and all business communications with him. On one or two occasions the old man asked him how he was getting along, and the witness replied to the family generally, and not to Mr. Ledwith. It does not appear that the witness ever attempted to converse with Mr. Ledwith about his business. He frankly states that such an attempt would have been unpleasant to him, because of the old man's repetition. Maria Gillespie, who, when she testified, appeared to have been employed in the home of the respondent, says that in February, 1890, Mr. Ledwith habitually went about the yard picking up sticks and whatever came in his way, and that along in April, 1890, his daughters would not trust him to go to the village alone; that, when he went to be shaved, some one was sent with him; that she (the witness) at times accompanied him to the village when he went to be shaved, and would receive the money for the barber from his daughters, and give it to the old man when he reached the village. She says that about that time the daughters were in the habit of ordering their father about, and that sometimes he was obedient to their orders, and at other times would not obey them. Ephraim C. Bass testifies that he married Melissa Christopher, a neighbor of the Ledwiths, in January, 1890, and that from the 23d of December, 1889, to the latter part of January, 1890, he lived at the house of his father-in-law. He was then a Western cowboy. He came to the East for the purpose of getting married, and at the end of January returned to the West. He came back to the East again in 1891, and is now a motorman upon the electric railway in Brooklyn. About the time that the younger James Ledwith died, night and morning he did chores about the Ledwith place. He says that Mr. Ledwith would get up in the morning at 9 or 10 o'clock, when called by a daughter, and that the daughters would wash and dress him and give him his breakfast; that at times he would go out and wander away and get lost, so that on three occasions, in January, the witness had to find him and bring him home; that, when found, on each occasion, the old man did not appear to know where he was; that he was unable to do anything properly; that, when he attempted to look after the cattle, he would overfeed them; that at times he had to be taken to attend to the calls of nature, or would act as an infant, in disregard of his clothing; that he did not take part in the household management; that all bills were paid by his daughters; that, at the very first

visit of the witness to the house, Mr. Ledwith took a hot tea kettle from the stove, and put it on the mantel, and then picked up the clock, and threw it on the floor, and broke it; and that his daughter Annie then said, "He is crazy anyhow, and don't know what he is doing." John Christopher testifies that in the spring of 1890 he at times did chores for the Ledwiths, and that he remembers that Mr. Ledwith would be in bed at 8 and 9 o'clock in the morning, and that his daughters would wake him; that in May, 1890, the witness built a fence to keep Mr. Ledwith out of his daughters' flower garden, because he would unconsciously trample down the flower beds; that the old man was accustomed then to wander aimlessly about, without being able to do anything useful; and that in June, 1890, the witness remembers that the old man soiled his clothing in answer to a call of nature, without apparently understanding what he had done.

The Rev. Charles Mull, a priest, testifies that he saw Mr. Ledwith 10 or 12 times between the latter part of the year 1889 and May, 1890, and that he thought that Mr. Ledwith was then in his second childhood; that he was not irrational, but, as a child, did childish acts, without fully understanding, and yet at the same time had power of reason; that he would answer some questions correctly, especially those which called upon his memory of long past events, but would have difficulty with questions concerning present matters, understanding about as a child would. Melissa Bass relates the putting of the tea kettle on the mantel, which was testified to by her husband, but does not corroborate her husband as to the clock. While her husband says that Mr. Ledwith threw down the clock, and broke it, she says that, at another time from the putting of the tea kettle on the mantel piece, Mr. Ledwith was going to break the clock, but it was taken from him. She gives an instance of the old man soiling himself as stated by her husband and her brother John Christopher, and says that in the spring of 1890 he would at times use the wash basin and water bucket as he would a bedroom chamber. She says that at that time he had to be constantly watched, because of his mental irresponsibility, to keep him from being harmed and doing harm. Peter J. Christopher gives testimony similar to that of his children. The respondent testifies that Mr. Ledwith ceased to manage his New York property in 1886 or 1887, and that at that time his son took charge of it, and that thereafter Mr. Ledwith did not attend to it; that in February, 1890, she visited him, and saw him, without apparent purpose, tearing up some almanacs and a colored picture; that she did not then meet and converse with him, because his daughters would not permit her to do so; that she did not see him again until the fall of 1890.

Dr. Henry C. Neer, who was the physician in attendance upon Julia Ledwith in 1890, testifies: That, prior to the execution of the will,

he had made about 40 visits to his patient, and that during them he frequently saw Mr. Ledwith. That on the 16th of May, the day after the will was executed, at the instance of Mr. Ledwith's daughters, he specially conversed with the old man, with a view to ascertain his competency to make a will. That he talked with Mr. Ledwith, and was satisfied that he was competent, and thereupon, at the suggestion of the daughters, made an entry in his memorandum book, which is this: "May 16, 1890. Am requested to make memorandum that James Ledwith made his will yesterday, and his mind is good, and he is competent to transact any business." That he cannot recall the entire conversation with Mr. Ledwith at the time stated, but does remember that the old man asked him if he lived where he formerly did, to which the doctor replied that he did, at Park Ridge, and Mr. Ledwith replied that he remembered the place, and then described the road leading to it from the main road to Hackensack, and said that he had frequently driven past it when he was going to Hackensack. That he also talked intelligently about a slight ailment, for which the doctor then treated him. Mark Dewsnap, a neighbor, testifies that he saw Mr. Ledwith after the death of his son, and that Mr. Ledwith said that he did not like the family his son was married in, and did not wish his property squandered in it. The witness did not notice that Mr. Ledwith changed mentally until after the daughter Julia died, in 1892. Stephen H. Burr, a merchant of Spring Valley, with whom Mr. Ledwith dealt, remembers that shortly after the death of his son Mr. Ledwith was in the store, and Mr. Burr spoke to him about his son's death, to which Mr. Ledwith replied that he did not expect the young man to go before he did. Frederick P. Van Riper, a neighboring farmer, testifies that he saw Mr. Ledwith shortly after his son's death, and the old man then said that his son had died of pneumonia, and had been sick only a few days. The witness thought that Mr. Ledwith was intelligent in his conversation. The testimony of Mr. Tallman, the postmaster at Spring Valley, is, as already stated, that during the year 1890 Mr. Ledwith would come for his mail. And Nelson May, the blacksmith, states that during 1890 Mr. Ledwith came to him from time to time to have work done, and conversed intelligently. He specially instances a visit by Mr. Ledwith to him in 1891, when Mr. Ledwith came to him alone on horseback, to have the horse shod and an iron bolt mended, and gave his instructions clearly, and remained more than an hour, until the work was done, talking intelligently. Dr. James A. Dingman says that upon one occasion, in 1889 or 1890, Mr. Ledwith came to his office, and talked incoherently and irrationally, so that the doctor, thinking him to be drunk, took him home; but that after that, for a period of three months, he prescribed for Mr. Ledwith to cure an ailment, during which period Mr. Ledwith used

to call at his office, and that then Mr. Ledwith paid him in cash, and then acted and talked as one mentally competent. John P. Kuhl says that late in 1889 or in January or February, 1890, he met Mr. Ledwith driving alone, looking for the home of Mr. Debaun, the tax collector. He asked the witness to direct him, saying that he wanted to pay his taxes. He said that his son was dead, and that his daughter was sick, and so he had to attend to the payment himself; that he would have known the place if he had driven upon the other road.

It will not be necessary to follow with particularity the testimony as to Mr. Ledwith's mental condition after the will was made. It will suffice to say of it that the witnesses decidedly vary in their impressions of his condition, and in their narration of incidents illustrative of his rational and irrational conduct until the time of Julia's death, in 1892, after which time the majority of them assent that his mental condition would not admit of his transacting business.

It is apparent, I think, from the references I have made to the testimony, that, if credit be given to all the witnesses, Mr. Ledwith, during the year 1890, and possibly earlier, was at times incompetent to transact business, and at other times had sufficient possession of his mental faculties to enable him to intelligently comprehend all that was needful in making a will. The majority of the witnesses who came in frequent contact with him express the opinion that, in the period when the will was made, he lacked capacity to transact business; but they fail to satisfy me, by detail of circumstances, of the correctness of their conclusion. There are many little indefinable actions in one who is incompetent which are difficult for witnesses to explain or communicate distinctly in their testimony. For this reason the opinions of those who are constantly in company with the subject of the inquiry are permitted to be given in evidence, but the weight of an opinion must depend upon the facts which the witness narrates to sustain it, his opportunities of observation, and his intelligence and freedom from bias. *Waddington v. Buzby*, 45 N. J. Eq. 173, 174, 18 Atl. 690. As has been seen in the incident related by John Christopher concerning Mr. Ledwith's conduct at the express office, the fact rather tends to overthrow than to support his opinion.

The greater number of opinions of witnesses against the competency of Mr. Ledwith come from five members of the Christopher family, and three members of the Gillespie family, and the respondent. The head of the Christopher family is a farmer, who worked part of Mr. Ledwith's lands upon shares, but, since the management of the property has come into the daughters' hands, has ceased to be so employed. From his own statement, he appears to also be a pettifogger, and promoter of litigation. He says that he has pushed cases to the supreme court in his state. It is claimed

that he zealously espouses the cause of the respondent, and that it is a just inference from the attitude of his family as witnesses that he is promoting the litigation in this case. As to the Gillespie family, it is shown that, at the time the testimony was taken, one member of it was employed by the respondent's mother in the respondent's home. Other witnesses, on both sides, have been subjected to criticism on the score of interest or bias of some kind. I think that interest or bias sufficient to wholly destroy credibility has not been shown in the case of any witness; yet in many instances enough has appeared to warp the judgment of the witness, and weaken my confidence in the conclusion he or she has expressed. Making allowance, where I think it should be made, for exaggeration due to ignorance, lack of appreciation, and the zeal of interest, I conclude, as I have stated, that Mr. Ledwith was sometimes incompetent, and other times competent, to make a will. In this situation, it becomes manifest that the greatest attention must be directed to the proofs of Mr. Ledwith's condition at the very times when instructions were given for the preparation of the will and the instrument was executed.

The subscribing witnesses to the will are William H. Kelly, a lawyer of New York City, whom I infer, from the fact that he is called "Judge" and "ex-Judge," at one time held some judicial position, and John J. Murray, also of New York, a nephew of Mr. Ledwith's deceased wife. The proofs show that in January, 1890, shortly after the death of the younger James Ledwith, at the instance of Annie Claffey, who wrote to Mr. Murray that her father wished to make a will, Murray called upon Mr. Kelly, and told him what was wanted, and asked him to visit Mr. Ledwith. Mr. Kelly delayed the visit until late in February, and then he and Murray went together to Spring Valley, to see Mr. Ledwith. Mr. Kelly says that, when he entered the house, he found the old man and his two daughters together. Murray introduced him, and then he and Mr. Ledwith conversed, first about Kelly's mother and family, and then Mr. Ledwith introduced the subject of the church with which they had formerly been connected in New York, and its pastor. After some conversation of this kind, Mr. Kelly asked Mr. Ledwith what property he had; and Mr. Ledwith replied that he had a farm, situated principally in Bergen county, in this state, but partly in New York; that he owned two tenement houses on one lot in New York City; that he had some money in bank, and the stock and farming utensils on the place where he resided; that his son had married, and had recently died in Brooklyn, where he had lived; that his two daughters lived with him; and that he desired to leave his property principally to his daughters. Mr. Kelly states that he remembers the substance of what Mr. Ledwith said, but not his precise language, and that part of the information he obtained.

was in the shape of answers to his questions, and part was volunteered by Mr. Ledwith. His visit was some two or three hours long, and during it the conversation was principally about the will; that Mr. Ledwith was his chief entertainer; that they walked out and looked at the place; that Mr. Ledwith's instructions were "very clear"; that there may have been suggestions by the daughters in course of them,—at least the daughters joined in the conversation in which they were given,—but that Mr. Ledwith did not acquiesce in that which his daughters may have said. He says: "He was a very stubborn man, and he was the boss. He was very firm. * * * He was a man who would not let anybody have much to say about his property." This impression the witness received in the two or three hours' interview, for he had not seen Mr. Ledwith before. He adds that he did not have difficulty in drawing Mr. Ledwith out; that Mr. Ledwith was "perfectly clear, perfectly intelligent, and very firm." The witness made a memorandum of the instructions, but at the time of his examination had been unable to find it. He returned to New York to prepare the will. A second visit he made alone, some six weeks or two months after the first. During the interval between the first and second visits, Mrs. Claffey called at his office in New York, and said that she was in New York shopping, and that her father had asked her to call upon him; that her father was a little annoyed by the delay, and would like to have the will completed. He says that he has no recollection of Mrs. Claffey's speaking of the provisions of the will; that, at any rate, he would not have taken directions from her. He says that at the second visit he again met the father and the two daughters, and read to Mr. Ledwith that which he had prepared, and discussed it with him, and that modifications were suggested by Mr. Ledwith. He says that the daughters took part in the conversations, dwelling upon the desired provision as to their occupancy of the farm, and that the father finally said that he thought it best to let them have the farm as long as either of them cared, and then to have it sold. The witness adds: "He didn't seem to want to bind them to continue all their lives on the farm, and yet he thought it was a good place for them to live." There was also, he says, discussion as to the propriety of making the \$1,000 for his son's children payable in installments, and some figuring in respect to that. Outside the matter of the will, the witness says that he talked with the old man as to past events, adding: "I found him at that time to be quite entertaining." This interview, like the former, was two or three hours long. The witness took notes of his instructions at this visit, but has not been able to find them. He went back to New York, and redrafted the will, and on the 15th of May, 1890, with Murray, went to Mr. Ledwith again. In addition to

Mr. Ledwith and his daughters, Thomas Ledwith, the brother of the testator, was present. Mr. Kelly read the will carefully, in the presence of those there, and then handed it to Mr. Ledwith, who asked for pen and ink and a sheet of paper, to practice, wrote his name two or three times upon the sheet of paper, and then signed the will. The will was then duly declared and duly signed by the witnesses, Kelly and Murray. Mr. Kelly says that, before the execution of the document, he walked out with Mr. Ledwith, so as to be away from the others, and asked him if the \$1,000 was all he wanted to leave his son's children, and the old man said, "Yes," and the witness said, "Is your mind fixed on that?" to which Mr. Ledwith replied, "Positively," adding that he did not want his son's wife to spend his hard-earned money; that his son's wife was extravagant. The subscribing witness Murray states that at both his visits he found Mr. Ledwith to be in possession of his mental faculties. He relates conversations to show the correctness of his conclusion. He corroborates Mr. Kelly as to the circumstances surrounding the execution of the will, and, among them, the private conversation Mr. Kelly had with Mr. Ledwith outside the house. His account is this: "The judge [meaning Kelly] says: 'Now, Mr. Ledwith, are you still wishing to give that \$1,000 to the child?' He says: 'Yes,' I think the judge proceeded with him a little while, and he asked him a second and a third time. He says: 'I will make no change. It will be a \$1,000.' * * * I made one remark: 'Why not give him the son's share?' There was no reply to it. Mr. Kelly said: 'Do you think that is enough, Mr. Ledwith?' 'I think,' he said, 'that is enough,' and I think he also said, also about his money, he earned it hard. He made that remark regarding the \$1,000; he earned the money hard, and didn't want it to be spent foolishly,—something of that kind." Thomas Ledwith also testifies that he saw his brother sign the will. Mrs. Claffey, the only other surviving person present, was not sworn as a witness.

If these witnesses tell the truth,—and I do not perceive sufficient ground for disbelieving them, though I am constrained to think that Mr. Kelly's testimony may in some respects be exaggerated,—there can be no doubt that when the testator gave instructions for the will, and when he executed it, he possessed ample capacity to make it. He comprehended his property, the natural objects of his bounty, the character of the business in which he was engaged, and the disposition he resolved to make of his property. His capacity, I think, was equal to the task he was called upon to perform. *Waddington v. Buzby, supra.*

But it is insisted that the will was imposed upon the testator. The subscribing witnesses reiterate with emphasis that Mr. Ledwith fully understood what he was doing, possessed ample ability to care for himself, and exhibited determination to have his own way. Mr. Kel-

ly declares that he was the "boss"; that he was "very firm"; that "he was a man who would not let anybody have much to say about his property." And Mr. Murray gives, as an instance of his resolution, his reply to Mr. Kelly's importunity as to the amount to be given to the grandchildren: "I will make no change. It will be a \$1,000." It is impossible, if this is believed, to hold that Mr. Ledwith was the subject of imposition.

Let us look at the other proofs submitted in this connection. John Van Benschoten says that about the 3d or 4th of February, 1890, having a letter written by Mrs. Claffey to Mrs. Keenan, which introduced him as the new property agent, he went with the subscribing witness Murray to see Mrs. Keenan, and that, as, he and Murray were coming away, Murray said to him: "I want to stop and see Mr. Kelly, or Judge Kelly, in regard to writing Mr. Ledwith's will. 'We' want to get the old gentleman to make his will. 'We' don't want to let the money go out of the family." Dr. Neer testifies that, a few days before the will was executed, Mr. Ledwith's daughters, who were together at the time, asked him if he ever wrote wills, and, upon his replying in the affirmative, asked him if he would write Mr. Ledwith's will, to which he replied to Mrs. Claffey, who was then living at her father's, separate from her husband, that, because of complications which might arise out of her relations with her husband, he advised them to employ a lawyer. The doctor thinks that Mr. Ledwith was not present when he was asked to write the will. He said that the daughters did not state what the will was to contain. He says he was then professionally visiting Julia Ledwith. Melissa Bass says that about a week after James Ledwith, Jr., died, his sisters told her that their brother's wife would never get a cent of their money, because her mother had spent her father's money. The husband of this witness testifies that he overheard the same conversation. He says: "They said that they didn't think she [the respondent] would get any of their father's money to spend, because her mother had spent her father's property, and they didn't think their father would give her any of his money to spend." He says that his wife argued for the child of the deceased brother, and that Julia said that the respondent would not get any of the father's money to spend "anyway"; that she need not expect it, to which Annie added, "She won't." Maria Gillespie relates that prior to the first call of Mr. Kelly, in February, 1890, she went to the dining room door in Mr. Ledwith's house, and saw Mr. Ledwith and his daughter Annie standing together by the table in the dining room, and overheard Annie say to her father that the respondent did not need anything; that she had enough; that, if she did not have enough, to let her work for it, and heard Mr. Ledwith reply, "Yes," or "Aye." She says also that at another time Annie said to her (the witness) that the Quinn family was

extravagant, and the respondent would be extravagant; that they were not going to let them spend "their" money; that the child would be left something, but not his father's share; that they were going to have their father make a will, and they were sorry he had not done so before, for, if he had, trouble in the future would be saved; that they did not suppose that the child Vincent would live long; that they thought he was too frail a child to live; that, if he should die, his share would go back to the Ledwith family; that they would be pleased if he would die; that he would not be brought up properly; that, if he was not there, trouble would be saved. The witness says that at one time she heard Mrs. Claffey say that the respondent was extravagant; that she (Mrs. Claffey) wanted her brother to come home and live; and that his wife might come, or she might stay where she was, as she pleased. It does not appear whether this was said before or after the brother's death. She also says that the daughters told her that their father did not like his son to marry Miss Quinn. She does not say when this was said to her. Jennie Gillespie, the sister of Maria, testifies that before the will was made, and while it was under consideration, Mrs. Claffey said to her that her brother's child, Vincent, would not get his father's share; that they did not think he was entitled to it; that Vincent's mother would not get anything; that she could work; that she was extravagant; that, if she got their money, she would use it extravagantly; that they wished that Vincent was dead, for he would cause trouble later on; and that, if the will had been made before, it would cause less trouble. The witness also states that, about two years after the marriage of the son to the respondent, Mrs. Claffey told her that her father said that he did not like the family into which his son had married. Peter J. Christopher says that, while the will was under consideration, the fact that Mr. Ledwith was making a will was talked about by the neighbors; and that he went to Mr. Ledwith's, and there saw the daughter Julia, and said to her: "Don't you think that you are doing wrong by robbing your brother's child of that property by making a will? The old man is not competent, in my judgment, to make a will;" and that Julia replied: "Mrs. Quinn has spent the children's money, and we have made up our minds that Minnie shan't spend ours. We will look after that child." Thomas Ledwith says that, a month or six weeks before the will was executed, he heard a conversation between the daughters and the father, at which the father said that he would leave his grandson \$100, and the daughters said that the sum was too small, and the father then said he would give \$1,000 to the child, and no more. He said that Mrs. Quinn's family was extravagant, and he did not want to give them money at all. It is remembered that Mark Dewsnap testified that, after the son's death, Mr. Ledwith told him that he did not wish his money

squandered in the family in which the son had married, and that he did not like the family. It is also noted in the cross-examination of Mrs. Keenan that, when Mr. Ledwith told her not to give the respondent any of the rents, he had just been talking to his daughter Annie, who asked Mrs. Keenan to come over to where she and her father stood, and, when Mrs. Keenan came, told her father to tell the witness what he wished, for they were in a hurry to go.

It is apparent from this testimony that Mr. Ledwith's daughters were very decidedly averse to their father's making any substantial gift to his daughter-in-law or to her children. They were unwilling that she or her children should have that which they called their brother's share,—one-third of their father's property. This unwillingness appears to have grown out of a disapprobation of the character of the family into which the younger James Ledwith had married, rather than out of a cause personal to the respondent, as though prompted by some petty jealousy of the family of the sister-in-law. Immediately after the son's death, the feeling against his wife found vent. Mrs. Keenan was instructed not to give her any of the rents. Whether the idea of this instruction originated with Mr. Ledwith or with Mrs. Claffey does not appear. Mrs. Claffey at least aided its communication to Mrs. Keenan. It was a week after the son's death that the daughters told Melissa Bass first that they did not think that the father would give the respondent any of his money, and then that he would not do so. It was later that Murray, acting under a letter of instruction from Mrs. Claffey, declared to Van Benschoten: "We want to get the old gentleman to make a will. 'We' don't want the money to go out of the family." And it was yet later that Maria Gillespie, through a partially open door, heard Mrs. Claffey telling her father that the respondent did not need anything, that she had enough, and, if not, to let her work for it; and that the daughters declared to her they would have their father make a will. It does not appear that the daughters were inimical to the respondent's child. They thought it was a delicate child, and would not live. They recognized its claim upon their father's bounty, for Julia told Peter Christopher that they would take care of it. The great burden of their apprehension seems to have been that some of the father's money might go to the Quinn family, and there be extravagantly expended.

The testimony shows too much intelligence in Mr. Ledwith when the will was made to admit of much argument to the effect that the document was imposed upon him, and executed without his appreciating that it was his will. In holding that there was such an imposition, the honesty and truthfulness of the subscribing witnesses and Thomas Ledwith must be almost wholly disbelieved. Such disbelief cannot be justified under the proofs. Besides, the declaration of Mr. Ledwith to Mark

Dewsnap, at some time during the process of will-making, that he did not like the family into which the son had married, and did not wish his money squandered in it, and his repetition of the same idea in presence of his brother when he substituted \$1,000 for \$100 as the amount of the bequest to his grandchildren, exhibit that he knew what he was doing. There exist, however, indicia of undue influence, which the contestants claim should be regarded as sufficiently strong to induce the rejection of the instrument. This is a summary of them: An intent upon the part of the daughters to procure just such a will as was made; the authority which their daily presence and ministrations to the comfort of the old man gave them over him; the mental enfeeblement of the old man, which made him susceptible to every influence his daughters, who had his confidence, might exert; their exclusion of the respondent from an interview with the old man after the son's death; their declared determination to have their father make a will; their instrumentality in procuring a scrivener for the will; the urgency of Mrs. Claffey's visit to New York to hurry the scrivener in the performance of the work; the appeal to Dr. Neer, while the scrivener delayed, to prepare the will; the presence of the daughters at, and participation in, every stage of the preparation and execution of the instrument; the fact that Mrs. Claffey told her father that the respondent did not need assistance, and should work; the outcome, an instrument which makes precisely the provision the daughters said it should make, which gratified their enmity, and gave them substantially the entire estate; and the failure of Mrs. Claffey to submit herself to examination as a witness, and explain her participation in the production of the will, and deny the exertion of undue influence upon her father. I cannot avoid the conclusion that these circumstances threw the burden upon Mrs. Claffey to show that undue influence was not exerted. *Dale v. Dale*, 38 N. J. Eq. 274, 276; *Waddington v. Buzby*, 43 N. J. Eq. 154, 161, 162, 10 Atl. 862. Their force is not negatived by the opinions of the subscribing witnesses, nor by the absence of clandestinity at the execution of the will. Nor is the burden borne by the showing that, at some time during the months covered in the process of will-making, the old father echoed the argument of his daughters, that the respondent's family was extravagant and would squander his money. It may be that in his enfeebled state this argument had been so constantly kept before him as to take possession of him, and become irresistible, and drive out all other considerations. It is remembered that for years his daughters had been his constant companions; that they had managed his business affairs for him, and had performed the most menial and disgusting offices in ministering to his comfort; that in every sense he had become dependent upon them; and that at this very juncture they were vehement in their opposition to the natural

claims of the respondent's children. There could be little doubt that recognition of these claims in a degree proportioned to the son's distributive share in his estate, if he should die without a will, would give serious offense to the daughters. They had communicated their wishes to him. When he came to act, they were present, supported by their cousin Murray (who had declared that he and undisclosed others, constituting the "we" in his declaration, "don't want the money to go out of the family") and the lawyer called by that cousin. The atmosphere in which he acted was apparently filled with influences against an adequate recognition of his grandchildren. His meager proposed award of \$100 to them indicates that its influence upon him was strong,—beyond the wishes of even his daughters. It was their influence which caused him to raise the sum to \$1,000. I think that under the proofs, left in this condition, without explanation from Mrs. Claffey, the orphans' court properly decided against the will, on the ground of undue influence.

The decree questions the rightfulness of the allowances made by the orphans' court. I think that the case was one in which allowances could lawfully be made. In amount they appear to be very liberal; I think sufficiently so to cover all services and expenses of the litigation to this time. I will not make further allowances. The decree will be affirmed.

QUICKSALL v. CHEW et al.

(Court of Chancery of New Jersey. Oct. 15, 1897.)

WILLS—LIFE ESTATE—TERMINATION—DELIVERY OF ASSETS TO REMAINDER-MEN—PARTIES—DISSIPATION OF PROPERTY BY LIFE TENANT—RECLAIMING SPECIFIC ARTICLES.

1. A testator devised his estate to his widow during her life, and, on her death, to his lawful heirs, share and share alike. His widow enjoyed the property during her life, and on her death her administrator took possession, among other assets, of 26 shares of the stock of an insurance company, which stood in the name of the testator. The administrator sold these shares, and received the money, and one of the heirs filed a bill to compel a delivery of the assets. *Held*, that a judgment validating the sale was not warranted where the insurance company and vendees of the stock were not parties.

2. A claim by remainder-men against the life tenant's estate for dissipating goods in which she had only a life estate, it being impossible to follow the specific articles, must be proved as any other claim against the estate, and share pro rata with other creditors.

3. If they could find the specific goods, they would stand as owners, not creditors, and could reclaim them.

Bill by Joseph S. Quicksall against William W. Chew and others to compel the delivery of the assets of an estate to the heirs at law. Decree for complainant as to so much of the estate as remained in specie, and denied as to proceeds of property which had been dissipated by life tenant or sold by her administrator.

Caleb D. Shreve, for complainant. Benj. D. Shreve, for defendant Freedom C. Lippincott.

GREY, V. O. (orally). This case is somewhat peculiar, and I think it should perhaps be disposed of now, unless counsel, on hearing what I have to say about it, should find it necessary to amend the proceedings.

The bill shows that Caleb Quicksall, at the time of his death, was the owner of a considerable amount of personal property, the total value of which was somewhat over \$1,700, and also a lot of land. By his will, he devised the land and bequeathed all the goods of which he was possessed to his widow during her life, if so long she remained his widow; and, upon her death, he gave all the property which he had given her for life to his "lawful heirs, share and share alike." The will is, quite inartistically drawn, probably by the testator himself; but I do not think there is any difficulty in ascertaining what its meaning is, and I take it to be what I have stated. By the will, the testator made his wife, Mary Ann Quicksall, his executrix. He died in 1873. She proved the will, and assumed the duties of the execution of it, shortly after the testator's death. At the time of his death, his heirs at law were his sons, Joseph S. Quicksall, the complainant in this case, and William M. Quicksall; his daughters, Annie R. Engle, Elizabeth N. Maxwell, and Abbie S. Martin; and his grandchild, William W. Chew, the only child of a deceased daughter, who died in Caleb's lifetime. These parties were also the children and grandchild of Mary Ann. The bill states that Mary Ann Quicksall, upon the death of Caleb, entered into possession of all the property which by the will was devised and bequeathed to her, and that she continued to be his widow up to the time of her death, and to possess this property. The only answering defendant is Freedom C. Lippincott, who answers as administrator, etc., of Mary Ann Quicksall. He admits substantially everything which is alleged in the bill. One charge in the bill is that there was property of Mary Ann Quicksall which the administrator, Freedom C. Lippincott, had not gathered in. That allegation the answering defendant denies, and I may say here that, the only testimony which is taken being that of Mr. Lippincott himself, he has sustained his side of the controversy by showing that there was no other property than that which he accounted for.

In the inventory of the personal estate of Caleb Quicksall appears an item of 26 shares of the Camden Insurance Company's stock; and it is charged in the bill that the shares stood in the name of Caleb S. Quicksall, and the proof is here to-day that they did so stand, and continued to so stand during the whole of the lifetime of the widow, who had a life interest in these shares, as a part of the estate of Caleb. It appears also by the testimony of the answering defendant that he, being connected with the estate only as administrator

of the estate of Mary Ann Quicksall, has exercised authority over those shares which after the death of Mary Ann still stood in the name of Caleb, and has sold them. How the insurance company was able to recognize his right to make such a sale, I do not see. The title of the shares, as is admitted, stood in the name of Caleb, and there was no privity whatever between Mr. Lippincott, as administrator of the estate of Mary Ann, and Caleb's ownership of the shares; and I do not see by what authority the insurance company could have transferred those shares to Mr. Lippincott's vendee on a sale made by him as administrator of Mary Ann. But he has made it, and he has in some way obtained the insurance company to recognize his sale, and he has the money, the proceeds of the sale, in his hands. The bill does not make the insurance company a party, nor does it pray that this sale may be declared to be void. I cannot in this suit pass any judgment upon the validity of the sale. Nor do I see, sitting here and now on this bill as it is framed, that I can make any decree that the administrator should turn over the money. The shares were, in my view, the shares of the heirs at law of Caleb Quicksall under his will; and the persons who were the heirs at law of Caleb Quicksall under his will have a right now to go to the Camden Insurance Company, and demand from it the issue of a certificate to them, the heirs at law, in recognition of their ownership of the shares. The sale of the shares was utterly void, and the insurance company may be compelled in a proper suit to issue a certificate to the heirs of Caleb, who are the true owners, or to respond in damages for its failure; and Mr. Lippincott may perhaps be called upon by the vendees of the stock to refund the purchase money to them. As neither the insurance company nor the vendees of the stock are parties, I cannot pass upon the validity of the sale. The bill is not so framed nor would the evidence in the case justify a decree that the administrator pay over the proceeds of the sale to the heirs. Nothing shows that they have validated the void sale of the stock, and, if they should do this, it could only be accompanied by such an arrangement between the administrator and his vendees and the heirs as would of itself adjust the matter, and require no decree.

A further claim of the bill of the complainant is that he should have delivered to him the goods named in the inventory of Mary Ann Quicksall. So far as there is a claim for the goods named in the inventory of Mary Ann Quicksall, which were the same goods as those whereof Caleb Quicksall died possessed, I think there is a clear right on the part of the legatees of those goods to have a delivery, and I do not understand that that is contested.

The complainant makes a claim against the estate of Mary Ann Quicksall for misconduct by Mary Ann in her lifetime, in appropriating to her own use, dissipating, or giving

away the goods and chattels which constituted a portion of the estate of Caleb, in which she had only a life estate. In my judgment, that is a claim which the claimants must prove against the estate of Mary Ann Quicksall; and, as to that, they must take the same position as any other claimant against the estate of Mary Ann Quicksall. If they could find the actual goods which have been by her given away or misappropriated, they might, from the hands of the person who has them, have a right to reclaim the actual goods by delivery. But, so far as they make claim against the estate of Mary Ann Quicksall for the disposition of those goods by her in her lifetime, it must be for damages for the conversion or misapplication of those goods; and in that respect the persons making the claim will stand as creditors of the estate of Mary Ann Quicksall, and a suit might be brought for that purpose (should they see proper to do so) at law, where the remedy, so far as I can presently see it, is adequate; and that is the proper forum.

I think I have referred to every question which seems to be raised by the bill. There is a suggestion in the bill that the deficiency between the value of the estate of Caleb Quicksall as received by Mary Ann and the value of the personal estate of Mary Ann now in hand, which might be turned over to the heirs of Caleb, should be charged on a lot of land which, at the time of Mary Ann Quicksall's death, stood in her name, and which is specifically described in the bill. The persons who were the owners of this lot of land, standing in the name of Mary Ann Quicksall, are her heirs at law. Those persons are also the devisees and legatees under the will of Caleb Quicksall, and his heirs at law, being the sons, daughters, and grandchild of Caleb Quicksall and Mary Ann. I do not see the advantage to persons having claims in exactly the same proportions to charge those claims on lands which they themselves hold in precisely the same proportions. The only way that there could be any significance in such charge would be as against the possible claims of creditors against the estate of Mary Ann Quicksall. In my view, so far as there is any difference between the values of the estate which she left, the heirs of Caleb, who were entitled to receive that, stand as creditors, and they must enforce their right as creditors of the estate of Mary Ann. As I stated before, if they could find the specific goods, they would not stand as creditors as to the specific goods, but would stand as owners, and could claim them from anybody; but, so far as this bill shows, they seem to claim as creditors, and the mode in which creditors should enforce their claims against the estate of a decedent is pointed out by statute, which directs a proof of claim and the exhibition of that proof to the administrator. If that course is pursued, all the creditors would come in and stand upon the same basis; and if, as is indicated in this cause, there is a de-

iciency of the estate to pay the debts, they must all take what there is proportionately. And for that reason I do not see, on the admitted statements of fact, and also in the absence of proof of actual conversion, or disposition by Mrs. Quicksall, and of any showing that she did actually dispose, by sale or otherwise, of this property, how I should be justified in making a decree such as is asked on this branch of the case. But, in any event, whatever claim there is must be that of creditors, and that must take its ordinary chances of a dividend against the estate, if it be insufficient to pay this debt, in common with all the rest. As the case stands, I can only make a decree that what there is of the estate of Caleb remaining in specie—in kind—this administrator may be ordered to deliver to the heirs at law, and, as to any other relief asked by the bill, it must be denied.

(57 N. J. E. 338)

COLUMBIA LODGE, NO. 117, I. O. O. F., v. MANNING et al.

(Court of Chancery of New Jersey. Oct. 16, 1897.)

CONTRACTS—CONSIDERATION—COMPOUNDING FELONY.

The defense that the consideration of a note and mortgage was illegal, in that the mortgagee promised not to prosecute another for embezzlement, when no prosecution was pending, was not sustained where defendant did not plead and prove that an embezzlement had been committed.

Bui by Columbia Lodge, No. 117, I. O. O. F., against Margaret Manning and others. Heard on bill, answer, replication, and proofs. Decree for complainant.

Adrian Riker, for complainant. Howard Hayes, for defendants.

EMERY, V. O. The bill in this case is filed to foreclose a mortgage given by one John Manning, now deceased, to the complainant, to secure the sum of \$3,800 with interest, in one year from its date, March 30, 1882. The bond accompanying the mortgage, and which is referred to therein, is conditioned for the payment by John Manning or Peter M. Melick of this sum of \$3,800, "the same having come into the hands of the said Peter M. Melick as treasurer of said lodge." John Manning died in 1889, and the defense set up by his executrix and widow and the infant children by the answer is that the bond and mortgage were given for an illegal consideration, and are illegal and void, under the following circumstances, viz.: That Peter Melick was the treasurer of the complainant, and had collected \$3,800, money belonging to it, and had embezzled the same, and appropriated it to his own use; that the complainant was about to institute criminal proceedings against Melick on account of the embezzlement, and that Manning, in order to prevent such criminal proceedings, executed and delivered the mortgage in question to

secure the sum which Melick had embezzled; and that in consideration of the execution of this mortgage the complainant agreed not to institute criminal proceedings against Melick on account of his embezzlement; and that the consideration of the bond and mortgage was to protect Melick from criminal prosecution, and the mortgage is, therefore, void. The execution of the bond and mortgage having been proved, the burden of establishing its illegality was upon the defendants; and the main question which arose at the hearing was whether the defendants, in order to establish the illegality of the bond, were not obliged to show by satisfactory evidence that the crime of embezzlement had been in fact committed. There was sufficient proof that the complainant, through its directors or agents, charged or asserted that the crime had been committed, and that the bond and mortgage in question were given upon the agreement of complainant that no criminal prosecution would be made, and were delivered upon such understanding with Manning on behalf of Melick, who had fled, probably to escape arrest. But at the time of giving the bond and mortgage no criminal prosecution had been actually commenced, nor had any indictment been found, and defendants failed to offer evidence sufficient either to convict Melick of the crime of embezzlement or to show that at the time of giving the bond and mortgage a crime had been in fact committed for which Melick could have been prosecuted. If a criminal prosecution had been in fact pending at the time, either by the finding of an indictment or otherwise, then the public interest in the prosecution of the actual pending charge was of such a nature as to avoid any security for a debt given upon an agreement for the stifling of the pending prosecution, even though the debt thus secured was due. But the question here is whether, in the absence of pending criminal proceedings or of an indictment, sufficient proof must be made in the case that in fact the crime had been committed, or whether the mere intention of the parties to compound what is charged or supposed to be a crime is sufficient to avoid a security given for a debt which is honestly due. Defendants' counsel claim that the security is avoided simply by the illegal or criminal intention of the parties to compound a crime, and that the agreement not to prosecute, founded on this intention, is sufficient to invalidate the security. The authorities, however, are against this view, and hold that, where criminal proceedings are not pending, the actual commission of the crime alleged to have been compounded must be alleged and proved. The cases are collected in 3 Am. & Eng. Enc. Law, 404, the leading case being *Bank v. Mathewson* (1843) 5 Hill, 249. This was an action on a bond, and a plea in bar alleged that the bond was given under an agreement to discharge a person—one Washburn—arrested by plaintiffs under civil process founded on a charge of obtaining

money on a forged note, and to surrender the note, discharge the person arrested, and forbear to prosecute him for forgery. The plea failed to aver that the crime of forgery had been in fact committed, and, in the absence of any pending criminal proceedings, the plea was held no answer to the action, the court saying that it was not possible to sustain the plea if it came short of averring the actual commission of the crime. The doctrine settled by this case is that, where no criminal proceedings are actually pending, the actual commission of the crime alleged to have been compounded is one of the facts at issue in the cause, and necessary to be alleged, and satisfactorily proved, in order to make out the defense of illegality. The same doctrine is held by the later cases. *Plant v. Gunn* (1874) 2 Woods, 372, 19 Fed. Cas. 800, 803; *Catlin v. Henton* (1859) 9 Wis. 476. Whether the proof in the civil cause of the commission of the crime alleged to be compounded must be such as would be sufficient to convict on a criminal charge, or whether a preponderance of proof is sufficient for the purposes of the civil suit, may be an open question on the authorities; some of them holding that a preponderance of evidence is sufficient. This latter doctrine would seem to be in line with the decision of our own courts in an analogous case. *Kane v. Insurance Co.* (1877) 39 N. J. Law, 697. But this question as to the character of proof is not involved here, as the proof in this cause is not sufficient, under either rule, to show that a crime was in fact committed. Defendants' counsel insists that the case of *Fishell v. Gray* (N. J. Sup.; 1897) 37 Atl. 606, establishes or recognizes the rule that, where one element of the consideration of a contract is illegal or immoral (as distinguished from being merely unenforceable), it will avoid the whole contract. But this rule is not decisive of the present case, for the question here is whether the agreement in question is illegal if, in fact, the crime has not been committed. The above cases, as I construe them, hold that it is not; the plain reason being, as it seems to me, that, if no criminal charge is actually pending for trial or prosecution, the public interest is, not that there should be a charge in any event, but only in case there has been an actual crime committed; and proof, therefore, that the crime had been committed, lies at the basis of the charge of illegality. The complainant is entitled to a decree.

(55 N. J. L. 740)

FORTESCUE v. BOWLER et al.

(Court of Chancery of New Jersey. Oct. 15, 1897.)

FIXTURES—WHAT CONSTITUTE—EQUITY—
ENJOINING WASTE.

1. A tenant, having no contract with or consent from the landlord, constructed a back building, and permanently attached the same to the rear end of a house on the demised premises, in such manner that its removal will leave

the original structure without any inclosure at the rear end. The original building and the added structure have, since the latter was built, been used together for a hardware store, neither being usable for that purpose without the other. At the time the back building was constructed, the tenant had no formed intention either to make a permanent addition to the premises, or to remove the structure. *Held*, the back building has become part of the freehold.

2. The court of chancery has jurisdiction to stay waste by enjoining the removal of such a structure by the tenant.

(Syllabus by the Court.)

Bill by Jane Fortescue for an injunction against William Bowler and others. Heard on answer and proofs. Decree for complainant.

Allen B. Endicott and David J. Pancoast, for complainant. Clarence L. Cole, for defendants.

GREY, V. C. (orally). The case is within such narrow limits that I think it may be readily passed upon now quite as fully and safely as if further consideration be given to it. The complainant files her bill, and seeks to restrain the defendant from the removal of a back building, which at present is detached, by severing from the front building, but still remains on her premises. The building came on the premises under these circumstances: The complainant was the owner of a lot in Atlantic City, on which there stood a frame structure, and her brother, the defendant, with her assent, entered into possession of the premises, and the use of the same, for a hardware store. The structure then on the premises consisted of a frame building 32 feet front, and running back on that width for some distance on the lot. The rear end of this structure had, as I gather from the testimony, an extension, shed, or lean-to, which covered part, but not the entire height, of the rear end. That was the condition when the defendant entered into possession. After he had been there two years, without consulting the complainant, or receiving any consent or direction from her, he took down the whole rear end of the original structure, and removed it, putting up the shed or lean-to part on some other property of the complainant, and it has thereafter remained in her possession and use. At the same time, the defendant added to the original building the structure which is now in dispute. The addition was built on piles, which is the common mode of building in Atlantic City, where the water is so near the surface that, unless an elevation is made around the cellar wall, it is almost impossible to have a cellar; certainly, below the depth of three feet it practically makes a cellar useless. For that reason, and because of the custom which seems to have obtained there, buildings were mostly built on wood piles, driven into the ground. The building was constructed on the premises for this particular place, and was not moved there, having been built somewhere else. It came on the premises as lumber, boards, and tin for the roof, and when it had

been put there, with the addition of the labor of those who were there for the purpose of making the structure, it became the building now in dispute. It was annexed to, and made part of, the original building by nails driven into the frame, as I gather from the testimony, along the whole height of the structures, so far as they touched each other. The nails have been detached, and the nail marks may still be seen. When it was built, it covered the whole rear end of the complainant's building, which had been taken away, which was one story high, and had also a second story. Without this covering by the new building, the old building, after its rear end had been taken away, would have been absolutely useless, and exposed to the weather. The new building consisted of a frame structure, built on piles, as stated, with the sill probably 6x8 inches in size. It was about 30 feet deep, having been built at two different times, 15 feet each, with the first story about 12 feet high and the second story about 8½ feet high, and with a tin roof. When the building was put there, it was, as to its first story, so much a part of the first building that it seemed to be impossible for a person to distinguish them from the inside, unless by the fact that there was a rise in the floor of about two feet, to get into the back building. This was the structure, so far as the physical construction of it goes, which the defendant put there. It never had any existence as a structure until it was, by the very act of its creation, permanently attached to, and made a part of, the freehold. The defendant put this extension there without the invitation of anybody, and without the permission of anybody, and it seems to me the building, when put there, became a permanent addition to the real estate, and not a trade fixture in any sense. It was not when taken on the premises a complete thing, nor when taken away from the premises would it leave the original structure in the condition in which it was when the latter one was put there. If it is taken away, it leaves the whole end of the complainant's building open; and I do not think that the fact that the defendant is willing to repair the damage in any way goes to detract from the force of the argument that the character of the structure, as originally made, shows what was the nature of the annexation,—whether it was a permanent erection, and made part of the real estate, or a trade fixture. He may be entirely willing to repair the damage caused by the removal, but that is not the question. The point under consideration is not the securing to the complainant what the defendant offers to give,—a restoration of the premises to their original condition,—but whether or not this court ought to restrain the defendant from taking away what, under the circumstances of this case, was a permanent erection, and became a part of the complainant's property.

Another element in the case indicates that this addition has become part of the realty, and that is the use for which the new building

was erected, and its relation in this respect to the old one. The use for which the addition was made was a use which was wholly valueless without the continued use of the original structure. The whole building was used as a hardware store. The new erection was in fact an extension of the old one, and valuable only when used in connection with, and as part of, the original structure, making of both a complete hardware store. It was not such an addition as a bellows or an anvil in a blacksmith shop, for use in carrying on a trade; it was made a part of the original structure itself, and it could not be used without it, nor could the original structure be, after the change, used without the addition. This merger of the use of the two structures into one, whereby both were coincidentally and dependently used for the same purpose, is an additional reason which leads me to conclude that the extension was made, not as a trade fixture, but as an enlargement of the building then on the premises, thus becoming a part of the realty.

The question of intention is considered by the courts in many cases where the relation of the parties and the character of the structure leaves the question open whether it is a chattel or a trade fixture, or has become a part of the realty. If the evidence is considered from this point of view, there seems to be no proof before the court of the existence of any intention on the part of the defendant, when he built this addition, not to make it a part of the real estate. He testifies that it was put there without any intention existing in his mind at the time he built it. The court must therefore determine the actual intention which accompanied the construction of the addition by the evidence of what was then done. The proof shows the construction by a tenant of an addition to an existing building, fastening it to the old building by permanent and non-adjustable attachments, and in such a manner that neither can be separated from the other without opening both to the weather; the new structure being used for the same purpose as the old, and the use of both for those purposes being necessary to the complete enjoyment of either, the removal of either being practically a destruction of the property for that use, the construction having been made without leave obtained from the owner, and without contract therefor, and with no definite intention to remove the new erection. In my view, the addition was intended at the time to be a part of the realty, and in fact then became such. I am the more confirmed in this opinion because of the relationship between the parties,—brother and sister,—and the fact that the tenant paid no rent either during the two years before he made the addition, or the many years since. His regard for his sister, his occupancy for two years rent free at the time he built the addition, and his expectation (since fulfilled) of the continued gratuitous enjoyment of the premises, may well have led him to build the back build-

ing as an improvement to his sister's premises.

Some doubt is suggested as to the jurisdiction of the court to grant an injunction to restrain the removal of the back building; and *Hamilton v. Stewart*, 59 Ill. 330, is cited to sustain the claim, on the ground that the proposed removal is a mere trespass. In that case the party restrained was a stranger to the premises, and out of possession. He claimed to be the owner of certain articles which the plaintiff alleged he intended to take away by force, or by a replevin suit. The court said that an injunction should not go to prevent a mere trespass, or to stay a suit at law to try the title to fixtures. In the case now on hearing, the defendant admits he is the tenant at will of the complainant, and that she is his landlord, and that he is in possession through her gift. He also testifies that he intended to remove off the demised premises a building which this court is of opinion constitutes part of the realty, and that he has, in execution of that purpose, severed this building preparatory to its removal from the premises.

Here the rights of the parties have been definitely ascertained, and it is shown that the proposed waste will be absolutely destructive of the premises for the uses for which they are most valuable. I speak now of their condition when the back building is removed, and without giving any weight to the defendant's statement that he intends to repair the damage he means to do, by restoring the building to the condition it was in when he came into possession, which cannot be considered. Lord Hardwicke in *Farrant v. Lovel*, 3 Atk. 723, held that, waste in an under-lessee being shown, the ground landlord had the same equity as in other cases of injunctions to stay waste. In *Ware v. Ware*, 6 N. J. Eq. 117, a tenant by the courtesy was restrained from cutting timber at the instance of the owner of the fee, Chancellor Kent in *Douglass v. Wiggins*, 1 Johns. Ch. 435, allowed an injunction to restrain a tenant of a dwelling house from converting it into a store. These allowances of the writ, I think, quite justify what is asked in this case. The tenant is put into possession by the landlord, and thereby obtains control of the demised premises. His possession is that of his landlord. It is inequitable that he should be permitted so to use his possession as to destroy the landlord's reversion, leaving him to an action of law for his remedy. On the question, then, of jurisdiction, the question presented is simply this: Has the court of chancery power to enjoin a tenant in possession from removing a portion of the real estate off the demised premises, and thereby destroying them for their accustomed use? I do not think there ought to be any question that this court has in such cases full jurisdiction, and that the court ought, under such conditions, to issue a writ, and restrain the removal.

There was a mention of damage to another

building, which is claimed to have been done, but I do not understand that there is any relief sought on this account.

Mr. Endicott: No; we haven't asked any relief as to that.

The Vice Chancellor: There is also in the bill a suggestion as to a restoration of this hardware building as it was before the defendant severed it. As to that, I think a sufficient remedy can be obtained by the recovery of damages. I am not willing to advise the issue of a mandatory injunction for restoration. If relief for damage done is sought, the complainant has a complete remedy in the courts of law. I will advise the issue of an injunction to restrain the defendant from removing the back building of the hardware store from the complainant's premises.

Mr. Pancoast: A perpetual injunction?

The Vice Chancellor: Yes; this is on final hearing.

(56 N. J. E. 304)

HALL v. HOME BLDG. CO. et al.

(Court of Chancery of New Jersey. Oct. 15, 1897.)

MORTGAGE—FORECLOSURE—PARTIAL RELEASE—TENDER.

1. By the terms of a mortgage it is provided that the mortgagee shall, on request, release from the lien of the mortgage, for each \$90 of principal paid, a lot of land, to be selected by the mortgagor or its grantee, containing 2,000 square feet. There was a default in the payment of the interest due on the mortgage. Bill was filed to foreclose. A defendant, who was a grantee of the mortgagor, had made an inefficient tender, which he set up by way of answer. This was overruled. He now claims to have made a tender of \$90 to the mortgagee, with a demand for the release of 2,000 square feet of land conveyed to him and selected by him in accordance with the above provision. This tender and demand were made after the bill filed, but before decree against the defendant. *Held*, the defendant should be permitted to file a supplemental answer setting up the later tender and demand.

2. The court will not refuse to hear a defense based upon an event which has happened since the filing of the bill unless there be something in the relation of the parties or the subject-matter of the suit which should exclude the proposed defense.

(Syllabus by the Court.)

Bill by Sarah I. Hall against the Home Building Company and others. Rule to show cause why defendant Abram Anderson should not be allowed to amend his bill and set up a tender and request for release made subsequent to the filing of his answer. Rule made absolute.

Bergen & Bergen, for complainant. John F. Harned, for defendant Abram Anderson.

GREY, V. C. I think the counsel have diligently examined this case, and I have gone over it myself, with care, to see whether or not the petitioner ought to be allowed, under the terms of the agreement, and in the present status of the case, to come in by way of sup-

plemental answer, and, if need be, by cross bill, to assert his rights. In my view, this is not a case where there is a seeking to amend because of a mistake of law. The cases where an amendment is refused on account of a mistake of law are those where, on the facts existing at the time the answer was filed, the answering defendant had set up his theory of defense against the complainant's bill, and after the court had delivered itself of an opinion, as in the case referred to in the collection of Marshall's opinions. 1 Brock. The defendant desired to amend his pleadings by a supplemental answer to conform to the opinion of the court. In this case there has been no opinion of the court on the facts which are sought to be set up here. It is an entirely new condition of things which the defendant Anderson claims he is entitled to submit to the court, to see whether or not it will affect the court's judgment on the final decree of this case, which, as to him, has not been made. I am very clear that where the after-happening fact sought to be brought in affects the equities of the parties, and would influence the court in coming to a final decree, a supplemental answer setting up that fact, which has come into existence since the bill and answer were filed, should be allowed. I know, it is common practice, and has been done in this state again and again. That is, the court will not refuse to hear a defense based upon an event which has happened since the filing of the bill unless something in the contract, the relations of the parties, or in the subject-matter of the suit is of a character to cut off the new defense. Whatever rights the defendant has to set up the defense which he opens in his petition are claimed to exist under the contract set out in the complainant's bill, and that contract is expressed very clearly, as to its meaning, in my judgment. The defense arises under the second proviso, which is in these words: "Provided, however, that during said term of five years the said company obligor, its successors or assigns, might at any time pay, on account of the said principal sum, such sum or sums of money as it or they might desire: provided that the sum of eight thousand dollars, at least, each year, should be paid on account of the said principal: and provided, further, that the said obligee, her heirs, executors, administrators, and assigns, should and they did thereby agree, from time to time, and as often as request was made to her or them for that purpose, to release from the lien and operation of the said accompanying indenture of the mortgage, for each ninety dollars of principal paid, a lot of land, to be selected by the said party obligor, its successors and assigns, containing two thousand square feet of land." Under that clause there was given to the mortgagor and to the mortgagor's assigns a privilege, without specification of any time within which it should be exercised, to demand from the mortgagee a release from the lien and operation of the mortgage of such

lot of land as the mortgagor or his assigns might select, containing 2,000 square feet of land, upon the tender of \$90 of principal. The effect of that proviso, in the view which I take of it, is that it gives the defendant Anderson in this case, who is the grantee of the mortgagee, a right to select 2,000 square feet of the land which has been conveyed to him, and to offer to pay the mortgagee \$90 for a release of the selected 2,000 square feet; and, having done that, he was entitled to a release of that portion of land from the lien of this mortgage, and to claim that the mortgage was thereafter no lien on his land. When the parties made that bargain they did not attempt to create the relation of debtor and creditor between the grantees of the mortgagor and the mortgagee. Nothing in the contract imposed upon the grantees of the mortgagor any obligation to pay anything unless they desired to redeem a lot of 2,000 square feet, as prescribed in the proviso, in which case they were required to pay \$90 to the mortgagee to secure a release of the lot. This proviso is an independent undertaking on the part of the mortgagee to release a lot of 2,000 square feet on those terms, and the grantee of the mortgagor had no obligation to pay any additional sum. Nor was the grantee called upon to show that the mortgagor had, at the time when the grantee undertook to accomplish a release, precedently paid up all interest due on the principal debt. Nor was the grantee obliged to make his tender at a time preceding the bringing of the foreclosure suit. The previous hearing of this case which was had on the question of the sufficiency of the first tender was a hearing on the facts as they then existed, and the later tender of payment for a release under the proviso since this suit may be made just as if the suit had never been begun. In my view, if this grantee of the mortgagor had never made any tender, but had been made a party and brought in here, and he had then made a tender, as he now says he did, and asked leave to set it up under the terms of that contract, he had a right to set it up. That is exactly his attitude. That he had previously made an ineffective tender did not preclude him from afterwards making an effectual one. He says he has now made a tender of \$90, and has notified the mortgagee of the particular piece of land that he demanded should be released. I think he has a right, in view of the fact that no decree has been taken against him in that respect, to set up this new condition of affairs, and that such an application is not based upon a mistake in law as to an existing condition of fact on which the court has passed an opinion, but is offered on the part of the defendant to set up facts, happening—of course, by his own creation, but which by the contract he had a right to create—since the filing of the bill. He had under the contract a continuing right to make this tender and demand the release of the 2,000 square feet,—certainly all the

way up to the time when he should be cut off by the decree, and perhaps up to the time of an actual sale. In *Chrisman v. Hay*, 43 Fed. 553, a purchaser of a lot was, under a similar contract, allowed to redeem at a date subsequent to a decree; the decree specifying the time within which he should redeem, or be foreclosed of his right. This would fully justify the defense of a tender of redemption after suit begun, more especially when the bill in this case makes no affirmative allegation against the petitioning defendant, denying the existence when the bill was filed of his right then or thereafter to exercise this privilege to make a tender, and thus to accomplish a release of the mortgage. All that is alleged in the bill is that the defendant Anderson has obtained a deed of these premises, and that his land so purchased is subject to the mortgage; but there is nothing in the bill which charges that he has no right to exercise his privilege of choice and tender for a release of the mortgage, nor is there any prayer that he may be cut off from it thereafter. The defendant Anderson was under no obligation to redeem the mortgage, except as to his own piece of land, and the method he might pursue to be rid of the mortgage as to that piece was fixed by the contract between the parties.

Mr. Bergen: How do you get clear of the fact that this money, when paid as release money, as specified in the mortgage, must be paid as principal, when the law is that he cannot pay the principal as long as there is interest due?

The Vice Chancellor: All that reference to the principal means is that the payment, when made, is to be credited by the mortgagee as part of the principal. I do not think the defendant grantee of the mortgagor must pay off the outstanding interest on the whole mortgage, when it is not so expressed in the clause which gives him this privilege of redeeming his lot. If by construction such a burden were cast upon him, it would be to add a new term to the contract, and one of so much importance that it seems to me it would have been expressly stated, had it been intended. The complainant's claim is that, before the release of lots under the proviso can be fully demanded, the outstanding interest due on the whole mortgage debt must have been discharged. Such a construction would oblige the grantee to see that the interest on \$63,800 was paid, as a condition precedent to his tender of \$90 for a release of 2,000 square feet. The true construction of the contract does not, in my judgment, cast upon an assignee of a portion of the premises such a duty, as a condition precedent to his right to tender the \$90 and demand a release of 2,000 square feet, part of the mortgaged premises which had been conveyed to him.

Mr. Bergen: I would like to except to your honor's holding, to the extent of keeping my position intact.

The Vice Chancellor: You have no need of

doing that. You can have an appeal without taking an exception.

Mr. Bergen: I do not want an appeal, but I would like to leave the question so that it would come up on final hearing.

The Vice Chancellor: I am not sure that you have a right to object to my giving a party leave to file a supplemental answer. I think that is a matter of discretion. As to my construction of the contract between the parties, I have given you my impressions of it, because the opposition to the admission of a supplemental answer required it; but I will hear you further on that point on final hearing, and the question may then be definitely determined whether the defendant Anderson has a right to make this tender without paying up the whole back interest due on the mortgage.

I will advise an order that the defendant Anderson be permitted to file a supplemental answer setting up the facts referred to in his petition, and a cross bill, if necessary to his relief.

(60 N. J. L. 482.)

WANSER v. HOOS.

(Court of Errors and Appeals of New Jersey.
Oct. 2, 1897.)

CONSTITUTION—CONSTRUCTION—STATUTES—SPECIAL ACTS—CLASSIFICATION OF CITIES.

1. The course of legislation will not control the decision of the judiciary in its construction of constitutional provisions.

2. P. L. 1897, p. 43 (providing that in cities of the first class, which comprises all cities having a population exceeding 100,000, and in those cities only, municipal officers shall be elected on the first Tuesday after the first Monday of November, and upon the same official ballots required by law for the election of state and county officers), does not affect the machinery, powers, or structure of city government; and population is not a proper basis for classification for the purpose of the act, and hence the act is repugnant to Const. art. 4, § 7, par. 11 (prohibiting special laws regulating the internal affairs of towns and counties).

3. When a law in terms is to operate only in specified localities of the state, satisfactory reasons must be found to exclude it from the constitutional prohibition against local laws.

Collins, Dixon, and Ludlow, JJ., dissenting.

Error to supreme court.

Action between Peter F. Wanser and Edward Hoos. From a judgment for the latter, the former brings error. Affirmed.

Charles L. Corbin, for plaintiff in error. Allen L. McDermott, for defendant in error.

DEPUE, J. The issue presented in this case is upon the validity of an act of the legislature entitled "An act relating to cities of the first class in this state, and providing for the holding of municipal and charter elections therein, and regulating the terms of elective and appointive officers therein." P. L. 1897, p. 43. It provides that all municipal officers in cities of the first class shall be elected in each year on the first Tuesday after the first

Monday of November, which is the day fixed for the annual election of state and county officers, and upon the same official ballots required by law for the election of state and county officers. It combined the election of municipal officers with elections for state and county officers, which theretofore had been kept separate. The contention was that this act was in violation of constitutional provisions. This contention was sustained by the supreme court. *Hoos v. O'Donnell*, 37 Atl. 447.

Paragraph 11, § 7, art. 4, of the constitution, provides that the legislature shall not pass any private, local, or special laws in certain enumerated cases, among which is "regulating the internal affairs of towns and counties." This constitutional prescription is a restriction on the power of the legislature. This limitation on the sovereign power of the legislature did not appear either in the constitution of 1776 or 1845. It was introduced into the organic law of this state by an amendment in 1875, and grew out of the public appreciation of the evils that spring from local and special legislation in relation to municipal affairs. The people, in adopting this constitutional amendment, intended to eradicate the source of these evils. In language too plain and explicit to be misapprehended, it prohibited the legislature from passing any local or special law on that subject, and restricted such legislation to general laws. The construction and force of this constitutional provision presents a legal question to be decided by the courts. *State v. Rogers*, 56 N. J. Law, 480, 28 Atl. 726, and 29 Atl. 173. The course of legislation on this subject by the legislature, while it is entitled to respect, cannot be permitted to control the decision of the judicial department of the government in its construction of the constitutional provision; for, as was said by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, "the power to make, or unmake, the fundamental instrument of government, resides only in the whole body of the people, and not in any subdivision of them." The legislature may, without infringing on this constitutional interdict, resort to classification for the convenience of legislation. The act of 1882 (1 Gen. St. p. 458), by which cities were divided into classes, and other statutes, by which boroughs and counties were in like manner divided, are instances of such legislation. The act of 1882 expressly declares that the classification therein made was for the purpose of municipal legislation in relation to cities, and that all legislation founded upon such classification should be construed to embrace all cities of the class referred to. The courts, in a series of cases too numerous to be cited, have given to this constitutional provision a fixed construction. In the first case in which this constitutional provision came before the court, a general law, as contradistinguished from a special or local law, within the meaning of the constitutional provision, was defined to be a law that embraced a class of

subjects or places, and did not omit any subject or place naturally belonging to such a class. *Van Riper v. Parsons*, 40 N. J. Law, 1.

The test of the generality of a law adopted is that it shall embrace all and exclude none whose conditions and wants render such legislation equally appropriate to them as a class. It is also equally well settled by decisions of our courts that, although population may be made the basis of classification in statutes relating to municipal bodies, such a classification cannot be made the means of evading the constitutional interdict of local or special laws. The question whether any particular statute is local or special must be determined, not upon its compliance with a legislative classification, but upon whether, having regard to the character of the legislation and the limitation upon it contained in the act, the statute is or is not a general law, as defined by the courts. The supreme court of the United States has likewise proceeded upon this principle in deciding upon the validity of statutes under the equality clause in the fourteenth amendment to the federal constitution. In *Railroad Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, the court held that there might be classification for the purpose of legislation, but that the mere fact of classification was not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not merely that a classification has been made, but also that it is based upon some reasonable ground,—something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection; and, in the application of that principle, the court set aside an act of state legislation, as in violation of the constitutional provision.

It must not be inferred from the language used in the opinions of the courts that the mere aggregation of individuals in a municipality is the actual basis on which a classification may legitimately rest. The constitutional prescription relates to the regulation of the internal affairs of towns and counties, without regard to population, and it applies as well to the lesser as to the greater municipalities in this state. In *re Haynes*, 54 N. J. Law, 28, 22 Atl. 923. Chief Justice Beasley, in discussing this subject, speaking of an act establishing a board of street and water commissioners in cities of the first class, observed that "it is true that the classification of cities is made on the basis of population, but this term, in this connection, included not only the number of the inhabitants, but also municipal magnitude in all respects; and a city largely populous must necessarily have a great stretch of streets and a water supply of immense volume. It is the largeness of such necessities, incident to a great population, that differentiates cities of the first class from cities of the other classes; and the consequence is that all legislation regulative of such necessities, on account of their magnitude, is obviously constitutional, as it is ger-

mane to the basis of municipal classification. If, therefore, municipal population, when it is large, does not require a different kind of machinery from that which is suitable to a small population, then it would be plain that the position of the counsel of the relators [that the act was special and local] would be impregnable." The chief justice reiterates the same views in *Matheson v. Camnade*, 55 N. J. Law, 4, 25 Atl. 933.

In *Warner v. Hoagland*, 51 N. J. Law, 62, 16 Atl. 166, a statute relating to streets, avenues, parks, and sewers, in which cities of the first class were excepted, was sustained on the ground that the extent and cost of local improvements necessary to the growth and prosperity of the excepted cities require efficient and expensive city governments, and that the affairs of these municipalities could not be managed by local governments adapted to cities of the population and insulated position of the smaller cities of the state. The same reasoning was adopted by the court in *Randolph v. Wood*, 49 N. J. Law, 85, 7 Atl. 286, and also in *Mortland v. Christian*, 52 N. J. Law, 538, 20 Atl. 673. The counsel of the plaintiff in error having relied considerably upon this case to sustain the present legislation, a statement of the grounds upon which that case was decided will be appropriate. The act then under consideration was one changing the membership and mode of election of the boards of freeholders in counties of the first class. In sustaining that law as not being local and special, the learned judge who delivered the opinion of this court said: "No one familiar with the construction and operation of boards of freeholders in the several counties in this state can fail to see that by this scheme an entirely new and distinct system of administrative machinery is provided, one more compact in form, with greater executive possibilities, making greater demands upon the time and services of the members, for which increased pay is provided, together with an increase of individual responsibility, with which is coupled a substantial security to the public by means of bonds with heavy penalties. That such a system is not applicable to the smaller counties is not less evident than that the existence of such machinery would be an unnecessary and disastrous burden upon their finances. Whether the largest counties do require boards of such increased efficiency is not for us to decide. If they do, it is evidently in respect to matters growing out of excess of population. The legislature, in whom the determination of these questions is vested by the constitution, has decided that counties of the first class do require a change of the character indicated by this act, which changes, from the considerations just mentioned, are inappropriate to the smaller counties for the same reasons which constitute their appropriateness to the larger ones. Such being the relation borne by the provisions of this act to the various counties of this state,

viewed from the standpoint of population, the act in question must be deemed to be general, in that it reaches the one class to which the legislature has determined that it is appropriate, and that that class is distinguished by those features which constitute its appropriateness from all the other counties in the state." The act sustained was restricted to counties of the first class. It created boards of freeholders in such counties, with membership, powers, duties, and responsibilities different from those pertaining to boards of freeholders in other counties of the state, and changed the time of the election of its members from the spring to the annual election in the fall. The act concerned the machinery by which the affairs of these counties were administered; and the classification was sustained by this court on the ground of the magnitude of the interests which came under the jurisdiction of boards of freeholders in those counties, which made the system of administrative machinery adopted appropriate to such larger counties, and inappropriate to the smaller counties in the state. The change in the time for holding the election of these officers to the election day on which the other county officers were elected was a mere incident in the scheme of administration provided by the act, which, the classification having been found to be lawful, was, in the judgment of the legislature, necessary for the election of the members of the newly-created boards, and was a matter of discretion on the part of the legislature. This case gives no countenance to the notion that the legislature may classify on the basis of population, and thereupon legislate upon any subject relating to the internal affairs of municipalities, untrammelled by the legislative prescription. The decision gives no support to the act under consideration.

State v. Borough of Clayton, 53 N. J. Law, 277, 21 Atl. 1026, is not in conflict with the cases above referred to. The act sustained provided a scheme for organizing borough governments. It provided for the incorporation of the inhabitants of any township or part of a township embracing an area not exceeding four square miles, and containing a population not exceeding 5,000, whenever, at an election called and conducted in a specified manner, a majority of the electors therein qualified to vote for state and township officers approved of it. In providing for these local governments, population, whatever it may represent or indicate, as well as area, are considerations necessarily entering into the propriety of establishing such local governments; and, as was said by the present chief justice, "population does bear a plain and obvious relation to the necessity and propriety of various grades of municipal government." The classification on the basis of population, as well as area, being necessarily committed to the judgment and discretion of the legislature, the court will not interfere with the legislative judgment unless the classification be illusive or be applied

illusively. The provisions of the act were extended throughout the state, and open to be accepted by a popular vote wherever area and population complied with the requirements of the act. *Paul v. Gloucester Co.*, 50 N. J. Law, 586, 15 Atl. 272, is a case of similar aspect. An act to regulate the sale of intoxicating and brewed liquors was under examination. The question pertinent to this discussion was whether the classification by population for the purpose of fixing the minimum license fee was vicious. In this case the legislation in question was under the police power of the state. The evil at which the legislation was aimed was one that concerned individuals, and the regulation of this traffic had prevailed in this state from the earliest period. In the opinion of this court sustaining the law, Mr. Justice Van Syckel said: "In administering the license laws, the practice has prevailed under the inn and tavern act to regard the density of population in fixing the license fees. Where the population is dense, the legislature may have concluded that the people will be more prosperous; that they will expend their money for luxuries more freely, and will pay higher prices, than in sparsely-settled districts; also, that, the larger the population, the greater will be the expense of maintaining the police department. No more suitable basis of classification which the legislature could have selected for itself has suggested itself during my consideration of this subject." Indeed, it may be said with great force that no classification for the purpose of regulating the sale of intoxicating liquors is so eminently appropriate as a classification on the basis of population. *Matheson v. Caminade* is also a similar case. The legislation under examination established in every city of the second class, having a population of 50,000 or over, one police court, and provided for the appointment of the judge by the governor with the advice and consent of the senate. The contention was that cities of this class were not possessed of any quality that would justify giving to them alone a court of this character. The chief justice, in his opinion, declared that this criticism had no force, unless it be assumed that the needs of the smaller cities regarding magistracy are identical with the larger ones. He said: "Such an assumption would, of course, be absurd; and yet, if it be admitted that places of great population require and are entitled to a more elaborate system of police than places of a sparse population, the fallacy of the position in question is demonstrated, for the legality of a legislative classification for such municipalities has become manifest." It would need no argument to demonstrate that it is density of population that in a great measure creates the necessity for increased police service. Population in that respect is an appropriate, if not the most appropriate, classification for such legislation. It was with respect to legislation of the character of that involved in *State v. Borough of Clayton* and

Matheson v. Caminade that Mr. Justice Van Syckel, in *Paul v. Gloucester Co.*, said: "Whether the basis of classification is wise or judicious, or whether it will operate as fairly as some other basis that might be adopted, is a question for the legislature, and not for the courts. The extreme limit of our inquiry in this direction is: Does population bear any reasonable relation to the subject to which the legislature has applied it? Is it germane to the law?"

The act now in hand is not an act establishing a scheme of local government, as was the act in the *Clayton Case*. It is an act regulating the internal affairs of existing municipalities. Nor is it a police regulation, in which population is essentially the basis of classification, as in *Paul v. Gloucester Co.* and *Matheson v. Caminade*. This act stands on considerations extraneous to those in the class of cases above cited. A case more pertinent to the case in hand is *Anderson v. City of Trenton*, 42 N. J. Law, 488. In that case a classification on the basis of population in an act authorizing cities having a population of not less than 25,000 to issue municipal bonds was held to be an illusory classification, and the court set aside the act on the ground that it could not see any natural connection between the number of people in a city government and its right to fund a floating debt. The learned judge who delivered the opinion of the court said that it was manifest that, "if the classification made by a statute is to be justified or not by considering whether it is proper to apply the peculiar provisions of the law to the particular individual or individuals designed to be affected, then laws will be upheld or overthrown, not as the court shall decide them to be general or special, but as they shall deem them wise or unwise. No rule heretofore laid down in this state sanctioned such a test of constitutionality, nor do I think that such a criterion should be adopted." It is also apparent from the decisions in the courts of our own state and in other jurisdictions, federal and state, that, when a law is in terms local, satisfactory reasons must be found to exclude it from the constitutional interdict. That the cities or municipalities to which it applies have been properly classified for general municipal purposes does not furnish a sufficient reason for sustaining such legislation; otherwise, the elaborate reasoning in *Re Hayes*, *Mortland v. Christian*, and similar cases was superfluous. The court should have simply said: "These cities have been legally classified, and the legislature may deal with their internal affairs in its discretion."

The principle by which general laws are distinguished from those which are either local or special applies to all legislation regulating the internal affairs of municipalities; and the discretion that enters into the decision of the question whether a particular law is general or local or special is that where the classification appears to rest on substantial grounds, and the line of demarkation which separates

the places included from those excluded is a matter of judgment, the resolution of the legislature will prevail, unless it plainly appears that such classification is an evasion of the constitution. In the much canvassed case of *Mortland v. Christian* similar views were expressed by Mr. Justice Garrison, who said: "Whether the largest counties do require boards of such increased efficiency is not for us to decide. If they do, it is evidently in respect to matters growing out of excess of population. The legislature, in whom the determination of these questions is vested by the constitution, has decided that counties of the first class do require a change of the character indicated by this act, which changes, from the considerations just mentioned, are inappropriate to the smaller counties, for the same reasons which constitute their appropriateness to the larger ones. * * * The act in question must be deemed to be general, in that it reaches the one class to which the legislature has determined that it is appropriate, and that that class is distinguished by those features which constitute its appropriateness from all the other counties in the state." In *State v. Borough of Clayton* the present chief justice said: "In determining whether this act is general within this meaning [that is, whether the class is composed of all municipalities which, considering the purposes, of the legislation, are distinguished from others by qualities or characteristics such as to make the legislation appropriate to them and inappropriate to others], its purpose is first to be considered, and it is then to be determined whether the municipalities upon which it operates have substantial distinctions segregating them from other municipalities, and evincing that such legislation is germane to them, and not to others." In every case the primary consideration in the process of determining whether a particular law local or special on its face is a general law, in the sense of the constitution, is the consideration whether the classification adopted is based on those substantial grounds which justify the limitation of its enactments to one set of municipal bodies, and the exclusion of others. No question of legislative discretion can possibly arise until the preliminary question is solved.

It was conceded that the legislation in question is a regulation of the internal affairs of the cities to which it applies; but it was contended that it related to the structure and machinery of government, and therefore classification on the basis of population was legitimate, whether the structure and machinery provided were equally appropriate to other cities or not. It must not be assumed that acts relating to the structure or machinery of municipal government are freed from those rules apt to distinguish general from local and special laws in other cases. The decisions are directly to the contrary. But it is unnecessary to discuss the conditions under which discretion may be said to enter in-

to legislation affecting the structure of municipal government, as exemplified in *Matheson v. Caminade*, supra, and *McLaughlin v. City of Newark*, 57 N. J. Law, 298, 30 Atl. 543; for the cases cited do not sustain the assertion that this act relates to either the structure or the machinery of government. In *State v. Borough of Clayton* the act provided for the organization of local governments with the appropriate machinery. In *McLaughlin v. City of Newark* the act provided the means of dividing cities of the class embraced in it into wards and election districts. It dealt, as was said by the learned justice who delivered the opinion of the court, only with the structure of the government, the formation of the machinery by which the affairs of the city are to be regulated. In *Re Haynes* the act constituted municipal boards in certain cities, and defined their powers and duties. The act, as was said by the chief justice, dealt exclusively with the machinery by which the city interests within their departments were to be regulated. In *Owens v. Furey* the act established a municipal board of public works in certain cities. In *Matheson v. Caminade* the act established a police court in cities of the second class, and provided for the manner of the appointment of the magistrates by which such courts should be held. In these and all the cases in which statutes based on a classification on the ratio of population were sustained, for the reason that they related to the structure or machinery of municipal government, such legislative acts were directed immediately to the structure of the municipality itself, or to the machinery of municipal government. The act under examination differs in every material respect from those involved in the preceding cases. It in no sense affects the machinery, powers, or structure of the city governments, nor does it change the mode of selecting city officers. The constituency by which those officers are elected remains the same. The act simply changes the date of their election, by the same constituency, and combines the election of municipal officers with the election of state and county officers upon the same official ballot. It applies only to cities of the first class; that is, to those having a population exceeding 100,000. Newark and Jersey City are the only cities of this state with a population above the limit mentioned in the act; the population of Newark being, by the census of 1895, 215,806, and Jersey City, 182,713. Among the cities with a population not exceeding 100,000 are Paterson, with a population of 97,344; Camden, with a population of 63,467; Trenton, 62,518; Hoboken, 54,083; and Elizabeth, 43,834.

From the earliest period in the history of this state, it has been the policy to keep the election of township, town, and city officers separate from the election of state and county officers. This policy is forcibly expressed in an act of the legislature passed in 1889 (P. L. 1889, p. 89), which in its preamble recited:

"Whereas, it is deemed for the best interest of municipal government that elections for local officers should not be held on general election days;" and enacted: "That no local or charter election shall be held in this state on the same day fixed for the holding of a general election, or on the day when members of the general assembly are now elected by law." At the time this act was passed, no one of the cities, towns, boroughs, or townships had its local election coincident with the state and county elections. The act changes the day for municipal elections in the two cities, and combines the election for local officers with the election for state and county officers. The issue presented by this record is whether, having regard to the subject-matter of this legislation, cities having a population exceeding 100,000 have, by reason of population, characteristics distinguishing them from cities with a population of less than 100,000, which would make such legislation appropriate to the former class of cities, and inappropriate to cities having a less population. In solving this issue, it must be borne in mind that this act, as already observed, in no sense relates either to the machinery or the powers or the structure of city government. On what course of reasoning can substantial grounds be found for discriminating between the cities of the one class and other cities, towns, townships, and localities in the matter of holding local elections at the same time, and combined with elections for state and county officers? What characteristics are inherent in the population or affairs of the two cities embraced in the act distinguishing them from other cities,—Hoboken, Paterson, Elizabeth, Trenton, and Camden, cities of large population,—which renders an election for local officers, combined with an election for county and state officers, appropriate to the one class, and inappropriate to the other, of such magnitude and importance as will justify the inclusion of the one class and the exclusion of the other from this scheme of legislation? The act being local on its face, just grounds for such discrimination must be found in its subject-matter, to relieve it from the constitutional interdict. In the supreme court the grounds assigned for such a discrimination appear, briefly, to have been the double expense, the lack of interest on the part of the voters, and consequent negligence in the choice of candidates, and in safeguards against election frauds, such as bribery, fraud, and corruption. Under the latter head it was argued that, offices in large cities being more lucrative, the temptation to election frauds is greater, calling for more elaborate and expensive safeguards than are applicable to charter and municipal elections elsewhere. It will be observed that by the act of February 19, 1896 (P. L. 1896, p. 13), it is provided that, in every city of this state having a population exceeding 40,000, the charter election and all elections for municipal officers should be held and conducted as the elections for members of the general assembly were held and

conducted at the last election preceding the time of holding such charter election or election for municipal officers. If the stringent election laws which apply to the fall elections are necessary to suppress frauds in the conduct of elections, such laws are in force in Paterson, Camden, Trenton, Hoboken, and Elizabeth, cities having a population in excess of 40,000; and these cities are excluded from the legislation under review. And as covering the whole of this subject, if any advantages are to be gained or evils prevented by combining elections for city officers with state elections, can any reasonable ground be assigned for conferring such benefits upon Jersey City which should not be conferred upon Hoboken in the same county, or granted to Newark, and denied to Paterson, Camden, Trenton, Elizabeth, and, I may add, other cities in the state?

With respect to the other reasons assigned as grounds for the discrimination created by this act, such as the expense of separate elections, lack of interest in voters, and election frauds, these evils exist in a comparative degree in all the cities of this state; and, if the combination of municipal and state elections will cure these evils, other cities cannot lawfully be excluded from this curative process. The reasoning of the justices of the supreme court on these subjects is so satisfactory that elaboration is unnecessary. Indeed, I may say that the counsel who argued this case in this court for the plaintiff in error by his brief seems to have repudiated the existence of any grounds to justify this classification by that process of reasoning. His argument for reversing the judgment below rests mainly, if not wholly, upon the contention that this legislation relates to the structure and machinery of local government,—an argument which to me seems unfounded. Being of opinion that this act is an act regulating the internal affairs of cities, based upon an insufficient classification, and therefore in violation of the constitutional prescription, I shall vote to affirm the decision of the supreme court.

(Oct. 18, 1897.)

COLLINS, J. (dissenting). I base my dissent from the conclusion reached in this cause upon three fundamental rules, evolved from the long discussion of the constitutional power of the legislature to classify towns when regulating their internal affairs by law:

1. For legislation dealing only with the structure of municipal government,—the formation of the machinery by which municipal affairs are to be regulated,—the municipalities of the state may be distributed into classes constituted on the basis of population. This rule was thus formulated in the supreme court in the case of *McLaughlin v. City of Newark*, 57 N. J. Law, 298, 299, 30 Atl. 543, and was approved by this court in its affirmance of the judgment therein (58 N. J. Law, 202, 34 Atl. 13). The rule is now conceded, but its applicableness in this case is questioned. It is doubted that a statute the only purpose or

the chief purpose of which is to change the date of municipal elections deals at all with the structure or machinery of municipal government. I have no such doubt. It seems self-evident that such a statute deals directly and solely therewith. Incumbency of office has the same place in the structure and machinery of municipal government that heart action has in an animal mechanism. Without it there can be no living organization. Elections and appointments to office are correlative. Most of the judicial decisions leading to the establishment of the rule above stated turn upon statutes providing for change from one to the other of these methods of filling municipal office. In *Warner v. Hoagland*, 51 N. J. Law, 62, 16 Atl. 166, the law sustained transferred from boards of commissioners, to the common council, important powers of government in all cities except those of the first class. The law sustained in *Re Haynes*, 54 N. J. Law, 6, 22 Atl. 923, took from various boards elected by the people, and placed in one board to be appointed by the mayor, all the powers over public works in cities of the first class. A later law, never questioned, made that board elective. P. L. 1894, p. 524. *Owens v. Fury*, 55 N. J. Law, 2, 25 Atl. 934, and other cases decided at the same term with that case, sustained, for other cities of a class based upon population, laws transferring, from elective to appointive boards and officers, various governmental powers. Surely, then, in judicial opinion, elections to municipal office enter into the structure and machinery of municipal government. The fixing of a date for such elections is, of course, a necessity. In *Mortland v. Christian*, 52 N. J. Law, 521, 20 Atl. 673, this court adjudged that local elections are subject to legislative change on the basis of population, and did so on the express ground that the act then under review concerned the machinery of administration. 52 N. J. Law, 537, 20 Atl. 674. It is now observed that the change of date there sustained was a mere incident in the scheme of administration provided by the act, and the inference seems to be that, standing alone, a change would not have been upheld. I cannot think that such an inference was intended, or that this court means to declare that, had the act left unchanged the date of election, a new date might not have been fixed by a separate act. There have been several such separate acts. In 1895 (1 Gen. St. p. 515) it was enacted in a statute dealing with no other subject that in all cities of the second class the annual or charter elections should be held on the second Tuesday of April; and in 1896 (P. L. p. 169) it was enacted that the municipal or charter elections in cities of the first class should be held on the second Tuesday of April. It is this last-named act alone that justifies the change of Newark's charter election from autumn to spring, the former act (P. L. 1892, p. 21) being plainly unconstitutional. Can it be that, under the decision now rendered, Newark must return to October elections? It

was very justly said by the present chief justice in the case of *State v. Borough of Clayton*, 53 N. J. Law, 277, 281, 21 Atl. 1026, that while the legislature may, in obedience to the constitutional requirement, pass a general law providing for a complete system of government for all municipalities, or for appropriate classes thereof, it is clear that it may also pass a series of co-related acts having the same purpose. I must assume that an act like that now overthrown would have been sustained had it fixed some other day for municipal elections than that already set apart by law for state and county elections. If so, it would have been so sustained by force of the rule I have stated, for on nothing else can it rest.

But it is argued that, in applying the rule, the court must look at every act dealing with the structure or machinery of municipal government, to see if population bears relation to its particular subject. This would lead to a paradox destructive of the rule. The courts have adjudged that population bears a reasonable relation to the structure and machinery of municipal government. This becomes meaningless if we say, instead, that population bears a reasonable relation to so much of the structure and machinery of municipal government as bears a reasonable relation to population. I find no support in the adjudged cases for the suggested limitation. The formative judicial opinion out of which the rule was finally evolved is only useful as showing the continuous progression that led to that result. For example, in the *Haynes Case*, relied on as an instance of this limitation, Chief Justice Beasley, in vindicating a statute by which in cities of the first class the legal machinery for controlling streets and water supplies was regulated (54 N. J. Law, 28, 22 Atl. 923), did, indeed, confine himself to showing the relation of those interests to population. He needed to go no further; but in the later case of *Matheson v. Caminade*, 55 N. J. Law, 4, 6, 25 Atl. 933, he uses language in which I find no hint of limitation. There he says: "It has been decided that, with regard to structural forms of government and administration, the municipalities of this state may be distributed for legislative purposes into classes constructed on the basis of population. The ground plainly expressed for this conclusion was that 'population,' in this connection, is a connotative term, signifying not only the populousness of a city, but as well the magnitude of its public concerns; and hence a fair classification on such basis was a distribution of cities which in all essentials were of different grades, manifestly requiring different forms of government; and hence the choice of adaptive forms of government was, of necessity, a legislative function." This is the only safe and sure rule. I trust the decision of the present cause has not overthrown it.

2. When the drawing of some line of demarcation between the larger and the smaller

aggregations of people is justified, it is for the legislature to say where that line shall be placed. I quote this rule from the opinion of the supreme court in the case of *Randolph v. Wood*, 49 N. J. Law, 85, 91, 7 Atl. 286. This court approved it when affirming the judgment in that case (50 N. J. Law, 175, 15 Atl. 271); and it is not questioned now. Of course, any classification, to be valid, must be not illusive or evasive. The "first class" of the general act has been too often sustained by this court to be now challenged as an evasion of the constitution. I do not see the force of the observations made upon that subject in the course of the prevailing opinion in this case.

3. Legislation appropriate to a proper class of municipalities is valid, though not extended to other classes to which it may be equally appropriate. This rule results from the reasoning and decisions in several cases, among them *State v. Borough of Clayton*, supra, followed and approved by this court in *Road Commission v. Haring*, 55 N. J. Law, 327, 26 Atl. 915. No one has stated this rule more clearly and comprehensively than the learned judge who speaks for this court in the present case. In the case of *Johnson v. Borough of Asbury Park*, 58 N. J. Law, 604, 33 Atl. 850, he says: "An examination of the many statutes relating to cities of the several classes, towns, townships, and boroughs, will disclose diversities in the power granted to these several municipal bodies, which, if tried by the criterion proposed by counsel in this case,—viz. that no reason can be given for granting certain special powers to one class of municipalities, and withholding them from other classes,—would operate disastrously upon the system of municipal government in force in this state. The division of municipalities into cities, towns, townships, and boroughs being a classification permitted by the constitution for the purpose of local government, the powers to be conferred upon these bodies severally which pertain to the ordinary functions of local government must rest in legislative discretion." The same reasoning applies, of course, to statutes that relate to the structure and machinery of municipal government. If, therefore, the act now impugned is invalid, it must be so because of some vice sui generis. Such a vice is said to inhere in the combination of municipal with general elections. This is the stress of the opinions of the supreme court in *Hoos v. O'Donnell* (N. J. Sup.) 37 Atl. 447, and of this court in the present case approving that decision. The claim must be thus stated, viz.: That in regulating, by means of elections, the formation of local government in a proper class of municipalities constituted on the basis of population, the legislature has not the constitutional power to fix, for such elections, a date already set apart by law for state and county elections, or (by implication) for national elections, and to prescribe the use of a single ballot. I

had supposed the opposite of this proposition to be involved in *Mortland v. Christian*, supra. There a statute was upheld as constitutional which reorganized, in counties of a class based on population, their boards of chosen freeholders, by substituting for a membership elected in the spring, from townships and city wards, one to be elected from assembly districts in November, at the general election. True, the point was not specially ruled, and perhaps was not fully presented by counsel. Still, it was of necessity involved in the case, and it would seem that a resolution against it must subsist in the judgment.

Taking up the question as *res nova*, I cannot assent to the proposition. I see for it no basis whatever. In this court it is said that it has always been the policy of this state to keep the election of township, town, and city officers separate from the election of state and county officers. This is a mistake. There have been previous instances of combining municipal with general elections. They were combined in *Newark* in 1851 (P. L. p. 233, § 4); in *Atlantic City* in 1854 (P. L. p. 280, § 4); and in *Elizabeth* in 1867 (P. L. p. 333, § 2). In the last-named city the combination prevailed until the act of 1889. The legislature of 1889 did declare its policy, but the legislature of 1897, as to cities of the first class, adopted a different one by law, and the courts cannot review its judgment. It should be noted that an incidental combination, as in the law upheld in *Mortland v. Christian*, supra, would be as much against the supposed policy invoked as separate legislation would be. I cannot distinguish the cases. Furthermore, the same reasoning would avoid statutes framed to include all towns as well as those limited to a class. Whatever may be thought as to the wisdom or unwisdom of combining municipal with general elections, the subject is one of legislative policy, and entirely within legislative control. The people have declared no such policy in the constitution. In the supreme court, in *Hoos v. O'Donnell*, the case was rested by one of the judges upon a proposition not adopted in the prevailing opinion in this court in the present case, but deserving of attention. That proposition is that the act overthrown infringes the implied constitutional restriction that all regulations of the elective franchise must be uniform and impartial. But this restriction has reference to such a right of suffrage as is guaranteed by a constitution or inherent in government by the people, and does not preclude local or special laws. For example, registry laws for large cities only have in this state existed unchallenged for more than 25 years; and I have no doubt that many of the other regulations now general would be unsalable even if limited in operation. But a sufficient answer to the objection is found in the fact that the restriction appealed to does not include municipal elections. There is in this state no constitutional right in the people to elect municipal officers. The legislature

in its control of municipal corporations, is limited only by various requirements that laws shall be general. If it is seen fit to adopt the method of popular elections in administering these governmental agencies, and the requirements of generality are met by a proper classification, the voter cannot complain that his vote in that behalf is called for in some localities at the time of exercise of his general right of suffrage, and in others at a different time.

The doctrine that voters at municipal elections cannot constitutionally be subjected to or protected from the influence of state or national politics, unless all municipalities, or at least all of the same type, are included in every law that may have such an effect, will, if logically carried out, lead to startling results. The legislature, if it change the date of the general election, must avoid the date of local election in every municipality in the state. It cannot, by classifying counties, yield to the powerful argument, now current, that, in populous communities, local should be separated from general elections, for counties as well as towns come within the constitutional prohibition. When providing for local elections in classes of towns or counties otherwise permissible, it must conform to the will of the federal congress; for, under the constitution of the United States (article 1, § 4), the right to fix the time of election of members of the house of representatives rests in the national legislature, and has been exercised (Rev. St. U. S. § 25). I cannot assent to a doctrine that, of necessity, leads to such results.

I find nothing in the opinions of the supreme court or of this court to convince me that the act of March 18, 1897, is unconstitutional. It is unnecessary to discuss the other objections urged by counsel. It is sufficient to say that I find them all untenable, and vote for reversal.

There is a suggestion in the opinion delivered for this court to which I think the court does not mean to stand committed, and that is that, when a law is seen on its face to operate only in specified localities, it is to be deemed to be local or special until the contrary is shown. The presumption should be the other way, for every intendment is in favor of the constitutionality of legislation. *Cooley, Const. Lim.* 182.

(Oct. 19, 1897.)

DIXON, J. (dissenting). My conclusion that the statute under review in this case is constitutional rests upon four legal propositions, which are, I think, duly supported by the decisions in this state:

1. Our earliest cases involving the effect of the constitutional amendment forbidding the passage of private, local, and special laws to regulate the internal affairs of towns and counties, lay down the principle that a law is general, and so not prohibited, if it applies to a class of towns, provided the class is form-

ed upon a basis which bears some reasonable relation to the object of the law. *Van Riper v. Parsons*, 40 N. J. Law, 1; *Hammer v. Richards*, 44 N. J. Law, 667.

2. Later cases decide that towns may constitutionally be classified upon the basis of their population for the purpose of legislation, whenever there exists a reasonable relation between population and the object of the law. *Randolph v. Wood*, 49 N. J. Law, 85, 7 Atl. 280; s. c., on error, 50 N. J. Law, 175, 15 Atl. 271.

3. Contemporaneously with the announcement of the foregoing rule, it was declared that, whenever population may constitutionally be made the basis of classification, the line of demarkation can be drawn in the discretion of the legislature, provided it be not drawn illusively; that is, "with a view of escaping the constitutional restriction," as Chief Justice Beasley expressed it in *Van Riper v. Parsons*, 40 N. J. Law, 9. *Randolph v. Wood*, 49 N. J. Law, 85, 91, 7 Atl. 286; *Paul v. Gloucester Co.*, 50 N. J. Law, 585, 592, 15 Atl. 272; *Warner v. Hoagland*, 51 N. J. Law, 62, 68, 16 Atl. 166; *Mortland v. Christian*, 52 N. J. Law, 521, 538, 20 Atl. 673; *Matheson v. Caminade*, 55 N. J. Law, 4, 25 Atl. 933. Manifestly, the rule last mentioned is but a corollary from the previous decisions; for, place the line of cleavage where you will, and let the reason for discriminating between the smallest member of the lower class and the largest member of the higher class be ever so strong, that reason will approach the vanishing point when you compare the largest member of the lower class with the smallest member of the higher class. Consequently, between these the line must be drawn arbitrarily, or nearly so; and this arbitrary power must rest with the legislature, subject to the proviso stated.

4. Our more recent decisions have in some cases expressly declared, and in others assumed, that there exists a reasonable relation between the population of towns and their "structural forms of government and administration." "the structure of the municipal government, the formation of the machinery by which their local affairs are to be regulated." This proposition is sustained by the uniform practice of civilized nations, for everywhere the systems of municipal government provided for large communities differ from those adopted for small ones. Our courts have relied upon it to support many statutes dealing with a great variety of municipal concerns. *Mortland v. Christian*, 52 N. J. Law, 521, 20 Atl. 673; *In re Haynes*, 54 N. J. Law, 6, 28, 22 Atl. 923; *Lewis v. Moore*, 54 N. J. Law, 121, 22 Atl. 993; *In re Passaic Sewer Assessment*, 54 N. J. Law, 156, 23 Atl. 517; *Owens v. Fury*, 55 N. J. Law, 1, 25 Atl. 934; *Matheson v. Caminade*, 55 N. J. Law, 4, 25 Atl. 933; *Baker v. Delaney*, 55 N. J. Law, 9, 25 Atl. 936; *Oler v. Ridgeway*, 55 N. J. Law, 10, 25 Atl. 936; *McLean v. Gibson*, 58 N. J. Law, 11, 25 Atl. 935; *Calvo v. Westcott*, 55 N. J. Law, 78, 25 Atl. 269; *McLaughlin v.*

City of Newark, 57 N. J. Law, 298, 30 Atl. 543; s. c., on error, 58 N. J. Law, 202, 34 Atl. 13; Johnson v. Borough of Asbury Park, 58 N. J. Law, 604, 33 Atl. 850.

The propositions thus established embody this rule, applicable to the present case: That a law will be general, although it embraces only a class of cities formed on the basis of their population according to the discretion of the legislature, provided the law deals merely with the structure or machinery of municipal government, and provided the class does not appear to have been formed illusively. It remains to consider whether the statute now in hand comes within these two provisos. Its purport is to change the day for holding the municipal elections in cities of the first class; that is, in cities having a population exceeding 100,000. That the municipal elections form part of the machinery of the local government is too plain to be elucidated by anything beyond the statement of it. It seems equally evident that the body possessing the general legislative power to authorize or prohibit such elections possesses also, as an incident, the power to set the times for holding them; and, unless there be express constitutional provision to the contrary, this incidental power must be as untrammelled as the principal. No such provision exists in New Jersey. I am quite unable to perceive why, if the legislature can prescribe or abolish municipal elections in a designated class of cities, without regard to the existence of such elections in other cities, and in its absolute discretion, it cannot also, with like freedom of judgment, fix the day for holding them.

The last matter for consideration is whether the line of demarkation between cities of the first class and other cities, which this statute adopts, is an illusive one,—one “contrived with a view of escaping the constitutional restriction.” That it is not is established by several reasons: First, it was originally drawn as part of a general classification of all the cities of the state, soon after the adoption of this constitutional amendment, and with the sole purpose, I believe, of furnishing a rational basis for constitutional statutes adapted to the diverse needs of our very dissimilar municipalities; second, when drawn, it was in recognition of a very wide gap between the cities upon one side of it and those upon the other, and, although some cities then far below it have now nearly reached it, that must happen with any permanent limit, and cannot render it illusory; and, third, every branch of government has for many years and in numerous instances acted upon it as an honest and reasonable division, unquestioned in this particular until the present controversy arose. I must therefore consider this statute as one dealing with a class of cities formed by the legislature, in the exercise of its constitutional discretion, upon a basis reasonably related to the object of the law, and therefore must vote to reverse the judgment of the supreme court.

VAN BUSKIRK v. MAYOR, ETC., OF CITY OF BAYONNE et al.

(Court of Chancery of New Jersey. Oct. 14, 1897.)

MUNICIPAL CORPORATIONS—IMPROVEMENTS—DAMAGES—ASSESSMENT OF BENEFITS—SET-OFF—POWERS OF COMMISSIONERS—EQUITY JURISDICTION—LACHES.

1. P. L. 1886, p. 149 (3 Gen. St. p. 3370), providing that commissioners shall, when any assessment of benefits for a public improvement levied prior to the enactment of said law remains unpaid, examine into and determine how much of such assessment, if any, shall be laid and collected, does not authorize said commissioners to set off, against the assessment as levied, awards for portions of the same land, previously taken by the city.

2. Complainant made application to the city council to set off certain awards for property taken from his grantor for public improvements against the assessment for benefits derived therefrom, the administrator of the grantor consenting in writing. The council passed resolutions making such adjustment. The awards were canceled, and it was resolved that the assessments be reduced accordingly, and a settlement made with the administrator of the grantor for his share of the benefits. Held that, by such adjustment, complainant obtained an equitable right to set off, that would be enforced in equity; there being no adequate remedy at law.

3. The right to set off an award for property taken by the city for an improvement, against assessments for benefits derived therefrom, is not barred before six years, and laches within that period will not destroy the right.

Bill by De Witt Van Buskirk against the mayor and common council of city of Bayonne and others. On application for preliminary injunction. Heard on bill and demurrer. Injunction granted. Demurrer overruled.

Charles L. Corbin, for complainant. Thomas F. Noonan, Jr., for defendants.

EMERY, V. C. This is an application for a preliminary injunction to restrain the city of Bayonne and its collector from selling the lands of complainant to pay certain assessments for improvements, which were adjusted by commissioners under the act of March 30, 1886, commonly called the “Martin Act” (P. L. 1886, p. 149, etc.; 3 Gen. St. p. 3370, etc.). These lands have been struck off to the city at a sale under this act, made to pay the entire amount of the assessment; and the bill is filed to compel the city to set off against these assessments certain awards for damages made at the time of the original assessments, which were superseded by the assessment under the Martin act. No deed has been delivered to the city, and the complainant has been notified to redeem the lands by paying the entire assessments, without the credit of the awards to which he claims to be entitled. The bill, which is demurred to, shows the following facts: The lands of complainant are portions of a larger tract formerly owned by one Edmund C. Bramhall, and over which, during his ownership, the city opened three streets, Thirty-Eighth street, Thirty-Ninth street, and Avenue B, taking portions of the tract for these improvements. These proceedings were

taken in 1874, and, by the provisions of the city charter then in force, the city was not authorized to take the lands without payment to the owner of the amount awarded for the value of the land taken and the damages to adjoining lands. In the case of each of these improvements, there was an award for the value of the land and damages, as well as an assessment for benefits. For two of the improvements the assessments for benefits exceeded the awards; for the other the award exceeded the assessment. Assessments for benefits and the awards were to be made in the same report of commissioners, and the charter provided (section 59, p. 716, P. L. 1872) that whenever an award was made to any person for property taken, who was also assessed for benefits, then, if the assessment equaled the award, no payment should be made on account of the award, and, if the award exceeded the assessment, only so much of the award as was in excess should be paid, and the resolution of council directing payment of the award should be framed accordingly; and, further, that, when the amount to be assessed should be finally determined, such amount should be set off against the amount of the award unpaid. If the amount of the award was in excess, the assessment should be canceled, and the excess only paid to the person to whom the award was made, and, if the assessment was in excess, the award unpaid should be canceled, and such excess only should be a lien upon the property assessed, and the rest of the award or assessment, as the case might be, being also canceled. These assessments, made in 1874, being still unpaid and unadjusted, the city, in 1890 and 1891, procured the adjustment of the assessments for benefits under the Martin act; and by reports of the commissioners under the act for that purpose, filed April 12, 1890, and June 14, 1891, the assessments were adjusted as follows: For Thirty-Eighth street at \$1,661.44, for Thirty-Ninth street at \$888.11, and for Avenue B at \$297.22. On June 3, 1891, complainant became the owner of the portion of lands which had been assessed for benefits. Edmund O. Bramhall was then deceased, and his administrator, W. H. Bramhall, had succeeded to the rights of his intestate to the award for damages. These awards being still unpaid, application to the city council was made on October 1, 1891, by the complainant, to set off the awards against the assessments, the administrator of Bramhall consenting in writing to the application, and at the same time applying for the payment of the excess of awards over assessment on Avenue B. The city council passed resolutions on or about that date making such adjustment setting off the awards against the assessments in all the cases, and directing warrant to be drawn to Bramhall's administrator for the balance (\$563.77) of the award for Avenue B, after setting off the assessment. The resolutions formally directed that the principal amounts due on the awards (without interest) be credited on the principal

amount of the assessments, as adjusted. The awards were canceled, and it was resolved that the assessments should be reduced accordingly, the balance to bear interest from the date of confirmation. The payment of the balance above mentioned was made by the city to Bramhall's administrator, and his claim against the city thereby settled, pursuant to the agreement. After this adjustment, the collector of the city, in whose charge the records of assessments are, without making the credits in the assessment directed by the resolution, advertised the lands of complainant for sale for the payment of the entire assessment adjusted, and has caused the lands to be bid in by the city, but no deed has yet been delivered. The bill is now filed by complainant to enjoin the execution of this deed, to compel the city collector to make the credits required by the resolution, and to annul the sale and certificates, besides a prayer for general relief. Application is now made for a preliminary injunction, and this is resisted by the city, which claims that these facts give the complainant no right to an injunction or to any relief, and a demurrer is filed to the bill.

The reasons relied on by the defendants at the argument were (1) that the adjustment by the commissioners under the Martin act included the awards, and was final and conclusive; (2) that the complainant has a remedy at law, either by certiorari to the proceedings for assessment, or by mandamus to the collector to compel him to make the credits directed by the resolution; (3) laches of the complainant. The demurrer, in addition, sets up the statute of limitations. My present opinion is that none of these grounds of objection can be sustained, and therefore, regularly, the injunction, until final hearing, should be allowed. The reasons for this conclusion, shortly stated, are:

1. That under the Martin act the commissioners were not authorized to consider anything except the proper assessment for benefits, and had no power either to consider or offset the awards for damages. These awards consequently remained under the original charter to be offset against the assessments as finally adjusted.

2. This court has jurisdiction of the cause upon the ground of enforcing the right of set off, which in this case has been adjusted by an agreement between the three parties interested,—the person entitled to the award, the owner of the lands assessed for benefits, and the city. The statutory right of set-off was conferred only as between the original owner and the city; and even if between these two parties the right of set off was altogether legal, and could be effectually enforced at law, which is perhaps doubtful, it seems clear that the complainant's rights to the benefit of the set-off are purely equitable, and arise from the adjustment made between the three parties in October, 1891, when Bramhall's interest, pro tanto, was transferred to complainant, and this transfer was accepted by the city in reduction of the claim against complainant's lands.

For the protection of these equities, complainant is entitled to the aid of this court, and I fail to see how they can be effectually protected at law, if the city, through its officer for sale, insists on the right of the city to sell without making the credits.

As to the laches of complainant in applying to the court, the bill alleges, in explanation of the delay, that, when the lands were advertised, the sale was adjourned from time to time for the purpose, as complainant understood, of having the adjustment carried out, and that, expecting this would be done, he gave the matter no further attention until he received notice informing him of the sale, and requiring him to redeem for the full amount of the assessments without any credit. This statement, uncontradicted, shows conduct on the part of the city calculated to throw complainant off his guard, and is probably sufficient to answer the charge of laches, if this doctrine is applicable to this case. The bill is substantially a bill to give complainant the benefit of a set-off to which he became equitably entitled in October, 1891. Such right certainly is not, in analogy to the statute of limitations, barred before the lapse of six years, and laches within that limit, at least, would not destroy the right.

I am of opinion, therefore, that the complainant is entitled by the decree of this court to have the awards offset against the assessment, and to redeem his lands upon paying the balance within such time as may be fixed by the final decree of the court. The preliminary injunction will be granted, and as the case upon demurrer was also argued, and decision thereon has been requested by counsel, order overruling this will be advised.

(56 N. J. E. 488)

STEVENS v. STEVENS.

(Court of Chancery of New Jersey. Oct. 13, 1897.)

COMMON-LAW MARRIAGE—EVIDENCE.

Where it appears that the parties lived together as man and wife for several years, were known as such, acknowledged the relation by their daily actions and by express declarations to all persons with whom they came in contact; that both were competent to contract marriage; that the cohabitation was connubial from the start, and that the result of it was a child, yet living,—the marriage contract will be presumed, though there is a denial of a ceremonial marriage, it appearing that both parties are financially interested in avoiding the contract.

Bill by William Stevens against Kate Stevens, otherwise Kate Watt, to obtain a decree of nullity of a marriage ceremony. Decree for complainant.

William P. Douglass, for complainant. G. B. Mattheus, for defendant.

PITNEY, V. C. The object of the bill is to obtain a decree of nullity of a marriage ceremony performed between the parties on the 10th of February, 1889. The ground relied

upon for such decree is that at the time of the marriage the defendant, Kate Stevens, was the wife of one James Watt, and that he was and is still living. The undisputed facts in the case are that James Watt and the defendant lived together as man and wife for several years, in Jersey City, were known as such, and acknowledged the relation by their daily actions and by express declarations to all persons with whom they came in contact; that the result of such cohabitation was one child, born May 13, 1881, named Harvey Watt, still living, and acknowledged by James Watt to be his son. The physician who attended the defendant on the occasion of delivering her of this child made a report to the board of health and vital statistics of Hudson county that the child was born on the 13th of May, 1881; that its mother was Kate Watt, whose maiden name was Evans; and the father was James Watt. Some time about the year 1886 they quarreled, and separated, the defendant still going by the name of Mrs. Watt, and James Watt taking the son, and providing for him. Some time in the year 1888 the complainant, then a young widow, met the defendant. She was introduced to him as Mrs. Watt. According to his story,—and I think that in this respect he is reliable,—she told him that she had been married to James Watt, but that she had been divorced from him, and that her divorce papers were in her sister's custody; and, believing that, he went through a ceremony of marriage with her on the 10th of February, 1889, before Joseph Wilkinson, a justice of the peace of the county of Hudson, since deceased. The complainant swears that Wilkinson asked each of them the usual questions, and that the defendant stated that she was the divorced wife of one Watt. The original marriage certificate, signed by the justice, was produced before the master from the files at Trenton, and on the back of it was a certificate, signed by the complainant and the defendant, in their own handwritings, to the effect that "we, the parties named in the within certificate, hereby certify that the information herein given by each of us is correct, to the best of our knowledge and belief." The certificate itself is in the usual printed form for marriage returns, furnished by the state bureau of vital statistics, with blanks to be filled in by the officer who performed the ceremony. I give so much as relates to the bride in full, as follows, the written parts being in italics: "(1) Full maiden name of wife: *Kate Evans*. Country of birth: *Pennsylvania*. (2) Place of residence. *151 Van Horn St., Jersey City, N. J.* (3) Age, nearest birthday: *30*. (4) Last name, if a widow [a pen line through the printed words 'a widow']: *Divorced Watt*. Number of bride's marriage: *Second*. (5) Name of father: *Harvey Evans*. Country of birth: *Pa.* (6) Maiden name of mother: *Elenor Sincox*. Country of birth: *Pa.*"

Defendant hardly denies that she gave this information to the justice. She does not deny that it is accurate in all respects except as to her being divorced and the marriage being a second one; and the evidence discloses no means by which the justice could have obtained the information as to her pedigree except from her in person. One of the witnesses to the marriage swears that she heard the justice ask the defendant whether she was a widow or divorced, and that she said she was neither; and the defendant swears to the same thing, but she is unable to account for the details of information contained in the certificate being given to the justice except by herself; and the witness is shown by her cross-examination not to be reliable. It is suggested that this assertion of a prior marriage and divorce was a mere ruse, resorted to for the purpose of satisfying the curiosity of the justice, who had heard the defendant called Mrs. Watt. I think this explanation unsatisfactory. In fact, it does not appear clearly that the justice had observed that she had been called Mrs. Watt. He had no previous acquaintance with her; was simply called in to perform this ceremony; and if it did happen that he heard her called Mrs. Watt I think that circumstance could have been explained more easily than to have resorted to the cumbrous fiction of a prior marriage and divorce.

Complainant swears that after they had lived together for about six years they quarreled, and separated, and that he entered into an agreement to pay her \$15 a month for her support; that shortly before filing the bill he ascertained that she had never been divorced from Mr. Watt, and declined to pay any further alimony. The defendant and James Watt both swear that they never were divorced, but they further swear that there never was any marriage ceremony between them. His language on direct examination is this: "I was never married to her; never signed any contract that she and I should live together as wife and husband." He further swears: "She was known as Mrs. Watt all the time we lived in Jersey City. They always took her for such. She was addressed as Mrs. Watt by people in my presence. I never objected against it. I know people took her for my wife, and me for her husband. Neither of us objected, as I know of. When I say I was never married to her, I mean that no marriage ceremony was ever celebrated between us." The defendant, called in her own behalf, denies the marriage in these words: "I was never married to Mr. Watt." She does not deny that there was a contract of marriage between them, unaccompanied by the sanction of a magistrate or clergyman.

With regard to the state of the law in New Jersey in respect to what are called common-law or nonceremonious marriages, I refer to the following cases: *Pearson v. Hovey*, 11 N. J. Law, 12, a common-law action of dower, in which the question was whether the de-

mandant was lawfully married to the decedent. The marriage ceremony was actually performed by a justice of the peace outside of the county for which he was commissioned, and the question was as to the legality of such a marriage. The three judges—Chief Justice Ewing, Justice Ford, and Justice Drake—concurred in holding that the justice might perform the ceremony in any county. Justice Ford went further, and said: "The parties joined together were not related within any prohibited degree, nor under any disability for want of age or understanding. They were free, able, and willing, as it respected themselves, and they contracted marriage before him [the justice of the peace] in words of the present tense, taking each other as husband and wife. I consider it to have been long and fully settled at law that such is a valid marriage, even if William Harrison, Esq., had not been a justice of the peace. It is a maxim in the common law, as ancient as the law itself, that 'consensus, non concubitus, facit nuptias.' It is the contract that makes the marriage. Such, also, has ever been the law or maxim of the church in all ages, as well as the common law." He then cites various old English authorities in support of his position, and says: "The common law requires nothing more of parties who are under no legal disability than proof of a contract, made in words of the present time, as, 'We take each other now;' not that 'we will, at a future time, take each other,' for this amounts to no more than an engagement which may never be fulfilled." He then holds that the statute which authorizes certain persons to perform the marriage ceremony is not restrictive, and does not alter the common law in this respect. In *Voorhees v. Voorhees*, 46 N. J. Eq. 411, 19 Atl. 172, at page 413, 46 N. J. Eq., and page 173, 19 Atl., Vice Chancellor Van Fleet says, "Two essentials of a valid marriage are capacity and consent." And on page 414, 46 N. J. Eq., and page 173, 19 Atl., he says: "Marriage is a civil contract, and no ceremonial is indispensably requisite to its creation. A contract of marriage made per verba de presenti amounts to an actual marriage, and is valid,"—quoting *O'Gara v. Eisenlohr*, 38 N. Y. 296. The same rule prevails in Pennsylvania. *Richard v. Brehm*, 78 Pa. St. 140. *Smith v. Smith*, 52 N. J. Law, 207, 19 Atl. 255, was also an action of dower, and the question was whether the demandant was lawfully married to the decedent. The demandant became acquainted with the decedent in Vermont, and when they proposed to get married suddenly in Vermont they met with some statutory difficulties, and decided to go to Massachusetts to be married, and for that purpose proceeded to an hotel in Charlestown. From there the demandant was conducted by the decedent to a house, and introduced to a gentleman who the decedent said was a minister, and the ceremony was there performed. There was no proof whatever that he was a clergyman, but the demandant believed him to be such. The stat-

ute of Massachusetts validated such a marriage, even though the man was not a clergyman. Mr. Justice Scudder, speaking for the court of errors and appeals, said: "There is nothing in our law or in any statute of this state which would make such a marriage as this invalid if performed here, and there is no reason why it should not be here recognized as entitling the demandant to dower in her deceased husband's land." There was in that case, as is well known, a second marriage by Smith, the husband, while his first wife, the demandant, was living.

Upon the probative value of cohabitation with what is called matrimonial habit and repute, I cite as follows: The case of *East Windsor v. Montgomery*, 9 N. J. Law, 39, was a contest between two townships under the poor laws, and the question was whether a certain pauper had gained a settlement by marriage. There was an actual marriage proven, but the allegation was that the husband, John Robeson, had a wife living in Ireland when he married the pauper. There was no direct proof of the previous marriage, but it was proven by the daughter of Robeson that he lived with her mother in Ireland as husband and wife; "that they were esteemed, reputed, and believed by their neighbors, acquaintances, relations, and friends as lawful husband and wife, and as such visited and received by them"; and that her father did always and upon all occasions acknowledge and declare her mother to be his wife; and that they must have lived together eight or nine years before her father left Ireland. It was held by the supreme court that the evidence of cohabitation with matrimonial habit and repute was sufficient to establish a prior marriage. This result was reversed on appeal by the old court of errors and appeals, but on what ground does not appear. In *Wilson v. Hill*, 11 N. J. Eq. 143, there was one husband and two wives,—Frances and Catharine. Frances claimed to have been married to the husband in 1839 in Massachusetts. Catharine was married to him many years later in New Jersey. The fact of the marriage with Frances was not proven either by any record or by the testimony of any witness present at the ceremony, but it was proven by numerous and unimpeached witnesses that the parties—Frances and the husband—lived together, cohabiting as, and were reputed to be, man and wife, for many years previous to the date of this transaction; that during such cohabitation she had two children, which were recognized by the husband as his; that in the year 1847, while the husband and Frances were so living together, a deed was executed to her of a tract of land, which contained this clause: "Which tract or parcel of land is conveyed to the said Frances Hill, wife of Josiah, and to her heirs and assigns forever," etc. The husband frequently joined with Frances in deeds of conveyance of property, and united with her in the acknowledgment of these instruments as husband and wife. When

her husband, however, was arrested for bigamy, and complaint was made before the grand jury, Frances went before the grand jury, and swore that she had never been married to him, that she was not his wife, that the connection between them was a partnership, and she then had abandoned the use of his name. Nevertheless, Chancellor Green held that she was his lawful wife, with all its consequences. In *Fenton v. Reed*, 4 Johns. 52, the question was as to whether or not a certain Mrs. Reed was the widow of William Reed. She was the wife of one Guest, who abandoned her in 1785, and seven years afterwards she believing Guest to be dead, married Reed. Guest returned to New York after this second marriage, but never interfered with the relations between his wife and Reed, and died in 1800. After that she continued to live with Reed until his death, in 1806. The supreme court held that the court below was justified, on the evidence, in inferring a common-law marriage with Reed after the death of Guest, in 1800. The same principle was conceded in *Wallace's Case*, 49 N. J. Eq. 534, 535, 25 Atl. 260, but it was shown there that the commencement of the sexual intercourse was meretricious, and the subsequent cohabitation as man and wife was very slight, and supported by insufficient evidence, and so a marriage was not presumed. This same principle was applied in *Chamberlain v. Chamberlain*, 71 N. Y. 423, where the presumption of marriage from cohabitation as man and wife was overcome by the circumstances of the particular case. *Clayton v. Wardell*, 4 N. Y. 230, was this: A man was arrested under the bastardy act as the putative father of a child with which a woman was pregnant, and entered into recognizances to answer the charge; and no further proceedings were had. There had been no previous matrimonial habit and repute. He then at once went to live with the female as her husband, and continued to do so until some time after the child was born and died, when he separated from her, and they entered into the usual articles of separation between husband and wife, in which they spoke of each other as husband and wife, and in which a third person indemnified the husband against any claim of the wife. Shortly after this the woman went through the ceremony of marriage and lived for years with another man as his wife, and had one child, and the question was as to the legitimacy of this child, the offspring of the first connection being dead. The surrogate before whom, as judge, the question first came, held that the first marriage was established. His decision was reversed by the supreme court, and such reversal was sustained, on appeal, by the opinions of Harris, Ruggles, Hurlbut, Taylor, and Pratt, JJ., against Chief Justice Bronson, and Judges Jewett and Gardiner. There was no proof of any formal marriage between the man and the alleged first wife, and the decision of the majority of the court was arrived at upon the ground that the intercourse between the

parties was, in its commencement, meretricious, and there was perhaps as much reason to believe that their subsequent connection was of the same character as that a marriage had in fact taken place; and for that they cite the opinion of Lord Eldon in *Cunninghams v. Cunninghams*, 2 Dow, 482. On the other hand, the opinions of Judge Gardiner and Chief Justice Bronson and Judge Jewett were that the cohabitation and holding themselves out to everybody as man and wife, and the entering into the articles of separation as such, were sufficient proof of an actual marriage.

A perusal of the opinions on either side in this case convinces me that the minority were in the right, and I think it probable that their views would have prevailed but for the fact that the effect would have been to bastardize a living issue of a ceremonial marriage. An interesting case is *In re Taylor*, 9 Paige, 611. Taylor married, and had four children by a wife who died shortly after the birth of the last child, and a year later took to his bed a housekeeper or servant, who had been in his house all the while, lived with her for 10 or 12 years, and had two or three children by her. There was no proof of a ceremonial marriage, but he introduced her to all his friends as his wife, and entered the names of her children in the family register. In 1816, Taylor went to England, and left his family in New York, and while there this second wife or mistress, whichever she was, wrote him a letter, which was produced in evidence, in which was an admission on her part that there had been no ceremonial marriage between them, and he himself also made the same statement in writing on his return. It was held by Chancellor Walworth that the living in matrimonial habit and repute with the second woman for so many years, and having children by her, was sufficient to enable the court to presume a common-law marriage between them, and that this view could not be overcome by the admissions of Mr. and Mrs. Taylor, made subsequently, and therefore not a part of the res gestæ; and he declared the issue of the second connection to be legitimate. It is impossible not to discover in all these cases a disposition on the part of the court to hold in favor of the marriage where there is issue which may be bastardized by a contrary ruling. And the same is to be said of the much debated cases of *Campbell v. Campbell* (1867) L. R. 1 H. L. Sc. 182 (*Breadalbane Case*), and *De Thoren v. Attorney General* (1876) 1 App. Cas. 686, referred to by Mr. Justice Garrison in his dissenting opinion in *Collins v. Voorhees*, 47 N. J. Eq. 315, 20 Atl. 676, on appeal from *Voorhees v. Voorhees*, 46 N. J. Eq. 411, 19 Atl. 172. In the English cases just cited the intercourse between the parties had an unlawful beginning. At its inception one of the parties in each case was incapacitated to marry by reason of precontract, not dissolved by death or divorce, and in each the connubial intercourse continued after the impediment was removed. In the *Breadalbane Case* the inca-

capacity was known to both of the parties. In the case of *De Thoren v. Attorney General*, it was unknown to both the parties. The house of lords held that the unlawful inception, under the peculiar circumstances of those cases, did not prevent the prevalence of the presumption, arising from the continued matrimonial habit and repute, that a marriage contract was actually made after the removal of the impediment. This court and the court of appeals (47 N. J. Eq. 555, 22 Atl. 1054) held the contrary upon the circumstances of the case in *Collins v. Voorhees*, where one of the parties knew of the impediment and the other did not. In both of our courts, however, the sufficiency of the proof by matrimonial habit and repute, and the validity of a non-ceremonious marriage, was recognized; but the probative proof in that case was held to be overcome by the circumstances that its origin was shown to be illegal by reason of incapacity of one of the parties, due to precontract.

In the case in hand there is nothing to show any want of capacity to contract between Watt and the defendant when they commenced their cohabitation. Both were competent to contract marriage, and, so far as appears, the cohabitation was connubial from the start. There is no proof, as in *Clayton v. Wardell*, supra, that the connection commenced meretriciously, or that legal measures were resorted to by the defendant to compel Mr. Watt to live with and support her, or that she was a woman of loose character, as in *Chamberlain v. Chamberlain*, supra, and avowedly accepted the position of a mere mistress. In fact, the indications are that the parties here, as in the two cases in the house of lords, were faithful spouses to each other during the entire period of their cohabitation. If the question here was as to the legitimacy of the issue of this connection, the evidence would be ample and well-nigh conclusive to sustain it, even as against the denial by the parents of a ceremonial marriage. Such was the opinion of Chancellor Walworth in *Re Taylor*, supra, and of Chancellor Green in *Wilson v. Hill*, supra. That denial, however, as I read it and construe it, does not necessarily include a private parol contract of marriage, in which they, in substance, said to each other, "Let us be husband and wife, and live together as such." And in considering what weight is due here to the denial of marriage, it must be borne in mind that both Watt and the defendant are interested in sustaining the later marriage. The defendant is interested in retaining her separation contract with complainant, and Watt is interested in being relieved of any duty to the defendant. I think the clear weight of the evidence is that there was such a contract. And if there was such a contract, accompanied as it was by actual connubial cohabitation, it is binding on the parties, and cannot be laid aside at their pleasure. They may have supposed that it was not binding because non-ceremonious, and this supposition may account for their subsequent conduct. In this connec-

tion it must be observed that the well-settled rule is that presumption of marriage in such a case is very strong, and not to be easily overcome. *Piers v. Piers* (1849) 2 H. L. Cas. 331; *De Thoren v. Attorney General* (1876) 1 App. Cas. 686. Against this view is urged what was said by me in the case of *Rooney v. Rooney*, 54 N. J. Eq. 231, 34 Atl. 682, namely, that, "in a suit for nullity by reason of precontract with a living person, strict proof is required of such prior contract." But whatever was there said on that subject must be construed in connection with the circumstances of that case, namely, that a party who comes into a court of justice, and asks for a decree of nullity of marriage, and the bastardizing of the issue thereof, by reason of his own precontract with a living person, of which he was himself conscious when he entered into the contract, must make such proof clear. If there had been issue of the marriage between the parties to this suit, and the defendant was suing the complainant for a decree of nullity by reason of her precontract with Watt, and the result of the decree was to bastardize issue, then the ruling in the case of *Rooney v. Rooney* would be more in point. As it is, I do not think it applies. I will advise a decree for the complainant.

(67 N. H. 300)

MOODY et al. v. DAVIS et al.

(Supreme Court of New Hampshire. Rockingham. March 17, 1893.)

GARNISHMENT—LIABILITY OF GARNISHEES.

Where a will gives all the property to an executor, who files a bond to pay the debts, and the estate is afterwards administered as insolvent, tenants indebted for rent accrued after testatrix's death are not chargeable in foreign attachment as the executor's trustees.

Case reserved from Rockingham county.

Action in foreign attachment by Charles E. Moody & Co. against Frank M. Davis, in which John D. Gilman and others were summoned as trustees. Case reserved on facts found by the court. Trustees discharged.

The plaintiffs seek to charge the trustees for rents of certain real estate. Writ served on the trustees December 3, 1890. The defendant, as executor of his deceased wife's will, claims the rents. Mrs Davis died testate February 6, 1890, seized of the real estate from which the rents accrued. She gave to her husband all her property, and nominated him executor. The will was proved, and the husband appointed executor, May 24, 1890. He gave bond in the penal sum of \$1,000 to pay debts and legacies, and returned no inventory. Upon his petition, and without notice, the estate was decreed to be administered in the insolvent course June 4, 1892, and a commissioner appointed to allow claims. The estate is, in fact, insolvent, the value of the assets being less than the amount of the liabilities by more than \$1,000. The trustees occupied the real estate as tenants of the defendant from

October 11, 1890, to October 11, 1891, and there was due from them at the date of their disclosure the sum of \$249.96 for rent. The question whether they are chargeable for this sum was reserved.

Arthur O. Fuller, for plaintiffs. Edwin G. Eastman, for defendants.

SMITH, J. The giving of a bond by an executor who is residuary legatee to pay debts and legacies (Gen. Laws, c. 195, § 13; Pub. St. c. 188, § 13) has been held to vest in the executor all the estate of the testator not specifically devised. *Tarbell v. Whiting*, 5 N. H. 63; *Batchelder v. Russell*, 10 N. H. 39. And see *Tappan v. Tappan*, 30 N. H. 50, 68, and *Mercer v. Pike*, 58 N. H. 287, 288. But this holding was questioned in *Heydock v. Duncan*, 43 N. H. 95, 101, and *Brown v. Brown*, 55 N. H. 106, 109. What would be the result in this suit, had there been no insolvency decree, is a question not considered. It must be presumed, when the estate was decreed insolvent, that the executor gave a new bond, and that the original bond was adjudged insufficient, or was withdrawn by leave of court. The estate could not be administered as insolvent without the executor giving a new bond. No appeal has been taken from the decree of insolvency. The decree is conclusive as long as it presumes. *Simmons v. Goodell*, 63 N. H. 458, 2 Atl. 897. Not having been reversed, the creditors are entitled to the property of the deceased. Trustees discharged.

CHASE, J., did not sit. The others concurred.

(123 Pa. St. 129)

In re SCHMIDT'S ESTATE.

Appeal of **BECKER et al.**

(Supreme Court of Pennsylvania. Oct. 25, 1897.)

ADMINISTRATORS—APPOINTMENT—QUALIFICATIONS.

On an application for letters of administration on a widow's estate, it appeared that her two sons claimed that certain notes and certificates of deposit left by their father, or the proceeds thereof, belonged to one of the sons, while her two daughters claimed that the same was a part of the mother's estate, in which they had a share: that there was an unfriendly feeling between the brothers and sisters and their husbands; and that both the sons were disqualified to act as administrator. *Held*, that letters should be issued to a stranger, rather than to deceased's daughters.

Appeal from orphans' court, Washington county.

Application by Caroline Becker and Mary Becker for letters of administration on the estate of Wilhelmina Schmidt, deceased. From a decree dismissing an appeal from and affirming the decree of the register of wills refusing such letters to the applicants, they appeal. Affirmed.

The opinion of the orphans' court is as follows (Taylor, J.):

"This is a contest between the four children

of Charles and Wilhelmina Schmidt, deceased, for letters of administration upon the mother's estate. Arrayed on the one side are Charles Schmidt and Francis E. Schmidt, the two sons, and on the other Caroline and Mary Becker, the two daughters, intermarried with George and John Becker, and the appellants in this proceeding to reverse the register of wills in refusing to grant letters to them. The oldest son, Charles Schmidt, the executor named in his father's will, and acting as such, resides in the city of Wheeling, in the state of West Virginia, and does not ask for letters upon his mother's estate, being a nonresident. Francis E. Schmidt, the other son, applied for letters of administration on his mother's estate; and they were, by the register of wills, issued to him, and he proceeded to discharge the duties of this appointment. Caroline and Mary Becker, his sisters, filed a caveat against the granting of letters to their brother Francis, and appealed to the orphans' court, June 30, 1896, to have the letters issued to Francis revoked, and letters of administration on said estate issued to them. After hearing had before the court, on September 25, 1896, the orphans' court filed an opinion and decree to No. 43, May T., O. C., 1896, revoking letters heretofore issued to the said Francis E. Schmidt, for the reason that under the will of his father he had an interest antagonistic to the interest which he acquired by the letters of administration, and was therefore disqualified. At the same time the court refused to grant letters of administration on the estate of Wilhelmina Schmidt, deceased; and it appearing that the appellants had already made application to the register for a grant of letters to them, and that Francis had filed a caveat against the granting of letters to them, which matter had not reached a hearing before the register when hearing was had, on appeal, to revoke letters issued to Francis, the court, in said opinion (a copy of which is filed with this opinion as a part of the history of the proceedings, and containing a suggestion manifestly for the interest of all parties concerned), referred the granting of letters again to the register, after a hearing on the application of the appellants before him, and upon said hearing refused letters to the appellants here to have his actions in refusing letters to them reversed.

"At the hearing before the court to revoke letters to Francis Schmidt the testimony was taken in open court, and afterwards written out in longhand by the stenographer. The contention between these devisees and legatees under the will of their father Charles Schmidt, deceased, was gone into at length. It appeared that the appellants were seeking to have the letters testamentary on the estate of their father issued to Charles Schmidt, Jr., also revoked in another proceeding. It was then and is now manifestly clear to the court that the daughters of these two deceased parents are seeking to wrest the settlement of these estates from their brothers in

order that they may themselves be clothed with power to administer. The claim of the appellants is that, Francis and Charles being incompetent or disqualified,—Charles being a nonresident, and Francis from an interest antagonistic to his mother's estate derived through his father's will,—they, standing in the first class, are next entitled to letters of administration, unless there is satisfactory evidence of their unfitness. That this is the law, we do not doubt. It then becomes a question, in what does this unfitness consist? That these applicants for letters are under coverture, and not the owners of any real estate, and personal property only to a limited extent, has no weight with us in determining this question. There are certainly *prima facie* rights or privy of administration, but they may be controlled by evidence of incompetence or unfitness from circumstances, say the court in the case of *Hassinger's Appeal*, 10 Pa. St. 455. What is understood to be the meaning of unfitness from the circumstances? On an appeal from the decision of the register in granting or refusing to grant letters of administration, we look at the whole cause on the merits, and the rights of the respective parties, without regard to all the alleged irregularities, say the court in *Bleber's Appeal*, 11 Pa. St. 161; and in deciding this case we have been governed by this principle.

Charles Schmidt, Sr., died on the 15th day of February, 1892, testate. His widow, Wilhelmina Schmidt, died on the — day of April, 1896, intestate. Charles Schmidt's estate consisted of about 16 acres of real estate, personal property, and money. By agreement of the widow and these four children of deceased, shortly after his death, no appraisal was filed, and the widow filed her election to take under the will. It is conceded that at time of the husband's death the widow had no separate estate, except less than one hundred dollars in money and personalty. By the will of Charles Schmidt, he bequeathed to his daughters, Caroline and Mary Becker, the appellants, the sum of \$1,500 each, which they admit was paid to them as said testator directed; to his wife, Wilhelmina, during her natural life, all of the rest, residue, and remainder of his estate, both real, personal, and mixed; to his son Charles \$3,000, payable to him on the death of his mother. After his wife's decease, he devised and bequeathed to his son Francis his home farm, together with the appurtenances, fixtures, implements, and all other articles, goods, chattels, etc., remaining upon said farm and belonging to his estate, and to his heirs. He further stipulated in said will, 'It is my will and purpose that, whatever money or profits may be made out of my estate bequeathed to my beloved wife by me as aforesaid, the same shall belong to her, and may be disposed of by her in such manner as she may wish or desire,' and appointed his son Charles Schmidt his sole executor thereof. At the time of his death the said Charles Schmidt had notes and certif-

icates of deposit for about \$3,000 in his own name, and his executor lifted them and had them reissued or assigned to his mother, in order that she could receive the income thereof under the will. At the death of the widow these notes and certificates of deposit were turned over to Francis Schmidt, to whom letters of administration were issued (afterwards revoked by the court), and residuary legatee and devisee under the will of his father. There was some wine stock on hand at death of Charles Schmidt. Shortly after his death the mother leased the 16-acre grape farm and all personalty, etc., to her son Francis, who continued to operate the same (she living with him) until her death.

"Francis Schmidt claims these notes and certificates of deposit left by his father, the income of which went to the mother, under the residuary clause in the will to him. The two daughters, appellants here, and asking for letters, claim that they are entitled to share in these notes and certificates of deposit as heirs at law of their mother's estate. This is the principal contention between these children. The sons claim these moneys belong to Francis, under his father's will, and the daughters claim to share in it as a part of their mother's estate. Letters to Francis were revoked because this claim, whether well founded or not, was antagonistic to his mother's estate. The claim of the appellants that this money evidenced by these notes and certificates belongs to the mother's estate, whether well founded or not, with the state of unfriendly feeling and hostility existing between these brothers and sisters and their husbands, satisfies the court that administration on the estate of Wilhelmina Schmidt should be conducted by an entirely disinterested and unconnected person with the estate or parties. Having revoked the letters heretofore issued by Francis, though his legal disqualification may have been, and is now, perhaps, greater than that of his sisters, the estate of Charles Schmidt and that of his widow are so commingled and blended, the widow deriving that which now forms the basis of this unfortunate condition of things between these children from her husband's will, these estates may be said to be antagonistic to each other so long as these antagonistic claims are made, that, having deposed Francis from settling the estate, it would be manifestly unfair and partial to give one claimant a single point or position of advantage over the other, as the issuance of letters to the daughters in this case would undoubtedly be. 'Where it is clear that the relations between the administrator and the legal representatives of a decedent are not harmonious, and it is manifest that the interest of the administrator is adverse to those of such representatives, nothing but some controlling necessity will justify his retention as administrator.' Kellberg's Appeal, 86 Pa. St. 120. While the interests of the appellants may not be adverse to the estate of their mother, it certainly is to that of Francis in

his father's estate, from whose estate alone the mother derived the corpus now in controversy. If letters were granted the appellants, it could not be claimed that the relations between them, as administrators, and the other two children, legal representatives (for Charles is resisting letters to the sisters on the same grounds as Francis), were harmonious with the other legal representatives of the deceased. Following again the opinion of the court, as we did in revoking the letters to Francis Schmidt, in Hassinger's Appeal, 10 Pa. St. 455, which contained facts and circumstances not wholly unlike the one before us, we are of the opinion, and so find, that both the brothers and the sisters, with their husbands, are in contest for the administration of the mother's estate,—the husbands standing with their wives, and the two brothers, standing together, resisting them; 'and it ought to be committed to an impartial stranger to them, who alone would have their confidence, or would perhaps deserve it.' Hassinger's Appeal, *supra*. This opinion was expressed when letters to Francis were revoked on application of these two appellants; and, in sustaining the register and dismissing the appeal, it must be at the costs of the appellants. Now, January 18, 1897, this cause came on to be heard, and was argued by counsel, where, upon due consideration thereof, the appeal of Caroline and Mary Becker from the decree of the register of wills in refusing to grant letters of administration to them on the estate of Wilhelmina Schmidt, deceased, is dismissed, at the costs of the appellants, and decision of the register in said case affirmed."

T. F. Birch, for appellants. Parker & McIlvaine, for appellees.

PER CURIAM. We find no error in the decree from which this appeal was taken. The questions involved appear to have been carefully considered and correctly disposed of by the learned judge of the orphans' court, and on his opinion the decree is affirmed and appeal dismissed, at appellants' costs.

(182 Pa. St. 435)

In re LENNIG'S ESTATE.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

ESTATE IN EXPECTANCY—GRANT—AGREEMENT TO CONVEY—CONSIDERATION—FAMILY SETTLEMENT.

1. An estate in expectancy is not the subject of grant.
2. An attempted conveyance of an estate in expectancy, to be enforceable as a contract to convey, must have a valuable consideration.
3. Agreement of certain of the children and grandchildren of testatrix, in whose favor she had made her will, with other grandchildren, that they should have part of the estate, is not a family settlement, there being no controversy or dispute or adverse claim of title.
4. Agreement of certain of testatrix's grandchildren, with her children and other grandchildren to whom she had devised all her property, that they would not solicit her to make a testamentary disposition in their favor, is not

a valuable consideration that will support the agreement of the others that they shall have part of the property devised.

Appeal from orphans' court, Philadelphia county.

Adjudication of the account of Nicholas Lennig, executor of Williamina Lennig, deceased. From a decree sustaining exceptions of Williamina Thudicum and others to the adjudication of the auditor, John B. Lennig, as trustee, appeals. Affirmed.

John G. Johnson, for appellant. Melick & Potter, for appellees.

GREEN, J. The subject of contention in this cause is the distribution of a fund constituting the estate of Williamina Lennig, amounting to about \$180,000. The decedent left a will, wherein she bequeathed the whole of the fund to Williamina Thudicum, a daughter, and two granddaughters, Joyeuse and Minnie Fullerton. These three legatees have the prima facie title to the fund because it is given to them by the will of the last owner, the present testatrix. But the appellant, as trustee for his three children, claims one-third of the fund by virtue of a paper duly executed by the three legatees in the lifetime of the testatrix. The paper is dated February 28, 1891, and the testatrix died September 15, 1893. The contents of the will were known to all the parties at the time of the execution of the paper mentioned. The appellant, John B. Lennig, trustee, was a son of the testatrix and her deceased husband, Charles Lennig, and the three children of the trustee were her grandchildren. The paper in question was an agreement on the part of Williamina Thudicum, Williamina Fullerton, and Joyeuse Fullerton that the share of Charles Lennig's estate which the testatrix received as his widow, claiming under the law and against his will, should be equally divided in the following manner, to wit: "One full third part thereof shall be paid to Williamina Thudicum absolutely. One other equal third part thereof shall be equally divided, share and share alike, between Williamina Fullerton and Joyeuse Fullerton. And one other equal third part thereof shall be equally divided, share and share alike, amongst the present and future children of John B. Lennig, and for this purpose shall be paid to the said John B. Lennig, as their trustee."

After having read all the testimony in the case with most careful attention, we are clearly of opinion that this paper was voluntarily executed by the parties to it, with a full knowledge of its contents, and with the intent that the instrument should do precisely what it purported to do, to wit, transfer to the children of John B. Lennig, through him as trustee, one equal third part of that part of the estate of the testatrix which she derived from her husband's estate. It is perfectly manifest to us that there was no fraud, imposition, mistake, misrepresentation, or undue influence exerted or existing in the minds of the parties

to the instrument at the time of its execution, or at any time afterwards. Upon this branch of the case we concur entirely with the findings and views of the learned auditing judge, and, if the decision of the case depended alone upon these considerations, we would reverse the decree, and award the one-third of the fund to the appellant, as trustee. But there is a fundamental question lying back of the instrument and the evidence affecting it, which, as it seems to us, is fatal to the appellant's claim. It is this, and it arises in this manner: The fund in controversy belonged to the testatrix absolutely, and she could dispose of it as she pleased. She has given it to her daughter and her granddaughters, and she refused to give any part of it to the appellant's children, when she had the opportunity to do so by means of a codicil to that effect, which she was asked to sign, but refused. We mention this incidentally, and not because we think it is vital to the decision. We see no reason to discredit the positive testimony of Dr. Fricke in relation to the codicil which he presented to the testatrix for her signature. The claim of the appellant therefore rests exclusively upon the effect, in any legal or equitable sense, of the paper signed by the daughter and granddaughters of the testatrix. While it must be conceded that, although they were mere expectant legatees at the time they signed the paper, they subsequently became absolute owners of the fund, by reason of the testatrix dying without having made any change in her will, yet they now claim that they have changed their minds; that they desire the whole of the estate themselves; that they formally revoked the grant made, by another instrument duly executed; but, over and above all, that the instrument they did execute was never obligatory upon them, and conveyed no estate or interest to the appellant or his children. The blunt question therefore arises, can that instrument be enforced against them, contrary to their will? If it was a good conveyance, operative from its date, or if it became effectually operative from the death of the testatrix, it could not now be recalled or rescinded by any act of theirs; and hence the formal rescission by the paper of June 12, 1893, is not of very material consequence, except as notice that the parties to it were determined to resist all claim under the former paper, and were no longer agreed that the appellant or his children should have or take any part of the fund under the original instrument.

The question now recurs, does that instrument confer a good title, which can be enforced either at law or in equity? The difficulty about it grows out of the peculiar character of the subject-matter of the instrument. It was an estate in expectancy only. The grantors had no present estate or interest in the property at the date of the grant. It was the property of the testatrix, and she might at any time, up to the moment of her death, revoke her will, and give the estate to other persons. The instrument was therefore an at-

tempted conveyance of something that did not then belong, and might never belong, to the persons assuming to convey it.

There are plenty of authorities in relation to this species of assignment or grant, but the sum of the whole of them is that at law they convey nothing, and in equity they must be founded upon a valuable, not merely a good, consideration. In *Bayler v. Com.*, 40 Pa. St. 37, a married woman, her husband joining, executed a mortgage, to secure a debt of the husband, upon all her estate, right, title, and interest which she would be entitled to receive from her father's estate. When, after the father's death, the creditor attempted to enforce it, we held it could not be done, because the estate mortgaged was only an expectancy, that it was invalid at law, and in equity there was no sufficient consideration to sustain it. Strong, J., delivering the opinion, said: "The mortgage given by Mrs. Jay and her husband to Henry Bayler was not a pledge or conveyance of any estate which she owned at the time of its execution. * * * Her father was then living. In his estate she had no property,—no interest. The subject of the mortgage was therefore nothing that she then had. It was a mere expectancy, and the instrument of mortgage was made, not for any consideration then received by her, or parted with by the mortgagor, but solely for the purpose of securing a prior debt of her husband. * * * It is an old and well-settled rule of the common law that a mere possibility cannot be conveyed or released; and the reason given for it is that a release or conveyance supposes a right in being. * * * At law, therefore, nothing passes by a deed of land of which the grantor is only heir apparent; certainly nothing by its direct operation. But though a conveyance of an expectancy, as such, is impossible at law, it may be enforced in equity, as an executory agreement to convey, if it be sustained by a sufficient consideration." In *Power's Appeal*, 63 Pa. St. 443, we said (Read, J.): "An heir or expectant devisee or legatee may, in the lifetime of the intestate or testate, sell or assign his expectant or contingent interest, whatever it may turn out to be, upon the death of a person from whom it may come, which contract, if made upon a valuable consideration, a court of equity will enforce." Citing from *Snell*, Eq. p. 72, the opinion proceeds: "A mere expectancy, therefore, as that of an heir at law to the estate of an ancestor, or the interest which a person may take under the will of another then living, nonexisting property to be acquired at a future time, as the future cargo of a ship, is assignable, in equity, for a valuable consideration. * * * The interest which a child has in his orphanage part is a mere contingency, and no present right, and therefore a release of it is not valid in point of law; but, if founded on a valuable consideration, it shall operate as an agreement, and be binding in equity." In *Kuhns' Estate*, 163 Pa. St. 438, 30 Atl. 215, our

Brother Williams, delivering the opinion, said: "At law a valid transfer can be made of anything in actual existence. What the assignor has, he may dispose of. What he has not, although he may hope or expect to acquire it, he can make no title to. But such sales and assignments have been sustained in courts of equity whenever good, conscience seems to require it, and not otherwise. * * * If the consideration for such an assignment is a fair and honest one, the assignment will be treated as an agreement to transfer when the assignee's title accrues, and it will be held to take effect as an assignment when the expectant interest vests in the assignor. * * * Was the assignment to Julia Ann Kuhns good in equity? This must depend on the bona fides of the transfer and the adequacy of the consideration." There is a great abundance of authorities to the same effect, and it is not necessary to cite more of them. They are not really disputed. Recognizing their force, the appellant contends that in this case there was sufficient consideration for the agreement in question on two grounds: (1) Because of its being a family settlement; and (2) it led to a discontinuance of efforts to procure the execution of a codicil to the will, in favor of the appellant's children.

We do not see how the paper can be regarded as a family settlement. There was nothing in dispute. There was no title or claim of title of any kind residing in the appellant's children. There was no doubt existing about any question at issue between the parties as to the title to any interest in the estate of the testatrix on the part of the children of the appellant. So far as there could be any title or pretense of title before the death of the testatrix, the persons signing the paper were the only persons having any interest whatever. Their interest was but an expectancy, at the best. While such an interest would have been sufficient to bind them, it could only do so by virtue of an actual and valuable consideration passing to them from the grantees. But there was no controversy or dispute between the parties about any claim of interest or title which the grantees had or might have in the estate of the testatrix, and hence we cannot see how the paper can be regarded as a settlement of a dispute or controversy. If they had even a doubtful claim, although it were found afterwards that it could never have been realized, still it would probably be regarded as sufficient to sustain an actual settlement. But here there is nothing which can be regarded as having even the semblance of a claim upon which to raise any kind of a consideration. In *Wistar's Appeal*, 80 Pa. St. 495, which was a bill in equity founded upon an agreement which was claimed to be a family settlement, and where actions of ejectment had been brought and were pending for trial when the agreement was made, and in which the master found that the plaintiffs were entitled to the relief sought on the ground that the agreement was of the

character claimed, this court reversed the master and court below, and dismissed the bill. Mr. Justice Sharswood, delivering the opinion, said: "It is certainly true that all agreements for the compromise and settlement of family disputes are favorably regarded, both in courts of law and equity, and are supported not only as beneficial in themselves, but as conducing to peace and harmony, where it ought most especially to exist. * * * But the principle is not to be carried so far as to work practical injustice. Especially, it ought not to override every other rule upon which courts of equity proceed in the enforcement of the specific performance of contracts. A bill for that purpose is always an appeal to the conscience of the chancellor, in which he exercises a sound discretion under all the circumstances; and he will not interfere if the bargain is hard or unconscionable, or the terms unequal, or the complainant is taking an undue advantage from the strict legal construction of the words. * * * In the compromise of family disputes particularly, the agreement of compromise should be complete in itself, not a mere plan looking to a future adjustment of details; more especially when, so far from settling the family difficulties, it will be itself merely the germ of future litigation. Otherwise, instead of promoting peace and harmony, it may be the source of prolonged discord and discussion." In the present case it will be observed that the agreement is entirely one-sided. The parties who signed the paper merely gave away their expected rights to the whole estate of the testator, and got nothing in return. The children of the appellant had nothing to give, and did not agree to give anything. If the paper could be sustained as a gift, it would answer the purpose; but that cannot be, because the thing given had no existence, and as a gift, under all the authorities, it cannot be sustained. In *Grove v. Hodges*, 55 Pa. St. 519, Strong, J., said: "Mutuality of obligation is considered perhaps more frequently in courts of equity than those of law. In bills to enforce the specific performance of contracts, which, of course, have to do with executory contracts, it is a constant inquiry what equities the defendant has against the complainant, and a chancellor will not enforce specifically a contract that is one-sided." In *Bisp. Eq. (5th Ed.)* p. 489, it is said: "It is essential to specific performance that the consideration should be valuable. A merely good consideration, such as natural love and affection or the performance of a moral duty, will not be sufficient. Moreover, it is necessary that the consideration shall be actual. A constructive consideration, such as that imported by a seal to a bond, will not do." In *Kennedy's Ex'rs v. Ware*, 1 Pa. St. 445, Gibson, C. J., said: "An equitable assignment of a chose in action is said by Mr. Butler (Co. Litt. 232b, note 1) to be a declaration of trust, with an agreement to permit the assignee to sue in the assignor's name. The contract, being consequently executory, must

have a consideration to support it, without which equity would no more execute it than the law would make the breach of it a subject of compensation. * * * Consanguinity is sufficient to raise a use; but that is not a consideration, for an assignment like the present is shown by *Bret v. J. S.*, Cro. Eliz. 756, where it was held that natural affection is not a sufficient consideration for an assumpsit to ground an action. * * * What, then, was the consideration of the assignment before us? Kennedy, whose executors are sued on a parol agreement to convey land to his son-in-law, Ware, assigned, by the instrumentality of his son, to whom he had conveyed his estate in special trust, a judgment against Avery in advancement of his daughter, Ware's wife. The trust being subsequently revoked and the estate reconveyed, Kennedy promised to convey to Ware a particular lot of land in lieu of part of the judgment which was reassigned to him. The judge charged that the promise would sustain the action, but, according to the cases brought into view, the first assignment of the judgment, being in consideration of natural love and affection, was void; and, as Ware had nothing in it to give back, Kennedy's promise to convey on the foot of it was also void. The partial rescission of the first assignment was not the compromise of a contested right, and there was therefore no consideration for the agreement on that or any other ground."

For the reasons stated, we are unable to regard the instrument in question as a family settlement, or as being founded upon any consideration. The only other point suggested in this connection is the proposition that, in consequence of the agreement, further efforts to obtain a codicil to the will of Mrs. Lennig were abandoned, and this may be regarded as a sufficient consideration to support the agreement as an equitable assignment. We find ourselves quite unable to assent to this contention. There is no evidence that we can discover of any agreement on the part of Mrs. John B. Lennig or her children to desist from further efforts to obtain from Mrs. Lennig the execution of a codicil in favor of the children; and, while it may be that no such further effort was actually made because of the agreement, that circumstance could not operate as proof of a restrictive agreement against further efforts. But, even if there had been a positive agreement to make no further efforts to obtain a codicil, we cannot regard such a stipulation as a valid condition, possessing the force of a valuable consideration. An agreement not to importune an aged and infirm invalid to make a testamentary disposition in favor of a party may be a very proper stipulation for the party to make, because such conduct would be reprehensible upon considerations of policy and sound morality; but that it can be held to be a valuable consideration for the conveyance of an expectancy in the estate of such a person is a very different proposition. While children may reasonably solicit

their parents to make a testamentary disposition in their favor, they certainly should not do so at the risk of annoying and distracting such parents or other persons when in conditions of sickness and suffering. It would certainly be an evil policy for the courts to give countenance to such proceedings by recognizing them as the legitimate basis of a contract right. We cannot regard the argument or the inference of such a result in this case as the foundation of a lawful right to recover the estate of such a person when deceased, upon the theory that it constituted the basis of a valuable consideration for the assignment of an expectant interest in such estate. Entertaining these views, we are obliged to sustain the decree of the court below, while we would have been very glad to reach a different result if that were possible. The decree of the court below is affirmed, and appeal dismissed, at the cost of the appellant.

(122 Pa. St. 587)

EAVENSON v. POWNALL.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

SEPARATE ESTATE OF WIFE—CONTEST WITH HUSBAND'S CREDITORS—EVIDENCE—BURDEN OF PROOF.

In a contest between a wife and her husband's creditors for farm produce, which, together with the farm on which it was grown, was in the apparent possession of the husband, her claim to the crop being rested on title to the farm, she has the burden of showing the existence of an estate in her, not derived from her husband, and a bona fide purchase by herself of the farm with such separate estate; and the mere showing of a deed to her is not enough.

Appeal from court of common pleas, Lancaster county.

Action by Hannah W. Eavenson against J. D. C. Pownall. Judgment for plaintiff. Defendant appeals. Reversed.

T. B. Holahan and J. W. Johnson, for appellant. Brown & Kiensel, for appellee.

WILLIAMS, J. This case was so well tried in the court below that but a single complaint is made against the rulings made by the learned judge at the trial. The action was in form an issue framed under the sheriff's interpleader act. The property seized by the sheriff consisted of farm crops grown upon a farm in the possession of the defendant in the execution. Hannah W. Eavenson was his wife, and claimed the crops as her own. She rested her claim of title to the crops upon the fact that the title to the farm on which they were grown was in her. The defendant alleged that her husband was the real owner of the farm, and in support of his position sought to inquire of the plaintiff whose the farm was, and whether she had a separate estate, and had herself furnished the purchase money. The learned judge excluded this evidence, holding that the production of her deed for the farm established conclusively her title to the

crops grown upon it. The correctness of this ruling is the only question presented by this appeal. Had the question been raised between Mrs. Eavenson and strangers, the rule adopted by the learned judge would have been applicable. It was raised by an execution creditor of her husband. Her husband was in the apparent possession of the goods. They were seized while so apparently in his possession. She set up an adverse ownership, and alleged the possession of her husband to be that of her agent or employé. Under such circumstances it is incumbent upon the wife "to prove her title by evidence which does not admit of a reasonable doubt." *Gamber v. Gamber*, 18 Pa. St. 363. Proof of her exclusive possession is not insisted upon as strongly as it once was; but proof of a separate estate, and a valid purchase by her, are insisted on in all the cases. *Rhoads v. Gordon*, 38 Pa. St. 277; *Lochman v. Brobst*, 102 Pa. St. 481; *Adams v. Bleakley*, 117 Pa. St. 283, 10 Atl. 884; *Stecaman v. Schell*, 130 Pa. St. 1, 18 Atl. 550. If she has a separate estate, and has made a bona fide purchase, the fact that her husband assented, and contributed part of the purchase money, he being out of debt, and free from any fraudulent purpose, will not defeat her title, nor justify the seizure of the crops by his creditors. *Shuster v. Kaiser*, 111 Pa. St. 215, 2 Atl. 110; *Phillips v. Hall*, 160 Pa. St. 60, 28 Atl. 502. The latter of these cases is much relied on as justifying the ruling of the court below, but the title of the wife was shown in that case. The existence of the separate estate appeared, the purchase by the married woman, and the management of the business carried on upon it by her. It appeared upon the trial that \$650 of the money paid for the property was money earned by her in her business as a boarding house keeper, and the creditors sought to treat this money as belonging to the husband, and its use in the payment of the purchase money as sufficient to defeat her title to the land. We declined to sustain their contention, and held, further, that, "when a husband in the enjoyment of the marital relation is permitted to live and be maintained on the property of the wife, managed by her for her own use and benefit, he does not acquire a title to the products by the labor he voluntarily bestows upon it." But it must be clear that the real estate is that of the wife, and that she is not simply a holder of the title for his benefit. If this is not made to appear, the legal presumption is that the money was furnished by the husband. The law does not presume the existence of a separate estate. The onus of establishing it is on the wife when the contest is between herself and her husband's creditors, and he is in the apparent possession of the property. We think the learned judge placed the burden of proof on the wrong shoulders. It was part of her case to show her separate estate, and its investment in the farm to which she held title; otherwise the presumption that the money was furnish-

ed by her husband ought to prevail. They lived upon it; he worked it; he was apparently in possession of it; and when the wife set up an exclusive title to it, and to all its products, she started with the presumption against her, and with the duty of overcoming it by clear proof, of two things: First, the existence of an estate of her own, not derived from her husband; second, a bona fide purchase by herself of the farm with, or upon the credit of, such separate estate. She was relieved by the learned judge from making any showing whatever, and the possession of a deed for the land was held to be conclusive proof that the title was actually and in good faith vested in her. In this particular we think the learned judge erred. The judgment is therefore reversed, and a venire facias de novo awarded.

(183 Pa. St. 624)

RYDER v. JACOBS.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

PLEADING AND PROOF—VARIANCE—PARTNERSHIP—SHARING PROFITS—EXPERT WITNESSES.

1. In assumpsit to recover an amount alleged to be due plaintiff as salesman, under a contract for a specified monthly compensation, proof that plaintiff's compensation was to be contingent on, and paid from, the profits of the business, will prevent recovery, regardless of any question of partnership.

2. The fact that compensation for services is to be contingent on, and paid from, the profits of the business, does not of itself make the employé a partner.

3. In assumpsit to recover an amount alleged to be due for services as salesman, the court did not abuse its discretion in rejecting the testimony of alleged expert bookkeepers called by defendant to prove that the accounts between the parties (involving only 17 charges, with half a dozen credits) were in the form of partnership accounts.

Appeal from court of common pleas, Lancaster county.

Assumpsit by Louis E. Ryder against William M. Jacobs for the recovery of money. From a judgment for plaintiff, defendant appeals. Reversed.

Brown & Hensel and John E. Malone, for appellant. George Nauman and B. F. Davis, for appellee.

DEAN, J. The plaintiff, as appears by his statement filed, brought suit to recover a balance of \$2,606.14, with interest from April 1, 1894. He averred in his statement that defendant owed him the greater part of this amount under a verbal contract, by which he was employed as a salesman of tobacco and cigars, of which defendant was a manufacturer; that, by this contract, he was to be paid \$200 per month and traveling expenses, the payments to be made monthly; that he served under this contract from January 18, 1893, to April 7, 1894, a period of about 15 months; that, under the contract, the amount payable to him for services and expenses was \$2,926.

54; that, in addition, he loaned to defendant \$1,900 in cash,—making, altogether, charges in his favor of \$4,826.54. On this he acknowledged payments made by defendant of \$2,220.40, leaving the aforesaid balance of \$2,606.14 due him. This is the ground on which, in his statement filed, he bases his right to recover. The defendant, in his affidavit of defense, admits that, by verbal contract, he employed plaintiff as salesman at \$200 per month in January, 1893, but avers this contract terminated by mutual consent on May 1, 1893; that at that date plaintiff was paid in full; that then a new contract was verbally entered into between them, by which plaintiff agreed to serve as salesman as theretofore, but as compensation was to receive one-half the net profits of the business, plaintiff agreeing to sell not less than \$100,000 worth of the product of the factory annually; and, further, that plaintiff should be permitted to draw from time to time of his share of the profits an amount not exceeding \$200 per month; and if it was found at the end of the year that one-half of the net profits exceeded the aggregate amount so drawn, plaintiff was to be paid the balance; that, under this contract, from May 1, 1893, to April, 1894, plaintiff drew in money \$1,600. The business was not profitable, and defendant notified plaintiff between July and October, 1893, that he had drawn more than his contract compensation, and thereupon plaintiff repaid \$1,000. Plaintiff also claimed payment of \$200 as traveling expenses, which was credited to him, making \$1,200 of repayments, leaving \$400 as payment on account of profits. Defendant further denied the receipt of \$700 in cash from plaintiff. He further averred no profits whatever had been made in the business. The \$1,200 credit as repayments and the denial of the cash loan of \$700 extinguished the claim of plaintiff for \$1,900 money loaned; and the payment of the monthly compensation of \$200 up to May 1, 1893, the date of the new contract, defendant avers left nothing whatever due plaintiff. On the issue thus made up, there was much testimony on both sides. The learned judge of the court below submitted the evidence to the jury, instructing them, if they found the facts to be as averred by defendant, then a partnership existed between plaintiff and defendant, and there could be no recovery in this form of action; on the other hand, if they found plaintiff's averments were sustained by the evidence, then they should find in his favor for such amount as was due. There was a verdict for plaintiff in the amount of his claim, and defendant brings this appeal, assigning five errors four to charge of the court, and one to the rejection of evidence.

The substance of the first four assignments of error is embraced in defendant's first written prayer for instructions and the court's answer thereto, as follows: "(1) If the jury believe, from the testimony in the case, that after May 1, 1893, the plaintiff was not to re-

ceive a compensation of \$200 per month for his services, but thereafter a share of the profits of the business, there can be no recovery by the plaintiff in this action for any services rendered after May 1, 1893. Answer: We answer that by saying this point is refused unless the jury find from the evidence that there was a partnership existing between the plaintiff and the defendant from and after May 1, 1893, until the time they separated, on March 1, 1894. If the jury find, from the evidence, that a partnership did exist between them during that period, their verdict must be for the defendant, because one partner cannot sue another partner for a partnership transaction except by bill in equity, or by an action of account render." We think manifest error is disclosed in this answer. The court makes the case, as to defendant, turn on the single question as to whether there was a partnership. If there was a partnership the plaintiff could not recover; but, if there was no such contract as plaintiff averred,—on the other hand, an entirely different one, as defendant averred, and adduced evidence tending to establish,—the instruction was erroneous, even though there was no partnership. What facts constitute a partnership has been the theme of endless discussion by courts and text writers, without, by any means, unanimity of opinion. It is not necessary to enter on the subject here. This court, since *Miller v. Bartlet*, 15 Serg. & R. 137, decided in 1826, and *Dunham v. Rogers*, 1 Pa. St. 255, decided in 1845, has uniformly held that compensation for services to be paid out of and contingent on profits, does not of itself constitute the employé a partner. The evidence of defendant tended to establish two propositions: First, that plaintiff, from May 1, 1893, was a partner; second, if not a partner, he was to be paid out of profits, and his compensation was contingent on profits. In the last case the contract was radically different from that averred by plaintiff. If the evidence established it, the allegata and probata were fatally at variance, and the defendant's first point should have been affirmed. Putting aside the question of partnership altogether, without amendment of his statement plaintiff cannot recover, if the jury should find that his compensation from May 1, 1893, was, by the contract, to be a share of the profits.

The fifth assignment is to the rejection of the testimony of alleged expert bookkeepers, who were called by defendant to testify, that the accounts, as kept in the books, between plaintiff and defendant, were in the form of partnership accounts. It is doubtful if these witnesses were any greater experts in book-keeping than at least one-half the jury; or whether, in these simple accounts, involving but two persons, and about 17 charges, with half a dozen credits, any such testimony was called for. We do not deprecate the production of expert testimony in sciences and subjects with which the people are not generally familiar, but it must be borne in mind that

jurymen are yet presumed to have some knowledge, and to be able to form opinions from their own observation. The tendency is to call experts to testify to ready-made opinions for them. Whether the witness be a competent expert, and whether the contention be such as calls for expert testimony, we have more than once held is largely in the discretion of the trial judge. We do not see that the learned judge of the court below erred in his ruling on this testimony. But the first four assignments of error are sustained, the judgment is reversed, and a venire facias de novo is awarded.

(122 Pa. St. 604)

HART v. BUCHER.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

PAYMENT—PRESUMPTION FROM LAPSE OF TIME—REBUTTAL.

Where the obligee in a mortgage bond dies more than 20 years after its maturity, the presumption of payment by lapse of time is not rebutted by proof of an indorsement of a credit on the bond in the obligee's handwriting, purporting to be made before the 20 years elapsed; but the proof must show that the indorsement was in fact made before that time.

Appeal from court of common pleas, Lancaster county; Brubaker, Judge.

Scire facias on a mortgage by John E. Hart, executor of the estate of John Hart, deceased, against John Bucher. From a judgment entered on a verdict directed by the court in favor of plaintiff, defendant appeals. Reversed.

A. J. Eberly and Brown & Hensel, for appellant. Wm. D. Weaver and Benj. F. Davis, for appellee.

STERRETT, C. J. This scire facias was brought November 29, 1893, by the executor of the mortgagee, who died September 26, 1892, more than 20 years after the maturity of the mortgage debt. For the purpose of rebutting the presumption of payment which had arisen from lapse of time, the plaintiff offered the following indorsement, on the bond recited in the mortgage, under date of April 1, 1895, viz.: "John Bucher paid the interest on the within bond up to April 1, 1895. [Signed] John Hart,"—and attested by B. B. Flickinger. The attesting witness, Flickinger, was called, and testified to the genuineness of John Hart's signature; but no offer was made to prove that the indorsement was actually written on the bond at the time it bears date. Without further evidence on the subject, the learned trial judge charged that the indorsed acknowledgment rebutted the presumption of payment arising from lapse of time, and directed the jury to render a verdict in favor of the plaintiff for the amount of his claim. In this, we think, there was error. If the evidence intended to rebut the presumption of payment was sufficient to go to the jury on the question as to when the indorsement was actually made, it should have been submitted to them

with proper instructions, instead of being withdrawn from their consideration by binding instructions to find for the plaintiff. But the evidence was insufficient to even justify submission of that question to the jury. From the fact (doubtless) that the indorsement bore date prior to the time when the presumption of payment would arise, in connection with proof of the genuineness of John Hart's signature, the learned judge erroneously assumed that the payment of interest credited on the bond was made at the time the indorsement bears date, or, at least, "before the presumption of payment had ripened"; but in a long line of cases, from *In re Cremer's Estate*, 5 Watts & S. 331, to the present time, it has been held that credits indorsed on a bond in the handwriting of the obligee are not evidence of actual payment, sufficient to rebut the presumption, until they are affirmatively shown to have made within 20 years, and at a time when it was against the interest of the obligee to make them. *Runner's Appeal*, 121 Pa. St. 649, 15 Atl. 647. Proof of signature alone is not sufficient where the death of the promisee occurred after the presumption arose, but it is otherwise where it occurred before the presumption arose, for that fact shows conclusively that the indorsement of credit was made before the presumption closed on the claim. *Addams v. Seitzinger*, 1 Watts & S. 243. The death of plaintiff's testator in this case having occurred after the expiration of the 20 years, the evidence relied on by the plaintiff to rebut the presumption of payment, arising from lapse of time, was insufficient, and the judgment cannot be sustained. Judgment reversed, and a venire facias de novo awarded.

(182 Pa. St. 634)

SCHAEFFER v. SENSENIG et al.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

TRESPASS—WHEN LIES—PAROL EVIDENCE—TORTS—RATIFICATION—INSTRUCTIONS.

1. Where bailors of cattle are authorized, by the agreement under which the bailee received them, to take possession of and sell them whenever they think best, and they afterwards take the cattle without the bailee's consent, and without compensating him for care and feed, as they had engaged to do, his remedy is an action on the agreement for the breach of it, and he can recover nothing in an action of trespass.

2. On an issue whether a transfer of cattle from defendants to plaintiff was an absolute sale, it appeared that at that time plaintiff gave notes to defendants for the price, as he testified; and a memorandum then made by defendants tended to corroborate plaintiff's contention. *Held*, that parol evidence was admissible in behalf of defendants, who asserted that the transfer was merely a bailment, to explain the memorandum, and the use to be made of the notes, and the terms on which they were given.

3. In trespass for taking from plaintiff cattle received by him from defendants, on an issue whether plaintiff received them as purchaser or as bailee, defendants and five disinterested witnesses testified to declarations of plaintiff, made on different occasions after the seizure, wherein he expressed satisfaction with what defendants had done. *Held*, that such declarations were

strongly corroborative of defendants' contention that the transaction was a bailment, and therefore an instruction that, if plaintiff "ratified" the taking, he could not recover, was not misleading on the ground that a tort cannot be ratified, where, immediately before and immediately after that instruction, the court charged emphatically that, if plaintiff was the owner of the cattle, he might recover, and concluded its charge by an instruction that, if there was an absolute sale, the verdict should be for plaintiff.

Appeal from court of common pleas, Lancaster county.

Trespass by Jacob F. Schaeffer against George R. Sensenig and Andrew F. Frantz. From a judgment for defendants, plaintiff appeals. Affirmed.

The eighth assignment of error is as follows: "(8) The court below erred in its answer to defendants' second point, which point was as follows: 'If the jury believe that Jacob F. Schaeffer, plaintiff, ratified and confirmed the taking of the cattle and the sale of them by Sensenig & Frantz, the verdict must be for the defendants generally in this case, and the plaintiff cannot recover in this action even the balance that may be due to him,'—the answer to which was: 'Our answer to that is in the affirmative also. He might have a claim against them for the feed, but he could not recover it in this case. There is nothing of the kind charged in his declaration, and the point don't arise in the case.'"

B. F. Davis, for appellant. Thos. Whitson and Brown & Hensel, for appellees.

McCOLLUM, J. In this case the defendants are charged with having taken from the plaintiff's stable, and appropriated to their own use, 44 head of his cattle. The defendants admit the taking, but deny that the plaintiff was the owner of the cattle, or that in taking them they were trespassers. It is undisputed that whatever right or interest the plaintiff had in the cattle at the time of the alleged trespass he acquired by the agreement or contract with the defendants, under which they were delivered to him in November, 1888. The defendants allege that the plaintiff received the cattle as their bailee, while he alleges that they were delivered to him as a purchaser of them. The defendants further allege that they were authorized, by their agreement with the plaintiff, to take any or all of the cattle they had delivered to him whenever they saw fit to do so, and were required by it, on their sale of the cattle, to compensate him for feeding and caring for them, in accordance with its terms. A specification of the terms or measure of compensation is unnecessary, because it is not considered of any importance in the decision of the issue made by the pleadings. If the plaintiff was the sole owner of the cattle, the taking of them by the defendants being admitted, he was entitled to recover on this action the full value of them. If, on the other hand, he was merely a bailee of the cattle, and the defendants were authorized, by the agreement under which he received them, to take

possession of and sell them whenever they thought best, he was not entitled to recover anything in it. In such case, if the defendants refused to compensate him for care and feed as they ought and had engaged to, his proper remedy was an action on the agreement for the breach of it. This was the view taken of the case by the court below, and in it we concur. It regards the issue between the parties as involving a question of fact determinable by the jury on the evidence in the case. What was the transaction between the parties? Was it a sale of the cattle, or a bailment of them with a right in the defendants to resume possession of them when they pleased to do so? In support of his claim the plaintiff testified distinctly that he bought the cattle from the defendants, and gave to them his notes in payment of the price agreed upon. The testimony of the defendants was equally positive and clear that the plaintiff was a mere bailee under an agreement which acknowledged their ownership of the cattle, and their right to take any or all of them, with their possession, at any time. The notes given by the plaintiff to the defendants at or about the time the cattle were delivered, and the memorandum made by the defendants in connection with the transaction, were, unexplained, corroborative of the plaintiff's claim. But the defendants' explanation of the memorandum, of the use to be made of the notes, and of the terms on which they were given, materially impaired their corroborative force. The testimony explanatory of these matters was competent. It was not intended to, and it did not, modify a written contract. Parol evidence is admissible to explain a receipt, an entry in a bank book or account book, or for the purpose for which a note was given. The defendants testified that the plaintiff on several occasions expressed himself as satisfied with what they had done, and five disinterested witnesses testified that he made statements or declarations to them, or in their presence, of the same nature, and to the same effect. Whether the statements and declarations so made be regarded as evidence of ratification or acquiescence in what the defendants had done, they were clearly and strongly corroborative of the defendants' claim respecting the agreement under which the cattle were received by the plaintiff.

The answer of the learned judge to the defendants' second point must be read in connection with the general charge. Before and after the answer in question the jury were positively and emphatically instructed that, if the plaintiff was the owner of the cattle, he was entitled to their verdict for the value of them. The concluding words of the charge were: "If you find there was an absolute sale of the property to Jacob F. Schaeffer in November, that he was the sole owner of these cattle when they were taken, then you should find a verdict in his favor for the amount claimed. If you find they were not sold absolutely, but let on feed, and that the defendants, Sensenig & Frantz, had a right to take and remove them,

under their contract, when they chose, and they did so remove them, your verdict must be for the defendants." Assuming that the answer to the defendants' second point admits of the construction contended for by the plaintiff, there is no reason to believe that the jury were misled by it. We are clearly of the opinion that, in the light of the general instructions to the jury, we ought not to reverse the judgment on the eighth assignment. The material questions raised by the specifications of error have been duly considered by us, and our conclusions respecting them are adverse to the contention of the plaintiff. The other matters complained of need not be specifically discussed or noticed. Judgment affirmed.

(123 Pa. St. 595)

SCHAEFFER et al. v. SCHAEFFER et al.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

SALE OF MORTGAGED PREMISES—LIABILITY OF PURCHASER.

Premises mortgaged to secure the payment of \$240 annually to A.'s widow during her life, and on her death \$800 to each of four children, were sold subject to the mortgage. After the widow's death, her annuity having been fully paid, scire facias was issued, and plaintiffs sought to recover, not only the sums secured to the four children, but also an additional sum of \$800 for the use of one B.; alleging that the mortgage represented \$4,000 bequeathed by A. in equal shares to his five children, and that the mortgagor, who was one of said children, had assigned his interest to B. Held, that the purchaser of the premises, who acquired title without notice of such claim, which was not disclosed by the mortgage, nor alleged to have been omitted therefrom by accident or mistake, was not liable for the additional sum.

Appeal from court of common pleas, Lancaster county.

Scire facias on a mortgage by Eliza Schaeffer, widow of Emanuel Schaeffer, and others, to the use of Catherine H. Long and others, against Edwin M. Schaeffer, defendant, and B. Frank Eshleman, terre-tenant. From a judgment in favor of Charles L. Schaeffer, one of the equitable plaintiffs, the terre-tenant appeals. Reversed.

W. T. Brown and Brown & Hensel, for appellant. Wm. R. Wilson and W. R. Roland, for appellees.

STERRETT, C. J. This scire facias is on a mortgage given by Edwin M. Schaeffer to Eliza Schaeffer, widow of Emanuel Schaeffer, deceased, to secure the payment of five obligations (one in favor of each of said mortgagees), viz.: One in the penal sum of \$1,000, conditioned for the payment of \$240 annually to said widow during her natural life, and the others each in the penal sum of \$1,600, conditioned for the payment of \$800 to one of said children, respectively, upon the decease of said widow. After specifically reciting the annuity of \$240 to the widow and \$800 to each of said four children as the consideration of the

mortgage, etc., that instrument contains the usual defeasance clause, to the effect that upon the payment of the sums thus secured the said mortgage, as well "as the said five recited obligations, shall become void and of no effect," etc. The first-mentioned obligation accordingly became "void and of no effect" by payment in full of said annuity to the widow to the date of her decease. In their statement the plaintiffs aver, among other things, that the mortgage represents \$4,000 of the estate of Emanuel Schaeffer, which by his will he divided equally among his five children, of whom Edwin M., the mortgagor, was one, and that his interest is claimed by his assignee, Charles L. Schaeffer, one of the equitable plaintiffs; but this averment derives no support whatever from the mortgage in suit. It discloses no interest thereunder in either the mortgagor or his assignee. The only mortgage debt that remained after payment in full of the annuity to the widow was the \$800 to each of said four children, aggregating the sum of \$3,200, with interest from that date. These claims, as we understand, are not disputed by the terre-tenant, appellant, but that of Edwin M. Schaeffer is denied; and we fail to find in the instrument sued on anything upon which he or his assignee can possibly base any claim against the terre-tenant, who became such by purchase of the mortgaged premises subject to the mortgage only, and, so far as appears, without notice of any other claim than those specified therein. In his affidavit of defense the terre-tenant distinctly avers "that Edwin M. Schaeffer never had any interest as a mortgagee in said mortgage, either in law or in fact, but, on the contrary, he was the mortgagor therein; that he neither created nor reserved for himself any interest or share therein at the time of the execution of said mortgage." In the face of this averment, and in the absence of anything in the mortgage itself on which to base any claim in favor of Edwin M. Schaeffer, it is impossible to sustain the court below in holding that the affidavit of defense was not sufficient to prevent judgment for the full amount claimed by the plaintiffs. The conveyances in the terre-tenant's chain of title "subject to the mortgage" gave him no notice of anything not set forth in the mortgage. As we have seen, all that the latter—including the bonds therein recited—provided for was the payment of the annuity to the widow, and, upon her decease, \$800 to each of the four children. On the payment of these sums the mortgage, as well as the obligations recited therein, were, in the language of the former, to become "void and of no effect." The claim set up by the plaintiffs for the additional sum of \$800 is in conflict with the plain terms of the written instrument. As clearly appears, it contains no intimation of any such claim or interest in Edwin M. Schaeffer as is asserted in plaintiffs' statement, nor is it averred that the terre-tenant had any notice of such claim prior to his purchase of the mortgage premises. It is not even suggested that any such provi-

sion in favor of the mortgagor was omitted from that instrument by accident or mistake, and hence no effort has been made to reform the instrument on which the *scire facias* was issued. Nothing can be recovered in this proceeding except so much of the several sums secured thereby as remains unpaid. The \$800 sought to be recovered to the use of Edwin M. Schaeffer's assignee is clearly not one of them. The court below therefore erred in embracing that sum, with interest, in the judgment. Judgment reversed and procedendo awarded.

(122 Pa. St. 521)

DERR v. ACKERMAN et al.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

STATUTE OF FRAUDS—SALE OF LANDS.

No such equity is established as to take a parol sale of land by a father to his children out of the statute of frauds, where the evidence fails to show a change of possession or management of the property in pursuance of the contract, or part performance of it by them which cannot be compensated in damages.

Appeal from court of common pleas, Lancaster county.

Action by John H. Derr against Ella D. Ackerman and others. Judgment for defendants. Plaintiff appeals. Reversed.

Chas. I. Landis and A. H. Fritchey, for appellant. G. Ross Eshleman and Brown & Hensel, for appellees.

MCCOLLUM, J. In 1892 Simon Ackerman resided upon, and had an estate by the curtesy in, the land in question. He was then indebted to Catherine Derr in the sum of \$1,400, for which judgment was entered against him on the 25th of April, 1892. On this judgment his estate in the land was sold to John H. Derr, who, having received from the sheriff a deed of it, instituted proceedings to obtain possession. The defendants, claiming that there was a parol sale of the estate to them prior to the entry of the Derr judgment, were allowed to intervene for the protection of their interests in it. On the trial the defendants presented their evidence of a parol sale, and of what they had done in pursuance of it. The court submitted the evidence to the jury, with instructions to the effect that, if they credited it, they should find for the defendants. The verdict was in their favor, and from the judgment entered upon it this appeal was taken by the plaintiff, whose contention is that the evidence was insufficient to clothe the defendants with a legal or equitable title to the life estate.

The witnesses to establish the sale were Simon Ackerman, his son Irvin, and his daughter Ella. They testified that the former, some time between the 1st of January and the 1st of April, 1892, offered to transfer his estate in the land to his children if they would assume and pay his indebtedness to Zimmerman for money expended in improv-

ing it, and that on or about the first of the last-mentioned month they accepted his offer. The offer and the acceptance were verbal, and constituted the agreement of the parties. Nothing appears to have been done in pursuance of it until October of the same year, when Zimmerman received the note of the children for their father's indebtedness, and relieved him from further liability on account of it. This was the first notice or knowledge that Zimmerman had of the arrangement between Ackerman and his children. In the meantime he had issued an execution on a judgment against Ackerman for the same indebtedness, sold his personal property, including crops on the farm, for \$880, and become the purchaser of it. Neither the defendant in the execution nor his children made any objection to the sale. This property, however, was surrendered to the children by Zimmerman, on receiving their note, as above stated. The taxes on the land in 1892 and 1893 were assessed to and paid by Simon Ackerman, and when it was sold in 1894 on the Derr judgment he filed an exception to the sale of it on the ground that the life estate had been set apart to him under the exemption act of April 9, 1849. There is not a scintilla of evidence in the case showing a change of possession or control of the property in pursuance of the alleged parol sale previous to October, 1892, nor subsequent to that time, unless the evidence that Irvin Ackerman bought some lumber and shingles in 1893 or 1894, which were used in the construction or repair of a washhouse, can be considered as such. It is not claimed that the children were to receive anything as a consideration for their assumption of their father's indebtedness, except a transfer of his life estate in the land, and yet they received property which sold at sheriff's sale for \$880 as part, if not the entire, consideration of it.

Is the evidence referred to sufficient to take the parol contract out of the operation of the statute of frauds? We think it is not. "The provisions of the statute are beneficial, and should not be further encroached upon." *Gangwer v. Fry*, 17 Pa. St. 491. "Though the giving of a negotiable security be equivalent to actual payment in order to found an action for money paid and received, it is not so to found an equity." *Parker v. Wells*, 6 Whart. 153. "It is the notoriety of a change of possession in execution of the parol contract that, more than anything else, takes a case out of the statute of frauds." *Ackerman v. Fisher*, 57 Pa. St. 457. "In order to take a parol contract for the sale of land out of the operation of the statute of frauds, its terms must be shown by full, complete, satisfactory, and indubitable proof. The evidence must define the boundaries and indicate the quantity of the land. It must fix the amount of the consideration. It must establish the fact that possession was taken in pursuance of the contract, and at or immediately after

the time it was made, the fact that the change of possession was notorious, and the fact that it has been exclusive, continuous, and maintained. Also, it must show performance or part performance by the vendee which could not be compensated in damages, and such as would make rescission inequitable and unjust." *Hart v. Carroll*, 85 Pa. St. 508. "In parol contracts between father and children, clearer and stronger evidence is required of the father's intention to part with his property than in cases of strangers in blood. The evidence of the contract must be direct, positive, express, and unambiguous. The payment of the price must be proved positively. Every presumption is against the claim under such sale. There must be proof that the vendee took possession in pursuance of the contract. If before, his possession was worthless as evidence of an executed sale." *Ackerman v. Fisher*, supra. We have referred to the parol sale as a sale by Simon Ackerman of his life estate in the land to his children, meaning thereby his sons John and Irvin and his daughter Ella. Neither his son George nor his sons Alvin or David had anything to do with the alleged sale, or claimed anything under it. The note to Zimmerman was signed by Ella, John, and Irvin, but John was not called as a witness to establish the contract. The quotations from the cases above cited sufficiently show what is essential to create an equity in the vendees which will take a case founded upon a parol sale out of the operation of the statute of frauds. As we have already seen, the evidence in this case is not sufficient to establish such an equity. It does not show a change, in pursuance of the contract, in the possession or management of the farm, or performance or part performance of it by the vendees which cannot be compensated in damages; and it is by no means clear that there was any consideration for the note given by the defendants to Zimmerman, except the surrender by him to them of the property he bought at sheriff's sale on an execution issued upon his judgment against their father. Upon the evidence in the case the court should have instructed the jury to find for the plaintiff. Judgment reversed and venire facias de novo awarded.

(183 Pa. St. 17)

JACOBS et al. v. JUNIATA VALLEY CANNING CO. et al.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

RIGHTS OF CO-SURETIES INTER SE.

A corporation whose directors had from time to time borrowed money for the business failed, and confessed judgment in the creditor's favor. Eighteen of the stockholders became sureties for the debt, and signed a warrant of attorney, confessing judgment against themselves individually. Judgment was entered against them, and soon afterwards the balance due thereon was assigned to one H., who purchased for the benefit of 15 of the defendants.

H. issued *fi. fa.*, and instructed the sheriff to make the money out of the property of the other three defendants, on the ground that they were formerly directors, and had illegally contracted a debt, and that the balance now due was for that debt. The defendants for whom H. was acting had never objected to the illegal borrowing, but had themselves continued the same practice down to the time of the failure. *Hdd* that, as all the defendants were equally bound, neither they nor plaintiff being in a position to object to the illegality of the debt, the sheriff was properly restrained from carrying out plaintiff's instructions.

Appeal from court of common pleas, Juniata county.

Action by Pomeroy Patterson Jacobs & Co., for the use of H. C. Hower, against the Juniata Valley Canning Company and W. N. Sterrett and others. From an order restraining the use plaintiff from collecting the judgment from three of the defendants only, plaintiff appeals. *Affirmed*.

Charles Hower and J. Howard Neely, for appellant. Robert McMeen and Louis E. Atkinson, for appellees.

WILLIAMS, J. The Juniata Canning Company was incorporated in May, 1892, with an authorized capital of \$4,000. Only about \$3,000 of this amount was paid in, but the company entered at once, and somewhat actively, upon the business for which it had been organized. Suitable buildings and machinery were purchased, and vegetables, fruits, and berries bought and canned. The capital was grossly inadequate, and, at the end of the operations for 1892, the company was owing about \$12,000 for money borrowed from the legal plaintiffs to carry on its operations. There is no suggestion that the money so borrowed was not honestly expended in the business of the company. Neither the personal integrity nor the business methods of the directors have been assailed. They were evidently inexperienced in the business they were to conduct, and they were without capital to carry it on. They were compelled to borrow money or to close their business at the outset. They chose to borrow money. Their decision rendered them personally liable to those who gave them credit, if they were then organized as a corporation. If they were a partnership, their action bound all the partners. The business was continued in the same manner until October, 1895, when the company failed, with an indebtedness for borrowed money of about \$18,000. This was all due to the legal plaintiffs. In order to secure them, an agreement was entered into, in pursuance of which the company executed a confession of judgment for a sum sufficient to cover its indebtedness to them, and 18 of the stockholders became sureties for the payment of the debt by the company, and signed a warrant of attorney, confessing judgment against themselves, as individuals, for the same sum. Judgment was entered against them by the plaintiffs, and, shortly after, the balance then due upon the judgment, which was about \$8,000, was assigned to H. C. Hower, the use plaintiff. He at once issued a writ of *fi. fa.*,

and instructed the sheriff to make the money out of the property of three of the defendants. This instruction rested upon the theory that the other defendants had a right to go back for three years anterior to the execution of the judgment bond or note on which the judgment had been entered, determine for themselves that the three defendants who had been directors in 1892 had contracted a debt illegally, that the balance now due on the judgment was for that debt, and that, as among themselves, the 15 stockholders were not liable for the indebtedness so contracted, although they had evidently acquiesced in the necessity and propriety of contracting it at the time, and in the continuance of the same course of management down to the failure, in the fall of 1895. Whatever may be said about the question of the liability of these three directors by reason of their disregard of the law limiting their authority to contract debts for their corporation, it is very clear that the subject can in no sense be treated as an original equity, existing at the time this judgment was confessed. There is nothing before us to indicate that these 15 defendants ever objected to the credits obtained by the directors in 1892. The *prima facies* are all the other way. The money went into the business, and the stockholders for three years more continued the same methods, borrowing money with which to carry on the canning of fruits and vegetables, and paying as much as they could when the year's product, or any considerable part of it, was sold. It was the only possible method in which, with the insignificant capital of the company, any business could have been carried on by it. This does not make the illegal loans proper, but it closes the mouths of those stockholders who did not object to this way of supplying the corporation with necessary funds, and who for three years more continued the same practice of illegal borrowing.

This consideration alone is sufficient to dispose of this case. The judgment was entered upon the express promise of 18 stockholders to pay to the lenders the entire balance due upon all these loans, without regard to their legality. This was an adoption of them as binding upon the corporation and all its members, and a waiver of all questions about their amounts or their regularity that might have been raised at that time. Nothing has taken place since to affect the position of any of these defendants. They remain liable, just as they agreed to be, for the payment of the whole sum due upon the judgment. Each and every one is bound alike, and, if it should happen that one of them should be compelled to pay more than his share, he may be subrogated to the rights of the plaintiff as to such excess, for the purpose of enabling him to have contribution from his co-defendant, and so equalize the common burden. The learned judge of the court below was right, therefore, in restraining the sheriff from carrying into execution instructions that were illegal and oppressive.

But it is urged that the plaintiff in a judgment has a right to direct the sheriff in the execution of process issued upon it. In a general way, this is true. The plaintiff may properly assist the sheriff in the collection of a debt due him by suggestions as to where property may be found, as to which of several defendants has personal property that may be reached by levy, or in any other proper and pertinent manner. But a plaintiff ought not to settle other controversies than his own by an attempt to intervene between defendants, and deprive them of the right of contribution which the law gives them. His position is adverse to the defendants, and any of them whom he compels to pay more than his share of the joint indebtedness has a right to subrogation or contribution, which the plaintiff cannot take away, and which he has no right to hinder or obstruct. It is very clear, upon the evidence, that the equitable plaintiff is a volunteer, who has no right to raise any question about the legality of the original loan. He is not only a volunteer, but he is an agent for 15 of the defendants, at whose instance, and on whose behalf, he has purchased the judgment, for the avowed purpose of relieving them of any liability whatever. This he claims the right to do by raising a question that both he and those whom he represents are in no position to raise. Our question is, therefore, whether he can defend his instructions to the sheriff on the ground of the illegal character of the loans made for the corporation three years before this judgment was confessed, notwithstanding the fact that it was confessed for the express purpose of securing the payment of the same loans. The absurdity of the position is perfectly apparent. As to the legal plaintiffs, this judgment is paid. As to H. C. Hower, it is not paid in fact, although, as to fifteen-eightieths of it, there seems to be an understanding between him and those of the defendants whom he really represents, and for whose benefit he purchased the judgment. As to three-eightieths, neither payment in fact, nor defense of any sort, is alleged.

The order of the court below, restraining the sheriff at this time from collecting from the three defendants named more than their equal shares of the amount due, is affirmed. As to any excess over their one-eighteenth part each of the debt that may be hereafter collected from them, or either of them, they will be entitled to contribution from their co-defendants. No reason for discrimination between the defendants as to the extent of their liability has been shown or suggested, and they must meet their undertaking in accordance with its terms, as co-sureties for the corporation to which they belonged, and whose reverses they have bound themselves to share.

The discussion of the other questions raised becomes unnecessary, as the view we have taken of the case is conclusive upon the rights both of the use plaintiff and the defendants.

(182 Pa. St. 618)

In re BRIDGE BETWEEN BOROUGHES OF CONNELLSVILLE AND NEW HAVEN.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

COUNTY BRIDGES—HIGHWAYS CROSSED BY STREAM.

Act June 13, 1836 (R. L. 551) § 35, providing that when a stream over which it may be necessary to erect a bridge crosses a public road or highway, and the expense of erection is too great for one or two adjoining townships, it may be at the expense of the county, applies only to a case where a highway, in the shape of a ferry or otherwise, has actually existed across the stream, and not where a township street terminates at a river bank, and its extension across the stream has merely been projected.

Appeal from superior court, Fayette county.

In the matter of the application for a county bridge over the Youghiogheny river between the boroughs of Connellsville and New Haven. From the decree of the superior court, affirming the decree of the quarter sessions ordering of record the bridge as a county bridge, Fuller Hogsett and another appeal. Reversed.

W. G. Guller, P. S. Newmyer, S. E. Ewing, and R. H. Lindsey, for appellants. Boyd & Umbel, J. C. Work, and W. A. Hogg, for appellees.

DEAN, J. The boroughs of Connellsville and New Haven, in Fayette county, are on opposite sides of the Youghiogheny river. For many years the two boroughs have been connected by a suspension bridge constructed and owned by a corporation which charges tolls for its use. The bridge is in a good state of repair, and, so far as its capacity and safety are concerned, is sufficient for the accommodation of the public. On the 1st of December, 1890, a petition, signed by citizens of both boroughs, was presented to the quarter sessions of Fayette county, setting forth that the bridge was necessary to the accommodation of the traveling public, and that payment of tolls was unjust and burdensome, and praying, under the act of May 8, 1876 (P. L. 131), that viewers be appointed for its condemnation. Viewers were appointed accordingly, who reported, after full hearing, that the payment of tolls was not an unjust burden on the public and the people of the two boroughs; and, further, that the amount of damages that would be sustained by the bridge company by taking of the same for public use would be \$80,000. This report was filed January 22, 1891. No exceptions were filed to it, nor was anything further done. On April 6, 1891,—three months after the report was filed,—proceedings were begun in both boroughs to establish a highway across the river about 300 feet from the site of the suspension bridge. The borough line of Connellsville includes the river bed to low-water mark on the New Haven side. A petition of citizens of Connellsville was presented to the

quarter sessions for the extension of a street known as "Apple Street" across the river to low-water mark on the opposite side. In New Haven there was a narrow alley, known as "Trader's Alley," running down to the river, which would connect with the proposed extension of Apple street where it terminated at low-water mark. Proceedings for enlarging this alley to the width of a street were commenced by citizens of New Haven the same day—April 6, 1891—that the citizens of Connellsville moved to extend Apple street across the river. The proceeding to widen the alley does not seem to have been prosecuted further. In the proceedings for extension of Apple street the report was confirmed June 9, 1892, so that on the records there is laid out on paper the extension of Apple street in the borough of Connellsville down to and across the river, connecting with or opening into Trader's alley in the borough of New Haven. On the 26th of September, 1892, a petition was presented to the quarter sessions by citizens of the two boroughs, setting forth that a highway—Apple street—of Connellsville, connecting with Trader's alley, of New Haven, is crossed by the Youghiogheny river; that it was necessary to erect and maintain a bridge across said river for the use of the traveling public; and that the expense of constructing and maintaining said bridge was greater than two adjoining townships or boroughs should bear. They therefore prayed the court to appoint viewers to report, etc. Viewers were appointed, who reported favorably on the prayer, and that a bridge should be built across the river where the highway crossed it; and, further, that the expense of such construction was greater than the two boroughs should bear; therefore it should be built and maintained by the county. The report was laid before the grand jury March 11, 1893, and was by them approved. Exceptions and numerous remonstrances were filed. On February 10, 1894, after full hearing, the court overruled the exceptions and approved the report of the viewers, then referred it to the county commissioners with the direction that, if by them approved, the bridge should be recorded as a county bridge. From this order the exceptants appealed to the supreme court. The appeal was quashed, because prematurely taken. There could be no final decree subject to appeal, until action upon the report by the county commissioners. On the coming back of the record, the county commissioners, on February 27th, approved the report. Then Hogsett and Bowman appealed from the final decree to the superior court. On hearing, that court affirmed the decree of the lower court, in opinion by President Judge Rice, and we have this appeal by appellants.

The principal exception to the decree of the quarter sessions, and assignment of error to the judgment of the superior court, deny the statutory jurisdiction of the quarter sessions to order of record this bridge as a county bridge. The entire proceeding, it is conceded, is under

the thirty-fifth section of the act of June 13, 1836 (P. L. 551). That section is as follows: "When a river, creek or rivulet over which it may be necessary to erect a bridge, crosses a public road or highway, and the erecting of such bridge requires greater expense than it is reasonable that one or two adjoining townships shall bear, the court shall, on the representation of the supervisors, or on the petition of any of the inhabitants of the respective townships, order a view in the manner provided for in the case of roads, and if, on the report of the viewers, it shall appear to the court, grand jury and commissioners of the county that such bridge is necessary and would be too expensive for such township or townships, it shall be entered of record as a county bridge." The first question raised here is, what is meant by "public road or highway?" not, what constitutes a public road or highway, within the meaning of the lexicographer, or even generally in law? but, what was the intent or meaning of the legislature by the use of the words in this section of the road law? We held, in *Re Vacation of Osage St.*, 90 Pa. St. 114, that the jurisdiction of the courts over highways of cities and boroughs was expressly withheld by the act of 1836. The section referred to, by its express words, refers to roads and highways crossed by rivers and creeks between adjoining townships. It does not intimate a jurisdiction in this particular to authorize the erection of county bridges so as to prolong or extend the street of a borough. At that point there is no highway the foot of man ever trod. The proposed site of the street was never occupied by a ferry or fording. Connellsville borough desires to extend one of its streets to its extreme territorial limit. It meets with an obstacle—a river—within its borders. To construct its own street within its own territory, it invokes an act of assembly, which, from its plain words, was never intended to burden the county with the cost of extending borough streets. The mere plotting of the street and filing it of record do not constitute a highway in fact. To order the county to build this bridge is to compel it to construct a highway within a borough where none exists, while the act only provides for the construction of a bridge where a river crosses a highway in a township or between two townships. We do not hold that under this act a highway between two adjoining boroughs crossed by a river could not be bridged by the county. What we hold is that, as the very base of the proceeding, there must exist, in a reasonable sense, and within the sense of the act, at the inception of the proceedings, a highway to be bridged; not one existing in the imagination, or on paper. Take, for example, the site of the present suspension bridge between the two boroughs, built in 1862. When built, the river crossed at that point the old state road, which operated a ferry. Unquestionably, this was an actual existing road or highway between two boroughs; and, under a liberal interpretation of the thirty-fifth section of the act

of 1836, proceedings for a county bridge at that point could have been sustained. Nor do we go so far as to hold that such highway must be a much traveled one, like unto the old state road. Whether traveled much or little, it must have an existence, not a mere projection. It is clear, the citizens of these two boroughs are restive under the exaction of tolls by the bridge company. As was their right, they commenced proceedings to condemn the bridge under act of May 8, 1876. This act was expressly intended to meet such a case, and by proceedings under it the citizen could be relieved of a vexatious burden, while the citizen who had invested in a public enterprise was protected in his property. The report of the viewers assessing the damages was filed. No further step was taken. If that report was defective in form, it could have been referred back to the viewers for correction. If the damages were excessive, they were subject to reduction. But, instead of pursuing the path pointed out by the statute, within three months the present proceeding was commenced, and by a perversion of the manifest intent of the statute it is sought to construct another expensive bridge at the cost of the county, not 300 feet from the first, which last is of sufficient capacity to meet the public want; thus practically confiscating the property of the owners of the suspension bridge. No court ought to sanction such a proceeding, prompted by such motives, unless the words of the statute unequivocally so command. In our opinion, instead of this statute, under these facts, plainly authorizing the erection of this bridge, it plainly does not authorize it. We have no words of dissent from the law so elaborately and clearly stated by the learned president of the superior court; but he has misapprehended the facts. Not one of the cases cited is applicable to these peculiar facts. Instead of this being a highway crossed by a river, it is an attempt by a borough to project and cross a river by a new highway,—a street,—at the expense of the county. The decrees of the superior court and of the quarter sessions are reversed, at the costs of the appellees.

(182 Pa. St. 463)

KENDERDINE HYDRO-CARBON FUEL CO. v. PLUMB.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

CONTRACTS—BREACH—DAMAGES.

1. One who contracts with a corporation owning a patent to manufacture the articles covered thereby, and furnish them to it at cost, and provide the money necessary therefor, and for putting them on sale, not to exceed \$10,000, and in consideration is to have a certain part of the company's stock, and be reimbursed for his expenditures, cannot terminate the contract at will, though it provides no time for its duration, but must give reasonable notice.

2. The measure of damages which the corporation owning a patent is entitled to recover for breach of contract by one who agrees to manufacture the articles covered by the patent, and

furnish them to it at cost, and provide the money necessary therefor, and for putting them on sale, not to exceed \$10,000, he, in consideration, to be reimbursed and to receive part of the company's stock, is not the unexpended part of the \$10,000, but the amount of any net profits it would have received from the continuation of the contract.

Appeal from court of common pleas, Philadelphia county.

Action by the Kenderdine Hydro-Carbon Fuel Company against Fayette R. Plumb for breach of contract. Judgment for plaintiff. Defendant appeals. Reversed.

John Roberts and Richard P. White, for appellant. A. T. Freedley, for appellee.

WILLIAMS, J. The plaintiff company, prior to the making of the contract now sued on, had an authorized capital of \$50,000, divided into 500 shares of \$100 each. This was owned by three men, Kenderdine, Kiltson, and Weidershelm. The first contributed the burners, which constituted the property of the company. The second contributed services of some sort. The third contributed more services. Neither paid a farthing in money, but together they held the entire stock as fully paid, and subject to no further assessment. The only asset of any value of the company was the mere right to make and sell burners. To test the value of this asset, it was necessary to find some one who would furnish the money needed for this purpose, and place the manufactured burner upon the market. Plumb, the defendant, undertook to do this. On the 6th of July, 1892, he entered into a contract with the plaintiff company, by the terms of which he was to act as treasurer and manager of the company; pay its debts, not exceeding \$1,000, contracted in the attempt to manufacture some of its burners; to manufacture Kenderdine burners for the company at his place of business; and furnish them to it at actual cost of manufacture; and provide the money needed for the purposes of manufacture, and the employment of salesmen to advertise and sell the burners, not to exceed \$10,000, inclusive of the debts of the company he had undertaken to pay. He agreed also to employ Kenderdine at \$30 per week, his son George at \$15 per week, and his brother-in-law Yerkes as a salesman for not less than one-half his time, paying all his traveling expenses and a suitable salary therefor. In consideration of all this, he was to receive 200 shares of the paid-up stock, and the prospective dividends they could be made to yield from the profits realized by sales of the burners. Under the terms of this contract, Plumb began the manufacture of burners and the effort to put them on the market and sell them to consumers. After a few months' experiment in the business, he complained to the gentlemen who composed the company that he had been deceived by them in the negotiations that led up to the contract, as to the utility and comparative value of the burners. He alleged that he had be-

come satisfied that the patent had no real value, and that burners could not be sold in such numbers as to make the business of manufacture and sale profitable to the company or himself. He told them he had expended about \$3,000 in excess of his gross receipts already; that he was ready to lose this sum, return the stock that had been transferred to him, resign his office of treasurer and manager, and go wholly out of the company and its business. This offer was not accepted. Not long thereafter Plumb discontinued the manufacture of the burners, and the employment of Kenderdine, his son, and his brother-in-law; and the company brought this action to recover damages alleged to have been suffered by reason of Plumb's refusal to continue the manufacture of burners under the terms of the contract of the 6th of July, 1892. Three questions were thus raised: Had Plumb the right to retire from the contract at his pleasure? If not, did his breach of its terms inflict damage on the company plaintiff? (The second question involves an inquiry into the commercial value of the "Kenderdine burner.") Third, if the plaintiff is entitled to recover, what is the measure of its damage?

The terms of the written contract were indefinite as to its duration. No time was fixed at which the relation between the parties should cease. If either party desired to terminate it, if this could not be done by agreement, it was his duty to deal fairly by the other party, and give a reasonable notice of his intention to withdraw from it at a fixed time. He could not abandon the joint undertaking arbitrarily and at his own will, without an injustice to the other party, and incurring liability for, at least, nominal damages for the breach of his contract. Whether Plumb gave such reasonable notice of his intentions to terminate the contract relation between the plaintiff and himself was a question of fact for the jury. If they found against him on this question, then it became necessary to advance to the next inquiry, viz. did his breach of the contract inflict any substantial injury on the plaintiff? This must depend on the value of the contract to the company. If the Kenderdine burner was a useful invention, having some commercial value, and able to compete successfully with the burners of other makers in the markets, then the contract had some value to the company that owned it, and the breach of the contract providing for its manufacture and sale inflicted an injury on the company corresponding to its three-fifths of the net profits to be made upon the sales. On the other hand, if the invention had no commercial value, and could not be sold in the markets in sufficient quantities to make the business of its manufacture and sale a profitable one, then the contract had no actual value to the company, and its breach inflicted no substantial injury upon it; Kenderdine and his relatives lost employment temporarily, but the company lost nothing. It had no interest in

the wages of its employes or those of Plumb, but, if the business was not profitable, it was interested in reducing wages and diminishing expenses. The income of the company was to be derived exclusively from net profits, and, if net profits were not made out of the business, the longer the work of manufacturing the burners was continued the greater would be the loss suffered by it. Whether the plaintiff, if entitled to recover, should be allowed more than nominal damages, must depend on whether the manufacture and sale of the burners was, or could reasonably be made to be, a profitable business to carry on. If the jury could, on the evidence before them, find that the business would pay a net profit, then the answer to the third question is very plain. The measure of the plaintiff's damages would be the probable profits over all expenses that would fall to it from the sale of the burners, after the reimbursement of the defendant for his advances. He had undertaken to make advances for the purpose of testing the value of the business, up to \$9,000, in addition to the payment of \$1,000 indebtedness of the company. But he was to repay himself these advances out of the sales before any division of profits could be made. The contract proceeded upon the assumption that profits would be made, and to an extent sufficient to repay Plumb all advances made in developing the business before the company or its stockholders could receive anything. Did the experiment justify this assumption? The business was prosecuted by the defendant for about seven months in apparent good faith. He employed the inventor and his son in the manufacturing of the burners, and Yerkes, the brother-in-law, in the sale of them. He advanced about \$3,000 above the income of the business in carrying it on, and became thoroughly satisfied, as he says, that the business could never be made to pay a profit, but that to increase his advances further was simply to increase his losses. It was at this time that he offered to return his stock, resign his connection with the company, and lose his advances. This would have left the company an opportunity to make some other arrangements for the manufacture and sale of the burners that would have produced a profit, if a profit could be obtained from the business, but this offer was declined. The company insisted that Plumb should continue to make advances up to the sum of \$9,000 named in the contract, whether they could be repaid or not. Worse than this, it claimed to recover as its damages the \$9,000, or the unexpended balance of it, which Plumb might have lost, but not one cent of which could have gone to the company if he had continued the business. The learned judge of the court below instructed the jury that this was a proper measure of the plaintiff's damages. This was error. This \$9,000 was the sum estimated to be necessary to determine whether the business could be made to pay a profit. It was to be expended in wages and materials necessary to

make burners, and to put them on the market in a businesslike way. If it had been actually advanced and expended, and the business had continued unprofitable, not only could no part of the \$9,000 have reached the company, but no profit would have been made; and the result would have been to increase the defendant's losses from three to nine thousand dollars, for which he would have had no recourse, except against the corporation plaintiff, that was without assets other than the patent upon its burner. The advances were the measure of the defendant's possible loss, but under no conceivable circumstances could they become the measure of the plaintiff's damages. The plaintiff's loss was a loss of three-fifths of the profits made out of the business, after reimbursing the advances. For seven months, and after \$3,000 spent in advances, no profit was made, but the business was found to be behind by the entire amount of the money advanced. The burner did not sell as it was expected. Purchasers returned many of them, as less economical and satisfactory than other burners on the market. They were found, as it was alleged, to require more oil than was represented by the owners of the patent; and the margin between the actual cost of manufacture and the selling price was consumed in expenses and charges. To Plumb it seemed clear that the experiment had been tried sufficiently to determine that the business was a commercial failure, from which he would not be able to reimburse himself, to say nothing of making net profits for division. If he was right, the plaintiff had suffered no substantial loss, and was entitled, at most, to nominal damages. If he was wrong, the plaintiff was entitled to no more than its three-fifths of what might be earned after fully reimbursing the defendant for his advances. Up to the time the business was discontinued, it seems reasonably clear from the testimony that no profits were made, and that the expenses exceeded the income by at least \$3,000. Up to that time, therefore, it is not easy to see how anything more than nominal damages could have been suffered by the plaintiff or incurred by the defendant.

The question raised by the eighth assignment does not appear to have been regarded as of sufficient practical importance to receive a distinct ruling; but if this case should be tried again, and the evidence be such as to justify the submission of the point once more to the trial judge, it should be affirmed. The plaintiff can recover only nominal damages, unless it can show that profits were or ought to have been made out of the business; and then only to the extent of what should have been received by it after the payment of advances and expenses.

Although the assignments of error have not been considered seriatim, yet what has been said substantially covers the important questions raised upon this record. The judgment is reversed, and a writ of *venire facias de novo* is awarded.

(123 Pa. St. 397)

In re VACATION OF PART OF MELON ST.

Appeal of STADELMAN. Appeal of BOWERS. Appeal of EDDOWES. Appeal of LEVERING. Appeal of PERKINS.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

APPEAL—SPECIAL ALLOWANCE—MUNICIPAL CORPORATIONS—VACATION OF STREETS—DAMAGES—REPORT OF VIEWERS—SUFFICIENCY.

1. Where it does not clearly appear from the record that a constitutional question is involved, no appeal can be taken to the supreme court from the superior court without special allowance, and the petition therefor should set forth clearly and specifically what constitutional question is involved, and in what manner it is raised.

2. The right given by Act April 21, 1858, § 6 (P. L. 386), to recover for injury to private property by the vacation of a street, is not confined to the owners of property abutting on that portion of the street which is vacated, but authorizes a recovery by one whose land is left in a cul de sac, shut off from direct access to the system of streets on one side, thereby lessening its market value.

3. Under Act April 21, 1858, § 6 (P. L. 386), providing that damages awarded to property owners for the vacation of a street shall be assessed on the owners of properties benefited, the omission of the viewers to report specifically that the person against whom they have assessed damages is the owner of land benefited is not a fatal defect if such fact appears from the report as a whole.

Appeal from superior court, Philadelphia county.

Petition by Sarah Ann Eddowes and others to the court of quarter sessions of the peace for the county of Philadelphia for the appointment of a jury of view to assess damages caused by the vacation of a portion of Melon street, in the city of Philadelphia. A jury was appointed, and from a decree confirming its report, which awarded damages to the owners of properties on a portion of said street, and assessed the same against the Philadelphia & Reading Terminal Railroad Company, said company appealed to the superior court, where the decree was reversed, and the report of the viewers set aside. The property owners severally appeal. Reversed.

The dissenting opinion of the presiding justice of the superior court, referred to in the opinion on this appeal, was as follows:

"The appellant's counsel contend that there cannot be any recovery by the claimants, because none of them was the owner of property within that part of Melon street which was vacated. They do not claim that they were not damaged, and in the face of the report of viewers, unappealed from, cannot do so; but do contend that there must be not only damage, but injury, in the legal sense, must exist. To this latter proposition I give my unqualified assent, but I am not prepared to concede that the loss which the claimants have sustained in consequence of the closing up of Ninth street and the eastern end of Melon street is *damnum absque injuria*. The right to compensation for loss sustained by a property owner in consequence of the vaca-

tion of a street is, in Pennsylvania, purely statutory. It was clearly decided in *Paul v. Carver*, 24 Pa. St. 207, that the legislature has power to vacate streets and highways which, in its judgment, or that of the municipal authorities to whom the power is delegated, are useless, inconvenient, or burdensome, and this without providing compensation to the owners of land incidentally injured. Judge Black said: 'Surrendering the right of way over a public road to the owners of the soil is not taking private property for public use, and the proprietors of other lands incidentally injured by the discontinuance of the road are not entitled to compensation.' This doctrine was in harmony with the ruling in *O'Connor v. Pittsburgh*, 18 Pa. St. 189, that 'the constitutional provision for the case of private property taken for public use extends not to the case of property injured or destroyed; but,' added Chief Justice Gibson, 'it follows not that the omission may not be supplied by ordinary legislation.' The injustice which constantly resulted from the ruling in this case—an injustice which Chief Justice Gibson thought so great that it ought to be remedied by appropriate legislation—was, to some extent, provided against by section 10, art. 1, and section 8, art. 16, of the constitution of 1874; but it has been held, for reasons which in no way affect the present case, that an injury caused by the vacation of a street is not within these constitutional provisions. No private property is 'taken or applied to public use,' within the meaning of the section first referred to, or 'taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements,' within the meaning of the section last mentioned. *McGee's Appeal*, 114 Pa. St. 470, 8 Atl. 237. But it is too plain for argument that a property owner may suffer injury in consequence of the vacation of a street, not only different in degree, but different in kind, from that suffered by the general public. It is the same kind of an injury which he suffers from a change of grade; and, upon the same principles of justice and equity which were recognized in *O'Connor v. Pittsburgh*, and which led to the adoption of the constitutional provisions above referred to, the state, although, as the sovereign, having power to inflict it without compensating him, may give such compensation, and provide for its payment by the state or the municipality, or its apportionment among the persons or properties benefited. This was expressly decided in the construction of the very act under which the present proceedings were had. In *re Vacation of Centre St.*, 115 Pa. St. 247, 8 Atl. 58. 'That the commonwealth was under no constitutional obligation to pay for the damage caused by vacating a street was decided in *Paul v. Carver*, 24 Pa. St. 207, and is so held under the present constitution. *McGee's Appeal*, 114 Pa. St. 470, 8 Atl. 237. But it has never been held, nor, so far as I am aware, seriously contended, that the legislature

might not put such obligation upon the commonwealth or its agents by statute. The principle of compensation was extended by the present constitution so as to include in certain cases not only property taken, but property injured. This provision might have been, and to some extent was, in fact, anticipated, by statutes providing for such compensation by assessments in the nature of special and local taxation.' *Vacation of Howard St.*, 142 Pa. St. 601, 21 Atl. 974; *Hare v. Rice*, 142 Pa. St. 608, 21 Atl. 976.

"The legislature, in the exercise of its undoubted power, having guaranteed compensation for injury caused to private property by the vacation of a street, the question arises whether the right is limited to properties abutting on the portion of the street vacated. No one could or does contend that an unqualified affirmative answer to this question would be justified upon any principle. If, for illustration, Ninth and Tenth streets had been vacated, we think no one would say that the properties of the claimants abutting on that portion of Melon street lying between the two streets vacated would not suffer injury in a legal sense, or that the legislature did not intend to give compensation for the kind of injury which those properties would sustain. Undoubtedly, the legislature might refuse compensation in such a case, but has not done so. But it is said that in the case supposed access to the property of the claimants would be wholly destroyed, while in the case in hand access by way of Ninth street only is taken away. But why should the statute be construed to give a right to compensation in the one case and not in the other? What authority is there for saying that a claimant must show that he has been wholly deprived of access to his property, in order to entitle him to recover damages? Take the case in hand. The claimants may still go to and from all parts of the city by way of Tenth street, but are now compelled to go further to reach points to the eastward. This is an inconvenience, and by the diversion of travel may cause a depreciation in the value of their property; but it is generally held to be the same kind of inconvenience as that which all the inhabitants of the city traveling that way must suffer. It is an interference with the right of passage over the street which was before enjoyed, and is not of itself a legal wrong for which a private suit at common law could have been sustained. It may be conceded that it is not an injury for which the claimants would be entitled to recover damages under the statute; but, in addition to the right of passage which they enjoyed in common with the general public, was their right or interest in the street as a mode of access to their properties, and there may result, from a destruction or impairment of access, a special injury which would not be sustained by the other members of the general public. It would seem to be manifest that the conversion of an open highway connecting

with another street into a cul de sac would, as to the properties thus deprived of one mode of ingress and egress, be evidence of a special injury, possibly differing in degree, but not in kind, from that resulting from closing up both ends of the street. A variety of special circumstances—the width of the street upon which the properties abut, the grade, the kind of traffic, the distance—would enter into the determination of the amount of damages sustained. In some cases they might be very trifling, but cases may very readily be imagined where they would be very serious; and I am not prepared to say that the mere fact that the properties do not abut on the portion of the street vacated would be conclusive upon the legal question whether such an act would be an injury.

"The learned counsel for the appellant frankly concede that the question is a new one in Pennsylvania. Therefore we are not prevented by any authoritative precedents from giving that interpretation to the statute which will carry out the manifest intention of the legislature to remedy an injustice, which *Paul v. Carver* showed was possible under the law as it stood before. I agree that some well-defined principle ought to control the assessment of damages; but there is a difficulty in laying down a general rule applicable to all cases, and the rule contended for seems to derive its chief support from the supposed inconveniences that would result if it is not adopted. This argument is not without force, but it seems to me that it is given too much weight. It is said, if the rule contended for is not established, where will be the limit to claims for damages? Questions like this can be addressed with much more force to the legislature than to the courts; but, after all, the difficulties which would arise from a more liberal interpretation of the statute are more imaginary than real. They are not greater than those which might have been, and, indeed, were, anticipated from the introduction into the fundamental law of the principle of compensation for the injury and destruction, as well as the taking, of private property in the exercise of the right of eminent domain. It is not to be supposed that the legislature were ignorant of the difficulties which are now urged upon our consideration, but they were not of sufficient gravity to deter them from enacting a law broad enough in its terms to secure compensation to these claimants, if, in fact, they have suffered substantial injury of a special nature. It is as broad as the constitutional provision. The injury is of the same kind as that caused by a change of grade. There is no reason for a stricter rule in one case than in the other, and there is no authoritative decision which requires us to make a distinction. If I am correct in this, then the language of Chief Justice Sterrett in *Mellor v. City of Philadelphia*, 160 Pa. St. 614, 28 Atl. 801, construing the constitutional provision, and applying it to a case of damages caused by a change of grade, might appro-

priately have been written for this case. Defendant's contention was that this provision is inapplicable to any of the cases under consideration, because neither of the properties fronts or abuts on either of the streets the grade of which was changed. This would, indeed, be a very narrow and unreasonable construction of the words above quoted, especially in view of the history and object of the constitutional provision. * * * There is nothing in the phraseology of the section that can be even tortured into a limitation of its provisions to property fronting or abutting on the particular work, highway, or improvement, by the construction or enlargement of which said property was injured or destroyed. The section in question cannot be thus narrowly construed without reading into it words which are not in it, and were never intended to be there.' The case is like this in so many parts that it seems to me that it might be regarded as ruling it. There access to the properties by way of Orthodox street was destroyed by lowering the grade of the latter street; but Trenton avenue, upon which the properties abutted, and Oxford street, which it intersected, remained as before. Here access to the properties by way of Ninth street was destroyed by the vacation of that street and the eastern end of Melon street; but the portion of the latter street on which these properties abut, and Tenth street, which it intersects, are unchanged. The outlet in that direction remains as before. In neither case was access to the properties wholly destroyed, but in both cases the conversion of the highway in front of them into a blind street was evidence of an impairment of access to the properties which might be proper to submit to a jury under appropriate instructions of the kind given in the cited case. Whether the injury was as great in this case as in that it is impossible to say without having a knowledge of all the facts which would have been brought before the court if an appeal had been taken, as was done in the case cited, but cannot come before the court on exceptions to the report. It is true, we have the undisputed facts that the properties do not abut on the part of the street vacated, that the street is nearly fifty feet wide, and that the outlet to the westward is the same as before. If these facts are sufficient in law to base a conclusion that the claimants have not sustained an injury which would entitle them to recover the damages allowed by the viewers,—if, in other words, we can say, as a matter of law, that access to their properties has not been impaired,—then the report ought to have been set aside. But this is what we must declare if we sustain the appellant's second, third, fourth, ninth, and eleventh assignments of error, and I do not think we can do so, and at the same time harmonize our decision with the just principle upon which a recovery was allowed in *Mellor v. City of Philadelphia*.

"It is argued that an affirmance of the judg-

ment of the quarter sessions in this case will be in the face of every authority upon the question. I have endeavored to show that such a ruling would be in entire harmony with the principle enunciated in *Mellor v. City of Philadelphia*, and, if time and space permitted, I think that it could be shown that it is not in conflict with the great weight of authority. It is true, some of the cases do lay down the rule that, where a part of a street is vacated, those whose property does not abut upon the vacated portion, and who have access to their property by the remaining portion of the street, cannot complain. In some of the states, especially in Massachusetts, this rule has been adhered to with great strictness; but even there the principle was thus explained in one of the latest cases: 'It is not enough to show that the shop has suffered by the diversion of travel, or that the owner finds travel less convenient at a distance from his place, if the access to the system of streets remains substantially unimpaired.' *Stanwood v. City of Malden*, 157 Mass. 17, 31 N. E. 702. In that case the court said that the means of access were ample, and in the leading case in that state (*Smith v. City of Boston*, 7 Cush. 254) the court said, 'The petitioner has free access to all his lots by public streets.' Are we prepared to declare in this case that access to the claimants' properties has not been impaired? Can the court say to these claimants: 'One opening to your properties is sufficient for your purposes; therefore no legal injury has been done to you by closing the other'? Could we say that if their properties fronted on two parallel streets, or were on the corner of two streets, one of which was vacated? Is it not more in accord with sound principle to say that their right of access was not limited by the frontage of their properties, but extended to the two intersecting streets, and that it is for the jury to say whether, under all the circumstances, the claimants have suffered substantial damages in consequence of the closing of one mode of access? A learned text writer, after reviewing the authorities, says: 'It has been held that the vacation and closing of one street afforded no ground of complaint when access remained by other streets, but we should doubt this proposition as universally applicable.' *Lewis*, Em. Dom. § 134. Another writer says: 'But the more liberal opinion is that the fact that access may be had from another direction is not conclusive evidence that there is no legal injury to property.' *Rand*, Em. Dom. § 411. He cites *Gargan v. Railway Co.*, 89 Ky. 212, 12 S. W. 259, as deciding that, 'if a convenient way be cut off, leaving only a decidedly inconvenient one, the abutting owner may have compensation.' If we leave out of consideration the cases which are based wholly on a construction of constitutional provisions like ours, and cases where the statutes under consideration were held not to contemplate the recovery of consequential damages, it will be found that the cases in which it has been held that the rigid rule, as stated by the appellant, applies,

where the street was converted into a cul de sac, are very few, although I do not say that there are none. In *City of Chicago v. Union Building Ass'n*, 102 Ill. 380, the part of the street to be vacated was three and one-half blocks—one-third of a mile—distant, and the only injurious consequences were that persons passing from the claimant's property down the street would have, on arriving at the obstruction, to go a little further, and make a slight detour; precisely the same injury that would be sustained by every person having to pass by that route. In *City of East St. Louis v. O'Flynn*, 119 Ill. 200, 10 N. E. 395, the question decided was, as stated by the court, 'Can the defendant, as matter of law, be held liable to the plaintiff for damages resulting from the vacation of streets and alleys between Front and Fourth streets, the vacation being in another block in the city than that in which plaintiff's property is situated?' So, in *Michigan*, it was held that a petitioner had no interest, and was not entitled to notice of proceeding, because he could not reach the discontinued way without crossing a public street (*Kimball v. Homan*, 74 Mich. 699, 42 N. W. 167); but where the discontinuance of a highway leaves the way to a landowner's house a cul de sac, he is directly interested in the proceedings, and is entitled to notice (*Goss v. Commissioners*, 63 Mich. 608, 30 N. W. 197). In *Whitsett v. Railroad Co.*, 10 Colo. 243, 13 Pac. 339, none of the lots of the plaintiff abutted on those portions of the streets or alleys vacated, but all were on other blocks. Hence the court properly held that the access to and egress from his lot is not affected by the vacating ordinances passed by the city. The same was the case in *Glasgow v. City of St. Louis* (Mo. Sup.) 17 S. W. 743, and the court held that the case was not within the constitutional provision, because there was no physical interference with the plaintiff's property, and no right of easement connected therewith, or entrance thereto, was affected. In the other Missouri case cited by the appellant (*Bailey v. Culver*, 12 Mo. App. 175) the point decided was that 'the substitution of a deflected alley for a straight one does no more than change the direction of their exterior communication, and, this being at a point beyond the confines of their property, is as harmless to their absolute rights as if it were in any other part of the city.' The case was precisely the same in principle as those in which the street vacated was in another block; and was put upon the same ground, namely, that, being compelled to travel further to reach other points, it was an inconvenience which the claimants would suffer in common with the general public. Neither of the Minnesota cases cited (*Shaubut v. Railroad Co.*, 21 Minn. 502, and *Brakken v. Railway Co.*, 29 Minn. 41, 11 N. W. 124) is parallel to the present one. The first is not because the obstruction was in another block, and the second is not because access was wholly cut off. Both are in point, however, because they recognize the general

principle that the right of access gives an abutting landowner a special interest in the street, even beyond the limits of the frontage of his property. The case of *Coster v. Mayor*, 43 N. Y. 399, is sometimes cited in support of the proposition that the vacation and closing of one street affords no ground of complaint where access remains by other streets; but a careful reading of that case, I think, shows that it was decided upon a construction of the statute which confessedly cannot be given to our statute, namely, that it did not give the right to consequential damages. It is sometimes said that the right of an abutting landowner in an open street is co-extensive only with the necessities of the case; but this doctrine cannot be sustained upon any sound principle, nor by the weight of authority, where a statute as broad as ours is in force. In *Bucclench v. Metropolitan Board*, L. R. 5 H. L. 418, cited in *Rand.*, Em. Dom. § 410, the right of access to the river Thames was held to appertain to every foot of the adjacent land of the plaintiff, though access had been habitually gained at a single point only. The same principle was held to apply where the tract in question abutted on more than one street. The deprivation of access to one street is an injury, although another street affords egress. *Railway Co. v. Fox*, 42 Kan. 490, 22 Pac. 583.

"I have made this review of the cases, most of which were cited by the learned counsel for the appellant, not to show that they expressly decide that a recovery can be had in such a case as this, but to show that it is not decided by the great weight of authority that there cannot be a recovery. Coming back to a consideration of the case upon general principles, and assuming that a property owner can recover such damages only as are special to him, and that this includes only damages consequent upon a deprivation or impairment of access to his property, I would hold that the facts set forth in this report, whether taken singly or together, do not raise a presumption of law or of fact that the claimants have not suffered such damage; and the report, being in due form, is sufficient to sustain the assessment. Is the omission of the viewers to report specifically that the appellant is an owner of land benefited by the vacation a fatal defect? In the *Centre St. Case*, 115 Pa. St. 247, 8 Atl. 56, it was decided that the assessment of special benefits for the purpose of raising a fund to pay those who have been damaged by the vacation of streets is a species of taxation, and within the power of the legislature. It was also held that under the act of 1858, now under consideration, the assessment might be made against the owner of the land benefited personally. Chief Justice Sterrett said: 'While it is, perhaps, true that such assessments are generally against the property benefited, and not against the owner thereof personally, the fact that the legislature has authorized them to be made against the owner, as in this case, cannot affect the constitutionality of the law. The object in either case

is to provide a mode of collecting the assessment, and that is wholly within the discretion of the legislature.' *Desty, Tax'n*, 286. It is, nevertheless, true that the assessment can only be made against the owner of the land, and that the assessment cannot exceed the benefit to the land. Both of these facts should appear expressly or by necessary implication in the report; but it seems that an omission to describe the land is not a fatal defect. In *re Vacation of Centre St.*, supra. But the ordinance annexed to and made part of the petition, and referred to in the report, contains this clause: 'Provided, that the Philadelphia & Reading Terminal Railroad Company shall pay all expenses and damages arising from the said revision, and that it shall enter into a contract with the city of Philadelphia, in a form to be approved by the city solicitor, covenanting to pay all such expenses and damages, and to indemnify the city of Philadelphia from any liability for or on account of the said revision.' It may be fairly inferred that the contract was entered into in compliance with the condition, for the report states that the revision of the city plans contemplated by the ordinance was made and duly confirmed by the board of surveyors, and that the appellant, in the construction of its necessary works, had entered upon and occupied those portions of Ninth and Melon streets stricken from the city plan as aforesaid. The report further sets forth: 'The vacation of Melon street on account of the closing of Ninth street for the benefit of the Philadelphia & Reading Terminal Railroad Company was part of a general scheme or plan for the revision of plans of the city streets in the vicinity of Philadelphia & Reading Terminal Railroad Company, made necessary by the building of its elevated railroad to its new terminal station at Twelfth and Market streets, in the city of Philadelphia.' Under these circumstances, may not a fair presumption of such ownership of land as would make the appellant liable to assessment arise from the occupancy of it by works of the permanent character referred to in the petition and report? It is said that no such presumption can arise, because the report shows that all the land abutting on that part of Melon Street stricken from the city plan belongs to the Philadelphia & Reading Railroad Company; but it by no means follows that this is the only land which would subject the owner to assessment, nor am I convinced that the ownership contemplated by the statute must be in fee simple.

It appears with sufficient certainty that the appellant is in the actual occupancy of land which might subject the owner to assessment for benefits thereto, with works of a permanent nature, namely, an elevated road connecting with its terminal station at Twelfth and Market streets; that the ordinances were passed for the benefit of the appellant, and upon condition that it would pay the expenses and damages caused by the vacation of the streets; that it had actually received, and is in the enjoyment of, the benefits which were

intended; and it may be fairly inferred that it has complied with the condition by entering into the contract required by the ordinance. These facts, taken together, take the place of a formal and specific averment of the ownership of land. But, say the counsel for the appellant, the roadbed of a railroad company cannot be assessed with benefits for such an improvement, and cite the sidewalk and paving cases in support of the proposition. But, as has been seen, this is not an assessment against the roadbed, but against the owner. The cases referred to were decided principally upon the ground that the improvements then under consideration could not, from their very nature, be a special benefit to the roadway of a railroad company, but the vacation of a street may be, and manifestly was in this case, a benefit; and when we come to the question of ownership it makes very little difference whether the appellant owns the roadbed in fee or has only the right of way. *Junction R. Co. v. City of Philadelphia*, 88 Pa. St. 424. I would therefore hold that the omission referred to in the assignment of error under consideration was not, under the circumstances, fatal to the report. In order to prevent misunderstanding, however, it should be stated that this is not put upon the ground that the contract referred to in the ordinance, even if entered into by the appellant, would entitle the claimants to recover damages if their property is so situated that it has not or could not receive legal injury in consequence of the vacation of the streets in question. The fact is referred to simply in connection with the facts as to the occupancy of the land as bearing upon the question raised by the assignment of error under consideration. For these reasons, in connection with the reasons assigned by the majority of the court upon the other two questions raised in the case, I would affirm the judgment of the court below.

"BEAVER, J., concurs in the foregoing dissenting opinion."

William W. Porter, Frederick J. Geiger, George Q. Horwitz, and Edward Brooks, Jr., for appellant William H. Bower. Frank M. Cody, M. Hampton Todd, and Wm. H. Staake, for appellant Jacob Stadelman. John G. Lamb and Thomas Hart, Jr., for appellee.

FELL, J. These appeals were taken from judgments of the superior court without special allowance on the filing of an affidavit that the cases involved the construction or application of the constitution of this state. It does not appear from the record that any constitutional question is raised, and an appellant cannot be permitted to decide for himself whether he is entitled to an appeal without allowance. Unless it clearly appears from the record that the cases come within one of the exceptions named in the seventh section of the act creating the superior court, there must be an allowance of the appeal; and the

petition therefor should set forth clearly and specifically what constitutional question is involved, and in what manner it is raised. As, however, the question of practice is new, and has not been provided for by rule, and as the cases are of public importance, and the judgments were rendered by a divided court, we overrule the motion to quash, and will consider the appeals as if before us by allowance of this court.

The proceedings in the quarter sessions were under the sixth section of the act of April 21, 1858 (P. L. 386), which places the owner of land in Philadelphia which has been injured by the vacation of a street upon the same footing to claim damages as the owner of land which has been injured by the opening or widening of a street. *Hare v. Rice*, 142 Pa. St. 608, 21 Atl. 976. This act was said by Mitchell, J., in the opinion in *Re Vacation of Howard Street*, 142 Pa. St. 601, 21 Atl. 974, to extend the system long established in Philadelphia for the assessment of benefits for local improvements, and the application of the money so raised to compensate others whose property has been taken, to consequential injuries caused by the vacation of streets, and to anticipate the provision of the new constitution, which secures compensation for consequential damages where property has been injured. Before the adoption of the new constitution, the commonwealth was under no obligation to make compensation for damages caused by the vacation of streets. *Paul v. Carver*, 24 Pa. St. 207. And for the purpose of this argument it may be conceded that since its adoption no such duty is imposed by the provision that compensation shall be made for property taken, injured, or destroyed, and that the right to recover damages for injury so resulting exists only by virtue of special legislative provision: *McGee's Appeal*, 114 Pa. St. 470, 8 Atl. 237. But the right to recover damages caused by the vacation of streets in Philadelphia has been conferred by the legislature, and the real question raised by these appeals is whether the claimants are within the right conferred. They are not owners of properties which abut on the part of Melon street which has been vacated, but by the vacation of a part of the street their properties are shut off from direct access to the system of streets to the east. The properties are left in a cul de sac, and their market value is lessened thereby. The plaintiffs have sustained a loss, for which they are entitled to recover, unless the right to recover for injuries caused to private property by the vacation of a street is limited to those whose properties abut on the part of the street vacated. The question raised is an important one, as affecting not only proceedings under the special act of 1858, but also those instituted under the general act of May 16, 1891 (P. L. 75). For the loss or inconvenience caused by the vacation of a street which those who own properties abutting thereon share in common with the community at

large there can be no recovery. Where their loss does not differ in kind from that sustained by all others who have occasion to use the street for the purpose of travel, it is *damnum absque injuria*. But the owners of properties which have depreciated in value by reason of the closing of the street have sustained an injury in their property rights which is peculiar to themselves, and which is different in kind from the injury sustained by those who use the street for travel only. The injury is not of the same kind, differing in degree only. It is an additional injury, caused by the impairment of an entirely distinct right,—the special right of ingress and egress. The interest of the public in a highway consists wholly in the right of passage, with the incidental right to do all acts necessary to keep it in repair. The owner of land fronting on a highway has an additional interest, which must be regarded as property, and which, when the right to recover has been given by the state, will sustain a claim for compensation. Such an owner, where the street has been laid out or established by his grantor, is a purchaser by implied covenant of the right that the street shall remain open; and the vacation of the street by the municipal authorities will not divest his right to have the space left open as a street. This private right of way as appurtenant to the land is wholly distinct from the public right of passage. Notes to *Dovaston v. Payne*, 2 Smith Lead. Cas. Eq. 167. Where the street has been established by the municipality, and a part of the land of the adjoining owner has been taken without compensation, except the consequential benefit to the remainder, and he has made expenditures in the faith that the street will remain open, he has a right or privilege which partakes of the nature of property. In *Hare*, Const. Law, pp. 376, 377, it is said by the learned author: "The whole argument may be summed up in the general proposition that the opening or mapping out by the state or by an individual of land as a street is a pledge that it shall not be closed or appropriated to a different and less beneficial purpose, which cannot be violated without a breach of faith to subsequent purchasers and builders. We may therefore believe that the right of the owner of a shop or dwelling to the use of the adjacent streets, or, at all events, of that on which the building is situated, is, if not as easement or incorporeal hereditament, an incident or appurtenance without which the building would be valueless, and of which he cannot justly be deprived without compensation; or, as the principle was accurately stated in another case, besides the public right of way or passage, there is a private right in the owners of the land on either side, resulting from an implied agreement that the street shall be kept open as a means of transit, and for the unobstructed access of light." Where the part of a street in front of a property is vacated, the owner's right to compensation is

conceded, but it is denied unless there is an actual vacation and closing of the part of the street on which the property abuts. It is evident, however, that without the impairment of the owner's outlet in one direction his property may be rendered comparatively worthless by a change in the physical condition of a street. To draw the line between owners who may and owners who may not recover at the point where the deprivation of access is total, is to draw it arbitrarily. The abutting owner's special right in a street as a means of access to his property is not limited to the part of the street on which his property abuts. Such a limitation of the right would deny him compensation if all of the street except the part immediately in front of his property were vacated. His right is the right of access in any direction which the street permits. As affecting this right, no distinction can be drawn between a partial and a total deprivation of access. The impairment of the right is a legal injury, differing in degree only from its total destruction. If the street is vacated on both sides of his property, so as to cut him off from other streets, his means of access is as effectually destroyed as if the entire street were vacated. If the street is vacated on one side only, and his property is left at the end of a *cul de sac*; if the street is decreased in width, so as to be impassable to vehicles; or if one means of access is taken away by the closing of a back street or alley,—his injury may be less, but the difference is one of degree only. In either case he has sustained a loss by the destruction of an important element in the market value of his property, and he has been injured in a legal sense.

There seems to be but one answer to the questions propounded by the learned president judge of the superior court in his dissenting opinion: "Are we prepared to declare in this case that access to the claimant's properties has not been impaired? Can the court say to these claimants, 'One opening to your properties is sufficient for your purposes; therefore no legal injury has been done to you by closing the other'? Could we say that if their properties fronted on two parallel streets, or were on the corner of two streets, one of which was vacated? Is it not more in accord with sound principles to say that their right of access was not limited by the frontage of their properties, but extended to the two intersecting streets, and that it is for the jury to say whether, under all the circumstances, the claimants have suffered substantial damages in consequence of the closing of one mode of access?" We have the distinct finding by the jury, approved by the court of quarter sessions, that the appellants' special right of access to their properties has been impaired by the vacation of a part of Melon street, and that they have sustained a property loss thereby. The act of 1858 provides a remedy for loss occasioned the owner of land in Philadelphia by the opening, widening, or vacation of

streets. We do not see how the court could say as matter of law that the claimants' means of access to their properties were not seriously impaired, or how it could, on principle, deny them the right to recover for the loss they sustain because their properties did not front on the part of the street which was vacated. All that can be said for or against the right claimed has been so well said in the opinions filed by the learned judges of the superior court that further discussion of the subject is unnecessary. The precise question raised has not been decided in any of our cases, and because of the difference in legislative and constitutional provisions but little aid can be had in its consideration from the decisions in other states; but we believe that the conclusion which we have reached is in harmony with the trend of our decisions and with the weight of authority elsewhere. On principle, the cases under consideration are almost parallel with Mellon's Appeal, 160 Pa. St. 614, 28 Atl. 991, which has been so fully discussed in the opinions filed. Indeed, it is difficult to see how that case can stand as an authority unless these appeals are sustained. In *Railroad Co. v. Walsh*, 124 Pa. St. 544, 17 Atl. 186, the property was at the corner of two streets, one of which was obstructed. In *Railroad Co. v. Ziemer*, 124 Pa. St. 560, 17 Atl. 187, damages were awarded for injuries to a property fronting on a cross street; and in *Snyder v. City of Lancaster* (Pa. Sup.) 11 Atl. 872, damages were awarded to the owner of a property not fronting on the street opened.

The difficulty in defining the limits where the right to compensation shall end cannot be urged as a valid objection to the claims of the appellants. To entitle the owner of land to recover, the loss must be one which he, as owner, has suffered by reason of the depreciation in value of his land. The basis of his claim for compensation is that his land has been lessened in value, not that he has suffered in common with others, or to a greater extent than others, because of something peculiar to himself. The difficulty in assessing damages is no greater than that which a jury meets in all such cases in ascertaining the extent to which properties in the vicinity have been benefited, and in making assessments therefor. To sustain the right of a claimant to compensation because of the vacation of a street, it must appear that the loss results from the depreciation in value of his land because of the change in the street; and his loss must be direct and proximate, and so obvious and substantial, as to admit of calculation.

As to the failure of the viewers to report specifically that the Philadelphia & Reading Terminal Company was the owner of the land benefited, it is sufficient to say that the report, as a whole, contains enough to supply the want of that formal averment. Reference is made in the report to the general scheme or plan of revision to enable that company to construct its elevated road; the ordinances providing for the same are recited;

and it is further stated that, "In the construction of the Philadelphia & Reading Terminal Railroad and its necessary works that company has entered upon and occupied a portion of Ninth street so stricken from the city plan, and also that portion of Melon street which has been stricken from the city plan as aforesaid." In *Re South Abington Road*, 109 Pa. St. 123, it is said: "The presumption is that the requirements of the statutes have been complied with by the viewers, and therefore it is not necessary specifically so to state in the report unless specifically required by the acts regulating the subject." In that case it was held that it was not necessary for the report to show that notice had been given to the landowners, or that the viewers had endeavored to obtain releases, or that they had taken into consideration the advantages accruing to the landowners from the opening of the street. It was also presumed that the route of the road was within the jurisdiction. For these reasons, in connection with those stated in the dissenting opinion of the learned president judge of the superior court, we think that the judgments of the court of quarter sessions should have been affirmed.

It was error on the part of the jury to include in their awards damages caused by the vacation of a part of Ninth street. As suggested in the opinion of the superior court, this error may now be corrected by the filing of releases. The judgments are reversed, and the records are remitted to the court of quarter sessions of Philadelphia, with direction to enter judgments for the appellants in the filing of proper releases.

(182 Pa. St. 530)

IN RE MITCHELL'S ESTATE.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

CLAIMS AGAINST DECEDENTS—LIMITATIONS—CHARGES ON REAL ESTATE—TRUSTS.

1. Even if a will charges debts of testator on his real estate, the lien of the debts will be lost by statutory limitation, unless the will also creates an express trust for their payment.

2. A trust giving testator's debts a lien on his real estate unaffected by statutory limitation is not created by his will directing generally that all his debts be paid as soon as may be, devising specified land to certain sons, and giving the residue of his real estate to the remaining son, thereafter directing that said son pay three-fourths of all testator's debts and legacies, and that another son pay the remaining fourth thereof, dividing his personal estate among his children equally, and appointing as executors the two sons directed to pay the debts.

Appeal from orphans' court, Huntingdon county.

In the matter of the estate of Samuel Mitchell, deceased. From a decree refusing an order to sell real estate for payment of debts, Thomas Mitchell, the surviving executor, appeals. Affirmed.

W. McK. Williamson, for appellant. Charles G. Brown, for appellee.

STERRETT, C. J. This appeal by the surviving executor of Samuel Mitchell, deceased, is from the decree refusing an order to sell, for payment of debts, the real estate of which his testator died seised in June, 1887. The petition for order of sale was not presented until March 25, 1896, more than eight years and nine months after testator's will was probated. At the time of his decease there was no unpaid debt that was then, or ever had been, a lien of record; nor was any action to recover unpaid debts commenced against the executors or devisees within five years, or at any time prior to presentation of the petition; nor was there any written statement of any such debt filed in the prothonotary's office. In short, there was nothing in the case to justify the issuance of an order of sale unless such a charge or trust, for the payment of debts, was created by the will as had the effect of continuing their lien beyond the statutory period. Appellant's contention in the court below, as here, was that the lien of testator's debts was thus extended, by the provisions of the will, indefinitely, and without limit, except only the limitation that may arise from the presumption of payment by lapse of time. The learned president of the court below held that there was nothing in any of the provisions of the will that could have any such effect, and he accordingly discharged the rule to show cause why an order to sell should not be issued. Our consideration of the question thus presented has led us all to the conclusion that there is no error in the record, and the decree might well be affirmed for reasons given in the opinion of the court below. In order to create a testamentary charge on real estate it must be found that such was the testator's intention, and, while it need not be declared in express terms, it must be disclosed by the will itself, and cannot be inferred from the mere fact that at the time of its execution the testator owned no personal estate. *Duvall's Estate*, 146 Pa. St. 176, 23 Atl. 231; *Dickerman v. Eddinger*, 168 Pa. St. 240, 32 Atl. 41. A mere direction by a testator that a devisee shall pay a legacy does not thereby create a charge on the land. *Cable's Appeal*, 91 Pa. St. 327. Nor is a direction that one devisee pay to another devisee, so as to equalize them, sufficient to charge the payment on the land. *Sauer v. Mollinger*, 138 Pa. St. 338, 22 Atl. 89. In *Duvall's Estate*, supra, it was said at page 185, 146 Pa. St., and at page 233, 23 Atl.: "The proposition that a devisee of land, who acts as executor of the will, must either refuse to accept the unconditional devise, or render himself liable to pay pecuniary legacies, is wholly untenable." See *Hackadorn's Appeal*, 11 Pa. St. 90. While the blending of the real and personal estate in the residuary clause will create a charge on the land (*Markley's Estate*, 148 Pa. St. 538, 24 Atl. 75; *Bennett's Estate*, 148 Pa. St. 139, 23 Atl. 1108), it has been decided that a devise of lands, followed, in a subsequent clause of the will, by a be-

quest of all the testator's personal property to the same persons to whom the lands were devised, with a direction that the legatees shall pay testator's debts and funeral expenses, is not such a blending of the real and personal property by the testator as will operate to create a charge on the real estate. *Van Vleet's Appeal*, 102 Pa. St. 574. As to the question of testamentary charge, that case appears to be decisive of the one under consideration. It is quite clear from all the authorities that there is no such charge in this case.

But it is not sufficient merely to show a charge on the real estate. To convict the court of error in this case it is necessary not only to show that the debts were made a charge upon the land, but also that an express trust was created for their payment. Unless such trust was created, the lien of the debts would be lost by statutory limitation, notwithstanding the fact that they were made a charge upon the land by the will. If there is a trust, as contended by appellant, what is its character, and is it such as to impose an indefinite lien of unsecured debts upon the lands? In the first line of his will the testator provides as follows: "It is my will, and I do so order, that all my just debts and funeral expenses be fully paid and satisfied as soon after my decease as can be conveniently done." After making provision for his wife, during life, in the occupancy of the house in which he then lived, he devised to his son John 40 acres of land and improvements, then occupied by him. The residue of his real estate, except a small tract of woodland, which he afterwards gave to his two sons, he devised to his son Thomas. This devise to Thomas embraced about 100 acres, including the house previously given to his widow for life. Then, after bequeathing several pecuniary legacies, he provides as follows: "It is my will, and I so direct, that my son Thomas Mitchell shall pay three-fourths of all my debts, as also three-fourths of the legacies to my daughters; and I order and direct that my son John Mitchell shall pay the remaining fourth of said debts and legacies." After dividing his personal estate among his children in equal shares, he appoints his two sons, Thomas and John, executors. There appears to be no direction in the will for a sale of the land, or any part thereof, to pay the debts or the legacies. If any express trust was created by the will, it has not been pointed out, nor have we been able to discover it. There is certainly no language therein creating such trust. If there be a trust at all, it must be an implied one; but, under all the authorities, that is not sufficient to charge the debts as an indefinite lien on the real estate. In *Agnew v. Fetterman*, 4 Pa. St. 56, the will began with a direction to pay debts, which was followed by a devise in fee to the wife, who was appointed executrix, and concluded with authority to sell sufficient real estate to pay debts. It was held that no trust was created which took the claims of creditors out

of the statute of limitations. Mr. Chief Justice Gibson, speaking for the court, says that, to take a claim out of the protection of the statute, the trust must not be an implied one; and he further says, "In view of the stringent tendency of the modern decisions on the statute, I would add that it be not only express, but precise and clear." Speaking of the will in that case, he says, "There is not a syllable in the devise to create an express trust." It was also said to be not even a case of charge. The widow took the land "burdened with no more than the law imposed on it, and the direction to pay had relation to debts which might be recoverable." In *Sample v. Barr*, 25 Pa. St. 457, the testator devised to his sons "what part of his land should remain after payment of debts," and the court held that the debts lost their lien at the expiration of five years, under the act of 1834. As was there said by Mr. Justice Woodward: "To assume the existence of the debt, which the statute says shall be proved, and then to argue that the will devised only what remained after the payment of debts, is to sacrifice the statute to a petito principali." The provision for testator's wife after his honest debts were paid was held in *Miller's Appeal*, 60 Pa. St. 404, not to create a special charge. Mr. Chief Justice Thompson, speaking for the court in that case, said: "It is argued that herein is an express trust created of the real estate to be concurrently liable with the personal estate for the payment of debts. That it is express is utterly untenable. If it be anything, it is but the implication of a trust. But would that supplant the charge created on the realty for the payment of debts? Certainly, I think, not; and this the case of *Agnew v. Fetterman*, 4 Pa. St. 56, shows." In *Trinity Church v. Watson*, 50 Pa. St. 513, the subject is exhaustively discussed. That case decides that a general charge on real estate by devise for the payment of debts does not create a testamentary lien of unlimited duration, subject only to the presumption of payment by lapse of time. Mr. Chief Justice Agnew there said: "It is true, there is a trust, and the devisee takes nothing 'till the creditor is paid.' But the title of the creditor, to be let in upon the trust, lies in his debt; and his relation to the trust is indefinite and unknown until this title be shown. But, in doing this, clearly his debt is subject to the law which regulates its recovery. The very feature which distinguishes the debt here is its indefinite, secret, and dormant character, requiring to be individuated by proof to give it a title to participate in the trust. * * * On no principle of sound reason, state policy, or legislative intent, can we find a distinction between a creditor standing upon nothing but a general direction for the payment of debts and any other creditor whose lien expires in five years. The act of 1834 was passed to curb all liens, of record or not; and why, upon the mere reasoning of cases decided before its passage, suffer a door to be opened to the intrusion of unknown and un-

numbered heirs raked up from the ashes of the past within the period of twenty years? If it be asked, why distinguish between a devise for specified debts and one generally for creditors? I answer that the former are equivalent to legacies charged upon land; indeed, to the devise of the land itself to the creditor, who, being thus known and recognized by the testator, stands in no need of proof of his debt, which can be ascertained and removed by payment or sale. He is well known, and upon equal footing with the devisee of the land; while one who claims but as belonging to a class is neither known nor recognized, even by the will, except upon proof that he belongs to the class. His case is clearly adversary until he has maintained his right to seat himself upon the trust. He falls within the mischief the act of 1834 intended to remedy, and should be governed by its terms, which literally include him." Citations to the same effect might be multiplied, but, inasmuch as the principle controlling the case at bar has been sufficiently elaborated, further reference to authorities is deemed unnecessary. The principle is unimpaired by recent decisions. One of these is *Seltzinger's Estate*, 170 Pa. St. 531, 32 Atl. 1101. In that case our Brother Dean, recognizing the principle, states the rule with much force and clearness. The foregoing considerations rule this case, and make it unnecessary to consider the numerous authorities relied on by the learned counsel for appellant as to what constitutes a charge of debts upon the land. The assignment of error is not sustained. Decree affirmed, and appeal dismissed, at appellant's costs.

(123 Pa. St. 514)

WRIGHT et al. v. WARRIOR RUN COAL CO.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

LANDLORD AND TENANT—COAL LEASES—INTERPRETATION—LIABILITY OF LESSEE FOR ROYALTY—SETTLEMENTS.

1. A lease provided that the lessee should pay the lessor 15 cents per ton for all coal mined of larger size than chestnut, and half price for chestnut coal. When the lease was made, marketable sizes of coal were (in the regular order of gradation, beginning with the largest) lump, steamboat, broken, egg, stove No. 3, stove No. 4, and chestnut. These were ordinarily produced by separating the coal as mined by means of screens of the proper sizes. When more of the smaller sizes was demanded than ordinarily resulted in that way, lump and steamboat coal was broken, and then separated by the screens into the different smaller sizes. The five smaller sizes were called "prepared coal." At that time the demand was largely limited to lump and steamboat coal, and the total production of chestnut did not exceed 15 per cent. The larger sizes of "prepared coal" were also in greater demand than the smaller. About 9 per cent. of the product was still smaller than chestnut, and went to the waste dump. Soon after the lessee began operating, the demand for lump and steamboat coal almost ceased, while the demand for stove and chestnut greatly increased; and there grew up a demand for "pea" coal, a much smaller size than chestnut. Later, "buckwheat"

coal, a still smaller size, became marketable. The change in the demand required the breaking up of the lump and steamboat, resulting in an increased proportion of chestnut, pea, and buckwheat coal, and of dust, etc., which went to the waste dump. *Held* that, though the parties did not contemplate payment of royalty on the sizes marketed smaller than chestnut, the lessee was liable for royalty at the rate of 15 cents per ton on the increased proportion of pea coal produced, and also on the increased proportion of chestnut.

2. In an action to recover such royalties, it appeared that from 1873 to 1881 the production of chestnut coal was from 20 to 30 per cent., instead of 15; that on a return being made in June, 1878, showing over 50 per cent. chestnut, the lessor complained, but finally accepted payment and receipted in full at 7½ cents per ton for chestnut, on plea of exigency of the market, and appeal to his generosity by the lessee. He continued to accept payment and receipt in full on the same basis until six months before his death, in September, 1881. *Held*, that he waived his right to royalty at 15 cents per ton for the increased proportion of chestnut so settled for.

3. But his representatives could recover such royalty on the increased proportion of chestnut after his death, though they accepted payments at the same rates as deceased, in the absence of anything to show that they had knowledge that the production of chestnut was in excess of that within the meaning of the contract, or of any exigency appealing to their generosity to prompt a waiver of their rights.

4. The parties contemplated payment for only such coal mined as should be marketed, and hence the lessee was not liable for royalty on coal consumed under the boilers in carrying on the mining operations.

Mitchell, J., dissenting.

Appeal from court of common pleas, Luzerne county.

Bill by Annie A. Wright and others against the Warrior Run Coal Company to recover rent or royalty alleged to be due on a lease of coal land, for an account, and for an injunction. From a decree in favor of plaintiffs, defendant appeals. Modified.

Alexander Farnham, for appellant. George R. Bedford and H. W. Palmer, for appellees.

DEAN, J. On 28th November, 1864, by sealed agreement, Hendrick B. Wright, for himself and as guardian of his minor son, leased to Abel Barker and four others two adjoining tracts of land, one containing 125 acres, and the other 163 acres, in Hanover township, Luzerne county, for the purpose of mining coal thereunder, with privilege to farm the same, and also to cut timber therefrom to be used in their coal operations. The term was for 10 years, with the right to the lessees to an extension of 99 years at the end thereof. The consideration to be paid by the lessees is expressed in the following clause of the contract: "The said party of the second part shall pay the party of the first part the following prices per ton for all coal mined during the said term, the ton in all cases to be twenty-two hundred and forty pounds (2,240 lbs.) prepared coal. Chestnut coal to be half price; but coal shipped from the mines, which shall not have been prepared, shall not be subject to abatement because not prepared.

For the first fifty thousand tons of coal mined in any one year, fifteen cents (15 cents) per ton; for the next twenty-five thousand tons in the same year, twelve cents (12 cents) per ton; and for any excess over and above seventy-five thousand tons in any one year of the term, ten cents (10 cents) per ton." The royalties were to be paid quarterly, commencing with the date of the lease, and a stipulation for a minimum quarterly payment of not less than \$1,250, the enforcement of the minimum payment, however, to commence only with the second year. It was further stipulated that, in case the term should be extended for 99 years, the extended term should be subject to all the conditions and covenants of the 10-years term, except that instead of the shifting scale of prices, determined by the quantity mined, the price should be "15 cents per ton for all quantities mined, chestnut coal, as hereinbefore stated, to be half price, or seven and one-half cents per ton." As a mining corporation by the lessees was contemplated, it was provided they should have power to assign such lease to the corporation. Accordingly, on the organization of this defendant corporation, about two months afterwards, the lease was assigned to it, and mining operations were commenced. From that date, January, 1865, until August 21, 1893, the defendant mined and shipped 1,460,760 tons. Plaintiffs admit that defendant accounted and paid for 1,298,336 tons, but allege that the difference, 162,724 tons, has not been paid for. This difference was made up of 156,400 tons of pea coal and 6,024 tons of buckwheat coal, shipped and sold during the later years of operations under the lease. In addition to these quantities shipped and sold and not paid for, defendant burned under its boilers, for steam purposes, 75,000 tons of large size coal, and 80,000 tons of pea and buckwheat coal.

The defendant having refused to pay for the pea and buckwheat coal shipped and sold, or for any coal used at the mine for steam purposes, plaintiffs filed this bill. The material complaints are: (1) That defendant has negligently and unskillfully mined the coal, so that the roof at places has fallen, and thereby rendered inaccessible large quantities of coal in place, which are now lost to plaintiffs. (2) That defendant, by changes in machinery and methods of preparing the coal for market, has largely increased the quantity of chestnut coal, for which the lower royalty is paid, and, further, largely increased the quantity of pea and buckwheat coal, for which it denies its liability to pay any royalty. (3) That defendant has refused to render proper and full accounts of the coal actually produced and sold on which royalties should be paid under a correct interpretation of the contract. The prayers are: (1) That defendant account for all coal rebroken for the purpose of increasing the product of chestnut and smaller sizes, and for the coal rendered unavailable by its negligent, unskillful, and improper mining, and also account

for the whole product of the mines actually mined upon which it ought to have paid the stipulated royalty. (2) That defendant be restrained from further mining operations on the premises until it pays or secures to be paid all sums of money due, or for which it is liable to the plaintiffs, and upon its failure to make payment or furnish such security during a reasonable time, to be determined by the court, then that the lease be declared forfeited, possession of the premises be decreed and awarded to the plaintiffs, and the defendant be enjoined from prosecuting its mining operations or interfering with the plaintiffs' possession or control of same. The three averments of the bill, as stated, were denied by defendant, and the issue thus made up was heard by Hon. L. H. Bennett, as examiner and master; and he, before the ending of the hearing, having been elected judge of common pleas of Luzerne county, by agreement of the parties in writing, continued both as master and judge of the court until final decree.

As to the first complaint, averring damage from negligent and unskillful mining, the master, on competent evidence, finds the facts against the plaintiffs; and we discover nothing in the evidence to warrant us in disturbing this finding, and further notice will not be taken of it in appeal by plaintiffs from same decree.

As to the averment in the second specification of complaint, the master finds as a fact that, before and at the date of this contract, there were "seven sizes, beginning with lump coal, as the largest, and ending with chestnut coal, as the smallest, size. The names of each were 'lump,' 'steamboat,' 'broken,' 'egg,' 'stove number three,' 'stove number four,' and 'chestnut,' respectively, and in that order of gradation as to size. Lump and steamboat coal (the latter being somewhat smaller than the former) were the larger pieces separated from the coal strata by the miner's blast. These came from the mine in the mine car, mixed with smaller pieces also resulting from the blasting operation. These smaller pieces which came from the mine in the mine car produced the other enumerated sizes, and, where a greater quantity of these was desired, some of the lump and steamboat sizes were broken for that purpose. In general, it may be said that the whole contents of the mine car, as mined and loaded into the car in the mines, and hoisted to the surface, was dumped into a chute leading to a series of iron bars located parallel with one another at the distance of five or six inches apart. The larger sizes of coal in the mine car, which did not drop through, but passed lengthwise over these bars, were lump and steamboat coal. That which dropped through or between the bars was screened and separated into the different sizes of broken, egg, stove of both sizes, and chestnut coal, already specified. But, in case this would not produce a sufficient quantity of the five sizes last named, the desired amount was obtained by passing lump and steamboat sizes between revolving cylindrical rollers having projecting

teeth with which to break or crack the coal, whereby these large pieces were broken into sizes like those which had passed between the bars, and these pieces, thus broken, were screened in the same manner into the five sizes specified. Coal which passed through small meshes constituting the first screen went to the dirt or culm bank, as it is called, and was not marketed, because there was no sale or demand for such small sizes. Coal that passed over the meshes of the first screen, and through those of a larger size in a succeeding screen, was chestnut coal, the smallest size marketed. Similarly, that which passed over the meshes of the screen last referred to, and through larger ones in a further screen, was stove coal number four; and in like manner, by the succeeding screens of larger, graduated meshes, the larger sizes of screened coal, up to and including so-called 'broken coal,' having a cubic diameter of about four inches, were produced. The term 'prepared coal,' as then commonly understood in this locality, in all coal transactions, embraced the five sizes of screened coal already mentioned, to wit, broken, egg, stove of both sizes, and chestnut, but no other kind of coal. Lump and steamboat, on the other hand, were coal not prepared. Under the system of rollers and appliances for breaking and preparing coal at that time, even when all the lump and steamboat sizes were passed through the rollers, the total production of chestnut did not exceed fifteen per cent. of the product of the mine, including in such product not only the chestnut and sizes above that, but also still smaller coal, equivalent to nine per cent. of the mine product which went to the dirt bank in sizes that later came into use as pea coal. Much of the mine output in this section was lump and steamboat, and was used in the surrounding country in operating large furnaces for smelting iron ore, or under boilers for the purpose of generating steam. Lump and steamboat coal and the larger of the 'prepared' sizes were in far greater demand than the smaller sizes of prepared coal, and the market prices for the former were correspondingly higher. As a result, a large portion of the lump and steamboat coal was not then broken, and the production of chestnut, although not uniform, was much less than fifteen per cent., as above specified, and such of the latter as was marketed was much below that of any of the other kinds of coal in price. Whatever of chestnut could be sold at a profit was regarded as a saving of so much coal, incidentally resulting from the miner's blast, the handling of coal before it came out of the mines, and the roller process, which had for its purpose the production of the larger and more valuable sizes of prepared coal. The size of chestnut ranged, according to different collieries, from that which went over a screen with meshes one-half inch square, and through a screen with one-inch meshes (the smallest size and the least used), to that which passed over a screen of three-fourths inch meshes, and through one of one

and one-fourth inches (the largest and most prevalent size made). In some cases the lease prescribed given meshes for chestnut, and, where this was not the case, the sizes differed within the range above indicated, according to different operators."

This clear and concise statement of the facts by the master, relating to the preparation of the coal at the date of the contract, is fully borne out by the evidence. He then finds that, soon after defendant's operations commenced, the demand for lump and steamboat coal rapidly fell off, and within a very few years practically ceased, while the demand for stove and chestnut coal greatly increased; that, about five years after the date of the contract, pea coal, a much smaller size than chestnut, and which before that time was thrown into the dump as worthless, acquired a market value, and defendant commenced and continued shipments and sales of it; that, later, buckwheat coal, a still smaller size, became marketable, and defendant shipped and sold large quantities of it. To meet the changed demand, defendant ceased to produce for the market the larger sizes, such as lump and steamboat coal. To that end, it introduced additional rollers, which broke and rebroke the coal. It also introduced screens for the separation of the buckwheat coal; also, increased the size of the meshes through which the chestnut coal dropped, one-eighth of an inch. These and other changes in methods and machinery were adopted for the preparation of the coal to meet the new market demand. As a result, the master finds, some coal which under the old methods would have gone, in combination with bone and slate, to the dump, has been saved and paid for to plaintiffs, but that more than the equivalent of this saving, in consequence of the additional breaking to reduce it to smaller sizes, has been lost in dust and buckwheat coal, both being proportionately increased. And, although the master finds the motive for the method in preparation was only to create a salable product, he also concludes, to use his own language, that, while defendant "has not deliberately broken down coal for the primary purpose of avoiding the payment of royalties, yet the effect of this process has greatly diminished the value of the lessor's interest, when measured by the changed standard of production and payment of royalty. The lesser royalty prescribed by the lease for chestnut coal, and the fact that the defendant has never paid any royalty for pea or buckwheat sizes, have, in connection with the conditions of the market, contributed to the greater production of stove coal (the highest grade in the product), and, consequently, to a very large increase of chestnut and the smaller sizes; for the lesser market prices received for these smaller sizes have been more than counterbalanced in the greater one for stove coal, and in the lesser expenses on royalty account for the general coal product." The master then, by a course of reasoning which amply vindicates his conclusions, thus inter-

prets the contract: "In our opinion, nothing smaller than chestnut was to be paid for by the ton, and there was no intention of providing for payment on pea and buckwheat coal. This conclusion derives much strength, in our mind, from the fact that the lease, whether as regards the original or the extended term, expressly provides only half price, or seven and one-half cents per ton, for chestnut coal, the smallest size then known to the trade, and full price, or fifteen cents per ton, for all other kinds of coal to be paid for. A construction whereby pea and buckwheat coal, then unknown to the market by reason of their inferiority even to chestnut coal, should be paid for at double the royalty placed upon chestnut, and at a royalty equal to that fixed for all the larger sizes, would be unreasonable, and, in our judgment, clearly unwarranted." As to coal consumed under the boilers, he says: "Our further conclusion is that payment was contemplated for only such of these three products of coal mined as should be sold and marketed, and that the terms of the lease, viewed in the light of its subject-matters, do not contemplate any per ton royalty for coal that may be used under the defendant's boilers. While the terms of the lease in this latter respect are not as clear as they might well have been made, we are nevertheless convinced of the correctness of our conclusions from a consideration of its context,—the well-known methods of holsting and preparing the coal from the mines by means of the use of extensive steam power obtained by the incidental consumption of the coal itself, and the general purposes of the lease." And this last conclusion, the master shows, from the terms of the lease and invariable custom, to be a correct one.

But then arises another question, viz.: Even if, by the terms of the lease, at the date of it, it was not in contemplation of the parties that any less size than chestnut should be paid for, nevertheless is not the defendant, under a reasonable interpretation of the contract, answerable for additional royalty on account of the largely increased production of chestnut coal, altogether beyond the intention of the parties at the date of their contract, and because of the excessive production of pea coal, caused by the increased quantity of chestnut? The contract is silent as to what proportion of the whole product shall be chestnut, and be paid for at half price. The plaintiffs argue that the contemporaneous facts and customs of the mining business at the date of the contract must be assumed as having been within the contemplation of the parties, and that on such knowledge they contracted; that, when half price was fixed for chestnut coal, they meant half price for such quantity as resulted from mining and preparation in that mining territory at that date. The defendant, in reply, argues that the lease provides for breaking the coal, and that its very silence as to the extent it shall be broken, or the proportion of the sizes, leaves defendant free to adopt such methods for the future as will adapt the coal

to the market demand, without thereby increasing its liability for royalty. The master comes to this conclusion: "In our opinion, the terms of the lease fairly contemplate the breaking of the whole mine product into the different sizes of what was 'prepared coal' in 1864, with their proportionate percentages to one another, by means of the methods and appliances in general use at that time, and the manner then employed of operating such appliances, if the demands of the defendant's market for selling coal reasonably require the breaking and preparation of the product to that extent, and the operation be performed 'with as much economy and as little waste as may be'; and payment of royalty measured by this standard is all that the contract calls for. To this extent we concur with the position of counsel for the defendant; but we find nothing in the terms of the lease which contemplates the breaking of this mine product to a greater extent than that already indicated, and while new conditions of the market for the sale of the defendant's coal, in competition with other operators, have justified it in adopting methods and machinery by which not only all the mine product has been broken to prepared sizes, but to the smaller of these sizes, whereby a great proportionate increase of chestnut and pea coal has occurred, these were not contemplated by the contract, and therefore the plaintiffs are entitled to payments of royalty upon the standard above indicated." While it is difficult to demonstrate that such was clearly the intent of the parties, it is very easy to show that the argument of defendant leads to an unreasonable conclusion, and one that works palpable injustice to the landlord; for, if payment under the contract be measured by the preparation of the coal to any size which defendant thinks may suit the market, then, if the market demand is mainly for pea and buckwheat, and nearly all of it be crushed to those sizes, plaintiffs are entitled to almost no royalty. The size of coal the market demands, and will alone accept, will doubtless determine the size which defendant will prepare and ship; but it cannot deprive the lessor of his right of contract payment; that must be determined by what the parties assented to at the date of the contract, and by their contract, and not by something wholly unforeseen by either. It is sufficient to say that with a somewhat obscure agreement, and evidence vague, at best, to guide him, the master adopts that view which is most consonant with reason, and in no way conflicts with any of the terms of the written contract. In so doing, he follows the suggestions in *Navigation Co. v. Moore*, 2 Whart. 477; *Dunham v. Haggerty*, 110 Pa. St. 560, 1 Atl. 667; and *Lance v. Coal Co.*, 163 Pa. St. 91, 29 Atl. 755. We affirm his conclusion.

The master then finds that, at the date of the contract, the proportion of chestnut coal did not exceed 15 per cent. of the product of the mine, and that pea coal, which then went into the dump, equaled 9 per cent. of the prod-

uct; that from February 1, 1873, the date of settlement between lessor and lessee, to August 21, 1893, there were prepared as chestnut coal, in excess of this 15 per cent., 188,469 tons; and that, for every additional ton in excess of this percentage, there has been an excess of pea coal amounting to four-tenths of a ton, or 75,378 tons. On this the master computes royalty,—15 cents for excessive production of chestnut; for one-half the excessive production of pea coal, which, but for the new method of preparation, would have been large-sized coal, 15 cents; and on the other half, which would have been chestnut, 7½ cents. This last computation afterwards, on exceptions, the master, sitting as judge, found to be error, and that the whole of the excess of pea coal, on the evidence, should be treated as what otherwise would have been larger size than chestnut, and therefore rated at 15 cents per ton. As thus computed, the balance, with interest due from defendant to plaintiffs, was determined to be, on August 21, 1893, \$42,116.77.

Of the twenty-two assignments of error preferred by appellant, all except the thirteenth are to findings of fact and conclusions of law touching the master's interpretation of the contract. While we have considered them all, we are unable to sustain any one of them, except the thirteenth, and this we sustain only in part. In this assignment, it is claimed that the knowledge of the lessor, plaintiffs' ancestor, of the percentage of production of chestnut coal, and his receipt of the royalty prices, fixed the interpretation of the agreement, not only for himself, but for his descendants, who now represent him in the contract. There is nothing in the evidence, in this particular, tending to show that at that early date there was any question as to the interpretation of the contract by either party. The coal business was at the date of the accounts from the settlement, in 1873, to 1881, in a very depressed condition. The returns during that period showed a production of chestnut coal running from 20 to 30 per cent., or 5 to 15 per cent. above the average at the date of the contract. The lessor, on June 3, 1878, had received a return of coal mined, from Davis, sublessee of defendant. It showed lump and prepared coal, 4,871½ tons; chestnut, 2,489 tons. Of this, the lessor, although the letter is not produced, evidently complained; for plaintiffs offer in evidence the reply of Davis, June 6, 1878, which to some extent discloses the grounds of the complaint. It says: "The coal mined at Warrior Run cannot be sold for iron purposes, nor for steam, and consequently has to be broken down into domestic sizes, and hard to sell at that. The return, instead of being, as you say, in chestnut, more than half the product of the mine, is as follows: 7,360 tons, total amount mined, 2,489 tons chestnut, or about 30 per cent., which is the amount we are obliged to make in these times, and which is no greater than Lehigh Valley Coal Co., Swoyer, and

others are making outside of lump-coal shipments. Now, Colonel, I appreciate your former generosity, and know your liberality," etc. This assumes that complaint had been made by Col. Wright, the lessor, that an undue quantity of chestnut coal was being produced. The lessee seeks to excuse it, because of an exigency. The lessor accepts payment, however, notwithstanding the excess of chestnut, at half the price of lump, and receipts in full; and so he continues to accept payment, and receipt in full, down to March 7, 1881. He died September 2, 1881. Clearly, he had full knowledge of the excessive production, and protested against it, but, being appealed to by Davis, waived his right, and receipted in full; and so with each return up until his death. This was not an interpretation of the contract favorable to defendant. Rather, it was directly the reverse. But, with full knowledge of his right, every receipt of money in full, on an account, embracing the excess, was a waiver of his right to insist on a strict interpretation of the contract in his favor. The payments may not have been in full of what was his due, but he chose to accept them, and his representatives cannot now go behind them. It was an act of generosity on the part of the lessor, which he had the right to exercise. This is not the case of a false return accepted by the lessor, as in *Dunham v. Haggerty*, 110 Pa. St. 560, 1 Atl. 667; it is a correct statement of the fact, with an appeal to generosity for a reduction in price. And it does not follow that either his knowledge or generosity must be imputed to his representatives, so far as concerns payments made to them. There is no proof of knowledge on their part that the production of chestnut coal was in excess of that within the meaning of the contract, nor any evidence of an exigency appealing to their generosity to prompt a waiver of their right.

We are of opinion, therefore, that computation of the excess, on the interpretation of the contract as adopted by the learned master and judge of the court below, should be made only on returns dated from the last receipt of Hendrick B. Wright, next to and immediately preceding his death. In all other particulars the master's very able and clear report is approved, and his decree, as herein modified, is affirmed. It is ordered that the record be remitted to the court below, that computation be made as herein directed; costs of this appeal to be paid in equal parts by appellant and appellees.

MITCHELL, J. (dissenting). I would reverse this judgment, as making a new contract for the parties, in the light of subsequent events, in place of the one they made for themselves. I do not find any basis in the lease for the master's assumption that it con-

templates "the breaking of the whole mine product into the different sizes of what was prepared coal in 1864, with their proportionate percentages to one another, by means of the methods and appliances in general use at that time." It is in the highest degree unjust and illogical to suppose that in an agreement made to extend certainly over 10 years, and at the lessee's option for 99 more, the latter cut themselves off from improved methods of mining, and bound themselves to the methods, appliances, and proportions of product commonly used at that date. On the contrary, the lease, in my view, gave the appellants the clear right to produce the different sizes of prepared coal without restriction as to the proportion of each to the whole. They were to pay the same royalty on all the sizes from the "lump" to "stove No. 4," but could produce as much or as little of each as, in their judgment, would be most profitable, and therefore could reduce it all to stove No. 4,—the smallest prepared size on which the full royalty was payable. This is all that, in fact, they have done. The market calling for a larger proportion of the small sizes, they have passed the coal through the rollers twice. Incidentally, in so doing, they have made more of the chestnut size than before; but the production of chestnut was always incidental, both at the time of the contract and now. If the demand for chestnut had ceased altogether, so that it became unsalable, appellants would nevertheless have had to pay for it, for they had taken that risk in their bargain, and it would have been their loss. In fact, the demand increased, and that is their legitimate profit. Of course, if larger sizes, requiring full royalty, were intentionally reduced to chestnut, they would still have to pay full royalty, for the contract does not contemplate the production of chestnut except as a necessary incident to the production of the stipulated "prepared" sizes. But no such evasion of royalty appears in the case. On the contrary, the master finds explicitly that the additional quantity of chestnut is necessarily produced by the reduction of lump and steamboat to the smaller sizes, and that the process of double rolling is the least wasteful plan of reaching the desired result.

I do not understand the appellants' argument to claim, as the opinion of the court states it, that they could prepare the coal "to any size which the defendant thinks may suit the market," but only to any of the stipulated sizes paying full royalty. The former claim, if made, is clearly too broad; but, with the limitation to sizes paying full royalties, the claim not only avoids entirely the *reductio ad absurdum* of the court, but is the just and fair interpretation of the contract, and shows that the appellants were at all times within their legal rights, and have accounted fully for all of complainants' just demands.

(20 R. I. 263)

MURRAY v. ALLEN, Town Treasurer.

(Supreme Court of Rhode Island. Oct. 28, 1897.)

SURFACE WATER—FROM STREETS—LIABILITY OF MUNICIPALITY.

A town is not liable for injury to abutting property from surface water, though it is turned thereon by reason of the highway and the drain thereunder being allowed to remain out of repair.

Action by Ann Murray against John B. Allen, town treasurer. Defendant demurs to declaration.

Charles H. Page and P. H. Quinn, for plaintiff. Albert R. Greene, for defendant.

PER CURIAM. We think the case stated in the declaration is within the decision in *Wakefield v. Newell*, 12 R. I. 75. In *Inman v. Tripp*, 11 R. I. 520, relied on by the plaintiff, the city of Providence was held liable, not because of the turning of surface water onto the estate of an abutting owner, but because it had so changed the grade of other streets than that on which the plaintiff's land was situated as to allow the surface water which had flowed down such other streets, and other surface water which had formerly been ponded at some distance from the plaintiff's estate, to run down the street on which the plaintiff's estate abutted, and thence onto the plaintiff's land. The allegation in the present suit is merely that the town has negligently allowed a drain under the highway, and the highway itself, on which the plaintiff's land abuts, to be and remain out of repair, in such manner as to turn the surface water onto the plaintiff's land. And see *Almy v. Coggeshall*, Index SS, 139, 36 Atl. 1124. Demurrer sustained, and case remitted to the common pleas division for further proceedings.

(20 R. I. 264)

McGOWAN v. INTERSTATE CONSOLIDATED ST. RY. CO.

(Supreme Court of Rhode Island. Oct. 26, 1897.)

DAMAGES—ADEQUACY—PERSONAL INJURIES.

The supreme court will not interfere with a substantial award of damages for personal injuries as being inadequate, unless the verdict is such as to shock the conscience, and clearly shows that the jury must have been influenced by passion or prejudice, or that they proceeded upon some erroneous basis in arriving at their conclusion.

Action by Katherine E. McGowan against the Interstate Consolidated Street-Railway Company. There was a verdict for plaintiff, and she petitions for a new trial. Denied.

Edwards & Angell, for plaintiff. Frank S. Arnold, for defendant.

TILLINGHAST, J. The plaintiff petitions for a new trial, on the ground that the damages awarded by the jury were grossly inadequate to compensate her for the injuries

sustained through the negligence of the defendant corporation. The amount awarded to her was \$5,000. It is true that the evidence shows a case of very severe and probably permanent injury; but, where substantial damages are awarded in an action of this sort, courts are very reluctant to grant a new trial on account of the inadequacy thereof. See *Manufacturing Co. v. Smith*, 9 Pick. 12. In personal torts there is no scale by which the damages can be graduated with certainty, and hence they admit of no other test than the intelligence of the jury governed by a sense of justice, in view of all the facts of the particular case. 1 Wat. New Trials, 451. And unless the verdict is such as to shock the conscience, and clearly show that the jury must have been influenced by passion or prejudice, or that they proceeded upon some erroneous basis in arriving at their conclusion, the court will not interfere therewith. See *Sedg. Dam.* (6th Ed.) 768, note 3. Such a case is not presented by the record before us. The extent of the plaintiff's injuries, and the money damages which would adequately compensate her therefor, were questions upon which different minds might very naturally and very honestly arrive at different conclusions. The jury were in the best possible position to judge intelligently and fairly in relation thereto; and while the amount awarded may not be so large as another jury, or even the court, perhaps, might award, yet, there being nothing to show that it does not represent the honest judgment of competent and fair-minded men, we have no right to disturb it. Petition for new trial denied, and case remitted to the common pleas division, with direction to enter judgment on the verdict.

(20 R. I. 261)

In re BOWLER.

(Supreme Court of Rhode Island. Oct. 1, 1897.)

INSOLVENCY—STAY OF EXECUTION.

Where an action for a tort was brought and prosecuted to judgment pending a proceeding in insolvency against defendant, under Gen. Laws, c. 274, the issuing of an execution on such judgment, prior to the determination of his right to a discharge, was illegal, as section 25 provides for a stay of execution in case the debtor is adjudged insolvent.

Petition by James I. Bowler for a writ of habeas corpus. Petitioner discharged.

Charles Acton Ives, for petitioner.

MATTESON, C. J. We think that the scheme of Gen. Laws R. I. c. 274 ("Of Proceedings in Insolvency"), is to place the administration of the affairs of an insolvent wholly in the court in insolvency from the time of the filing of the petition till the question of the debtor's discharge has been determined. To this end, from the publication of notice to creditors on the petition, the disposition and control of his property is taken from the debtor, and the property placed in the custody of

the law. Provision is made for proof of debts and claims against the debtor, whether arising in contract or tort, and for the stay of all pending suits and proceedings against the debtor till he has been adjudged insolvent or the petition dismissed, and, if an adjudication of insolvency results, for a stay of execution till the determination of the question of discharge. It will be observed that the statute (Gen. Laws, c. 274, § 25) provides for a stay of execution in case the debtor is adjudged insolvent. A suit, therefore, whether pending at the time of the filing of the petition or subsequently brought, as was the case in the present instance, may properly proceed to judgment when the claim is unliquidated, for the purpose of ascertaining the amount to which the plaintiff is entitled. But execution on the judgment must be stayed until the determination of the question of the debtor's discharge. We think, therefore, that though the suit referred to in the petition may have properly proceeded to judgment for the determination of the amount of the claim, the action being for a tort, and the damages unliquidated, the execution should have been stayed until the petition in insolvency had been dismissed, or if sustained, as it has since been, until the determination of the petitioner's right to a discharge. We are of the opinion that the issuing of the execution was illegal, and that the petitioner is entitled to be discharged from his commitment thereon.

(20 R. I. 259)

DYER v. SHOVE et al.

(Supreme Court of Rhode Island. Oct. 12, 1897.)

PARTNERSHIP — DISSOLUTION — GOOD WILL — ACCOUNTING.

A firm composed of W., D., and S. dissolved on the death of W., and D. and S. separated. The old firm had a large list of customers in its business of insurance. A third person, knowing that S. had a right to compete for the continuance of the insurance business with the old customers, paid him a sum of money to be admitted into partnership with him. *Held*, that there was no sale of the good will of the old firm, so as to entitle D. to an accounting.

Bill by Charles Dyer against Herbert M. Shove and another for an accounting. Dismissed.

William A. Morgan, for complainant. Wilson & Jenckes, for respondents.

PER CURIAM. The testimony shows that, upon the death of Addison H. White, the surviving partners of the firm of A. H. White & Co. separated, and that the firm had a large list of customers in its business of insurance, which is the only thing of value alleged to have been the property of the firm. The claim here made is that Herbert M. Shove sold the good will of the business, and the complainant, as surviving partner, asks an account. Upon the dissolution of the firm, both partners had the right to access to the books and to the list

of customers of the old firm. Both had the right to compete for the continuance of their business with the old customers. The respondent Sweet, knowing that Shove had this connection with a large line of customers, paid him a sum of money to be admitted into partnership with him. It does not appear that anything more than this was done. No exclusive right to the old business was conveyed. The complainant could have made a similar arrangement without infringing any right of his former partner, Shove. One partner had as much right to use the name of the old firm as the other. There was therefore no sale of the good will of the old firm, assuming that it existed, and hence no ground for the bill on that account. *Rice v. Angell*, 73 Tex. 355, 11 S. W. 338. The bill is dismissed.

(20 R. I. 264)

STAPLES v. STAPLES et al.

(Supreme Court of Rhode Island. Oct. 21, 1897.)

MORTGAGES — TWENTY YEARS' POSSESSION — PRESUMPTION OF SATISFACTION.

A bill to foreclose a mortgage will be dismissed where it appears that the mortgagor defendant has remained in possession of the mortgaged premises for more than 20 years, without the payment of interest or a recognition by him of the mortgage as an existing obligation, and his testimony that the mortgagee forgave him the debt is corroborated by other witnesses.

Bill by Henry Staples, executor, against Levi Staples and another, to foreclose a mortgage. Dismissed.

Irving Champlin, for complainant. James Wm. R. & Theodore F. Tillinghast, for respondents.

PER CURIAM. The testimony shows that the mortgagor (the defendant) has remained in possession of the mortgaged premises for more than 20 years, without the payment of interest or a recognition by him of the mortgage as an existing obligation. These facts give rise to a presumption that the mortgage has been paid or released. 2 Jones, Mortg. (4th Ed.) §§ 1195, 1196. Consistently with this presumption, the respondent Levi Staples testifies that his mother, the mortgagee (the plaintiff's testatrix), forgave him the mortgage debt; and in this he is corroborated by the testimony of his wife, and also of his brother Charles. We think, therefore, that the bill must be dismissed, with costs.

(20 R. I. 260)

WHITTLE et al. v. UNITED FIRE INS. CO.

(Supreme Court of Rhode Island. Oct. 16, 1897.)

INSURANCE — CONDITIONS SUBSEQUENT — CONTRACTS — ACCEPTANCE — PLEADING.

1. Provisions of an insurance policy that are in the nature of conditions subsequent have no place in a declaration on the policy. They are matters of defense.

2. Where a provision that insured shall pay certain assessments in addition to cash premiums

is made a part of the consideration for the policy, and a condition of it, the acceptance of the policy is tantamount to an agreement to make such payments.

8. Where a declaration on an insurance policy alleges in a general way the performance of all conditions, it need not allege that insured had agreed to pay certain assessments in addition to cash premiums, the agreement to pay which was made a condition of the policy.

Action by Charles P. Whittle and others against the United Fire Insurance Company. On demurrer to the declaration. Overruled.

J. Jerome Hahn, for plaintiffs. John T. Blodgett, for defendant.

MATTESON, C. J. The defendant criticises the declaration because the plaintiffs have not averred and negatived the several provisions contained in the policy which are in the nature of conditions subsequent, the existence of the facts creating which would avoid the policy. All that is necessary, however, for a plaintiff to do in declaring on a contract of insurance, is to set forth so much of it as will show a right to recover. 2 May, Ins. § 589; 2 Greenl. Ev. (13th Ed.) § 376. Hence it follows that the various limitations, conditions, and stipulations of a policy which are in the nature of conditions subsequent, and go to defeat the liability of the insurer, are matters of defense, and have no place in the declaration. *Lounsbury v. Insurance Co.*, 8 Conn. 459.

The objection is also taken that it appears by the policy that it was a condition of it that the insured, or their legal representatives, should pay, in addition to the cash premium, such sums as might be assessed by the directors of the defendant pursuant to the laws of the state, but not to exceed three times the amount of the cash premium, and that it does not appear in the declaration that such agreement was made by the plaintiffs. The agreement, however, being made a part of the consideration for the policy, and a condition of it, the acceptance of the policy was tantamount to such an agreement; and, moreover, the declaration avers that the plaintiffs have in all things kept, fulfilled, and performed all conditions and things on their part to be kept, fulfilled, and performed to entitle them to recover on the contract. *Tripp v. Insurance Co.*, 55 Vt. 107. Demurrer overruled, and case remitted to the common pleas division for further proceedings.

(68 N. H. 37)

DOHERTY et al. v. COTTER.

(Supreme Court of New Hampshire. Merrimack. July 27, 1894.)

INTOXICATING LIQUORS—STATE REGULATIONS—INTERSTATE COMMERCE—PAYMENTS—APPLICATION.

1. Gen. Laws, c. 109, § 18, makes penal the soliciting or taking orders for intoxicating liquors in the state for delivery in another state, with cause to believe they are to be brought within the state, and sold in violation of the laws thereof. *Held*, that the price of liquors sold

by persons doing business in another state, and delivered to the purchaser within the state in the original packages, in violation of such statute, prior to Act Cong. Aug. 8, 1890 (Wilson Bill), can be recovered.

2. Where payment is made and received on a general account of many items, without any express application of it by either party to any particular items, the legal presumption is that it is to be applied to the payment of the oldest items due at the time of the payment, in the absence of any equity or other evidence tending to show an intention to make a different application.

Exceptions from Merrimack county.

Action of assumpsit by Michael T. Doherty and another against Mary Cotter to recover the price of intoxicating liquors sold and delivered by plaintiffs to defendant. There was a verdict for plaintiffs, and defendant excepts. Exceptions overruled.

The specification is for spirituous liquors sold on eight different dates, from December 9, 1887, to September 20, 1888, to the amount of \$580, and contains credits of cash, discount, and liquors returned from January 14, 1888, to December 24, 1888, to the amount of \$434; the action being brought to recover the balance of \$146. The plaintiffs introduced evidence as to the last seven items in the specification, which are as follows:

1888. Aug. 21.	1/2 bbl. whisky	\$55 00
" " 21.	2 packing casks	2 50
" Sept. 8.	1/2 bbl. whisky	68 00
" " 8.	Packing casks	2 50
" " 20.	1 bbl. whisky	92 00
" " 20.	Packing	1 00
" " 28.	1 doz. porter	8 00

The last item was abandoned.

Facts found by the court: The plaintiffs resided in Massachusetts, having their place of business in Boston. The defendant resided and did business in Concord, in this state. The three casks of whisky embraced in the items given above were ordered by the defendant, and were sent to her at Concord by the plaintiffs, the price being \$221, including cost of casks and packing. They were sent by railroad from Boston, marked in the plaintiffs' name, were received at the railroad station at Concord, and were drawn away from the station by a teamster employed and paid by the defendant. The freight from Boston to Concord on the liquor sent August 21st and September 20th was paid by the plaintiffs. The plaintiffs took bills of lading from the railroad company in their own name, and forwarded the same by mail to the defendant. The bills were produced by the teamster, and surrendered to the railroad company on delivery of the packages. The casks sent in September were concealed within larger casks, marked "Crockery," by the defendant's request, for the purpose of deceiving the officers of the county as to the true character of the goods. The plaintiffs offered no evidence as to the other items in the specification, except the fact that they had sold the defendant liquors previous to August 21, 1888, at different times, for which orders were sometimes received by their agent at Concord, and some-

times sent by her to them at Boston by mail. The sale and delivery of the liquors on which the freight was paid by the plaintiffs were at Concord, and of the other package at Boston. The liquors were delivered to the defendant in the same unbroken packages in which they left Boston.

The defendant introduced no evidence, but moved for a nonsuit, also for a verdict, on the ground that the sale and delivery were at Concord, and that the plaintiffs, being guilty of a violation of the statute, are denied a remedy by our courts, and also upon the ground that the credits were larger than the price of the goods of which the sale was proved. The motion was denied, and the defendant excepted. Verdict for the plaintiffs for \$143, and interest from the date of the writ, and the defendant excepted.

J. S. Matthews, for plaintiffs. Albin & Martin, for defendant.

BLODGETT, J. The questions arising upon the sale and delivery of the liquors were decided adversely to the defendant in *Durkee v. Moses*, 67 N. H. 115, 23 Atl. 793; and the remaining question, as to the application of the credits on the plaintiffs' specification, was likewise so decided in *Bancroft v. Holton*, 59 N. H. 141. Exceptions overruled.

SMITH, J., did not sit. The others concurred.

(68 N. H. 4)

MCDONALD v. METROPOLITAN LIFE INS. CO.

(Supreme Court of New Hampshire. Rockingham. July 27, 1894.)

INSURANCE—CONDITIONS—FORFEITURE—RIGHTS OF INSURED—ACTION FOR MONEY RECEIVED—WHEN LIES—PARTIES.

1. An application for life insurance and a medical examination each stated insured's occupation to be "laborer," and that he was not connected in any way with the ale, wine, or liquor business. The representations and answers therein were warranties, and formed the basis of the contract of insurance, and the application provided that any untrue answers would render the policy void. The policy provided that the application should be a part of the contract, and that the insured should not be connected with the ale, wine, or liquor business unless specified in the application or permission should be indorsed on the policy by the company; that agents could not make, alter, or discharge contracts or waive forfeitures; that, if any of the warranties were not true, the policy should be void; and that, whenever the policy terminated, all premiums should be forfeited to the company. Insured was a mechanic, but had a grocery, in which, when not employed at his trade, he sold ale, wine, and liquor. The company's soliciting agent, who wrote and took the application, and also its agents who collected the premiums for three years, knew insured's business. Its assistant superintendent of agents, who was also a solicitor, was at insured's store at least 12 times during such three years, knew insured's business, and made no objection. Insured made no attempt to conceal his business, never read or heard read the application or policy, and did not know the contents until the company canceled the policy, at the end of about three years, on

learning his business. *Held*, that the termination of the contract by the company did not forfeit to it the premiums paid, and insured was entitled to a return of the equitable value of his policy.

2. Where the insured in a life policy is entitled to a return of the equitable value of his policy on its being declared forfeited by the company, he may recover it in an action for money had and received.

3. The insured, and not the beneficiary, is the proper party plaintiff in such action.

Assumpsit by William A. McDonald against the Metropolitan Life Insurance Company for money had and received. Heard on an agreed statement of facts. Case discharged.

The facts agreed are as follows: The defendants insured the plaintiff's life for the benefit of his wife, and the action is brought to recover the sums paid as premiums on the policy. The plaintiff signed an application and a medical examination, each of which stated as his occupation, "laborer," and that he was not connected in any way with the ale, wine, or liquor business. The application stated that the signer thereby declared and warranted that the representations and answers made therein and in the medical examination were strictly correct and wholly true; that they should form the basis and become part of the contract of insurance; and that any untrue answers would render the policy null and void. The policy provided that the application should be a part of the contract, and was made subject to certain conditions, one of which conditions was that the person insured should not be connected in any capacity with the ale, wine, or liquor business, unless so specified in the application, or unless the permission of the company should be indorsed on the policy; another, that agents were not authorized to make, alter, or discharge contracts, or to waive forfeitures; and another, that if any of the warranties referred to were not true, or if the conditions of the policy were not in all respects observed, the policy should thereupon become void, and whenever the policy should terminate all premiums paid should be forfeited to the company. The plaintiff was by trade a mason, but had a small grocery store, in which, when not employed at his trade, he sold ale, wine, and liquor, as well as groceries. The application was taken by a soliciting agent of the defendants, who knew the plaintiff's business, and the defendants' agents who collected the premiums on the policy had like knowledge. The defendants' assistant superintendent of agents for the district in which the plaintiff lived, whose powers were to act as soliciting agent and to supervise the other soliciting agents of the district, was at the plaintiff's store at least 12 times during the continuance of the policy, for the purpose of inspecting the agent's work, knew the business there carried on, and made no objection. The defendants had no knowledge that the plaintiff was engaged in the ale, wine, and liquor business, except the knowledge of their agents, as

above stated, until the policy had been running nearly three years, when they offered to give him permission to engage in that business, and to continue the policy, on condition that the amount of the policy should be reduced, but the amount of the premiums should remain as before. On his refusal to accept the condition, they declared the policy forfeited and lapsed. The application was written by the defendants' soliciting agent, and neither that nor the policy was ever read by or to the plaintiff, and the plaintiff did not know the contents of either, or that the defendants objected to his business, until their offer above mentioned. He made no attempt to conceal his business.

E. L. Guptill, for plaintiff. Drummond & Drummond, for defendants.

BLODGETT, J. In receiving the application, the agent clearly represented the defendants. *Eastman v. Association*, 65 N. H. 176, 18 Atl. 745. Whether, in filling it up, he technically represented them or the plaintiff, is not important. In either case the defendants cannot set up the false description of the risk against the plaintiff as a warranty; and the reason for this is that it would be a fraud on their part to hold him to the truth of the representations which he did not in fact make, and of whose falsity they must be deemed to have had notice. By issuing the policy, the defendants ratified the agent's action in taking the application, and became chargeable with his knowledge of the plaintiff's business; and by receiving the subsequent premiums, collected by their agents with full knowledge of the business, they continued to be chargeable with such knowledge so long as they accepted the premiums. This estops them from taking to themselves the benefit of the false representations without responsibility for it. They cannot adopt that part of the agent's acts beneficial to them, and reject the rest. "With the benefit they must accept the burden." *Eastman v. Association*, supra; *Rader's Adm'r v. Maddox*, 150 U. S. 128, 14 Sup. Ct. 46. They are bound to repudiate the agent's acts in toto, or not at all. The contract must stand or fall as an entirety. As a corollary from the preceding propositions, the termination of the contract by the defendants did not forfeit to them the premiums already paid upon it. But this is so for another reason, to which no exception can with fairness be taken. No fraud is imputable to the plaintiff. On the contrary, the facts show that both parties acted in good faith, and were alike deceived by the agent. By his fraudulent conduct, the plaintiff was unwittingly placed in the position of making a false representation, for the purpose of securing a valuable contract, which, upon a truthful statement of his occupation, could not have been obtained; and by that representation the defendants were induced to consummate the contract, and subsequently to terminate it. "When both the insured and the in-

surer are deceived by fraudulent acts of an agent, * * * If both parties acted bona fide, the policy should be canceled and the premiums returned." *Insurance Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837. In such a case the insurer cannot take advantage of a provision of the policy that "whenever, for any cause, this policy shall terminate, all premiums paid shall be forfeited to the company," because, in the language of Miller, J., in *Insurance Co. v. Wilkinson*, 13 Wall. 233, "it would be an act of bad faith and of the grossest injustice and dishonesty." See, also, *McKee v. Insurance Co.*, 28 Mo. 383.

In the absence of any forfeiture, it is instinctively manifest that, when such a contract is terminated by the insurer from a cause like the one disclosed by this case, the insured should have some compensation or return for the money already paid on the contract. He has an equitable, and, in our opinion, a legal, right to have this amount restored to him, subject to a deduction for the value of the insurance enjoyed by him during the existence of the policy. In other words, he is entitled to have the equitable value of his policy (*Insurance Co. v. Statham*, 93 U. S. 24, 33, 34); and this he may recover in an action for money had and received, which is an equitable action, and may, in general, be maintained whenever the defendant has money belonging to the plaintiff, which in equity and good conscience he ought to refund to him.

The objection that the action should have been brought in the wife's name is of little practical consequence. If the objection is well taken, she may be substituted as plaintiff by amendment. *Boudreau v. Eastman*, 59 N. H. 467. An inspection of the policy, however, shows the plaintiff, and not his wife, to have been the party to the contract with the defendants. It was made upon his application; it issued to him as the assured; the premiums were paid by him; and it was his interest in his own life that supported the policy. The fact that the policy was for the benefit of his wife did not make her the assured, but merely the person designated by agreement of the parties to receive the proceeds of the policy upon the death of the assured. As such, she had the equitable interest in the policy, but not the title to support an action at law upon it in her own name against the defendants, or for the recovery of the premiums paid by her husband. *Campbell v. Insurance Co.*, 98 Mass. 389, 400, 401. Case discharged. All concurred.

(68 N. H. 35)

Appeal of ELA.

(Supreme Court of New Hampshire. Merrimack. July 27, 1894.)

ADMINISTRATORS — APPOINTMENT — ACCOUNTING — PROBATE COURTS — JURISDICTION — ORDERS — COLLATERAL ATTACK — FRAUD OF PARTY — DEFENSE.

1. An administrator, on appeal from a decree settling his accounts, cannot cause his appointment and all orders relating to the estate to be set aside on the ground that decedent was not

an inhabitant of the county where the estate was administered, and had no estate in such county, where the petition for his appointment asserted all essential jurisdictional facts, as the determination of the probate court cannot be collaterally avoided.

2. A representative of a decedent cannot impeach an order of court on the ground that it was procured by decedent's fraud.

3. Though an appointment of an administrator was void on the ground that decedent left no estate in the county of such appointment, yet, in the exercise of its common-law jurisdiction, the probate court could charge such administrator with property of the estate brought into such county by him.

4. An administrator cannot set up the invalidity of a decree under which he has obtained and holds property as a defense to an accounting therefor.

Appeal from probate court, Merrimack county.

Proceeding by George W. Ela, as administrator of the estate of Joseph Ela, deceased, for the settlement of his second account. From the decree of the probate court he appealed, assigning errors in charging him with certain specified sums and disallowing certain specified credits. George W. Ela died since the entry of his appeal, and his administrator, Richard L. Ela, appeared and filed motions that the appeal be dismissed, and that the probate court be ordered to reverse its decrees and dismiss the proceedings relating to the administration of the estate of Joseph Ela, and to revoke the grant of administration and all orders and decrees of said court, because Joseph Ela was not, at the time of his death, last an inhabitant of Merrimack county, but was an inhabitant of Mobile, in the state of Alabama, and had no estate in Merrimack county, and the proceedings in the probate court are therefore void. Denied.

At a court of probate for Merrimack county held April 23, 1863, George W. Ela, then living in Concord, in said county, filed his petition representing that Joseph Ela, late of Mobile, in the state of Alabama, had lately deceased, having at the time of his decease an estate in said county, and that the petitioner was a brother and next of kin to Joseph, and praying that administration thereof be granted to him. On the same day the petitioner was appointed administrator of the estate, and in May he returned an inventory, which was accepted; the property inventoried consisting of promissory notes made in Mobile, Ala., and payable in the city of New York, and stock of steamship and railroad corporations, amounting in the whole to \$63,240. He settled his first account in November, 1873, and presented his second account in July, 1892.

The appellant offered to prove, in support of his motion, that the property inventoried was at the time of the appointment in Washington, D. C., and had then never been in the county of Merrimack, or elsewhere in New Hampshire, and that there was then no property of the estate in said county or state;

the offer embracing also various other particulars not material to be here stated.

Sylvester Dana and J. M. Mitchell, for appellant's administrator. S. C. Eastman, for certain heirs of Joseph Ela.

BLODGETT, J. Extended consideration of this case is unnecessary. Few words need be expended to show that there is no legal or equitable ground for the plaintiff's motions.

1. G. W. Ela's appointment as administrator of his deceased brother's estate having been made by a court possessing general jurisdiction to grant administration of the estates of deceased persons, and upon a petition asserting the essential jurisdictional facts, it was a judicial determination that the facts necessary to give the court jurisdiction existed, and cannot be collaterally avoided. *Spaulding v. Groton* (June, 1894)¹; *Van Fleet, Coll. Attack*, §§ 637-647; *Fisher v. Bassett*, 33 Am. Dec. 227, note, 241, 243.

2. If the petition was false, then the appointment was procured by a fraud upon the court, which the plaintiff, as the representative of, and a privy to, the petitioner, cannot now set up to defeat the ends of justice. *Tebbetts v. Tilton*, 31 N. H. 287; *Adams v. Adams*, 51 N. H. 897.

3. Assume that the probate court had no power to make the appointment, for the reason that the deceased left no estate in this county; the subsequent bringing of the property here by the administrator would confer jurisdiction of the subject-matter upon that court, and authorize it to charge him with the property, in the exercise of its common-law jurisdiction over the estates of deceased persons. *Stearns v. Wright*, 51 N. H. 601, 605, 611.

4. Another consideration fatally adverse to the plaintiff is that a party cannot set up the invalidity of a decree under which he has obtained and holds property as a defense to an accounting for that property. It is useless to argue such a self-evident proposition. What is clearly apparent need not be proved.

5. Finally, it cannot be successfully controverted that there is jurisdiction of the property, and Ela's administration of it, somewhere; and, if this be so, it is clear there can be jurisdiction nowhere, if not in the probate court for this county. Motions denied. All concurred.

(63 N. H. 34)

HURLBUTT v. CURRIER.

(Supreme Court of New Hampshire. Grafton. July 27, 1894.)

JUDGMENT—RIGHT TO ENFORCE—EXECUTION—SALE—INSOLVENCY OF DEBTOR—EFFECT—RIGHTS OF ASSIGNEE.

1. Pub. St. c. 201, § 26, which provides that "the proceedings in insolvency shall dissolve all attachments of the debtor's property made within three months before the beginning thereof," ap-

¹ Opinion had not been filed Jan. 24, 1893.

plies only to attachments on mesne process, and not to a seizure on execution.

2. Though the failure of the sheriff to advertise and sell goods seized under execution, in the manner required by Pub. St. c. 232, § 2, renders such goods liable to seizure by other creditors of the same debtor, the debtor himself, or his assignee in insolvency, has no right or interest in the property entitling him to its possession.

3. Though the judgment creditor had reasonable cause to believe that at the time of the levy under his judgment the debtor was insolvent, he was not thereby precluded from proceeding.

Trover by Charles O. Hurlbutt against Lewis W. Currier for 217 pieces of cloth. On agreed facts. Case discharged.

The facts agreed are as follows: "November 25, 1893, Benjamin Greenbank was adjudged insolvent by the judge of probate of Grafton county, upon his own petition, filed November 17, 1893. A warrant issued November 25th to W. B. Richardson, deputy sheriff, as messenger. The defendant was elected and appointed assignee December 26th. At the October term, 1893, for the Southern judicial district of Grafton county, George H. Goodhue obtained judgment against Greenbank for \$501.06 damages and \$9.93 costs of suit, the date of judgment being October 19th. Execution issued October 23d, and was placed in the hands of the plaintiff, the sheriff of the county, who seized the cloth November 13th, placed it in the hands of a keeper, and was proceeding to advertise and sell it upon execution, when it was taken from the keeper by the messenger, who subsequently delivered it to the defendant, as assignee. The defendant subsequently sold it, and holds the proceeds as assets of the estate of the insolvent. Goodhue, his attorney, and the plaintiff had reasonable cause to believe Greenbank was insolvent at the time the cloth was seized by the plaintiff. The question whether this action can be maintained on these facts is reserved."

J. L. Spring, for plaintiff. G. W. Murray, for defendant.

BLODGETT, J. Section 26 of the insolvency statute (Pub. c. 201), which provides that "the proceedings in insolvency shall dissolve all attachments of the debtor's property made within three months before the beginning thereof," applies to attachments on mesne process, under which the lien acquired is merely contingent and provisional upon the recovery of judgment by the plaintiff, and does not apply to absolute liens acquired by a seizure or levy on execution, as contended by the defendant. An execution is final process, and the end of the law; and the settled doctrine is that a seizure or levy upon it before the commencement of insolvency or bankruptcy proceedings against the debtor under statutes containing provisions like that in section 26, although not completed until afterwards, is not dissolved or impaired by the proceedings. In such a case the posses-

sion of the sheriff cannot be disturbed by the assignee, who is only entitled to the residue of the property remaining after the execution has been satisfied. *Cushing v. Arnold*, 9 Metc. (Mass.) 26; *Andrews v. Southwick*, 13 Metc. (Mass.) 536; *Hall v. Hoxie*, 3 Metc. (Mass.) 251; *Marshall v. Knox*, 16 Wall. 551; *Savage v. Best*, 3 How. 111; *Mollison v. Eaton*, 16 Minn. 426 (Gil. 383); *Fehley v. Barr*, 66 Pa. St. 196; *Thompson v. Moses*, 43 Ga. 383; *Doremus v. Walker*, 8 Ala. 194; 2 Freem. Judgm. (4th Ed.) 691; *Avery & H. Bankr. Law*, 56; *Bump, Bankr.* (10th Ed.) 320; *Freem. Ex'ns*, § 207.

The conversion of the property in suit by the defendant was unlawful. If the failure of the plaintiff to advertise and sell it as required by Pub. St. c. 232, § 2, rendered its subsequent detention by him invalid as against other creditors of the debtor (*Poole v. Symonds*, 1 N. H. 289, 295), the debtor himself had no right, title, or interest in the property which entitled him to its possession at the time of his assignment (*Caldwell v. Eaton*, 5 Mass. 404), and the defendant, by force of the statute and assignment, took nothing more than the debtor had. He stands in his place, having his rights, and his only, except in cases of fraud. *Adams v. Lee*, 64 N. H. 421-423, 13 Atl. 786. There is here no allegation of fraud or illegality of any kind, other than that arising from the fact that the judgment creditor, his attorney, and the plaintiff had reasonable cause to believe the debtor was insolvent at the time the levy was made. For the present purpose, this is of no consequence. There is nothing in the insolvency statute, either in its language or object, which prevents a creditor from seasonably enforcing his judgment lien against a debtor who is even known to him to be insolvent. It would be absurd to hold that a party may not enforce a valid lien upon property simply because he has knowledge of the owner's insolvency. A legal right not enforceable by its possessor is unknown to the law of this jurisdiction. The action can be maintained on the agreed facts. Case discharged. All concurred.

(68 N. H. 67)

WHITCOMB v. CUMMINGS.

(Supreme Court of New Hampshire. Cheshire. July 27, 1894.)

LEASES—ASSIGNMENT—LIABILITY OF LESSEE—ESTOPPEL—CONTRACTS—CONSTRUCTION—COSTS.

1. An action of covenant by a lessor against an assignee of the lease, brought at the request of the lessee, who had not been released from his liability, is not such an election to treat the assignee as the lessee as will release the original lessee from liability.

2. The lessor, at the request of his lessee, who had not been released from liability under the lease, sued the assignee of the lease for rent. The lessee promised the lessor to "stand behind" him in such action. Held a mere promise to indemnify the lessor, and save him harmless from the costs of suit.

Debt and covenant by Elbridge G. Whitcomb against Leander W. Cummings for rent reserved in a lease under sale. Submitted on report. Judgment for plaintiff.

Facts found by a referee. The lease was for a term of five years from April 1, 1873, and contained no stipulation against an assignment or underletting. The defendant (the lessee) assigned the lease to John W. Starkey, August 8, 1874, by a writing under seal indorsed upon the defendant's copy of the lease, and signed by both him and Starkey, in which writing Starkey agreed to pay the rent, and perform the defendant's covenants, and indemnify the defendant against the covenants. After this, Starkey's agent offered to pay the rent to the plaintiff, but the plaintiff declined to receive it, stating that he recognized no one but the lessee (the defendant) as the party to the lease. The defendant then requested the plaintiff to receive the rent from Starkey's agent, saying that he would continue liable on the lease. The plaintiff thereupon received rents from the agent, and gave receipts, in which he acknowledged receipt of the money of the agent "for the defendant." The agent made all payments of rent subsequently made, except a payment of \$101, made by the defendant April 17, 1877. After the expiration of the term, the plaintiff frequently requested the defendant to pay the balance due. The defendant did not deny his liability, but urged the plaintiff to get it from the Starkey heirs (Starkey having died), if he could; and he applied to Starkey's widow to pay it to the plaintiff. In 1884, at the defendant's request, the plaintiff brought an action of covenant against the devisees under Starkey's will for the balance of rent due, alleging that Starkey became liable to pay the same by virtue of the assignment of the lease to him, and his agreements therein contained. This is the action reported in 63 N. H. 607, 4 Atl. 793. The defendant said he would stand behind the plaintiff in that action. The referee in the present action finds that: "By the assignment to Starkey, and the acceptance of rent of Starkey, as before stated, the plaintiff did not release the defendant on his covenants to pay rent; that the bringing of the suit against the Starkey heirs, at the request of the defendant, did not create an estoppel; that, the lease being assignable, and having been assigned, the assignee's relation to the plaintiff was by virtue of privity in estate, even if the plaintiff accepted rent of the assignee without qualification, and the defendant would continue liable on his covenant to pay rent; but * * * that the rent was accepted of the assignee by the plaintiff with the understanding and agreement that such acceptance of rent would not in any way release the defendant from the obligation of his covenant to pay rent, and that there was no express or implied assent to said assignment * * * by the plaintiff which

was designed to release the defendant from his covenant to pay rent, unless, as a matter of law, the foregoing facts produced such a result." The referee's general finding was for the plaintiff. The plaintiff moved for judgment. The defendant objected, and contended that judgment should be entered for him, because (1) the action of covenant by the plaintiff against Starkey's devisees was an election by the plaintiff to treat the defendant's assignee as the lessee, and operated to release the defendant on his covenants in the lease; (2) the plaintiff's only remedy against the defendant is upon the defendant's collateral promise to stand behind the plaintiff in the suit brought by him against the Starkey devisees.

Batchelder & Faulkner, for plaintiff. Herbert Parker and D. H. Woodward, for defendant.

BLODGETT, J. The action in covenant by the plaintiff against the Starkey heirs was not an election by him to treat the defendant's assignee as the lessee, and did not operate to release the defendant from his covenants in the lease. If that action had been brought by the plaintiff of his own motion, it might, perhaps, have had the effect claimed for it by the defendant; but the facts clearly show that it was brought at the defendant's request, and upon his promise to stand behind it, and that it was solely for his benefit. In the light of these facts, the plaintiff must be regarded as having been the nominal party merely, and the defendant the real party. As such, the attempt of the defendant to now set up the technical advantage obtained by him because the action was in the plaintiff's name is unconscionable, and wholly indefensible. The doctrine of equitable estoppels applies to him with full force. The principle is that, where one party has, by his representations, or his conduct, induced the other party to a transaction to give him an advantage which it would be against equity and good conscience to assert, he will not, in a court of justice, be permitted to avail himself of that advantage. *Insurance Co. v. Wilkinson*, 13 Wall. 233; *Drew v. Kimball*, 43 N. H. 283, 285, 80 Am. Dec. 163, and note; *Horn v. Cole*, 51 N. H. 287, 292; *Rubber Co. v. Rothery*, 107 N. Y. 310, 14 N. E. 269; s. c. 1 Am. St. Rep. 822, and note; *Cowles v. Bacon*, 21 Conn. 451, 56 Am. Dec. 371, and note; *Caldwell v. Auger*, 4 Minn. 217 (Gil. 156); *Stewart v. Commissioners*, 45 Kan. 708, 26 Pac. 683.

The further claim of the defendant that the plaintiff's only remedy is upon his collateral promise to stand behind the plaintiff in the Starkey suit is equally indefensible. The fair and reasonable construction of the promise is that the defendant would indemnify and save harmless the plaintiff from the costs of the suit, and we so construe it. Judgment on the report for the plaintiff. All concurred.

(182 Pa. St. 607)

DENT v. HUNTLEY.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

PRINCIPAL AND AGENT—PROOF OF AGENCY—PURCHASE FOR CORPORATION.

Plaintiff, as purchasing agent of a corporation in which he was a director, contracted in writing for the purchase of logs. Subsequently he made another contract with the sellers for the purchase of the same logs. After the logs were delivered to plaintiff, the corporation took possession, and plaintiff brought replevin against defendant (who claimed under said corporation), alleging that he (plaintiff) had rescinded the original contract made in behalf of the corporation, that the second contract was in his own right, and that the corporation had thereafter verbally agreed to buy the logs from him, but that there had been no delivery to the corporation under such agreement. It did not appear that plaintiff had authority to cancel the original contract, nor was there any evidence that the corporation knew of the second contract, except the testimony of plaintiff in regard to the alleged verbal agreement. The sellers testified that it was not the intention of either party to abrogate the first contract by the second, but merely to amplify the provisions thereof; and it appeared that after the logs were delivered to plaintiff he repurchased from the corporation all its interest in contracts made by him for logs which had not been delivered to him, thereby assenting to the company's implied assertion of title to the logs already delivered. Held, that the logs were purchased for the corporation, and became its property immediately on delivery to plaintiff.

Appeal from court of common pleas, Potter county.

Replevin by William Dent against G. W. Huntley for the recovery of logs. The referee to whom the issue was referred gave judgment for plaintiff, and defendant appeals. Reversed.

G. A. Jenks, G. W. Huntley, Jr., C. L. Peck, and L. B. Selbert, for appellant. Dornan & Ormerod, N. J. Peck, and Larrabee & Lewis, for appellee.

DEAN, J. On 22d March, 1890, the plaintiff replevied 3,400 hemlock saw logs on the banks of Sinnemahoning creek, in Potter county, of the value of about \$3,000. The writ was served on defendant, and possession of the logs taken by the sheriff. The same day defendant gave bond, and the possession was restored to him. He appeared, and pleaded non cepit and property. The parties referred the issue to Hon. T. A. Morrison, referee, under special act of February 23, 1870, relating to Potter and Tioga counties, who found for plaintiff in the sum of \$4,135. From the judgment entered on that finding, the defendant appeals.

The logs had several marks, but may be divided, for purposes of this case, into two lots, those marked "H," known as "Cobb logs," and those marked "XX," known as "Barclay logs." The plaintiff claimed possession of the Cobb logs under a contract of purchase with a partnership of the name of Cobb Bros., dated the 8th of June, 1888. By this contract, Cobb Bros. agreed to sell to William Dent, this plaintiff, and August Schwarzenbach, and their assigns, all the hemlock timber then growing up

on lots numbered 90, 91, and 31 of the Fox and Ross lands in Potter county, with right of ingress to cut and remove the same into the South Fork of Sinnemahoning creek. In consideration, Dent and Schwarzenbach agreed to pay Cobb Bros. \$1.25 per 1,000 feet, Doyle's rule, when the timber was cut into merchantable logs and skidded; the price to be paid as follows: Cobb Bros. were indebted to Dent and Schwarzenbach by judgment in Potter county in the sum of \$2,000, which was first to be deducted, and the balance of the stumpage to be paid in cash. A second agreement between them was made the same day, by which Cobb Bros. agreed to do all the work preceding delivery. Further, the length and quality of the logs was more particularly specified. Still further, the point of delivery was thus particularly specified: "To be cut, skidded, and banked in good shape on the South Fork of the Sinnemahoning creek, in or below the splash dam, in time for and before the first spring flood of 1889, and to be put afloat in said stream (by Cobb Bros.) when and in the manner directed by Dent and Schwarzenbach." In addition, Cobb Bros. were to furnish right of way in fork of Sinnemahoning to its mouth, and clear the stream to facilitate floating. Dent and Schwarzenbach agreed they would pay 75 cents per 1,000 feet when the logs had been cut, skidded, marked, and scaled; this to be paid monthly. Further, to pay to Cobb Bros. \$1.75 per 1,000 feet when the logs were banked, and 25 cents when put afloat. It was also agreed that, if all the logs could not be put in by spring flood of 1889, they should have the privilege of putting them in for flood of 1890. It will be noticed that stumpage and cost of delivery together amounted to \$4 per 1,000. Months after the logs in dispute had been put in the stream and floated out, on 28th November, 1889, Schwarzenbach, for the consideration of one dollar, by agreement in writing, assigned all his "interest in all contracts for the purchase of timber standing or down, and peeled and barked, thereon, in which we [he and Dent] are interested together," to Dent. Cobb Bros. had also sold logs to Barclay Bros., and had delivered them in the Sinnemahoning above the mouth of the East Fork above the First Fork. These logs Barclay Bros., by agreement in writing dated 8th of August, 1888, sold to Dent, the price to be \$4.15 per 1,000, quantity not specified, but, from the amount of money stipulated for, was probably estimated at about 1,000,000 feet. The plaintiff admitted the logs in dispute under these contracts had been delivered to him as stipulated. He also alleged that by a verbal agreement with the officers of the Consolidated Lumber Company he had afterwards sold the same logs to the company, to be delivered by him in the First Fork below the mouth of the South Fork of the Sinnemahoning; but he further alleged no delivery was made by him to the company; that by the extraordinary flood of May 31, 1889, known as the "Johnstown Flood," the logs had been

swept from his possession down the stream, and had been wrongfully taken possession of by defendant for the lumber company. The defendant claimed the purchase from Cobb Bros. and Barclay Bros. was made by Dent for the lumber company, he acting as the agent of the company, and that the moment there was a delivery by the vendors under their contract to Dent the right of possession at once vested in the lumber company. Further, that, even if on delivery by Cobb Bros. and Barclay Bros. under their contracts there was a possession in Dent, yet by his alleged verbal contract of sale to the company there was a delivery by him of the logs in the stream to the company. It was claimed by defendant, the logs thus being the property of and in possession of the company, it, on the 24th of December, 1889, made an assignment for the benefit of creditors to one John C. Zeller, who, on March 5, 1890, sold the logs in dispute at public sale to E. A. Irvine, who purchased for himself and G. W. Huntley, the defendant. There was a great deal of evidence bearing on the questions of fact as to whether the purchase was made by Dent for the company, and whether there was an actual delivery by him under his alleged verbal sale. The learned referee found both questions against defendant, and we now have this appeal by him. Twenty-two errors are assigned to rulings on evidence, findings of fact, and conclusions of law by the referee. It seems to us the case must turn on the question raised by the ninth assignment, which alleges error in this finding of fact by the referee: "To sustain the defendant's theory, the logs in dispute must have been purchased for the company in the first instance, or else Dent must have delivered the same. Now, we think the weight of the evidence established the fact that Dent bought the logs on his own account, agreeing to sell and deliver the same to the company, but that he made no delivery, and that he did not receive his pay for these logs. Whatever delivery there was, resulted from the Johnstown flood, an extraordinary event; and surely the plaintiff, Dent, should lose none of his rights thereby, nor should the defendant Huntley profit by this unusual and unexpected occurrence."

For whom were the logs in dispute purchased? It will be noticed, plaintiff founds his claim to the Cobb logs on the contracts of 8th of June, 1888. But, 10 days before this, on 29th May, he, by written agreement, purchased the same logs for the Consolidated Lumber Company from the same parties, to be delivered in the same stream. That in this first transaction he was acting as the agent for the company, he explicitly declares by the writing itself. He was a director of the company, and authorized by it to act as its purchasing agent. Plaintiff alleges that before he made the contracts of 8th of June following he rescinded this contract made for the company. But from whence came his authority to rescind? There is no evidence that we can discover of precedent power or subse-

quent ratification. Dent does not even allege the company had knowledge of a hostile claim under the later contracts. Having full authority to purchase for the company, and having explicitly in writing so purchased, surely, when he sets up a rescission, that he may sustain a sale to himself for the purpose of reselling the same property to his principal, the burden is on him to establish the transaction by the clear preponderance of testimony, and to further clearly show he acted in good faith. The only evidence relating to subsequent knowledge on the part of the company of a claim of property by Dent is that of plaintiff himself, who testifies that "somewhere along in the summer of 1888" he sold these same logs to the company by a verbal contract with the president and superintendent. The president is dead. The superintendent, although called by plaintiff as a witness, is not asked to corroborate him, and says nothing on the subject. The reasonable interpretation of the three writings—that of 29th of May in name of the company, and those of 8th of June in names of Dent and Schwarzenbach—manifestly is that the two later ones were a mere elaboration in detail of the stipulations of the first; that at the time they were not intended by either the Cobb Brothers or Dent to abrogate the first, but to more specifically declare its provisions in the interest of both parties. And that this was the purpose is, in substance, positively testified to by two of the Cobb brothers. Further, the plaintiff's subsequent conduct is wholly inconsistent with a rescission of the first agreement. On November 21, 1889, he repurchased from the company, by formal resolution of the board of directors, and a receipt embodying a contract, all the interest of the company in contracts made by Dent and Schwarzenbach for timber and logs not delivered. The logs delivered by Cobb Bros. are, by clear implication, excepted from this transfer. At the same time there is an implied assertion on part of the company of title to all logs already delivered, an assertion assented to by this plaintiff when he became a party to the transaction. There is much other evidence bearing out the same conclusion, and scarcely a scintilla inconsistent with it. As to the Barclay logs, the letter of the superintendent of the company to plaintiff of December 19, 1888, shows clearly he purchased these logs for the company, and that it arranged to pay for them. Other evidence shows they were paid for in part by the company's note, and that on January 2, 1889, it paid directly to Barclay Bros. the last payment of \$1,460.95. In connection with this transaction, Dent wrote to the company a letter, in which occurs the following significant paragraph: "As I understood my position with the company, they authorized me to buy logs for them, and are consequently bound by my contracts. If, however, they conclude

that I am not competent, and intend to refuse me the funds to carry on jobs and fulfill said contracts, I would like to know it, and have a settlement at once, and get out of the way." We are of opinion the evidence shows beyond doubt the logs in dispute were purchased from Cobb Bros. and Barclay Bros. for the Consolidated Lumber Company, and were delivered to the company under its contracts; and as, under the assignment and sale, the title and right of possession passed to defendant, plaintiff cannot recover damages in this action.

As to the second question,—assuming plaintiff had obtained title, was there a delivery by him to the company under the verbal sale alleged by him?—it is unnecessary to answer it, in the view we take of the first. The judgment is reversed, costs to be paid by appellee.

(123 Pa. St. 612)

HUNTLEY v. GOODYEAR et al.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

WITNESSES — TRANSACTION WITH DECEASED — REBUTTAL.

1. A party claiming under a contract made with a firm, one of whose members died before the trial, was competent to rebut the testimony of the surviving partner in reference to the transaction. Act June 11, 1891; P. L. 287.

2. Where an action is tried by a referee, the fact that witness in some of his answers, not responsive to questions, went beyond the statutory limit, and improperly testified to conversations with a decedent, was not reversible error.

Appeal from court of common pleas, Potter county.

Trespass by G. W. Huntley against F. H. & C. W. Goodyear. The referee to whom the cause was referred gave judgment for defendants, and plaintiff appeals. Reversed.

G. A. Jenks, G. W. Huntley, Jr., O. L. Peck, and L. B. Selbert, for appellant. Dornan & Ormerod, N. J. Peck, and Larrabee & Lewis, for appellees.

DEAN, J. This is an action of trespass against defendants to recover damages for the alleged wrongful appropriation of a large lot of hemlock logs put in the South Fork of Sinnemahoning creek, in Potter county. The logs were identified in the trial by the names of "Cobb logs" and "Barclay logs." They are part of the same lot that formed the subject of contention in the case of Dent v. Huntley (in which judgment has been this day entered) 38 Atl. 505. In the opinion filed in this last case a full statement of the facts leading to the controversy is given. The defendants here rely on practically the same evidence to defeat plaintiff's claim as William Dent relied on there to establish a right to recover, and Huntley relies on the same evidence to recover here that he defended on there. It is stated as a fact in appellant's paper book, and not denied by appellee, that, although the Goodyears are nominally of record as defendants

in this case, William Dent appeared and defended for them; so that there is not, in either evidence or real parties, any substantial variance in the two suits. The Goodyears claim title through Dent, the plaintiff, by purchase from the Consolidated Lumber Company. The plaintiff avers the logs in dispute were purchased by Dent, acting as agent for the lumber company, and under this contract they were delivered to him as agent of the company. The defendants allege they were purchased by Dent and Schwarzenbach, delivered to them, and they afterwards contracted to sell them to the company, but never delivered them. The referee finds as a fact that Dent was not a purchasing agent for the company; on the contrary, that he and Schwarzenbach purchased for themselves; and that, there never having been a delivery to the company, the plaintiff took no title from the company's assignee. As noticed by us in the opinion in Dent v. Huntley, before mentioned, we think this finding is in the face of the most significant and weighty testimony. Notice the undisputed facts: Dent, on the 29th May, 1888, was a director and stockholder of the company. On that day, by a plain written agreement, he purchased these logs expressly for the company. He admits the genuineness of this writing. From the minutes of the company, duly proven, dated April 16, 1889, a report of the investment or purchasing committee was called for. William Dent reported that, among other timber, he had purchased 5,000,000 feet on Sinnemahoning creek. On October 8, 1889, the company delivered directly to Cobb Bros. its note for \$1,000 as part payment on these Sinnemahoning logs. The company's marks were put on them, and they were scaled by the company's scaler. The company then paid a large amount of money for driving them. On December 19, 1888, a letter was written by the company to Dent, recognizing him as its purchasing agent, and giving him directions as to marking logs. In answer to this letter, on December 22d, Dent writes: "As I understand my position with the company, they authorized me to buy logs for them, and are consequently bound by my contracts." Then, further, at the request of Dent, on November 21, 1889, in writing, the company assigned to him all its interest in contracts for timber and logs, but not logs already delivered. The logs in dispute had already been delivered, and of course were not included, and the company had no interest to assign except that vested in it by the contract of May 29, 1888. This was a distinct recognition of their right of property under that contract. Could there be a more clearly proven case of agency than this? The evidence is not vague, but is positive and specific. It rests, not in parol, but in writings between the parties made at intervals during the existence of the agency. A careful examination of the whole of this testimony shows no act of the company inconsistent with this agency, and that all its acts

are confirmatory of it. Nor is there any act of Dent's really inconsistent with such agency, until after the insolvency of the company. On the 8th of June, 10 days after the purchase of the company on the 29th of May, 1888, Dent and Schwarzenbach entered into two contracts with Cobb Bros. for the purchase of the same logs, but, as stated in the case of *Dent v. Huntley*, these agreements, of themselves, are not destructive of the first agreement, but only an amplification of its provisions. They provided for the purchase and delivery of the same timber, with more specific stipulations of sizes and times of delivery. And unless Dent, the agent of the company, who joined in the first agreement, undertook to set up the second in hostility to the company, the title of the company and the liability of Cobb Bros. were unaffected by them. Two of the Cobb brothers positively testify it was not the intention of either party to abrogate the first by the second agreements. Dent now testifies, it was his intention to cancel the company's agreement by these second ones. He does not pretend the company gave him any authority to do so. He is asked this question: "Q. Who did you make your last contract for? A. For myself and Mr. Schwarzenbach. Q. Did the Consolidated Lumber Company have anything to do with that contract? A. No, sir; they never knew of it. Nothing was ever said to them about it,—not to my knowledge." From whence came the authority to thus cancel the company's written contracts? Assume that Dent was not expressly authorized to act as purchasing agent for the company; he was a director of it; he did act as agent, and purchased in writing this timber, having at the time in his pocket \$2,000 of the company's money, which either then or afterwards—it is not clear which—he applied in payment of the hand money. The moment the contract was executed for the company, its property right vested, and could not be divested without express authority. It is not necessary to cite authorities to show that a director acting for the stockholders, for whom he is trustee, cannot, of his mere motion, destroy their rights to property, then purchase himself, with the object of reselling to his cestui que trustant at a profit. Certainly, the burden is on him, when he avers such a transaction, to show by clear proof, not only authority, but extreme good faith. There is not a spark of evidence of such authority. None is alleged. The only explanation by Dent of the admission of agency in the letter of December 22, 1888, is that when he wrote it he was in a "roaring temper." As to the Barclay logs, the evidence is almost uncontradicted not only that they were purchased for the company, but paid for by the company's money.

As to the eighth assignment of error, it raises a question as to the competency of Dent as a witness to conversations with L. H. Cobb, deceased, one of the partners of

Cobb Bros. The witness was not competent to testify to declarations of the deceased partner, who was a party to the contract. But, although to a slight extent his testimony was inadmissible, he was not called to testify to declarations of the deceased, but to rebut the testimony of D. H. Cobb, one of the surviving partners; and to this his testimony almost wholly related. To this extent the witness was competent, under the enabling act of June 11, 1891 (P. L. 287). That in some of his answers, not responsive to the question, he went beyond the statutory limit, is no error of the court, which, we doubt not, disregarded that which was incompetent. We are of opinion that William Dent, in the purchase of both the Cobb and Barclay logs, was the agent of the Consolidated Lumber Company, through whom plaintiff claims; that the delivery of these logs to William Dent, and to Dent and Schwarzenbach, was a delivery to said company; and that plaintiff had a clear title and right to possession of those in dispute in this issue. The judgment of the court below is therefore reversed, and it is directed that the record be remitted to the court below, that an account may be taken, and plaintiff's damages be assessed according to law by the referee; costs of this appeal to be paid by appellee.

(183 Pa. St. 88)

CARSON et al. v. AMBROSE.

(Supreme Court of Pennsylvania. Oct. 25, 1897.)

SHERIFF'S SALE—SETTING ASIDE.

Mere inadequacy of price does not call for the setting aside of a judicial sale.

Appeal from court of common pleas, Armstrong county.

Under a judgment in favor of William Carson and others, plaintiffs, land of J. R. Ambrose, defendant, was sold on execution. Rule to show cause why the sale should not be set aside was discharged, and defendant appeals. Affirmed.

The opinion of the court below and the assignments of error are as follows:

Opinion.

"The defendant seeks to have sale of his land set aside, and, as reasons therefor, alleges inadequacy of price, want of proper notice of sale, improper description, and conduct of plaintiffs which deterred bidders. Inadequacy of price is not of itself sufficient to warrant the setting aside a sheriff's sale. The land consisted of 176 acres, more or less. The plaintiffs in the writ became the purchasers at a bid of \$700. This would appear to be grossly inadequate, but when you consider that the land was sold subject to the lien of a mortgage, upon which there is to be paid to the widow of the predecessor in title the annual interest of \$206.73, and upon her death, to the heirs, the principal, viz. \$3,-

445.53, and that there is due and unpaid of this interest \$1,400, according to plaintiffs' statement, and admitted by defendant to be over \$500 yet unpaid, and the further fact that the judgment upon which the property was sold called for the payment of \$1,718.69, with interest from March 7, 1891, the price or sum bid was not inadequate. Therefore in disposing of the exceptions the question of price will not be considered. The evidence shows that a handbill was placed upon the premises by the sheriff, and upon argument the exception as to that fact was abandoned. The defendant admits in his testimony that he had notice of the sale, and the evidence shows that he was apprised of the fact that the execution was going to be issued, and sought to have it prevented, and, after it was issued, continued in his efforts to get the matter arranged with the plaintiffs so that the land would not be sold. The exception as to proper description cannot be sustained. The fact that sheriff did not mention that the land lay in gas territory is not any reason why the sale should be set aside. The sheriff is not called upon to make conjectures in his advertisements. They should contain and set forth verity, not speculation. There is not anything in the evidence to show that plaintiffs or their attorney did anything to deter bidders, and it is unnecessary to comment thereon. And now, March 20, 1896, rule is discharged, at the costs of the defendant."

Assignments of Error.

"First. The court erred in his opinion, in this: 'But when you consider that the land was sold subject to the lien of a mortgage upon which * * * there is due and unpaid of this interest about \$1,400, * * * and the further fact that the judgment upon which the property was sold called for the payment of \$1,718.69, with interest from March 7, 1891, the price or sum bid was not inadequate.' Second. The court erred in finding as a fact 'that the defendant admits in his testimony that he had notice of the sale.' Third. The court, in his opinion, erred in this: 'The exception as to lack of proper description cannot be sustained.' Fourth. The opinion of the court is in error in stating, 'There is not anything in the evidence to show that plaintiffs or their attorney did anything to deter bidders.' Fifth. The court erred in not deciding that the sheriff's advertisement of such sale was illegal, and in not setting the sale aside for that reason."

McCain & Christy and Findlay P. Wolff, for appellant. Barclay Nulton, for appellees.

PER CURIAM. No sufficient reason for setting aside the sheriff's sale in this case has been shown either in the court below or here. The discretion vested in the court was wisely exercised in discharging the rule to show cause. There is nothing in either of the spec-

ifications of error that would justify a reversal or modification of the decree. Decree affirmed, and appeal dismissed at appellant's costs.

(183 Pa. St. 65)

PETERS v. CARNER et al.

(Supreme Court of Pennsylvania. Oct. 25, 1897.)

APPEAL—JURISDICTIONAL AMOUNT—SUPREME COURT.

In the common pleas, plaintiff, in his statement, claimed over \$1,000. The jury rendered a verdict for him for \$800, subject to the opinion of the court on a question of law reserved, and the court entered judgment for defendant non obstante. Plaintiff appealed to the supreme court, and assigned as error the refusal to enter judgment for the amount found by the jury. *Held*, that the supreme court had no jurisdiction, under Act June 24, 1895, giving the superior court original and exclusive and final appellate jurisdiction "if the value of the real estate or personal property or the amount of money really in controversy in any single action or claim is not greater than \$1,000, exclusive of costs."

Appeal from court of common pleas, Butler county.

Action by one Peters against one Carner and others. From a judgment in favor of defendants notwithstanding a verdict in favor of plaintiff, he appeals. Remitted to superior court.

W. H. Lusk and McJunkin & Galbreath, for appellant.

PER CURIAM. Section 7 of the act of June 24, 1895, provides, *inter alia*, that the superior court shall have exclusive and final appellate jurisdiction of all appeals which are now allowed to the supreme court in the five classes of cases respectively designated "a," "b," "c," "d," and "e." Class "c" embraces "all other actions, claims or disputes of every kind, including distributions in the common pleas, at law or equity, whether originating therein or reaching that court by appeal or certiorari from a justice of the peace or alderman or magistrate, if the value of the real estate or personal property or the amount of money really in controversy in any single action or claim is not greater than one thousand dollars, exclusive of costs." In addition to this, two other exceptions are specified in the clause, but they have no bearing on the present case, and need not be quoted. If "the amount of money really in controversy in" the case under consideration "is not greater than one thousand dollars, exclusive of costs," the superior court clearly has jurisdiction. The record shows that while the plaintiff, in his statement, claimed more than \$1,000, his claim in this appeal is less than \$1,000. On the trial the learned judge submitted to the jury the question as to the amount of the plaintiff's claim, and they rendered a verdict in his favor for \$800, subject to the opinion of the court on the question of law reserved; and afterwards the court disposed of that question by entering judgment for the defendant non obstante vere-

dicto. From that judgment plaintiff took this appeal, and assigns for error the refusal of the court to enter judgment on the verdict for the amount (\$800) found by the jury. He thus, by his pleading, limits his claim to that sum, and it follows that we have no jurisdiction. It is therefore ordered that this appeal be remitted to the superior court, at the costs of the appellant, for hearing and decision.

(182 Pa. St. 427)

BASCOM v. DANVILLE STOVE & MANUFACTURING CO.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

SALE—ACTION FOR PRICE—REFUSAL TO ACCEPT—INSTRUCTIONS—WAIVER OF ERROR..

1. Defendant, in an action for the purchase price of goods, cannot complain of a statement in the charge that, if they were injured in transportation, the fault was that of the carrier, and not of either of the parties, there being no question of delivery as between the parties, and the statement being in the abstract, and, as such, correct.

2. Statement in letter of purchasers of patterns, to the seller: "We fear we cannot use them at all. We must either be paid for the extra cost, or will return the patterns. Please advise us what to do in the matter,"—is not an absolute refusal to accept.

3. It is not error to refuse defendant's point, in an action for purchase price of patterns, that plaintiff cannot recover if there is a total or partial failure of performance of the contract in the kind or quality of the workmanship, so as to render the patterns unfit for the uses intended, and unprofitable to defendant; as it was too broad, there being evidence that defendant received the patterns during a considerable time, made changes in them, and retained and used them for several months, without specific offer to return.

4. There is no error in the affirmation of plaintiff's point, in an action for price of patterns, in which there was evidence of alterations and changes in the patterns after they were received by defendant, that acts of that kind done by defendant after receipt of the patterns would be an assertion of ownership; the proposition of the point being abstract, and in that sense strictly true.

5. Assignment of error to admission of testimony disclosing offer of compromise cannot be sustained, the testimony having been voluntarily given, without objection or exception or motion to rule out.

Appeal from court of common pleas, Montour county.

Action by H. Clay Bascom against the Danville Stove & Manufacturing Company for price of patterns sold. Judgment for plaintiff, and defendant appeals. Affirmed.

Defendant's third point, the refusal of which was complained of by the fifth assignment of error, was as follows: "That if there is a total or partial failure of the performance of the contract, in the kind or quality of the workmanship, so as to render the patterns unfit for the uses intended, and unprofitable to the defendant company, and the jury so find from all the evidence, there can be no recovery by the plaintiff in this case."

James Scarlet and Charles Chalfant, for appellant. O. G. Voris and H. M. Hinckley, for appellee.

GREEN, J. We discover nothing wrong in the first assignment of error in this case. There certainly was no express warranty established on the trial, but the learned court below charged that the patterns should be reasonably fit and suitable for the purpose for which they were designed, and added: "If they were not, and the defendant, by reason thereof, has sustained damage, to an amount equal to or greater than the contract price, then you must find for the defendant." Certainly, this is all the defendant could ask. When the court further said that, if the jury found that the damage was less than the contract price, "then if the patterns have any value for any purpose, notwithstanding their unfitness for the use for which they were intended, the plaintiff might be entitled to recover such value," the connection in which this was said must be considered. The whole subject had been gone over in the immediately preceding part of the charge, as to whether there had been an acceptance or a refusal to accept, and whether the patterns had been retained and used, or changes had been made in them by the defendant; and these subjects were carefully and correctly submitted to the jury. In that connection the court used the language complained of in the first assignment. The court had just previously said: "If you find from the evidence that they [the patterns] were not in full compliance with the contract and specifications then the plaintiff is not entitled to recover the full amount named in his contract, unless you further find that the defendant company accepted and held the patterns for such length of time and in such manner as thereby to make them so liable." The learned judge then said: "Or, if the purchaser keeps the property when sued for the price, he may set up the breach of implied warranty, and set off his damage, if any, against the plaintiff's claim, even to the full or equal amount of the price or sum agreed to be paid for the same. Whether the defendant accepted and used or changed or undertook to change these patterns, and retained them for an unreasonable time, exercising acts of ownership over them, we leave to you, under all the evidence in the case." It was in this direct connection that the court used the language in question. That there was evidence enough to leave these questions to the jury is beyond all doubt. There was so much of it that it is not at all necessary to recapitulate it. It was the alternative of the defendant's having retained the patterns and used them that the judge was speaking of when he said: "Then, if the patterns have any value for any purpose, notwithstanding their unfitness for the use for which they were intended, the plaintiff might recover such value." Understood in this way, there was no error in the charge.

We cannot possibly see any error in the matter contained in the second assignment. The gist of the alleged error is that the court

said that, if the patterns were injured in the course of the transportation, the fault was that of the carrying company, and not the fault of either the shipper or the consignee. It was but a statement in the abstract, and, as such, it was literally correct. There was no question of delivery as between the vendor and vendee at issue, and authorities on that subject have no relevancy.

In the third assignment the only error claimed was the alleged misstatement by the court as to the time the patterns were received and held by the defendant. The evidence shows that the court was correct in saying they were all received about the middle of October. This is strictly correct. The court did not say or intimate that, between the 15th of October and some time in January following, there was no notice of any defects, by defendant to plaintiff. What was plainly intended when the court spoke of the defendant's holding without notice from October until January was without notice of refusal to accept. The context would be meaningless without this. Now, during that period there was no notice of that kind. Prior to October 15th there had been complaints made in some of the letters of defects in the work, but not of any refusal to accept. On the contrary, letters written by the defendant during that period clearly indicated that the defendant expected to retain the patterns. The letter of September 30, 1890, was certainly to this effect. So were the letters of October 2d and 6th. The latter contained this expression: "We will be glad to receive all the patterns as soon as possible, for we will make changes in Res. to conform with our suggestion." There was an abundance of testimony that the defendant did make changes in the patterns, and intended to do so, but there was no testimony that during this period they intended refusing to accept them. These remarks are equally applicable to the twelfth and thirteenth assignments. The letter of defendant of 28th January, 1891, in which they said: "We fear we cannot use them at all. We must either be paid for the extra cost, or we will return the patterns. Please advise us what to do in the matter, and oblige,"—was certainly not a refusal to accept them. At the very best, it was but an alternative suggestion that the defendant should be paid the extra cost of making changes, or else they would be obliged to return them, and they asked the plaintiff's advice as to what they should do. Clearly, such a letter is not to be regarded as an absolute refusal to accept. We cannot sustain any of these three assignments.

The language complained of in the fourth assignment is predicated on a finding by the jury, that if the plaintiff did not fully and entirely fulfill the contract on his part, but that, notwithstanding such failure, the defendant received and accepted the patterns for an unreasonable length of time before giving notice

of such failure, and without offering to return in as good condition as they were, then the plaintiff might recover the contract price, less the damage sustained by the failure. We see nothing wrong in this as a legal proposition, and the only question is whether there was evidence upon which such a question could be submitted to the jury. We think there was, and hence there was no error in what the court said.

As to the fifth assignment, it is to be observed that the third point of the defendant is too broadly stated. The conclusion that there could be no recovery in this case does not necessarily flow from the premise contained in the first part of the point. The negative answer of the court must be taken in reference to the facts in evidence, and, in view of those facts and the possible finding of the jury in reference to them, the point should not have been affirmed without qualification. There certainly was evidence—quite considerable evidence—that the defendants did receive the patterns during a considerable period of time; that they did make changes in them; that they did retain them, and use them for several months, without making a specific offer to return; and these facts, if found by the jury, would, in a most important manner, qualify the answer to be made to the defendant's third point. In view of these considerations, we cannot say there was error in the answer. The same remarks are true of the sixth assignment and the ninth, and we therefore cannot sustain any of these assignments.

We could not possibly sustain the seventh or tenth assignments, as there was plenty of evidence of acts done and letters written both by Vincent and Schoch, as president and bookkeeper, to carry to the jury the question of their authority to write the letter and do the acts in question. What the court said on this subject was entirely correct. The question was fairly left to the jury, and they have found for the plaintiff, with ample testimony to sustain their finding. These assignments must be dismissed.

There was considerable testimony as to alterations and changes made in the patterns after they were received by the defendant. The plaintiff's second point requested an instruction that acts of that kind done by the defendant after receipt of the patterns would be an assertion of ownership. We can see no error in this. Surely, such action cannot be reconciled with an intent to refuse the patterns and return them. They are the proper and legitimate acts of persons who are owners. They are not the acts of persons who neither are, nor expect to be, owners. The proposition of the point is abstract, and in that sense it is strictly true. In the concrete it depends upon the evidence, which, of course, is for the jury. The eleventh assignment is not sustained.

It does not seem to us that the fourteenth assignment is correctly stated. The testimony complained of was not admitted under ob-

jection; nor was the question to the witness an attempt to prove an offer of compromise. The witness Foster was being cross-examined in reference to a conversation which had been introduced by counsel for the appellant. Having answered a number of questions as to what the conversation was, the witness was asked by counsel for the appellee: "Q. What was the wind-up of your interview? A. Well, the wind-up of our interview was, I made him a proposition or offer to pay him five hundred dollars and give him the patterns." Neither to the question nor to the answer was there any objection. The witness was then asked: "Q. You offered that, that day? A. Yes, sir. Q. What did he say? A. He said he would not settle that way. Q. Did you at any time renew that proposition? A. I did. Q. When? A. Subsequently, I think, by letter, I renewed the proposition." At this time an objection was first made "that anything in the way of a proposition of settlement, that is not accepted by the parties, cannot be evidence in the case." There was no motion to strike out the testimony already in, and no objection or exception to the admission of that evidence. The witness, in answer to the last question, simply said that the proposition was renewed on his own responsibility, by letter of May 15th. But it does not appear that that letter was given in evidence, and, if not, its contents were not before the jury. The oral testimony of the witness as to the conversation having been voluntarily given by the witness, without objection or exception, and no motion made to rule it out, we do not see how we can sustain an assignment of error to its admission. But, in any event, what was said on this subject was part of a conversation which had been given in evidence by the defendant, and the question was not an offer to prove a compromise, and the part of the answer of the witness which disclosed an offer to pay a sum of money less than the claim was inconsistent with the claim made by the defendant that they held the patterns only subject to the order of the plaintiff. It tended to contradict the testimony and the theory of the defendant that they never had accepted the patterns, and had no ownership of them. Being, therefore, in the nature of the admission of a fact inconsistent with the defense, the question is assimilated to the question raised in *Arthur v. James*, 28 Pa. St. 236. There a letter was offered in evidence which contained an unaccepted offer of compromise. It was objected to on that ground, but we held it was admissible because, although it contained an offer of compromise, it also contained admissions of material facts. In the opinion, *Lewis, C. J.*, said: "In the case before us the letter received in evidence contained distinct admissions of material facts. These facts cannot be excluded because the same letter closes with an offer of a certain sum of money to settle the matter." In the case now before us, if the objection had been promptly made to the testimony as to the offer, by itself, a different question

might have arisen. But, as no such objection was made, the part now objected to, being part of an entire conversation, it seems to us, cannot be excluded because it discloses an offer to compromise. The fourteenth assignment is not sustained. Judgment affirmed.

(183 Pa. St. 91)

McMILLIN v. McMILLIN.

(Supreme Court of Pennsylvania. Oct. 25, 1897.)

APPEAL—REVIEW.

Where, by agreement, a bill for divorce was heard in open court, the conclusions of the judge will be accepted as verity, unless manifest error is shown.

Appeal from court of common pleas, Lawrence county.

Bill by Herman E. McMillin against Charlotte McMillin for a divorce. From a decree dismissing the bill, plaintiff appeals. Affirmed.

The following is the opinion of the lower court (Wallace, P. J.):

"On September 19, 1895, Herman E. McMillin presented his libel in divorce, and subpoena was awarded. The petition alleges as a ground for divorce adultery on the part of the defendant with one Victor Leibrich. Defendant, on December 4, 1895, moved the court for a rule on the libellant to furnish a bill of particulars; and in pursuance of said rule libellant filed a bill of particulars alleging adultery at different times with the said Victor Leibrich, mentioning the dates at which said adultery took place. The case was heard in open court, witnesses being called, and the testimony taken. After hearing the testimony and the arguments of counsel, both for the libellant and the respondent, the court directed the testimony to be written out in longhand. And a careful examination of the testimony taken in the case reveals the facts that Dr. H. E. McMillin and Charlotte McMillin were married; that they lived together as man and wife in the borough of Mahoningtown until some time in the fall of 1895,—until about the time of the bringing of this suit,—when she was refused admission to his house, but was supported by him at an hotel in Mahoningtown; that Dr. McMillin was a practicing physician in the borough of Mahoningtown, Lawrence county; that one Victor Leibrich, who also resided in the borough of Mahoningtown, was employed by Dr. McMillin to keep his books; that Victor Leibrich was brought to the home of Dr. McMillin, by reason of this occupation, oftentimes,—in fact, daily, and sometimes three or four times during the day; that Mrs. Charlotte McMillin was a woman in delicate health, frequently being confined to her bed; that often, in the absence of the doctor, and at the doctor's request, Victor Leibrich did take care of and wait upon Mrs. McMillin while she was confined to her bed on account of sickness; that Leibrich had access to all parts

of the house, you might say, at all times of the day and night; that he carried medicine from the office or drug store to her, and administered medicine to her, and this by the request of the libelant in this case. The libelant now undertakes to have a decree in divorce made by reason of adultery, and in support of that alleges circumstances of familiarity, asking the court to say from these circumstances that adultery was committed by the said Charlotte McMillin with the said Victor Leibrick, in the house of Dr. McMillin in the borough of Mahoningtown. To further support these allegations, he calls a number of witnesses, all of whom testify regarding familiar relationship. One of them—Miss Clara Moore—testifies that she was, in November, 1895, a domestic in the house of Dr. McMillin; that she was called there by reason of Mrs. McMillin's illness; that at that time Mrs. McMillin was and had been confined to her bed for more than one week; that Victor Leibrick was in the habit of coming into the house, and did, during this time of her sickness, come into the house, and go to the room where Mrs. McMillin was sick in bed; that that was a frequent occurrence; that one evening between 9 and 10 o'clock she went upstairs into a room across the hall. After remaining there some time, she went across the hall, and, as she says, 'she opened the door, and he (Leibrick) was just getting out of the bed.' In answer to the question, 'In what condition was the bed clothing?' she answered, 'Well, the bed clothing,—she was straightening the bed clothing down.' In answer to the question, 'In what condition was Victor Leibrick's clothing?' she answered, 'Well, he was buttoning up his pants.' And she further testified that they each solicited her to keep quiet, 'and not give her away.' This is the only testimony in the case, if the defendant had called no witnesses, that would tend or in any way lead the court to a presumption that they were guilty of adultery. This testimony is positively denied by both parties, Charlotte McMillin and Victor Leibrick. Then, is it such, as it stands, that would be sufficient to warrant the court in making a decree of divorce? Other witnesses have testified to familiarities—undue familiarities, we might say—on the part of the defendant with Victor Leibrick in the house of the said Dr. McMillin. And in considering the question whether or not the decree ought to be made by reason of this testimony the court must take into consideration all of the surrounding circumstances which would tend to lead the mind of the court to the general result of the act of the parties under the circumstances of each particular case. It is well settled that no general rule can be laid down showing what facts constitute sufficient proof, because the same presumptions do not follow the same facts, as they are somewhat dependent upon the character, habits, and situation of the parties. And, in order to ar-

rive at a correct conclusion, we must look at the situation of the parties in this case. Who was Victor Leibrick? What brought him to the house? Victor Leibrick, the testimony shows, was the bookkeeper of Dr. H. E. McMillin, and as such kept the books in the house of his employer; that he was there at the request of Dr. McMillin, to aid and assist him in taking care of Mrs. McMillin while she was sick. In fact, frequently, under the doctor's direction, he was left alone with her in the sick room for hours. Can we then say, with these facts before us, that he was in that room on this night, when she was in bed, sick, for an unlawful purpose? That leads us to the truth of the statement made by Miss Moore. Is her story reasonable? Let us see. Miss Moore was a domestic in the house of Dr. McMillin, and known to have been in the house at the time of this visit by Leibrick to Mrs. McMillin's room, it being her custom, as Miss Moore says, to visit the room of Mrs. McMillin each night prior to her retiring, or about the time of this alleged visitation by Leibrick to the room of Mrs. McMillin. Mrs. McMillin had been at this time sick in bed for a week or more; was at this particular time confined to bed. There was sufficient light in the room to discern the people and all things going on in the room. The door was unlocked. Then, would people under these circumstances do what Miss Moore says she saw there? Is that reasonable? These are matters that must be weighed in connection with Miss Moore's testimony. And, with her testimony standing alone, could any person, taking into consideration the circumstances,—the condition of the parties, and the circumstances surrounding their being together,—reasonably conclude the truth of Miss Moore's statements or the unlawful acts of the parties. But her statement is not alone, so that we are not to conclude from the surrounding circumstances alone, as her testimony is directly and positively denied by both Charlotte McMillin and Victor Leibrick. Taking into consideration, then, her testimony on the one hand, and the testimony of Victor Leibrick and Charlotte McMillin, as well as the surrounding circumstances, there is but one conclusion that the court can arrive at, and that is that they were not there for the purpose of committing adultery on that particular evening, and that no adultery has been proven. Indeed, in this case the court would hesitate to grant a decree in divorce without stronger testimony than that offered. While we are frank in saying that the behavior of both Mrs. McMillin and Victor Leibrick has been very imprudent, and at times familiarities have been proven which ought not to take place in any well-conducted family, yet let us see what brought about those familiarities,—that imprudence. The libelant in this case brought the tempter in the way. He placed his home under such circumstances that

brought temptations that otherwise would not have been before the weaker sex. And, if undue familiarities were taken by Victor Leibrich with Charlotte McMillin, the libelee in this case, part of the blame should be laid upon the shoulders of the libelant. From the facts, as we have already stated them, we are not satisfied that the circumstances proven are sufficient to lead us to the belief that the specifications alleged by the libelant in this case have been fully made out. Now, June 31, 1896, the bill is therefore dismissed, at the cost of the libelant.

J. Norman Martin and S. L. McCracken, for appellant. M. McConnell, for respondent.

PER CURIAM. A careful consideration of the somewhat conflicting evidence in this case has not convinced us that the court below erred in refusing a decree in favor of the libelant, and dismissing the petition, with costs. By agreement of the parties, the case was heard in open court. The witnesses were called and examined in the presence of the trial judge, who, by thus seeing the several witnesses, hearing them testify, observing their manner on the witness stand, etc., had much better opportunity than we have of forming a correct judgment as to their credibility, and the evidential value of their testimony. His conclusions of fact should therefore be accepted as verity, unless manifest error therein is clearly shown. Especially is this so where, as in this case, the testimony on the controlling question of fact is so conflicting, and apparently irreconcilable. But, while we cannot say that the trial judge erred in holding that the alleged criminal offense charged in the libel was not proved, we think his reflections on the conduct of the libelant, quoted in the third specification, were unwarranted by anything that appears in the record. There is nothing in the case that calls for further comment. Decree affirmed, and appeal dismissed, at plaintiff's costs.

(183 Pa. St. 124)

In re ADAMS' ESTATE.

(Supreme Court of Pennsylvania. Oct. 25, 1897.)

TRUSTEE—OPENING OF ACCOUNTS—LACHES.

Testator gave one-fifth of his estate to a son, in trust for an insane daughter, with remainder over to her two sons. At testator's death, he and his son were engaged as a firm in private banking, and in the appraisement \$4,988 was appraised as due from such firm. The son, who was also executor, received, as trustee, the daughter's full share, and placed it on deposit in said banking house. Ten years after testator's death the court confirmed, without exception, the trustee's account, showing only \$2,127.86 on hand. Fourteen years afterwards, and after the death of both the cestui and the trustee, the trustee's executors filed an account, showing the expenditure by the trustee of the entire trust fund, and \$971.54 additional, in her support. This account was exhibited in the register's office, was advertised, and 30 days afterwards was confirmed by the court without ex-

ception thereto. *Held*, that the daughter's son was not entitled, as a matter of grace, to have said two accounts opened for review on an application made two years after the last one was confirmed, to show that the trust funds were invested in the banking business, and amounted to \$40,000 at the death of the trustee.

Appeal from orphans' court, Washington county.

Petition by William A. Adams for a bill of review to certain accounts of William J. Alexander, as trustee of the estate of Rose Ann Adams. From a decree sustaining a demurrer to and dismissing the petition, the petitioner appeals. Affirmed.

The opinion of the orphans' court is as follows (TAYLOR, J.):

"It is conceded by the petitioner in this case for a bill of review of the accounts of Wm. J. Alexander, trustee of Rose Ann Adams, and James S. Alexander and Joseph A. Herron, executors of the will of the said Wm. J. Alexander, who was trustee of the said Rose Ann Adams, deceased, that he has laid no ground demanding relief as a matter of right, which was to admit that there were no errors of law apparent on the face of the records referred to, and that no new matter had arisen since the decrees confirming said accounts. It was frankly stated by the petitioner's counsel at the argument of the case that, if the petitioner were granted the review for which he laid claim, it rested solely with the court as a matter of grace, and to this attribute alone in the equitable side of the court he addresses himself, and refers his cause. In disposing of the case it will be necessary to consider only when, and under what circumstances, a review should be granted as a matter of grace, after referring to the facts stated in the petition, from which the petitioner's rights are now to be determined, if he have any, under this proceeding. The will of Joseph Alexander must be taken as the basis of any claim the petitioner here may have to relief, since the petition sets forth his will, and that whatever estate Rose Ann Adams had was derived by and under said will, and in which the trust here was also created. Joseph Alexander died testate on the — day of June, 1871. His will was duly probated, and letters testamentary issued to William J. Alexander, a son, who, at the time of his father's death, was engaged with him in the banking business as private bankers in the city of Monongahela. By the said will of Joseph Alexander his executor therein named was also made trustee of the one-fifth residue of his estate remaining after the payment of his debts, to be by him held in trust for the use and benefit of the said Rose Ann Adams during her life, and then any remaining after her death to be paid to her two sons, Wm. A. Adams, the petitioner in this case, and Charles W. Adams, who died intestate, unmarried, and without issue. Rose Ann Adams was a daughter of the said Joseph Alexander, and a sister of Wm. J. Alexander, the executor and trustee

under the father's will. In the appraisement of the estate of Joseph Alexander, deceased, filed August 1, 1871, the sum of \$4,988 was appraised as 'due from Alexander & Co.,' the banking firm, and represented the interest of the deceased father in this business. This sum, with other items of personal property of the deceased, aggregated \$5,542, which sum the accountant, together with the sums derived from the sale of the decedent's real estate, aggregated, as the entire estate of said deceased, \$17,961.50; and, after deducting debts, funeral expenses, and expenses of settlement, left a balance for distribution among the legatees under said will of \$17,169.95, which balance was distributed in five equal shares and amounts to and among the children of said deceased of \$3,433.99 each, as shown by the account of said executor filed to No. 14, February term, O. C., 1872, which account was confirmed and never excepted to. The executor of Joseph Alexander received, and receipted for as trustee of Rose Ann Adams, her full share, as shown by the distribution account of her father's estate, December 16, 1871, \$3,433.99, and placed it on deposit in the banking house of Alexander & Co., where it has remained ever since until finally used up by the said Rose Ann Adams, principal, and interest, which it drew from the date of its deposit with the bank on December 16, 1871, the interest of which, and so much of the principal as was remaining, were paid July and January of each year for the support and care of the said Rose Ann Adams, who was a lunatic, confined in an asylum for the insane, until her death, May 22, 1893. At No. 5, January term, O. C., 1881, the said William J. Alexander filed an account of his management of this trust fund held by him under the will of Joseph Alexander for the use of said Rose Ann Adams, accounting for principal and interest accrued thereon, July 1, 1880, \$4,810.88, from which he took credit in the sum of \$2,683.02, as paid out for the maintenance, care, and keeping of his sister in the institution for the insane where she was confined. This account was duly confirmed by the court, without exception filed; and the balance shown by it in the hands of the trustee, viz. \$2,127.86, the said trustee continued to keep invested at six per cent. annual interest until January 2, 1888, when principal and interest of the trust fund became exhausted in the support of the lunatic, and the trustee and brother had expended of his own funds, as appears by the account of his executors, who, to No. 56, May term, O. C., 1895, filed his final account as trustee, the sum of \$971.54, showing an indebtedness in said amount of the estate of Rose Ann Adams to the executors of William J. Alexander, deceased. This account filed of this trust estate by the trustee's executors, the trustee having died June 4, 1894, was exhibited in the register's office April 17, 1895, in a few days less than one year after the decease of the said trustee of Rose Ann

Adams, and was advertised and confirmed according to law absolutely May 15, 1895, without exception filed thereto. It is these two latter accounts that the petitioner here, William A. Adams, the only surviving son and heir of the said Rose Ann Adams, filed March 8, 1897, for a rule, etc., asks the court to open up to him, as a matter of grace, for review, for the purpose of showing, as he sets out in paragraph 14 of his petition, that 'the portion of the estate allotted to the trustee of Rose Ann Adams was an interest in the said Alexander & Co. equal to the amount of said estate, and was never converted into money, and never passed through the hands of Wm. J. Alexander as executor and trustee, but remained a vested interest in said company, without interruption, from the death of Joseph Alexander to this date, and the principal thereof has never been accounted for.' It is here plain to be seen that no new proof has been discovered after the decree confirming the account of Wm. J. Alexander as trustee of the said Rose Ann Adams, a lunatic, filed to No. 5, January term, 1881, which proof could not possibly have been used at the time when the decree confirming that account was made. By that account the trustee plainly discloses the fact that the share or interest derived by the said Rose Ann Adams from her father's estate, and by him held in trust under the will of his father for this lunatic sister, is not a vested interest in the banking firm of Alexander & Co., but there as a deposit drawing interest thereon at the legal rate, the same as that of an investment for an interest rate instead of an interest in the firm. A period of about eight years had elapsed since the death of Joseph Alexander and the filing of the first account of Wm. J. Alexander as trustee of Rose Ann Adams, yet in all these years no expenses of the running of the banking house of Alexander & Co. were charged up to the trust estate of Rose Ann Adams in the trustee's hands in this account, and then, as now, the accountant treated the money derived by her from her father's estate as invested simply as an interest bearing investment, the income of which, as well as some of the principal from time to time, was necessarily used for her support and maintenance in the asylum. There is no allegation in the petition that the petitioner was without knowledge of the filing of this account, or the last one filed by the executors of the trustee, or so situate that he could not inspect the same; and we must take it, after this lapse of time, and particularly after the death of Wm. J. Alexander, the trustee, whose lips are now sealed in death, that the petitioner has been guilty of such laches—he being the residuary legatee of the mother's trust estate under the will of his grandfather, Joseph Alexander—as destroys his title to relief. For the principle laid down above, and which controls our decision in this case, see Scott's Appeal, 112 Pa. St. 427, 5 Atl. 671; Priestley's Appeal, 127 Pa.

St. 420, 17 Atl. 1084; and the cases in the above two cases cited, wherein these principles of equity, as applicable to the act of 1840, were early adopted by the supreme court of this state. We must assume that the petitioner, interested as he was in the estate of his grandfather, a portion going to his mother, and then to himself, in the hands of the trustee appointed by the will of his grandfather, had legal notice of the filing of these accounts, which were advertised, and the solemn decrees of the court confirming them, wherein it is shown on the face of each that they could then, before the confirmation of each, have been attacked for the same reason and by the same proof as now proposed, but for the laches or negligence of the petitioner. 'As a matter of grace, a review may be granted for new proof discovered after the decree, which proof could not possibly be used at the time when the decree was made; yet, when the party complaining has been guilty of laches after notice of the decree, the bill should not be granted.' Priestley's Appeal, *supra*; Scott's Appeal, *supra*; Milligan's Appeal, 82 Pa. St. 389; Lee's Estate, 29 Wkly. Notes Cas. 346.

"We can attach no weight to paragraph 10 of the petition, wherein the simple statement is made that the interest of Joseph Alexander in the banking firm of Alexander & Co., being a one-third interest, was valued at \$4,988 on the 1st of August, 1871, and that the interest of Wm. J. Alexander in the banking firm of Alexander & Co., August 20, 1894, was a one-third interest, valued at \$40,000. We are led to conclude, therefore, that, as no proof or evidence is suggested by the petitioner now of gross errors, the knowledge or evidence of which he could not, by the exercise of reasonable diligence, have discovered before the accounts were finally confirmed, his claim for relief must rest on his averments. Le Moynes' Appeal, 104 Pa. St. 321. The petitioner sets forth that he 'has discovered very recently, and since the filing and confirmation of the last account, that the estate of Rose Ann Adams was invested as hereinbefore set out,' etc. There can be no doubt but that his claim as to this is based upon the will of Joseph Alexander, and full and entire information as to the trust funds could have been demanded and enforced at any time by him, at least since May 22, 1893, the date of the death of Rose Ann Adams, and prior to the death of the trustee. If the petitioner was content to rely on the 'advice of the custodians and trustees of the funds,' and if, 'believing their statement,' he 'has allowed said accounts (made under oath) to remain unquestioned,' this would not bring him within the requirements of the law which would entitle him to a bill of review under the circumstances of this case disclosed by his petition. The authorities of McNeels' Estate, 68 Pa. St. 412, and Kinter's Appeal, 62 Pa. St. 318, cited by petitioner's counsel, do not apply to the situation as disclosed by the

petition. In those cases there was a plain showing that assets belonging to estates had been omitted from the accounts. It was made to appear as a matter of fact that such was the case, upon which the review was granted to reform and surcharge. In the case before us no such facts plainly appear, nor can we take the filing of the demurrer in this case to admit that the statements made here are facts, admitted for any other purpose than to avail the demurrers of a legal defense as a matter of form in pleading."

Norman E. Clark, I. S. Stentz, W. I. Berryman, and R. A. Hitchens, for appellant. A. M. Todd and James A. Wiley, for appellee.

PER CURIAM. In the court below this case was heard on the demurrer to appellant's petition for a bill of review of the accounts specified therein. The demurrer was sustained, and the petition dismissed, at the petitioner's costs; and hence this appeal. A careful consideration of the record has satisfied us that no other decree should have been made, and that neither of the questions involved requires further discussion. For reasons given in the opinion of the learned judge of the orphans' court, the decree is affirmed, and appeal dismissed, at appellant's costs.

(183 Pa. St. 112)

CAMPBELL v. BROWN.

(Supreme Court of Pennsylvania. Oct. 25, 1897.)

REBUTTING EVIDENCE—WHAT CONSTITUTES—GIFTS FROM PARENT TO CHILD—PRESUMPTION—WITNESSES—COMPETENCY.

1. In an action against plaintiff's brother to set aside deeds and assignments made to him in 1891 and 1892 by their father, since deceased, on the ground of fraud and undue influence, and of the father's incapacity, plaintiff offered evidence that in 1888 deceased stated that he intended to give the house he then lived in, and afterwards deeded to defendant, to plaintiff, and that he had given the house adjoining to defendant, and he wished to make them alike, to rebut testimony that deceased had stated that he had helped plaintiff to raise her family, and, as defendant was raising one, he intended to give the balance of his property to help him. *Held* not error to exclude such evidence on the ground that the latter statements of deceased were made after the statements referred to in the offered evidence, and that the latter was evidence in chief.

2. It was not error to exclude, as not rebutting said testimony, evidence that in the fall of 1891 deceased stated, at a specified place, that he wished to treat both of his children alike, and that he had given them both a good deal of money, and that defendant could spend more money than any person he ever saw.

3. Nor was it error to exclude, as not rebutting, a deed made in 1884 by deceased and wife to a third person, conveying the same property afterwards included in one of the alleged fraudulent deeds to defendant, offered for the purpose of showing that deceased did not know what he was signing when he signed the deed to defendant.

4. And the court properly excluded evidence offered in rebuttal, to show that an assignment by deceased to defendant of stock in a corporation was in defendant's handwriting.

5. Every presumption of law is in favor of the validity and fairness of gifts from a father to his son, as against another child seeking to set them aside for undue influence and fraud.

6. In an action by the daughter of a decedent against her brother to set aside deeds and assignments by deceased to defendant on the grounds of fraud, undue influence, and incapacity, plaintiff and her husband are incompetent witnesses as to matters occurring in deceased's lifetime.

Appeal from court of common pleas, Beaver county.

Bill by Amanda E. Campbell against Hartford P. Brown to set aside certain deeds and assignments obtained by defendant from one Perry Brown, and for an account, an injunction, etc. From a decree dismissing the bill, plaintiff appeals. Affirmed.

The bill alleges in substance that plaintiff is a daughter of Perry Brown, late of Rochester borough, Beaver county, Pa., deceased; that Perry Brown died on the 18th day of November, A. D. 1892, leaving to survive him no widow, and but two children, viz. herself, the complainant, and Hartford P. Brown, the defendant; that from about the year 1888 Perry Brown was in feeble health; that on or about the 15th day of October, 1888, he had a stroke of apoplexy, which resulted in a weakening of his will power, and incapacitated him from attending to his own affairs; that at that time he was seised of real estate of the value of about \$40,000, and stock in the banking firm of John Conway & Co. valued at \$5,000, 104 shares of Heat & Light stock, par value of \$25 per share, and 100 shares of the People's Insurance Company of Pittsburgh, of the par value of \$50 per share; that, from the year 1889 until the decease of Perry Brown, Hartford P. Brown, the defendant, was the sole confidential adviser and business manager of the said Perry Brown, and that Perry Brown made his home with H. P. Brown from April 15, 1890, to the time of the death of Perry Brown; that on July 20, A. D. 1892, the said defendant fraudulently procured the execution to himself of several deeds from Perry Brown, conveying to him all his real estate, without consideration; that on September 15, 1891, the defendant fraudulently procured from Perry Brown the execution of an assignment to himself of the 100 shares of the People's Insurance stock, without consideration; that on the 6th day of August, 1892, the defendant fraudulently procured an assignment of the stock held by Perry Brown in the banking firm of John Conway & Co., without consideration; and that, at the time said purported deeds and assignments were procured, Perry Brown was weak in mind and body, easily influenced, and did not comprehend the meaning and effect of said instruments. The bill prays that the deeds and assignments be declared fraudulent and void; that there be an account of rents, issues, and profits; that the defendant be enjoined from executing any transfer of the property; if any of the property has been transferred, a decree for the value thereof, and for such relief as the case requires. The answer

admits that plaintiff is a daughter of Perry Brown, and that Perry Brown died November 18, 1892, leaving no widow, and defendant and plaintiff as the only heirs of Perry Brown. Defendant places the value of the real estate at about \$20,000, and the actual value of the stocks about \$8,500. The answer denies that he was the sole confidential adviser and business manager of Perry Brown from 1889 to the time of his death, but admits that Perry Brown lived with him from April 15, 1890, to the time of his decease. It denies that he fraudulently procured the execution of the deeds and assignments; and avers the deeds were executed to him for the nominal considerations mentioned in them, and for other good consideration, and, as to the stocks, that no consideration was paid therefor, and none intended. The answer also denies that, at the time of the execution of the assignments and deeds, Perry Brown was weak in body and mind, and easily influenced, and that he did not understand the meaning and effect of the instruments. The amended answer denies the fraudulent execution of the assignments and deeds, and avers that while the consideration in the deeds was nominal, and no consideration was paid for the stocks, the said conveyances were in fact gifts and other good consideration freely and voluntarily made by the said Perry Brown, with the full knowledge of the nature and effect of his acts, and their effect upon him in relation to his estate, and that the actual value of the stocks did not exceed \$8,500.

The assignments of error are as follows: "First. The court erred in not admitting the testimony of Rebecca Bowers for the plaintiff in rebuttal, the offer of which was as follows: 'Plaintiff's counsel propose to prove by this witness, Rebecca Bowers, that in the fall of 1888, during a visit to the house of Perry Brown, during Mrs. Brown's last illness, that Captain Perry Brown stated to witness that he intended to give the house that he then lived in to Mrs. Campbell; that he had given the house adjoining to his son, Hartford P. Brown, and he wished to make them alike. This for the purpose of rebutting the testimony given by the witnesses who say that Captain Brown had stated that he had helped the Campbells to raise their family, and, as Hartford was raising one, he intended to give the balance of his property to help him raise his family. By the Court: The witnesses testified that Captain Brown made a statement to them as alleged in this offer; testified that these statements were made subsequent to the offer now made; and, if these facts are true, they would be a part of the plaintiff's case in chief. For these reasons the objection is sustained, and an exception sealed for the plaintiff. J. Sharp Wilson [seal], P. J.' Second. The court erred in not admitting the testimony of Robert McLain for the plaintiff in rebuttal, the offer of which was as follows: 'Q. Did you have any conversation with, or did he tell you anything about what he had given to Mrs. Campbell and to Hartford Brown? (Objected to, asking the

purpose.) Plaintiff's counsel offers to prove by the witness Robert McLain that in the fall of 1891 Perry Brown had stated to him in the gas office at Rochester, Pennsylvania, that he wished to treat both of his children alike, and he had given them both a good deal of money, but that Hartford Brown could spend more money than any person he ever saw. This to rebut these witnesses who stated that he had helped the Campbells to raise their family, and, now that Hartford was raising a family, he intended to help him raise his; that he intended to give him the rest of his property to help raise his. (Objected to by defendant's counsel—First, for the reason it is not rebuttal; second, that is an attempt to interject matter at this stage of the case which is only proper in chief.) The Court: Neither time, place, nor circumstances is fixed in the question. It appears to be a part of the plaintiff's case in chief. The offer is overruled, the objection sustained, and an exception sealed for plaintiff. J. Sharp Wilson [seal], P. J.' Third. The court erred in not admitting in evidence the deed from Perry Brown and wife to George F. Stetsell, for plaintiff in rebuttal, the offer of which was as follows: 'Plaintiff's counsel next offer in evidence the deed of Perry Brown and wife to George F. Stetsell, dated the 27th day of March, A. D. 1884. Recorded in Deed Book 97, p. 38. Entered of record June 4, 1884. This for the purpose of showing that Perry Brown did not know what he was signing when he signed the deeds to Hartford P. Brown, as this property is included in the deed from Perry Brown to Hartford. (Objected to by defendant's counsel—First, as incompetent and irrelevant; secondly, for the reason that it rebuts nothing; and, thirdly, for the reason that it was only proper, if at all, in chief; fourthly, that the deed was made long prior to the time that the deeds in controversy were executed.) The Court: It is a part of the plaintiff's case in chief, for the reason it is set up in the bill that certain properties for certain values were conveyed. It is also alleged in plaintiff's bill that a fraud was committed. This should have been offered in chief. The offer is overruled, the objection sustained, and an exception sealed for the plaintiff. J. Sharp Wilson [seal], P. J.' Fourth. The court erred in not admitting the testimony of Frank Bowers for the plaintiff in rebuttal, the offer of which was as follows: 'Plaintiff's counsel offer to prove by the witness, Frank Bowers, that in a conversation with Perry Brown on or about June —, 1889, in his house at Rochester, Pennsylvania, said Perry Brown said to him that he meant this house (being the one he then occupied, and the one now included in the purported deed to Hartford P. Brown) for Mrs. Campbell, his daughter; that he had already given one to Hartford P. Brown, just across the alley; that he wished to make them alike in his property. This to rebut the testimony for defendant that he had helped to raise Campbell's family, and, now that Hartford was raising one, he was going to give him the re-

mainder of his property to help raise it. Further, that this testimony and the testimony of Rebecca Bowers has been discovered since this hearing; that this is a case of equity, not tried before a jury, the effect of the evidence being for the court only; and that, in that discretion which the court ought always to exercise, these witnesses should be heard in a case of this importance, and not compel a discontinuance and probable rehearing. (Objected to by defendant's counsel—First, for the reason that it is not rebuttal; secondly, for the reason that it could only be proper, if proper at all, in chief. It is objected to, further, that the witness Mrs. Bowers having testified that she was in company with Mrs. Campbell, the plaintiff in this case, at the house of Perry Brown, that it was her duty to be vigilant, and produce such evidence in chief, if any such evidence existed; also, that it is an attempt to open up plaintiff's case in chief. The evidence, in its nature, would rebut nothing, no witness having testified to anything that occurred at the time of the alleged conversation, and no witness' attention having been called to anything that was alleged to have been said upon any such occasion; and it is, therefore, entirely improper, as rebuttal, or for any purpose, at this stage of the case). By the Court: The testimony of the witness Bowers, now offered, is properly testimony in chief, or that which should have been offered in chief. But if, however, the discretion of the court were exercised, and the evidence admitted, it antedates the testimony given by witnesses for the defendant as to the time when the decedent made statements contradictory to that which the plaintiff proposes to prove by these witnesses. For these reasons the objection is sustained, and an exception noted for the plaintiff, and bill sealed. By the Court. J. Sharp Wilson [seal], P. J.' Fifth. The court erred in refusing to admit the testimony of Robert McLain for plaintiff in rebuttal, the offer of which was as follows: 'The witness on the stand having testified that he had seen Hartford P. Brown write, and that, from having seen him write, he thought he could tell his handwriting; Exhibit No. 10 having been shown witness (this exhibit having been offered in evidence by the defendant, it being a paper under which he claims stock for which he received nine thousand dollars, as appeared by the evidence, as a gift), it is proposed by plaintiff to prove by this witness that the paper under which he claims this gift is in the handwriting of the defendant, who claims the stock as a gift. (Objected to by defendant's counsel—First, as incompetent and irrelevant; secondly, that such evidence, if proper at all, would only be proper in chief; thirdly, for the reason it is not rebuttal; fourthly, for the reason that the plaintiff, at this stage of the case, cannot interject a part of her case in chief.) The Court: The offer is overruled and the objection sustained. A bill of exceptions sealed for plaintiff. J. Sharp Wilson [seal], P. J.' Sixth. The court erred in finding as a fact 'that at the time of

the assignments and deeds were made the said Perry Brown was strong, physically, for a man of his age, and of sound and unimpaired mind.' Seventh. The court erred in finding 'that no fraud, misconduct, or undue influence on the part of the defendant has been shown, nor that the defendant stood in the relation of confidential adviser to the said Perry Brown.' Eighth. The court erred in finding as a fact 'that the said Perry Brown was a man of strong mind and good business capacity, and so remained until his decease, at the age of 72 years, and physically unafflicted, save by the usual infirmities of age.' Ninth. The court erred in finding as a fact 'that, in transferring the stock and making the conveyances complained of in the bill of complaint, that the said Perry Brown intended to make a gift of the stocks and real estate described in the deeds to defendant, and at the making of said gifts he was of sound mind, and knew the nature of his acts and their effect upon him in relation to his estate, and that his intention was not produced by any undue influence, fraud, or misconduct on the part of the defendant.' Tenth. The court erred in finding as a matter of law, 'The transfer of the interest in the firm of John Conway & Co., the People's Insurance stock, the Heat & Light gas stock, and the conveyances of the real estate of August 6, 1892, were gifts, and should be sustained.' Eleventh. The court erred in finding as a matter of law, 'that, said transfers and conveyances being gifts from father to son, every presumption of law is in favor of their validity and fairness.' Twelfth. The court erred in finding as a matter of law, 'The plaintiff, Amanda E. Campbell, is an incompetent witness, and her testimony as to matters occurring in the lifetime of Perry Brown would be stricken out, as should that of her husband, S. R. Campbell.' Thirteenth. The court erred in finding as a matter of law that the bill should be dismissed. Fourteenth. The court erred in entering a decree dismissing the plaintiff's bill of complaint."

Alfred P. Marshall, John M. Buchanan, and Wm. A. McConnel, for appellant. Richard S. Holt, for appellee.

PER CURIAM. The first five specifications allege error in excluding the several offers of testimony recited therein; the sixth to ninth, inclusive, complain of the findings of fact therein set forth; the tenth to thirteenth, inclusive, allege error in the several conclusions of law stated therein; and the fourteenth charges error in the decree dismissing the plaintiff's bill. We have carefully considered the record, including the evidence relating to these specifications, and are satisfied that neither of them should be sustained. Nor do we think that any of them requires discussion. Finding no substantial error in either of the trial judge's rulings on questions of evidence or in his conclusions of fact and law, the decree should not be disturbed. Decree affirmed and appeal dismissed at appellant's costs.

(123 Pa. St. 36)

IN RE FAIR HOPE NORTH SAVAGE FIRE-BRICK CO.'S (Limited) ESTATE.

Appeal of BOYTS.

(Supreme Court of Pennsylvania. Oct. 25, 1897.)

EQUITABLE LIENS — PARTNERSHIP ASSOCIATIONS — ASSIGNMENT FOR BENEFIT OF CREDITORS — DISTRIBUTION OF ASSETS — PRIORITIES — CLAIMS FOR LABOR.

1. W. leased to B. and others the fire clay on certain land, and a site for the erection of brick-works, the lease providing that, as the lines of such site could not then be defined, the lessor would, on completion of the works, give the lessees a deed of the land occupied thereby. The lessees subsequently formed a limited "partnership association," and B. borrowed money from W., which was used in the erection of the plant, giving his judgment note, with warrant of attorney to enter judgment on B.'s two-fifths interest in the plant of the association "now building and to be built," and such note was entered of record. *Held*, that the judgment was a lien on B.'s equitable interest in the land.

2. A deed to a partnership association, in which the grantee acknowledges that the amount of a certain judgment against one of the partners individually "exists against four-tenths of everything conveyed in this deed," establishes an express lien on said property to the extent specified.

3. The partnership having assigned for the benefit of creditors, and the assignee having sold the premises by order of court, said judgment was entitled to be paid from the proceeds of the sale, in preference to claims of firm creditors accruing after said judgment became a lien.

4. One who, relying on the solvency of a partnership association, lends it money, which is used in paying laborers' wages, without intending to purchase the labor claims, cannot, by taking an assignment of said claims after the firm becomes insolvent, succeed to the statutory rights of the laborers on distribution of a fund arising from a sale of the firm property.

5. Judgments which have become liens on the land of a manufacturing partnership association six months prior to its assignment for the benefit of creditors have priority over laborers' claims for wages subsequently accruing.

Appeal from court of common pleas, Somerset county.

Exceptions by Josiah Boyts, to use, a wage claim creditor, to the report of an auditor distributing a fund in the hands of Jacob D. Swank, assignee of the Fair Hope North Savage Fire-Brick Company (Limited). From a decree overruling the exceptions, and confirming the report, said Boyts appeals. Affirmed.

The trial court delivered the following opinion (Longenecker, J.):

"On the 13th March, 1890, Henry Thomas Weld entered into a contract with William E. Boyts, J. H. Friedline, and W. L. Shuck, which they entitled 'Lease of fire clay land and site for a fire clay yard at Fair Hope, in Somerset county, Pennsylvania.' Besides leasing to the parties of the second part the fire clay in several tracts of land, it provided as follows: 'All that piece of land lying between Willis creek and the present lumber office of Weld & Sheridan and the line of the railroad switch owned by Weld & Sheridan and the P. & C. R. R. branch, save and except that which is in use as a steam sawmill and its appurtenances by said Weld & Sheridan.

* * * And it is further agreed, that as the lines of the site to be occupied by the fire brick establishment cannot be defined or agreed on now, that when the works are laid out and completed, he, the said party of the first part, will make a warranty deed against all parties claiming from, to, or under him for the land so occupied.' On the 20th March, 1890, the said parties of the second part formed a 'partnership association,' under the act of June 2, 1874 (P. L. 271; Pepper & L. Dig. p. 3402), to be called the Fair Hope North Savage Fire-Brick Company (Limited); acknowledged their articles of association before a justice of the peace; and had them duly recorded in Somerset county, in Record Book, Vol. 74, at page 502, according to section 1 of said act. On the 14th August, 1890, William E. Boyts borrowed from Henry Thomas Weld \$2,500, and gave him his judgment note therefor, which was on the 19th August, 1890, entered of record in the common pleas of Somerset county, to No. 299 of September term, 1890. The warrant of attorney contained authority to enter judgment 'upon my two-fifths interest in the works of the Fair Hope North Savage Brick Company, now building, and to be built, at Fair Hope, Somerset county, Penna.' The auditor finds as a fact that the money so borrowed was 'used in the erection of said plant.' On the 27th April, 1891, Weld executed a deed to the 'Fair Hope North Savage Fire-Brick Company (Limited),' for the land indicated in the lease, and on which the buildings of the company had in the meantime been erected. It contains the following provision: 'Subject to the following conditions, namely: * * * Thirdly. And that the said North Savage Fire-Brick Company (Limited), its successors and assigns, and the heirs, executors, and administrators, * * * shall and do acknowledge that the amount of a certain judgment in favor of Henry Thomas Weld against Wm. E. Boyts, in the common pleas of Somerset county, Penna., at No. 299, Sept. term, 1890, for two thousand five hundred dollars, * * * exists against four-tenths of everything conveyed in this deed and the lease aforesaid.' The works of the association were erected on the ground conveyed in this deed, and it continued the business of manufacturing fire brick until February 23, 1892, when, having become financially embarrassed, and its property covered with liens, it made a voluntary assignment for the benefit of its creditors. The same day a number of the creditors entered into an agreement by which they employed the assignee to take charge of the plant, and continue the business, and provided for the gradual payment, out of the earnings, of all the liabilities. A few months of this experiment demonstrated that the business could not be successfully operated, and the project was abandoned. The assignee then procured an order to sell the premises, and disposed of them. Distribution of the proceeds was made by the auditor, and exceptions to his report are now pressed, because he per-

mitted the Weld judgment to participate in the fund, and because he did not allow the labor claims held by Josiah Boyts.

"In the first place, it was argued that all the assets must be regarded as personalty, and that no lien had been acquired by the judgments. Section 1 of the supplemental act of June 25, 1885 (P. L. 182), amending section 4 of the original act, says, 'Interest in such partnership associations shall be personal estate,' etc.; but that provision was intended only for the control of the interests of partners as between themselves, in the management of the affairs of the concern, and for the convenient transfer of such interests while the partnership continues. It was not meant to exempt the real estate of the association from the effect of a lien on the ordinary incumbrance held by an outside person. So that the position of the auditor, supported by him on the authority of *Moore v. Moore*, 153 Pa. St. 495, 25 Atl. 763, is correct. But the general rule is that 'land held by a partnership is considered as realty so far as firm judgments are concerned, and they are liens upon it; but, as the separate interests of partners in it are considered as personalty, judgments against them individually are not liens upon it or upon those interests.' 3 Trickett, Liens, p. 276. And the face of the title must govern as to whether land held by members of a partnership shall be regarded as firm property. The lease in the present case was not to the firm, but to Boyts and his two associates as tenants in common. The separate two-fifths interest of Boyts might therefore be bound by the Weld judgment. But it is further objected that the land on which the works were afterwards erected was not designated in the lease with sufficient certainty to sustain a decree for specific performance, and hence no lien could attach to his equity therein. While the exact lines were not ascertained at the time, yet the description above quoted would seem to be sufficient to support an order for its conveyance. The judgment was taken for what was really a partnership debt, but was against Boyts alone, and so bound only his interest in law, as it purported to do in fact. The interest of Boyts was a mere equity, arising on articles of agreement for the purchase of the small piece of ground, in connection with the lease; but the rule is so well settled by the cases cited to us, and many others, and so thoroughly understood by the profession to be that a judgment binds every interest or estate which a defendant has in land, including a mere inceptive title, and that the lien on the equity grasps the legal title into which the equitable becomes perfected by a subsequent conveyance, that it barely needs repetition. But see *Waters' Appeal*, 35 Pa. St. 524; *Holmes' Appeal*, 108 Pa. St. 27; *Zeigler's Appeal*, 69 Pa. St. 473, and cases there cited and considered.

"If no lien existed prior to the conveyance from Weld to the firm, April 27, 1891, there was, I think, an express lien established in the

face of the title, by the deed of that date. In *Hlester v. Green*, 48 Pa. St. 101, it is said: 'The sum of the authorities is that, though equitable liens are not favored by our law, yet parties may, by clear and express words in a deed of conveyance, create liens upon land, * * * which will be binding between themselves and their privies, and such liens will be devested by subsequent sheriff's sales,' etc. Such a lien is not, of course, to be left to legal implication. The intention to create it must clearly appear, but the language used in the deed from Weld to this partnership association says: 'Subject to the following conditions: Thirdly. That the North Savage Fire-Brick Company (Limited) * * * shall and do acknowledge that the amount of a certain judgment (reciting it fully) exists against four-tenths of everything conveyed in this deed and in the lease aforesaid.' Language substantially like this was held sufficient to create a lien by deed in *Brownback v. Ozias*, 117 Pa. St. 87, 11 Atl. 301; *Myers v. Brodbeck*, 110 Pa. St. 199, 5 Atl. 662; *Christman v. Christ*, 4 Penny. 291; *Rohn v. Odenwelder*, 162 Pa. St. 346, 29 Atl. 899. The intention to fix the lien of the Weld judgment on the property to the extent mentioned is too clear for doubt. It is contended on behalf of Josiah Boyts that 'the three papers referred to (the lease, judgment note, and deed) constitute a lease of ground, and any interest that Weld had in the same was not disturbed by the assignment and sale'; and, also, 'that, if Weld had a lien, it is in the nature of a defeasance, runs with the land, and was not disturbed.' The cases of *Blood v. Crew Levick Co.*, 171 Pa. St. 328, 33 Atl. 344, and *Ringrose v. Ringrose*, 170 Pa. St. 593, 33 Atl. 129, are particularly relied on, in connection with other cases given in the brief, to sustain the first proposition, to the extent that the lien was not disturbed if there was one. In the first case mentioned, the vendor had given a mortgage, which incumbered the land at the time of the conveyance, and in the deed stipulated that it was 'under and subject to the payment' thereof. This was held to involve an implied covenant on the part of the vendee to indemnify the vendor against the payment of the mortgage, should he be required to pay it. That principle does not arise here. In the latter case the deed embraced an agreement for the future support, during life, of the parents of the vendee, with the annual payment to each of them of the sum of \$25 during their natural lives. This was held to create a charge upon the land, which would follow it into the hands of a subsequent purchaser at private or judicial sale. Judicial sales pass property clear of all liens with three exceptions, viz.: First, those created by last will, etc., as provisions for wives or children; second, when the incumbrance will not admit of valuation; third, where it is plain from the agreement of the parties that it was intended to run with the land. *Hlester v. Green*, 48 Pa. St. 101. In *Ringrose v. Ringrose* the last-mentioned pur-

pose was manifest, and so the incumbrance followed the land. But Weld's judgment was payable in designated installments, and does not fall within any of the exceptions. The firm took the title subject to the payment of the judgment on its terms, subject to its lien on the four-tenths interest. Of course, there was no defeasance arising out of these transactions. The papers were executed at different times, and could not, under the provisions of the act of June 8, 1881, result in a defeasance.

"As already stated, the only other claim seriously contested is that of Josiah Boyts for \$2,993.44. The personal estate was first liable for all debts, including labor claims. But Boyts and some others of the creditors entered into an agreement to continue the business. They did so at a loss, and disposed of most of the personal effects during that time. It is, however, further found by the auditor that these claims were not in fact purchased by him in the first instance, but that his money was merely loaned on the credit of the firm, to aid in settling with its men, and was charged to it on his books at the time. We are not prepared to say that this finding is not sustained by the evidence. Nearly all the testimony on the subject is from the claimant himself. On page 42 he says the claims were assigned to him 'for a valuable consideration.' On page 53 he says: 'In my account I have charged the company with the claims I have put in for labor, all of which are named in the list marked "A." My orders for the labor claims were taken after my entries in this book against the N. S. F. B. Co. (Limited).' On page 54: 'The most of these men were paid by Wm. E. Boyts, and I furnished the money, and charged the company with it, and afterwards the labor claims were assigned to me. * * * The reason I furnished the money to Wm. E. Boyts on the list "A" was because he was a brother of mine, and I was interested in the success of the company.' On page 56: 'The first item of \$404.78 was made at the time the company and I had a settlement, January 5, 1892. Bills were made by me against the company of these individual claims; made up to August 20, 1892; then it was settled up to October.' He was conducting a store at the company's works, in the same building in which it had its office. If it was originally a loan to the firm, at a time when he still believed it solvent, and not for the purchase of the claims, and if he did not then mean to succeed to the statutory rights of the laborers, as the auditor concludes, he could not afterwards protect himself by the assignments. It is claimed that these claims are protected to the extent of \$100 each under the act of 1854. It seems clear, however, that they are of a class embraced in the act of 1872 and its supplements, and, if so, the act of 1854 does not apply. The act of 1854 is supplied by that of 1872 as far as the latter has application. *Hall's Estate*, 148 Pa. St. 121, 23 Atl. 992. No effort was made to com-

ply with the act of 1872 and its supplements, so as to secure a lien on the realty. The requirements of those acts were again clearly set forth, and the proper practice thereunder reiterated, in Hall's Estate, supra; and that was the case of an assigned estate, the ruling in which seems to be conclusive as to these claims so far as the proceeds of the real estate are concerned. Besides, both the Weld judgment and the \$2,500 judgment of Liven-good became liens on the land more than six months before the failure, and therefore have priority over his claims. 3 Trickett, Liens, p. 576, § 436. There is no opposition to the other labor claims.

"All exceptions inconsistent with the auditor's report and the foregoing opinion are hereby overruled, and the said report is confirmed absolutely.

"Exceptions noted on behalf of all parties whose exceptions are overruled by the foregoing order, and bills sealed to them."

J. L. Pugh, for appellant. Kooser & Kooser and Coffroth & Ruppel, for appellee.

PER CURIAM. We are all of opinion that there is no substantial error in the decree from which this appeal was taken; nor do we think that either of the questions presented by the assignments of error requires discussion. They have been sufficiently considered and correctly disposed of by the court below. The decree is affirmed, on the opinion of its learned president, and the appeal is dismissed, at appellant's costs.

(183 Pa. St. 123)

CHAMBERS v. SMITH.

(Supreme Court of Pennsylvania. Oct. 25, 1897.)

OIL LEASE — ACTION FOR BONUS — AFFIDAVIT OF DEFENSE — QUIET ENJOYMENT.

Affidavit of defense to the complaint of lessor in an oil lease to recover bonus to be paid when first well produced a certain amount is insufficient, the allegations being merely that prior to the lease, by recorded deed, the mortgagor had conveyed the coal under the land to third parties, reserving the right to drill three wells for oil and gas, which right he gave defendant by the lease, and that, after the first well was drilled, the owners of the coal denied defendant's right to drill through their coal, and litigation between such owners and defendant followed, resulting in a compromise; as, even if defendant were correct in his contention that, because the lease contained words of grant, there was an implied covenant for quiet enjoyment, under Act May 23, 1715, § 6 (1 Smith's Laws, p. 95), it is not shown to be broken.

Appeal from court of common pleas, Washington county.

Action by Robert Chambers against Charles A. Smith on an oil lease. Judgment for want of sufficient affidavit of defense, and defendant appeals. Affirmed.

The affidavit of defense and opinion of the court below are as follows:

Affidavit of defense: "Washington County

—ss.: Charles A. Smith, the above-named defendant, being duly sworn, deposes and says that he has a full and complete defense to the whole of the plaintiff's claim, the nature and character of which is as follows: On September 22, 1890, Robert Chambers, the plaintiff, executed and delivered to the Ohio & Pennsylvania Coal Co. a deed for a tract of coal underneath his land situated in Cecil township, Washington county, Pennsylvania. The said land under which the said coal was situated included the 50 acres subsequently leased by the said Robert Chambers to O. P. Irvine and John Chambers, as set forth in the plaintiff's statement. The said deed is recorded in the recorder's office of Washington county, in Deed Book 160, page 130. In and by the said deed the said Robert Chambers, the grantor, reserved to himself the right to drill three wells for oil and gas through the said coal, said three wells to be so drilled as 'not to conflict in any way with the proper mining of said coal.' After the execution and delivery of the above-mentioned deed to the Ohio & Pennsylvania Coal Co., the said Robert Chambers sold and conveyed to Jacob E. Ridgeway a portion of the surface overlying the coal which has been conveyed to the Ohio & Pennsylvania Coal Co. The deed from the said Robert Chambers to Jacob E. Ridgeway is dated July 20, 1891, and recorded in Deed Book 167, page 112. The amount of land conveyed was 5.32 acres. The said Robert Chambers conveyed the 5.32 acres to Jacob E. Ridgeway without reserving to himself any right to drill for oil and gas upon said land so conveyed. The deed from Robert Chambers to the Ohio & Pennsylvania Coal Co., and the deed to Jacob E. Ridgeway, are made part of this affidavit of defense. Subsequent to the said conveyance to Jacob E. Ridgeway, the said Robert Chambers sold and conveyed various other portions of the surface overlying the coal conveyed to the Ohio & Pennsylvania Coal Co. to Baptiste Marie, Mary McKinney, August Bord, F. Pondevigne, Valet Caliste, Emil and Sarah Lipscher, Patrick Fisher, A. Schwab, A. J. Allston, Cornelius O'Rourke, Adolph Hirart, Charles Handal, W. C. Musselman, John Givandan, John Moureau, Andrew Savage. All of said conveyances were made without any reservation to the said Robert Chambers of the right to drill for oil and gas, and were all made prior to the time of the execution of the lease from Robert Chambers to O. P. Irvine and John Chambers. It is true that this deponent became the owner by assignment of the lease of O. P. Irvine and John Chambers, and that he drilled a well upon said tract of land, which said well was completed on or about the 2d day of February, 1896, and produced in excess of one hundred barrels of oil per day for thirty consecutive days after its completion. Since that first well was completed, — wells have been drilled upon the 5.32 acres conveyed to Jacob E. Ridgeway, in neither of which wells has this deponent had any interests; and during the same time a number of

wells were drilled upon the lots conveyed by the said Robert Chambers to the parties above named, as herein set forth, and in none of those wells did this deponent have any interests whatever. Subsequent to the completion of the first well by the deponent upon the said tract of land, and while the second well was being drilled, the Ohio & Pennsylvania Coal Co., claiming that the conveyance made by Robert Chambers of the surface overlying the coal conveyed to said company subsequent to the date of the conveyance to the Ohio & Pennsylvania Coal Co., and prior to the time of the execution of the lease above mentioned, under which this deponent was operating, without any reservation of the right to drill the three wells for oil and gas, stipulated for in the deed from Robert Chambers to the Ohio & Pennsylvania Coal Co., had passed his right to drill the said three wells, denied the right of the said Robert Chambers or his lessees or assigns to drill any wells for oil or gas upon the said tract of land embraced in the lease under which this deponent was operating, and threatened to stop by injunction any further developments by this deponent upon said land for oil or gas. This deponent consulted counsel, and was advised that his right to operate upon said tract of land was, at least, doubtful, and that it was dangerous for him to risk an injunction being granted, which might ruin his property. A compromise was accordingly effected with the Ohio & Pennsylvania Coal Co., in and by which the said company granted to this deponent the right to drill any number of wells, not exceeding ten, upon said tract of land, by paying the sum of \$500 for each well at the time the location was made, and at the same time this deponent paid to the said company \$1,000 for Nos. 1 and 2 wells on said farm. Subsequently the said Ohio & Pennsylvania Coal Co. filed a bill in equity for an injunction to restrain the further drilling of wells upon the lots conveyed by the said Robert Chambers as hereinabove set forth, which said injunction the court granted. Deponent further says that, while the said conveyances hereinabove referred to were all recorded at the time of the execution of the lease under which the deponent is operating, and were, therefore, legal notice, yet this deponent had no actual notice of the matters herein set forth until after the completion of one well upon the said land. This deponent therefore says that if, as a matter of law, upon the facts as above set forth, the said Robert Chambers, at the time of the execution of his said lease to O. P. Irvine and John Chambers, had no right to drill three wells, or to drill any wells, upon the said tract of land, and that neither the said O. P. Irvine or John Chambers, nor this deponent, as their assignee, had right, as against the Ohio & Pennsylvania Coal Co., to operate for oil and gas upon said land, then the covenant in said lease to pay \$1,000 bonus on said first well was without consideration, and is void. All of which the deponent avers and believes, and expects to be able to prove."

Opinion of the court: "It was admitted on the argument of this case by the defendant that the first well completed under the lease produced one hundred barrels of oil for thirty consecutive days, in which event, a 'bonus of one thousand dollars shall be paid to the party of the first part,'—the plaintiff in this suit, brought to recover this one thousand dollars bonus. The affidavit of defense sets out the facts and states the reasons for withholding the payment of this bonus. Prior to the lease of the plaintiff's land for oil and gas to the defendant's assignors, he had sold the Pittsburgh or river vein of coal under said tract of land, the deeds for which were duly recorded, and of record at the time of the lease for oil and gas. In the conveyances of the coal, the owner of all except the coal reserved the right to drill three wells for oil and gas. This right he gave to O. P. Irvine and John Chambers under the lease in suit, who sold the same to the defendant, Smith. After the first well was completed some time, and a second drilled below the coal, the owners of the coal denied the said defendant's right in law to drill through their vein of coal, and litigation followed between the owners of the coal and oil rights, which resulted in a compromise, to which litigation and compromise the plaintiff in this suit was not a party, or in any particular consulted or concerned. The contention of the defendant is that, the lease for oil and gas containing words of grant, there is an implied covenant for quiet enjoyment under the sixth section of the act of May 28, 1715 (1 Smith's Laws, p. 95), against the grantor, his heirs and assigns. This act refers to any estate of inheritance in fee simple, while the lease in this case is the mere right to operate, drill; the estate being in the oil when brought to the surface, and only passing when oil is found and brought to the surface. *Oil Co. v. Fretts*, 152 Pa. St. 451, 25 Atl. 732; *McNish v. Stone*, 152 Pa. St. 457, 25 Atl. 732. But, assuming the act of May 28, 1715, applies to the lease in this case, has the lessor, his heirs and assigns, done any act prejudicial to his assigns, defeating or incumbering in any way the right or estate granted? Whenever the enjoyment of a right or an estate or interest ceases by lawful title, where there is a covenant for quiet enjoyment or against incumbrances, then, and then only, is the covenant broken in such a manner that an action assigning a breach thereof will lie. *Duff v. Wilson*, 69 Pa. St. 316. There are other questions raised by the affidavit of defense, and upon the argument of the case, but we do not think they are sufficient to prevent judgment for the plaintiff. All the conditions and provisions of the lease relating to the drilling of the first well have been fulfilled by both parties thereto, except the payment by the defendant to the plaintiff of the bonus of one thousand dollars for the first well, admitted to have produced one hundred barrels of oil per day for thirty consecutive days, when it became due and payable. Now, No-

vember 23, 1896, this cause came on to be heard, and was argued by counsel, and, after due consideration thereof, it is ordered that judgment be entered for the plaintiff, Robert Chambers, against the defendant, Charles A. Smith, for want of a sufficient affidavit of defense, and the prothonotary is directed to liquidate the sum due from the statement filed in said case."

J. W. & A. Donnan and R. W. Irwin, for appellant. Parker & McIlvaine, for appellee.

PER CURIAM. The only question presented by the assignments of error is whether the court erred in entering judgment against the defendant for want of a sufficient affidavit of defense.

We find nothing in the record that would have warranted the court in sending the case to a jury. On the contrary, its action in sustaining the motion for judgment is amply vindicated in the opinion sent up with the record; and, on that opinion, the judgment is affirmed.

(182 Pa. St. 479)

McNULTY v. PENNSYLVANIA R. CO.
(Supreme Court of Pennsylvania. Oct. 11, 1897.)

CARRIERS—WHO ARE PASSENGERS.

One employed by a railroad company to work on a bridge under a contract whereby, in addition to specified wages, he is to have daily transportation from his home to the bridge and return, is not an employé of the company while being transported from his work, but a passenger.

Appeal from court of common pleas, Philadelphia county.

Action by Kate McNulty against the Pennsylvania Railroad Company to recover for the death of plaintiff's husband. From a judgment for plaintiff, defendant appeals. Affirmed.

David W. Sellers, for appellant. P. F. Rothermel, Jr., for appellee.

STERRETT, C. J. The first and third specifications of error are intended to present what may be regarded as the controlling question in this case: Whether, upon the undisputed facts, the relation of plaintiff's husband to the defendant company, at the time he was killed, in the collision that occurred on October 28, 1894, was that of a passenger being transported in one of its cars, or that of an employé then in the service of the company. The specifications are as follows: (1) In refusing to charge, as requested in defendant's first point, "that McNulty was carried by defendant in the performance of a contract of employment and service, and was in law not a passenger, but an employé; and, as he was injured by a collision due to the negligence of the engineer, the verdict must be for the defendant." (3) "In charging the jury that the decedent was a passenger." This specification was, doubtless, intended to embrace that part of the charge in

which the learned trial judge refers to the relation of the deceased to the defendant company at the time of the collision. If so, it offends against rule 13, which provides that "the part of the charge * * * referred to must be quoted totidem verbis in the specification."

Turning to the charge sent up with the record, we find that as to the contractual relation existing between the deceased and the defendant and the circumstances attending the collision in which he lost his life, etc., the learned judge said: "It appears that the husband was an employé of the railroad company. He was employed to work on a bridge at Tacony, in this county, under a contract of employment, by which he was to receive one dollar and twenty cents a day; and the company also contracted to transport him from his home to the place where his work was to be performed, and from that place back to his home at night, when his work was over. The dead man lived at Bristol, in the adjoining county; and, upon the Sunday when he met his death, he had finished his work about 15 or 20 minutes after 6 o'clock, and he, with other workmen employed upon the bridge at Tacony, entered a passenger car of the Pennsylvania Railroad Company, and the car then proceeded towards Bristol. It stopped at a station called 'Croyden,' situated between Tacony and Bristol; and while there at rest, or when about to come to rest, a freight train of the Pennsylvania Railroad Company, upon the same track, crashed into the rear end of the car, and the plaintiff's husband was killed. It was argued to the court that under a statute of our state, and under the general law, a railroad company was not liable in damages in such a case as this, because McNulty was an employé of the company at the time of the accident, and that the company is not liable to the employé who is injured through the negligence of another employé. In passing upon the motion for a nonsuit, I stated, and I now charge you, that, under the contract of hiring in this case, the services, the work, the employment of McNulty, ceased when he quit work at Tacony, and that, while he was being transported to his home over the tracks of the railroad company, he was not an employé then in its service; and therefore the injury which he suffered, and which resulted in his death, did not come to him while he was in the employ of the company. * * * He was not in the employ of the company, but was being transported over the road for a valuable consideration, under a contract, it is true, which involved his employment, but a contract in which the transportation and the wages were a return for services rendered; and therefore it became the duty of the company to transport him with care, and with due regard for his safety."

It is unnecessary to refer in detail to the testimony. A careful examination of the record clearly shows that the foregoing instructions were in strict accord with the un-

disputed evidence in the case. The conclusively established facts as to the contractual relation of the parties are not susceptible of any other conclusion than that the transportation of plaintiff's husband from and to his home, in Bristol, was part of the consideration moving from the company to him, and given him, with the \$1.20, in payment of a day's wages. That being so, he had virtually paid for his passage home in the car in which he was riding at the time of the collision, and was therefore a passenger, and not an employé, as soon as his day's work was done, and he entered the car for the sole purpose of being carried home. In its controlling features, this case is on all fours with *O'Donnell v. Railroad Co.*, 59 Pa. St. 239, in which Mr. Justice Agnew, after referring to the contract of hiring in that case, says: "The work of the plaintiff was wholly at the bridge. * * * At the time of the accident he had finished his day's work, and was ten or twelve miles from the bridge on his way home. Under these circumstances, the court below instructed the jury that the plaintiff was traveling as a passenger, and not in the capacity of a servant. * * * He was not hired to pursue his business on the train, but was carried in consideration of a reduction in the price of his wages. When his day's work was performed, he was no longer in the service of the company, but was free to go or stay, and, when he traveled, in effect paid his fare out of his wages." As was clearly shown in *O'Donnell v. Railroad Co.*, supra, the cases of *Ryan v. Railroad Co.*, 23 Pa. St. 384, and *Tunney v. Railway Co.*, L. B. 1 C. P. 291, are clearly distinguishable from the one now under consideration. The plaintiff in the former was a laborer on a gravel train. In the exercise of his employment, he was required to be on the train. The loading and unloading of gravel necessarily required the hands employed in that work to travel with the train from place to place. He traveled, not as a passenger to any particular destination, but went with the train whenever it became necessary to obtain or deposit gravel. His traveling on the cars, like that of a brakeman or a fireman, was in pursuance of his employment, and not under a contract with the company for transportation to his home or elsewhere. In the other case it was part of Tunney's employment, as a laborer, for specific wages, to travel from Birmingham to Derby on a train called the "pick-up train," for the purpose of gathering up materials left along the line of the road; and he was required to be ready for the train at Birmingham, and start thence on his trip, and return there. The case was put distinctly on the ground that it was part of Tunney's "contract of service that he was to return each day to Birmingham by the pick-up train, to be ready to start upon his work the next morning."

In the case at bar, the transportation from and to his home, to which the deceased, McNulty, was entitled, was not in any sense a service or connected with any service that he was rendering to the defendant company, but it was a service which the latter, by the terms of its contract, was required to render to him. He was under no obligation to ride on the cars, but there was an obligation on the part of the company to afford him an opportunity of doing so, if he saw fit to avail himself of it; and when he exercised the right to which he was thus entitled, and entered the car for the purpose of being transported to Bristol, he was a passenger, in the full sense of the word, and not an employé, of the defendant. Before he did so, his day's service to the company was fully completed, and he had earned the \$1.20, together with the right of transportation to Bristol.

The point for charge, recited in the second specification, was rightly refused, for the reason that there was no evidence in the case to bring it within the provisions of the act of April 4, 1878. As we have seen, plaintiff's husband, according to the undisputed evidence, was a passenger, and not an employé, at the time of the collision; and hence, by express terms of the act itself, it has no application to the case.

The question of defendant's negligence, as the sole cause of McNulty's death, has been definitely determined by the verdict, rendered under adequate and proper instructions. The question of contributory negligence of the deceased was not even suggested.

Further elaboration of the questions involved in the assignments of error is unnecessary. We find nothing in either of them that would justify a reversal or modification of the judgment. Judgment affirmed.

(123 Pa. St. 500)

EVERHART v. NESBITT et al.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

TAXATION—ASSESSMENT—EVIDENCE—TAX DEED—MISDESCRIPTION.

1. Where part of the land conveyed to one C. was separately assessed in the unseated list, the fact that the number of acres mentioned in an assessment to C. of a larger tract, as seated land, substantially corresponded with the acreage mentioned in C.'s deed, was not conclusive that the larger assessment included the unseated land.

2. A mere mistake of the treasurer in describing unseated land sold for taxes does not invalidate the deed if the land can be identified as that assessed and sold.

Appeal from court of common pleas, Lackawanna county.

Ejectment by James M. Everhart against George F. Nesbitt and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Everett Warren and Henry A. Knapp, for appellants. Wm. H. Jessup, W. W. Watson, I. H. Burns, and H. M. Streeter, for appellee.

McCOLLUM, J. The land in suit was included in the deed from Paul Aten to Martin Crippen, dated September 26, 1873, and it was all of the Turner tract that the former could convey to the latter. In 1882, and in at least seven of the eight years previous thereto, and directly following Aten's conveyance to Crippen, the land was separately assessed, by the proper officer, in the unseated list. In the first three years of the period thus defined, the assessed valuation of it was \$108, or \$3 per acre; in the fifth and sixth years \$360, or \$10 per acre; and in the seventh, eighth, and ninth years \$540, or \$15 per acre. In 1876 the land was sold by the county treasurer for taxes levied on one or more of these assessments, and A. D. Dean, as attorney for Martin Crippen, and on his request, became the purchaser of it. On the 8th of August, 1881, Dean conveyed the same to Crippen's administrator, who on the 18th of July, 1882, paid the taxes upon it for the years 1879, 1880, and 1881. While the land in question was separately assessed and valued as above stated, the land assessed to Martin Crippen was returned in the seated list as unimproved, and was valued in 1874, 1875, and 1876 at \$5 per acre, in 1877 and 1878 at \$2.40 per acre, and in 1879, 1880, 1881, and 1882 at \$3 per acre. It is a reasonable inference from the above-recited facts that the Turner tract was separately assessed in the unseated list from 1874 to 1882, inclusive, and that the taxes levied on the separate assessments of it made prior to 1882 were paid by Martin Crippen or his estate. It may also be reasonably inferred from them that the separate assessments of it in the lifetime of Martin Crippen were made with his knowledge and consent, and that like assessments of it subsequent thereto were recognized and approved by his administrator. In 1884 that part of the Turner tract included in Aten's deed to Crippen was sold by the county treasurer for taxes levied on the separate assessment of it in 1882, and purchased by James M. Everhart, the plaintiff in this suit. His claim of title to it is contested by the defendants on three grounds: (1) The assessments to Crippen from 1874 to 1882 included it, and as Crippen or his estate, prior to the sale under which the plaintiff claims, paid all the taxes levied on these assessments, the sale was unwarranted and void. (2) If there was a valid assessment and sale of the Turner tract, the treasurer's deed of it "was so indelictive as to be inoperative." And (3) the defendants were purchasers without notice or knowledge of any separate assessment of it.

The main support of the first ground of defense lies in the fact that the acreage mentioned in the assessments to Crippen correspond substantially with the acreage mentioned in Aten's deed to him. This was undoubtedly a circumstance to be taken into

consideration by the jury in determining whether the Turner tract was included in the Crippen assessments, but it was not in and by itself conclusive that their claim of inclusion was well founded, nor fatal to the plaintiff's contention. "If the quantity in the assessment was too great, it does not follow that the disputed land was included, nor, if not enough, that it was excluded. The quantity returned and assessed would be a fact to consider in ascertaining if the land in dispute was a part of the tract assessed." *Kramer v. Goodlander*, 98 Pa. St. 370. The separate assessments and valuations of the Turner tract, and the payments by the Crippens, without protest or complaint, of the taxes levied thereon, were inconsistent with the inclusion of it in the assessment of the tract valued at three dollars per acre. These were matters proper for the consideration of the jury in determining whether the Turner tract was included in the Crippen assessments. Whether it was so included was a question for them to decide on the relevant and competent evidence in the case. This was the view taken of it by the court below, and this appears to have been in accord with the view of it entertained on the trial by the learned counsel for the defendants.

The defendants have not brought to our notice any decision of any court in Pennsylvania to support the second ground of their defense. They have cited adjudications of the courts of other states which seem to give color to it, but these were undoubtedly made in accordance with the legislation regulating and governing tax sales within their respective jurisdictions. The numerous decisions of the courts of Pennsylvania relating to the sales of unseated lands for taxes are certainly not in clear accord with the adjudications referred to, and, while they may not cover the exact point in question, their trend is obviously adverse to this branch of the defendant's contention. In *Miller v. Hale*, 26 Pa. St. 432, as in this case, the treasurer's deed to the plaintiff was attacked as defective. This court, in its opinion, said: "The question, then, upon this deed, was whether it described the land assessed, and that was properly submitted to the jury as a question of fact. That land, by whatever name it was sold, was the debtor for the taxes imposed; and, if it was sold and conveyed to the plaintiff in satisfaction of the assessment, he acquired a good title. The name of the warrantee and of the township are circumstances of designation, but not conclusive. The identity of the tract assessed must be fixed to the satisfaction of the jury,—if by the warrantee and the township, very well; if by other circumstances of designation, equally well. 1 *Watts & S.* 166; 4 *Harris*, 404. The evidence here tended to identify the tract covered with that assessed and sold; and, having proved satisfactory to the jury, it must be so to us." In our case the defendants frankly admitted in their printed argument that the defect in the

deed was the result of the treasurer's mistake in describing the land, and that it was within the power of the court to correct it, or to consider that as done which ought to have been done; but, in connection with this admission, they characterized the plaintiff's claim as without merit, and maintained that the treasurer's error was therefore fatal to it. We cannot assent to this view of the treasurer's mistake, because, aside from the admission above stated, the evidence in the case clearly and indisputably identified the land described in the deed as the land assessed and sold, and now in question.

The specifications of error which relate to rulings upon offers of evidence are not sustained. The evidence admitted under these rulings was relevant to the questions already discussed, and proper for the consideration of the jury. As to the claim of the defendants that they were purchasers without notice of a separate assessment and sale of the land in question, it is sufficient to say that the treasurer's sale of it to Dean, as hereinbefore stated, was recited in Willard's deed to them, in his deed from the sheriff, and in the sheriff's deed to Smith, and that, at the time of the sheriff's sale to Willard, public notice of Everhart's title was duly given. The specifications of error are overruled. Judgment affirmed.

(182 Pa. St. 407)

In re BARTOL et al.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

TRUSTEES—INVESTMENTS—AUTHORITY TO MAKE
—LIABILITY FOR DEPRECIATION.

1. Trustees are not liable for losses resulting from the depreciation of authorized investments made in good faith, where they use all ordinary care in determining on the investment.

2. A will provided that the executors and trustees might, if they deemed it for the benefit of the estate, retain in their hands, as assets, any investments which "I may have and possess at the time of my death," without liability in case of depreciation or loss, etc. *Held*, that the trustees were not accountable for depreciation of shares of stock in a corporation, owned by testator when he died, held by the trustees as a part of the trust estate, on the ground that they had no power to invest any part of the fund in the stock of a private corporation, or because they had an opportunity, before the depreciation, to sell the stock for its full appraised value.

3. A railroad 30 miles in length was built in 1885, and had been running with a full equipment for three years, when, in 1888, it was decided to extend it 11 miles. The extension was completed prior to December 31, 1889, when it had 13 locomotives, 24 passenger cars, and 42 freight cars. *Held*, that in the fall of 1890 such road was "finished," within the meaning of a will authorizing trustees to invest in real estate and in first-class mortgage bonds of railroad companies whose railroads are finished and earning interest on their entire bonded debt, etc.

4. Especially were bonds which were secured by a mortgage which only covered the original 30 miles of the road bonds of a "finished" road, within such will, at the time they were bought by such trustees, in the fall of 1890.

5. The fact that they were second mortgage bonds did not render the trustees liable for de-

preciation; the will not restricting the trustees to first mortgage bonds, and both mortgages being a very small lien on the road.

Appeal from orphans' court, Delaware county.

Judicial settlement of the accounts of Henry W. Bartol and others, trustees for George E. Bartol under the will of B. H. Bartol, deceased. From a decree dismissing their exceptions to and approving the auditor's report, except in one particular, the trustees appeal. Reversed.

V. Gilpin Robinson, William C. Hannis, and John G. Johnson, for appellants. John F. Lewis and George B. Lindsay, for appellee.

GREEN, J. In the case of Webb's Appeal, 165 Pa. St. 330, 30 Atl. 827, we reviewed at some length the law as to the liability of trustees to be surcharged for loss arising from alleged negligence or fault in the administration of their trust estates. It ought not to be necessary to restate the law on this subject as it prevails in Pennsylvania, because it is so perfectly well settled and so entirely free from doubt. But, as we are not able to reconcile the decision of the present contention with the law as we understand it, we will be obliged to make reference to some, at least, of the principal cases. In one of the earliest of these (Calhoun's Estate, 6 Watts, 185), the general doctrine was stated in reference to all classes of trustees in these words: "Executors and administrators or trustees, acting with good faith, and without any willful default or fraud, will not be responsible for any loss that may arise. All that a court of equity requires is common skill, common prudence, and common caution. Executors, administrators, or guardians are not liable beyond what they actually receive, unless in case of gross negligence; for when they act as others do with their own goods, and with good faith, and not guilty of gross negligence, they are not liable. * * *

A court of equity, as is said in Thompson v. Brown, 4 Johns. Ch. 619, always treated trustees acting in good faith with great tenderness. In Knight v. Earl of Plymouth, 3 Atk. 480, Dickens, 120, Lord Hardwicke observes, if there was no mala fides, nothing willful, in the conduct of the trustee, the court will always favor him. For, as a trust is an affair necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety, it is an act of great kindness in any one to accept it. To add hazard or risk to that trouble, and to subject a trustee to losses which he could not foresee, would be a manifest hardship, and would be deterring every one from accepting so necessary an office."

These principles have been constantly repeated and applied in very numerous cases from that time to the present. In the following cases it was held that the measure of diligence and care required of a trustee is that which a man of ordinary prudence would practice in the case of his own estate. Witmer's

Appeal, 87 Pa. St. 120; *Kyster's Appeal*, 16 Pa. St. 372; *Fahnestock's Appeal*, 104 Pa. St. 46. In *Chambersburg Saving-Fund Association's Appeal*, 76 Pa. St. 203, we said: "It is wellsettled that a trusteeshall not be surcharged for a loss which has occurred, in case he has exercised common skill, common prudence, and common caution; but for supline negligence or for willful default he shall be held responsible." In *Pleasant's Appeal*, 77 Pa. St. 358, the executors were authorized to invest "in some safe and productive stock." They invested in the stock of the Bank of the United States. We said: "Under the powers given to the executors to invest, and an honest exercise of that power, we think it would be a very harsh application of law to their sound discretion, after this lapse of time, to hold the executors personally liable for the loss of the bank stock. They should not be held responsible for not possessing a knowledge and not exercising a forethought superior to the great body of intelligent and prudent business men." In that case the bank failed about a year after the investment, but we held that there was no liability for the loss, because the investment was apparently good when it was made. In *Oridland's Estate*, 132 Pa. St. 479, 19 Atl. 362, we sustained the adjudication of the orphans' court for the reasons stated in the opinion, among which was the following: "A trustee is not required to be infallible in his judgment, nor to possess the power of anticipating events not generally looked for. Common prudence and common skill are all that is demanded; and, if these are exercised, a loss arising must be borne by the estate which the testator, who is supposed to have contemplated such risks, has thought proper to confide to his care." We have held in a number of cases that an administrator is not chargeable with the consequences of a disastrous exercise of discretion, unless accompanied with such negligence as raises a presumption of willful default. *Dillebaugh's Estate*, 4 Watts, 177; *Hughes' Appeal*, 53 Pa. St. 500; *Neff's Appeal*, 57 Pa. St. 91; *Derbyshire's Estate*, 81 Pa. St. 18. It is scarcely necessary to continue the citation of authorities, which are very numerous, and all to the same effect. It is only important to determine whether they are applicable to the facts of the present case.

The assignments of error practically raise two questions of surcharge and one of costs. The first question of surcharge relates to the *Birkbeck* stock. The testator, at the time of his death, owned 1,600 shares of the stock of a corporation called *John Birkbeck Company, Limited*, whose business was the boiling of molasses for the manufacture of sugar. *B. H. Bartol* (the decedent) and *John Birkbeck* each owned one-half of the stock, and carried on the business with much success. Both the partners died within a short time of each other, and a reorganization became necessary. As each of the deceased parties owned exactly one-half of the stock, it was deemed highly desirable by the accountants, trustees for *George E. Bartol*

and his children, under the will, to preserve the equality of ownership, and run no risk of disadvantage arising from a possible acquisition of a majority of the stock by the other parties in interest. In the distribution of the estate among the six parties entitled, one-sixth (266 shares) of this stock was taken for the trust estate of *George E. Bartol*, and these shares were subsequently held as a part of the trust estate. The business had been, and still was, very largely profitable, and heavy dividends were constantly earned and paid until the passage of the tariff bill of 1892, after which the profits were so seriously affected that the business was closed out. In the liquidation which followed there was a loss of \$1,583.20 upon the stock held as a part of the trust, and for this the accountants claimed credit in their account. The auditor refused the credit on the ground that the accountants had an opportunity to sell the stock to the cestui que trust for its full appraised value, \$8,333.33, and declined to do so, and thus lost on the liquidation the sum of \$1,583.20, which the stock realized less than its appraised value. This appraised value was 25 per cent. in advance of its par value, and was made because of the large profits which had been realized from the business. The court below did not sustain the auditor in his reasoning for the surcharging of the accountants, but held that *George E. Bartol* should sustain the loss personally, and therefore the accountants, while being chargeable with the loss so far as it affected the body of the trust fund, should recoup their loss from the future payments to be made of the income to *George E. Bartol*. The ground upon which the court below held the trustees accountable was that they had no power to invest any part of the fund in the stock of a private corporation; but, because it was stock held by the testator in his lifetime and at the time of his death, the court further held that the whole estate of the testator should sustain the loss, and therefore the one-sixth of the aggregate loss should be paid by *George E. Bartol*, and the other five-sixths by the other legatees. We think the learned court below fell into error in this view of the subject, by failing to regard one of the provisions of the will. That provision is in the following words: "It is my will that my executors hereinafter named and my said trustees may, in their discretion, if they deem it for the benefit of the estate, retain in their hands, as assets, any investments which I may have and possess at the time of my death, without liability in case of depreciation or loss, and that they shall not invest the funds in their hands in coupon bonds of any kind, and that all investments made by them shall stand in the names of all of them." As the testator expressly directed that the trustees as well as the executors might, in their discretion, retain any of the testator's investments, without liability for loss from so doing, they certainly cannot be held liable for doing what they were explicitly authorized to do, without violating a positive provision of the will. We do not regard either

the reason given by the auditor or that given by the court as sufficient to warrant the surcharge in question, and therefore sustain the first seven assignments of error.

The second item of surcharge is the loss occasioned by the depreciation in the price of bonds of the Union Railway Company of Chattanooga, \$5,360.30. This was an investment of trust funds made by the trustees in the fall of 1890 to the extent of \$7,000. There had been an investment of \$10,000 in these bonds made by the executors in May, 1888, after a very thorough investigation of the condition and affairs of that company; George E. Bartol himself participating in the transaction. The latter represented to the executors that his father had agreed to buy \$5,000 of these bonds, but became sick before he paid for them, and that he (George E. Bartol) had paid the money for them during his father's illness, and asked to be reimbursed for his payment. This was done, and the executors made the investment of \$10,000 as above stated. Afterwards, in 1890, the trustees, having some money to invest, consulted with George E. Bartol as to the investment. Mr. Henry W. Bartol, one of the accountants, testified before the auditor that George E. Bartol authorized the trustees to buy bonds at 108, and this statement was not denied by the latter. The bonds were selling at about that price at the time of the investment. The trustees actually paid 107 for them. The trustees also made investigation through a number of sources as to the condition and character of the property, obtaining, among other things, a copy of Poor's Manual for 1890, with quite full information as to all matters pertaining to its physical condition and operation. The reports of its earnings and expenses for the previous year, 1889, were given, showing a surplus of \$5,117.22 after all expenses and the interest on the bonds had been paid. Dun & Co.'s report made in May, 1888, was already in the possession of the trustees, showing a very favorable physical condition, with 30 miles of completed road, with a full equipment of engines and cars; a gross income of \$92,000, and a net income of \$40,800, for the year before; and the trustees obtained a number of letters of business men, acquainted with the property, highly commendatory in character, and certifying to its being a flourishing company, and its bonds a first-class investment. In 1890 the road had been extended 11 miles, making 41 miles in all, with a total bonded debt of only \$600,000, of which the investment now in question was a part of the second \$100,000 issued. There is very much of this testimony which it is not necessary to review in detail, because the decision of the court below does not turn upon that question. The learned court was of opinion that the investment was unauthorized, and therefore the trustees were liable to make good the loss which subsequently resulted. The clause of the will upon which this question turns is in the following words: "It is my will that my trustees may sell any of my investments, and

may sell and resell any investments which they themselves may make when and as often as they may deem it advisable, and, further, that they shall have the right to invest and reinvest the funds which may at any time come into their hands in real estate, in first-class mortgage bonds of railroad companies whose railroads are finished and earning interest on their entire bonded debt, and in other corporate bonds (secured by mortgage), whether of a public or a private character; also, in state and municipal bonds; also, in bonds of individuals, secured by first mortgage or deed of trust on real estate in any part of the United States: provided, that they shall make no single investment exceeding in amount \$30,000; the above investments to be in addition to such securities as are recognized by the laws of Pennsylvania as proper for the investment of trust funds." It will be observed at once that the authority to make investments conferred upon these trustees is very broad and complete, and it was intended and expressly declared to be in excess of the authority conferred by law. The investment, therefore, now in question, is not to be governed either by the limitations imposed by the Pennsylvania statute, or by any other test than that which is exacted by the will. Viewed by this alone, we have only to inquire whether the authority conferred by this will was transcended when these trustees purchased the bonds now under consideration. It is not at all disputed that they are mortgage bonds of a railroad company. It cannot be controverted that at the time of the investment the bonds were those of a company which was earning and paying interest upon its entire bonded debt, because in each of the three years preceding and including the one (1890) when the bonds were bought the company not only earned interest on its entire bonded debt, but there was a remaining surplus over and above the interest. This was positively proved, and not contradicted. Thus, by the testimony of the appellee O'Brien's report it was proved that in the year 1888 there was a surplus of earnings, after all interest was paid, of \$9,161. For 1889 the surplus was \$5,117, and for 1890 it was \$708. In the nine months of the year 1887 ending December 31, 1887, the surplus was \$10,395.03. So far, therefore, as this requirement of the will is concerned, the investment in these bonds was strictly within its terms. Both the auditor and the court below held that the road was not finished when the investment was made, and for that reason surcharged the accountants as to this item. The reasoning adopted by both seems to be that because in June, 1888, it was decided to extend the road, it was not a finished road. In point of fact, the road was actually finished in 1885, not only as to its track, but as to its equipment; and it was running on its whole length, and with a full equipment of engines, passenger cars, and freight cars, for fully three years before it was decided that it should be extended. Further, it was shown by Poor's Manual for 1890 that the

extension was completed, by adding 11 miles to the length of the road, and that the company then (December 31, 1889) had 13 locomotives, 24 passenger cars, and 42 freight cars. The argument that the road was not finished because at a certain time in its history it was decided to build an extension to it cannot be sustained. Assuredly, when a road is built, is fully equipped, and is actually running and doing all the business that comes to it, it must be regarded as a finished road. When an extension of its length was determined upon, the part that was finished before was finished still. That fact is not changed. The road still remains as a completed structure, notwithstanding an addition to it is to be made. Otherwise no railroad can be said ever to be a finished road, because it is always possible, and the fact is almost universally so, that railroads are extended in length beyond their original limits. Moreover, it is to be observed that the bonds in question were secured by a mortgage which only covered the original 30 miles of road which had been finished in 1885. It is matter of public history that all the large railroads of the country are constantly making additions and extensions of their tracks, and also increasing their equipment. To hold that such roads must be regarded as unfinished, for that reason, would be to antagonize the common-sense convictions of the whole business world, and would not be in accord with any legal principles or rulings of which we are advised. We are constrained to differ with the auditor and the court below on this subject, and must hold, as we do, that this road was a finished road when the present investment was made. This being so, the purchase of the bonds was entirely within the authority conferred by the will of the testator, and the trustees cannot be held liable for the subsequent depreciation in the price of the bonds. It must be conceded, under the evidence, that the trustees used all the care that a person of ordinary care and prudence would use in determining upon an investment of his personal funds. They not only obtained the published reports of the company, but consulted with the cestui que trust himself, and other business men who had means of knowledge and advised the loan. The point that these were second mortgage bonds, and therefore not first-class, is not well taken. The will did not restrict the trustees to first mortgage bonds, and it does not at all follow that a second mortgage bond may not be a first-class security. In this case the first lien was a mortgage for only \$100,000,—a most remarkably small charge upon a railroad of 30 miles in length. But the second mortgage was given for \$200,000, for the very purpose of raising a fund to pay off the first mortgage bonds, and the whole increase of the debt was but \$100,000; and the mortgage was a consolidated mortgage for the security of the whole \$200,000, which also was a very small lien upon a road of the length that this was. The propriety of the investment must be judged as it was at the time it was made, and

not as viewed in the light of subsequent facts. Of course, these trustees could not foresee that a trolley road would be built through the same town, which would largely impair the business of this road, and they are not responsible for not possessing the quality of prevision which would anticipate such a result. All the authorities are to this effect. The testator's investments, which were very large and greatly diversified, contained a large number of consolidated bonds, the object of which was to absorb bonds of prior issue, and they were made without loss. There was no question as to the entire good faith and integrity of the trustees, and as to their good business qualifications. The auditor and the court below found and declared repeatedly that they were without exception in these respects. Upon the whole case, we are decidedly of opinion that neither of the surcharges can be sustained, and we therefore reverse the ruling of the court below. The assignments of error are all sustained. In our judgment, there was no legitimate reason for imposing any part of the costs of the audit upon the trustees, and we therefore sustain the fourteenth assignment. The decree of the court below is reversed at the cost of the appellee, and the record is remitted, with instructions to correct the decree in accordance with this opinion.

SKOLFIELD v. SKOLFIELD.

(Supreme Judicial Court of Maine. Oct. 26, 1897.)

DOWER — ASSIGNMENT — PRACTICE — RECOMMITTAL OF REPORT — WRIT OF SEISIN.

1. When the report of commissioners selected to set out dower on a writ of seisin, under Rev. St. c. 103, § 22, is not accepted because of irregularities of procedure disclosed therein, it is not error for the court to recommit the report to the same commissioners to set out dower anew, in accordance with law.

2. In such case the commissioners act by virtue of their original appointment and under their original oaths.

3. When the commissioners set out to the demandant certain parcels of land "as and for dower," it is held to have been a sufficient assignment.

4. It is not necessary that the writ of seisin to set out dower should contain specific directions to the commissioners. Their duties are prescribed by law. It would be inconvenient, not to say impossible, to incorporate them all in the writ of seisin.

See Skolfield v. Skolfield, 34 Atl. 27, 88 Me. 258; Skolfield v. Robertson, Id.

(Official.)

Exceptions from supreme judicial court, Franklin county.

Action by Eliza A. Skolfield against Eben H. Skolfield.

This was an action of dower. Upon a return of the report by the commissioners who were selected to set out to the plaintiff her dower in certain lands described in the writ, and attached to the writ as part of the officer's return, the defendant made objections to it. These objections were overruled by

the court, and the defendant took exceptions. The writ of seisin, the commissioners' report as amended by them in accordance with the decision of the court in 88 Me. 258, and 34 Atl. 27, and the officer's return on the writ, were made a part of the bill of exceptions. Exceptions overruled.

J. C. Holman, for plaintiff. H. L. Whitcomb, for defendant.

SAVAGE, J. Exceptions to the acceptance of the report of commissioners selected to set out dower to the demandant on a writ of seisin. The writ issued July 17, 1894, and it contained a mandate that it should be returned to the term of the court then next to be held, on the fourth Tuesday of September, 1894, and the writ was accordingly so returned. Exceptions to the acceptance of the report of the commissioners were then taken, and those exceptions were sustained by this court. 88 Me. 258, 34 Atl. 27.

In the opinion in that case, it was suggested that the irregularities which had been complained of, and which had proved fatal, could be "corrected on a new assignment." At the February term of the court, 1896, the report of the commissioners was "recommitted to set out dower anew in accordance with the requirements of law"; and, upon the same writ of seisin, the same commissioners, being newly sworn, made a new assignment. Their report thereof, attached to the return on the writ, was returned into court at the June term, 1897. The report was accepted, and the tenant excepted.

1. The tenant claims that the writ of seisin, having been returned in accordance with the mandate contained therein, after the first assignment, was *functus officio*; that the new assignment should have been made upon an alias writ of seisin; or if the doings on the writ of seisin, in the first instance, were a bar to the renewal of the writ, that *scire facias* should have been brought, and a new writ obtained; and, therefore, that all the proceedings now complained of are void. The counsel for the tenant bases his reasoning upon supposed analogies between writs of seisin and executions and writs of possession.

We are unable to concur in this view. We see no objection to the course which was pursued in this case. Writs of execution, and writs of possession which are likewise writs of execution, are final judicial processes, and, upon being properly served and returned, take effect, without further order or action of the court. The statute fixes the time when they shall be made returnable. Alias executions and writs of possession issue at any time after former ones have been returned, as a matter of course. Rev. St. c. 82, § 140; *Belcher v. Knowlton*, 89 Me. 93, 35 Atl. 1019. Unlike the service of executions and writs of possession, the doings of commissioners under a writ of seisin, to set out dower, have

no efficacy until accepted and approved by the court. Writs of seisin, in this respect, are more analogous to warrants to commissioners to make partition. An assignment of dower is, in effect, a species of partition. The report of the commissioners in either case must be returned to the court for further judicial action. The statute prescribes no time within which a writ of seisin must be returned. Necessarily it must be returned to a term of the court.

The writ in this case was originally made returnable to a term certain, and it was so returned. But the assignment of dower was void because of irregularities in procedure on the part of the commissioners. Their report, instead of being accepted, was recommitted. This court is of opinion that the court at nisi prius had power to recommit the report, to the end that an assignment might be made in accordance with law, the same as it has power to recommit the report of commissioners appointed to make partition, for the correction of errors in their prior proceedings. *Ware v. Hunnewell*, 20 Me. 291. One would virtually be a new assignment, as the other would be a new partition.

The tenant complains that by this proceeding he was deprived of a voice in the selection of the commissioners, the same as at the first assignment. The answer is that the report was recommitted to the same commissioners, one of whom had been selected by the tenant. They were to act by virtue of their original appointment, and under their original oaths. But, were it otherwise, the complaint of the tenant is unfounded, because it appears by the return of the officer that the tenant did select one of the commissioners in this proceeding, and, as a matter of extra precaution probably, the commissioners were sworn anew.

2. The tenant further complains that it should appear from the report of the commissioners, or from the officer's return, that they set out to the demandant, as dower, such part of the land as would produce an income equal to one-third part of the income which the whole estate would now produce, if no improvements had been made upon it since the demandant's decree of divorce. *Carter v. Parker*, 28 Me. 509.

But the commissioners did set out the parcels described in their report to the demandant, "as and for her dower," and this has been held a sufficient assignment. *Skolfield v. Robertson*, 88 Me. 258, 34 Atl. 27. In this latter case the court said: "The term 'dower' is one very well understood by laymen; and when the appraisers set out a part of the tract, as and for dower, the necessary implication follows that they adjudged it would produce one-third of the income of the whole lot subject to dower."

3. Finally, the tenant complains that the writ of seisin gave the commissioners no directions whatever. This was not necessary. The writ directed the officer to cause the de-

mandant's dower "to be assigned and set out to her by three disinterested persons to be appointed by the plaintiff, defendant, and officer as in the levy of an execution on land." The duties of such commissioners are prescribed by law, and it would be manifestly inconvenient, not to say impossible, to incorporate them in the writ of seisin. There certainly can be no greater necessity for such directions in a writ of seisin than there is for directions to appraisers in a writ of execution.

Exceptions overruled.

(90 Me. 479)

INHABITANTS OF BRUNSWICK v. CITY OF BATH.

(Supreme Judicial Court of Maine. July 2, 1897.)

MANDAMUS—DUTY TO REPAIR BRIDGE—ENFORCEMENT.

1. The legislature, in 1842, authorized the then town of Bath to erect and maintain a free bridge across New Meadows river, the channel of which river was then a boundary line, at the place of location of the bridge, between the towns of Bath and Brunswick, now between the towns of West Bath and Brunswick, as well as between the counties of Cumberland and Lincoln, and now between Cumberland and Sagadahoc counties. The legislature also authorized the county commissioners in their respective counties to lay out ways to the bridge from Bath and from the bridge in Brunswick, which was done, Brunswick constructing the way as laid out on its territory; and the roads have been used for public travel ever since. The bridge having been carried away by freshet, the legislature, in 1861, authorized the city of Bath, after the town of West Bath had been incorporated out of its territory, to rebuild the bridge, the act containing a provision that, "if the city shall erect and complete such bridge, it shall have the same control thereof, and be under the same liabilities to keep the same in repair, as if the bridge were wholly within the limits of said city, and may raise money by taxation or otherwise for the purpose of building and maintaining said bridge." The city built the new bridge in pursuance of the act, and, having lately neglected to keep it in repair, the town of Brunswick seeks by mandamus to require it to do so.

Held, that mandamus is a proper remedy, and the town of Brunswick a proper party to prosecute the remedy, and that the city of Bath is under obligation to keep up and maintain the bridge until the public way over it shall be discontinued by the commissioners of the two counties, or until the city may obtain relief from its self-assumed liabilities by some act of the legislature.

2. The case having been certified to the chief justice upon the petition and answer to be taken as the alternative writ, it is ordered that the peremptory writ issue from the clerk of Sagadahoc county.

(Official.)

Petition of the inhabitants of Brunswick for mandamus against the city of Bath. Writ granted.

Barrett Potter, for plaintiff. F. E. Southard, for defendant.

PETERS, C. J. The inhabitants of Brunswick, in their corporate capacity, seek, by proceedings in mandamus, to compel the city

of Bath to put in repair a bridge which crosses New Meadows river at a place called "Bull Rock" or "Little Bull Rock," so that such bridge shall be safe and convenient for public travel thereon. The questions involved require some historical statement of the origin of the bridge and of the manner in which it has been heretofore maintained.

In 1842 a special legislative act was obtained by the then town of Bath allowing it to erect and maintain this bridge, the act reading as follows:

"Section 1. The town of Bath is hereby authorized to erect and maintain a free bridge over New Meadows river, from land of Robert Harding in Brunswick over Little Bull Rock (so-called) to land in Bath; said bridge to be provided with a convenient draw sufficient for the passage of vessels on said river, and also to be built of good materials, substantially made, well railed, and convenient for the passage of travelers thereon.

"Sec. 2. If the town of Bath shall erect and complete said bridge, the said town shall thereafter have the same control thereof, and be under the same liabilities to keep it in repair, as if it were wholly within the limits of said town and said town is authorized to raise money by taxation or otherwise, for the purpose of building and maintaining the same."

By virtue of the authority of this act, the bridge was erected, in the summer of 1842, by the inhabitants of Bath, and maintained exclusively at their expense until April, 1852, when it was carried away by freshet.

New Meadows river, at the place where crossed by this bridge, being then the boundary line between the counties of Cumberland and Lincoln, now between Cumberland and Sagadahoc counties, the counties first named were authorized by a special act, passed by the legislature in 1843 (chapter 67, Priv. & Sp. Laws 1843), to lay out a road over the bridge, the act running as follows:

"Section 1. The county commissioners of the counties of Lincoln and Cumberland are hereby authorized, after petition and notice as required by the twenty-fifth chapter of the revised statutes, to lay out a highway from High street in the town of Bath, county of Lincoln, over the bridge erected on New Meadows river, at a place called Little Bull Rock, to some point in the county of Cumberland.

"Sec. 2. Nothing in this act shall be so construed as to affect the powers and obligations imposed on the town of Bath by an act passed March 10, 1842, entitled, 'An act to authorize the town of Bath to erect a bridge over New Meadows river.'"

Under the authority of this act the commissioners of the two counties in 1843, acting jointly, laid out the highway accordingly.

There was no bridge, after the one which was swept away in 1852, until 1861, when another legislative permission for the building of a bridge was obtained by Bath (chapter 26,

Priv. & Sp. Laws 1861), the new act reading as follows:

"Section 1. The city of Bath is hereby authorized to erect and maintain a free bridge over New Meadows river, from land in Brunswick, over Little Bull Rock (so-called) to land in West Bath; said bridge to be built of good materials, substantially made, well railed and convenient for travelers to pass thereon.

"Sec. 2. If the city of Bath shall erect and complete said bridge, the said city shall thereafter have the same control thereof, and be under the same liabilities to keep it in repair as if it were wholly within the limits of said city, and said city is authorized to raise money by taxation or otherwise, for the purpose of building and maintaining said bridge."

In 1861, following the act above quoted, the city of Bath erected a new bridge on the old location, and has ever since maintained it in at least a passable condition until shortly before the institution of this petition, when, it is alleged, the structure became unfit and unsafe for public travel. Both Bath and Brunswick have built and maintained roads in connection with the bridge for the use of themselves and the public generally. It is inferable from the tone of the arguments of counsel that when the bridges were first erected the principal benefits thereof accrued to the city of Bath and its citizens, while at the present day, by the mutations of business, Brunswick and its citizens receive greater advantages from the bridge than does Bath; especially if the latter is to pay all the expenses of maintaining the same. The fact that New Meadows river is now the boundary line separating Brunswick from West Bath, instead of from Bath, as formerly,—the latter town having been created in 1855 out of territory before that time constituting a portion of Bath,—may be one reason why the city is less interested in maintaining the bridge than formerly.

The first objection urged by the respondents against the petition is, that the complainants are not a proper party to maintain mandamus in such a case. We think otherwise. The town is certainly a much interested and a responsible party. The case cited by the petitioners—*Inhabitants of Cambridge v. Charlestown Branch R. Co.*, 7 Metc. (Mass.) 70—fully sustains their position on this point.

It is contended that mandamus is not a proper remedy, for the reason that the petitioners have a complete and adequate remedy at law in either one of two ways: First, by indictment; and, secondly, by petition to the county commissioners under a provision of the statute (Rev. St. c. 18, § 53) which invests such commissioners with the power to compel a municipality to repair its neglected ways. But, while those might be modes of legal remedy, they would not be adequate and sufficient, for the reason that, inasmuch as the middle of the bridge is the divisional line between two counties, the remedy would have to be pursued by separate indictments or peti-

tions in two counties, and not by any joint prosecution or procedure in any one county alone. And the result might be one way in one county and another way in the other, and it would be very likely to be so if any local feeling or prejudice should affect the question. Such a legal remedy as either of the uncertain modes suggested would be unsuitable and unsatisfactory. This court has said that mandamus will be granted if it be doubtful if there be another effectual remedy, or if the court does not clearly see its way to one: *Baker v. Johnson*, 41 Me. 15. Mandamus has frequently been sustained against county supervisors and county commissioners to require of them the execution of ministerial duties resting on them, and against corporations and their officers to enforce the performance of corporate duties. *Railroad Com'rs v. Portland & O. C. R. Co.*, 63 Me. 269. Towns may compel, by mandamus, railroad companies to keep in repair bridges in their towns which the companies are bound to maintain. *State v. Gorham*, 37 Me. 451. Generally, where ministerial duties are clearly defined, and are legally established, mandamus will be upheld to enforce them. It is not a sufficient answer to the application that the party is also legally liable to indictment for the act complained of. *Bouv. Law Dict.* tit. "Mandamus," and cases cited.

At the same time, whether the writ of mandamus should be granted or not depends on the judicial discretion of the court, and it may be denied on grounds of expediency, when equity does not clearly require the contrary. *Belcher v. Treat*, 61 Me. 577. Acting on this principle, the court in Massachusetts refused to grant the writ to compel county commissioners to construct an unnecessary way, although legally laid out, basing its refusal on the ground that another way already constructed sufficiently subserved the public convenience. *Hill v. Commissioners*, 4 Gray, 414. While we may entertain the idea that there is less necessity for this bridge now than when it was built in 1842, or rebuilt in 1861, after its abandonment for 10 years, still, inasmuch as no evidence whatever was introduced at the hearing, bearing on the question of any necessity for the bridge, or of its importance to the people of either Brunswick or Bath, we feel that we are bound to assume that public necessity and convenience require its continuance.

And this brings us to perhaps the most important question of the case, and that is whether Bath is under any obligation to maintain the bridge longer than she desires to use the same for her own purposes,—whether or not, in other words, she can so far abandon it as to deprive the public of its use. It is contended in behalf of the respondents that the liability imposed on them was a consideration for the privileges conferred, privilege and liability existing dependently together; and that, when one ceased, both ceased, and when the city of Bath surrendered the privileges of the

bridge she became absolved from the burden of further maintaining it. The city has signified to the public her purpose of abandonment by the act of her city council in passing a vote, December 14, 1896, to discontinue her part of the way. This vote, if ineffectual to abate the way, is effectual to indicate an intention to abandon the privilege of maintaining the bridge.

The petitioners contend, on the other hand, that the privilege conferred and the liability incurred are absolute and unconditional after once accepted by the city of Bath, and that she cannot voluntarily relinquish one for the sake of avoiding the other, and that she should maintain the bridge in good repair as diligently as she must any highway or portion of any within the limits of her own territory, and continue to do so until relieved from the obligation either by some legislative enactment or by a discontinuance of the way obtained through the joint action of the two boards of county commissioners. We feel constrained to believe that this position of the petitioners is the correct view of the question presented.

Writ to issue.

(90 Me. 485)

EMERY v. CITY OF WATERVILLE.

(Supreme Judicial Court of Maine. July 5, 1897.)

DEFECTIVE SIDEWALKS—NOTICE TO CITY.

1. The mere fact that a street commissioner directed a subordinate to construct a crosswalk across a street does not of itself charge the street commissioner with "actual notice" (under Rev. St. c. 18, § 80) that the crosswalk was so constructed as to become a defect in the street.

2. *Held*, that the question of notice, under such circumstances, is not one of general legal principles, but is purely one of statutory interpretation, since the injured party's right of action, if any, is based solely on the statute. The doctrines of principal and agent, or master and servant, in this respect, are not applicable.

Holmes v. Paris, 75 Me. 559, and Buck v. City of Biddeford, 19 Atl. 912, 82 Me. 433, distinguished.

(Official.)

Exceptions from supreme judicial court, Kennebec county.

Action by Ida M. Emery against the city of Waterville. This was an action on the case to recover for damages sustained by plaintiff on account of the alleged defective condition of Sherwin street, in the city of Waterville. The plea was the general issue, and defendants particularly relied upon plaintiff's failure to prove legal notice of the alleged defect to the municipal officers. Upon that point the presiding justice instructed the jury as follows: "I feel it my duty to say that there is sufficient evidence here, uncontradicted and uncontroverted, to hold that the street commissioner had twenty-four hours' actual notice of the condition created by his order. Therefore you will consider that the evidence here shows that the street commissioner must be deemed to have had twenty-four hours' actual notice of

the condition created by his order." The jury returned a verdict for the plaintiff, and to these rulings and instructions defendants excepted. Exceptions sustained.

C. F. Johnson, for plaintiff. H. D. Eaton, City Sol., for defendants.

EMERY, J. The street commissioner of Waterville was requested to continue a gravel sidewalk along Summer street across Sherwin street. This would make a gravel crosswalk across Sherwin street at its junction with Summer street. He, without personally going to the locality, directed a foreman to have some gravel hauled there and spread so as to make such a crosswalk, and grade up the sidewalk on Summer street. The foreman sent the gravel, and sent a laborer in the employ of the city to spread it across Sherwin street. The laborer undertook to do so, but did it in such a manner that the gravel, as left by him across Sherwin street, became a defect in that street, through which the plaintiff was injured.

The street commissioner had no other notice of that defect than what could properly be implied from the circumstances above stated. Was that an "actual notice" to him, within the statute (Rev. St. c. 18, § 80)? The question is not one of general legal principles, but is purely one of statutory interpretation, since the plaintiff's right of action, if any, is based solely on the statute.

The plaintiff contends that the street commissioner, through his subordinates, created or caused the defect, and hence must be held either to have had actual notice of the defect, or else not to be entitled to more notice, under the doctrine of *Holmes v. Paris*, 75 Me. 559, and *Buck v. City of Biddeford*, 82 Me. 433, 19 Atl. 912. But did the street commissioner in this case create or cause the defect?

In *Holmes v. Paris*, supra, he clearly did. He "deposited and left heaps and piles of dirt in the traveled part of the highway." He therefore knew they were there, knew the actual condition of the road, knew its defective condition, since "heaps and piles of dirt in the traveled part" of a road in themselves constitute a defect. In *Buck v. City of Biddeford*, supra, the defect was an improperly, and visibly improperly, constructed iron grating over a cesspool in the street. The street commissioner directed that particular grating, or pattern of grating, to be placed in the street. He knew it was there, knew its actual condition, and hence knew the defective condition of the street.

In the case at bar the street commissioner directed gravel to be hauled and spread to make a crosswalk at the place named. He undoubtedly, therefore, created a crosswalk there. He was also bound to assume that his orders were executed, and hence bound to know that gravel had been hauled and spread there. But he was not bound to assume, or even apprehend, that the work he had commanded was left incomplete or imperfect.

While the crosswalk was his, the imperfections were not his. A crosswalk in itself is not a defect. To know of a crosswalk is not to know of a defect. The defect was created, not by the commissioner, but by the laborer, without instructions or directions so to do. The commissioner, while cognizant of the existence of a crosswalk, was ignorant of any defect in the street,—ignorant, indeed, of any conditions which might constitute a defect.

The case of *Rich v. City of Rockland*, 87 Me. 188, 32 Atl. 872, is illustrative of the distinction above made. The plaintiff urges that it does not apply, inasmuch as there the defect created—the ridge of frozen snow—was not part of a thing constructed or ordered to be constructed by the commissioner, but was outside of that work. Nevertheless the cases are similar in this: that the subordinate, and not the commissioner, created the defect.

A defect created in a street by a subordinate, even in the line of his general duty or employment, is not thereby created by his superior, the street commissioner. The doctrines of principal and agent or master and servant, in this respect, are not applicable. Within the purview of this statute, the act of the subordinate is not the act of the commissioner, unless specifically directed by him. The subordinate's creation or knowledge of a defect is not notice to the commissioner of that defect. *Welch v. Portland*, 77 Me. 384.

Exceptions sustained.

(90 Me. 506)

HODGE v. HODGE.

(Supreme Judicial Court of Maine. July 23, 1897.)

ADMINISTRATORS DE BONIS NON—POWERS—CLAIMS
AGAINST ESTATE—LIMITATIONS—EQUITABLE
RELIEF—TRUSTS—PREFERRED CLAIMS.

1. An administrator de bonis non, as is indicated by the title of his office, succeeds only to the unadministered property of the intestate; that is, the goods, effects, and credits which were of the intestate at the time of his decease, and which remained in specie, unaltered or unconverted by any act of the administrator, or the proceeds thereof which have not been commingled with the administrator's own money.

2. An administrator de bonis non cannot maintain an action against the estate of his predecessor for money wrongfully received by him prior to his appointment as administrator, in the absence of allegation and proof that such money is distinguishable as a part of the intestate's property.

3. A debt due from a person to a testator or intestate becomes, by the debtor's appointment as executor or administrator, assets in his hands. The administrator's own debt being assets, it becomes an item in his administration account; and the question whether such debt is due, and the amount of it, becomes a question of probate administration, in the first instance, to be decided by the judge of probate, on all questions of law and fact, subject to an appeal to this court.

4. An indebtedness from an administrator to the estate, having been converted into assets by his appointment, is not revived by the death or removal of the administrator, so that it can be sued by an administrator de bonis non.

5. A wife was owner of a deposit in a savings bank standing in the name of a trustee for her sole benefit. After her death, her husband pro-

cured a transfer of the deposit to himself from the trustee, without paying any consideration, and withdrew a portion of the deposit. He was subsequently appointed administrator upon his wife's estate, but did not include this sum in his inventory, or account for it in any way. The husband having died, an administrator de bonis non of his wife's estate filed a bill in equity against his estate, charging that he became an executor de son tort, and prayed that his estate be charged with the money so withdrawn.

Held, that an action at law, under these circumstances, cannot be maintained by an administrator de bonis non against the personal representative of the husband; also that the complainant has no better or greater rights, in this respect, in a proceeding in equity.

6. By Rev. St. c. 87, § 19, this court, sitting in equity, may give judgment for the amount of a claim against the estate of a deceased person that has not been presented within the time limited by statute, when justice and equity require it to be allowed, and the creditor is not chargeable with culpable negligence in not prosecuting his claim.

Held, that the only object of this statute is to relieve a creditor, under certain circumstances, from the limitation of the statute in regard to the prosecution of claims against the estates of deceased persons. It does not create a cause of action in equity, after the bar of the statute, when there was none at law before.

7. *Held*, that the bill cannot be sustained upon the ground that the money was received by the defendant's testator charged with a trust in favor of the wife's estate; because, if it were so, the identity of the trust fund has been lost. The identity of this trust fund, if such it was, having been lost, the cestui que trust can stand in no better position than other creditors.

(Official.)

Report from supreme judicial court, Lincoln county.

Bill in equity by Edward T. Hodge, administrator de bonis non of the estate of Abigail T. Hodge, deceased, against Juliaette Hodge, executrix of the will of William Hodge, deceased. Submitted on report. Heard on bill, answer, and demurrer, and testimony. Bill dismissed.

T. P. Pierce, for plaintiff. N. & J. A. Merrill, for defendant.

WISWELL, J. Bill in equity by the administrator de bonis non of the estate of Abigail T. Hodge against the executrix of William Hodge, the administrator of Abigail T. Hodge.

The complainant, the administrator de bonis non, is the son of Abigail T. and William Hodge. The intestate died April 8, 1879. Her husband, William Hodge, was appointed administrator upon her estate December 7, 1880, and died June 6, 1892. The complainant was appointed administrator de bonis non on the first Tuesday of October, 1892.

The complainant alleges, in substance, that the intestate at the time of her death was the owner of a deposit in the Cambridgeport Savings Bank of Cambridgeport, Mass.; that, although such deposit was in the name of one Hannah C. Wilson, it was in fact the money of the intestate, deposited by her in the name of Hannah C. Wilson, in trust for the sole benefit of the intestate; that after her death William Hodge procured from Hannah C.

Wilson a transfer of said deposit, without consideration; and that on August 26, 1879, before his appointment as administrator, he withdrew from the savings bank a portion of such deposit,—about \$800; that he did not include this sum in his inventory as administrator, and never in any way accounted for the same; that in withdrawing a portion of such deposit he became an executor *de son tort*; and he asks that the defendant, as executrix of such administrator, may be compelled to pay the amount so withdrawn, with interest, to him as administrator *de bonis non*.

The respondent both demurred and answered to the bill, and the case is here upon report of the pleadings and testimony. The defendant contends that the bill cannot be sustained, either upon its allegations or upon the testimony.

It is very clear that if this sum of money had been received by William Hodge in his capacity as administrator, and had been either administered or converted to his own use, neither an action at law nor a bill in equity could be maintained by the administrator *de bonis non* against him or his estate. As indicated by his title and commission, there vests in him, as administrator *de bonis non*, only the unadministered property of the intestate; that is, the goods, effects, and credits which were of the intestate at the time of her decease, and which remained in specie, unaltered or unconverted by any act of the administrator, or the proceeds thereof which have not been commingled with the administrator's own money. *American Boards' Appeal*, 27 Conn. 344.

"But at common law the authority of the administrator *de bonis non* does not extend to any property which has been administered, either fully or partially. * * * It follows from these principles that the administrator *de bonis non* can sustain no action at law against his predecessor for anything save unadministered effects existing in specie." *Woerner, Adm'n pp.* 744, 745.

In *Beall v. New Mexico*, 16 Wall. 535, it is said: "To the administrator *de bonis non* is committed only the administration of the goods, chattels, and credits of the deceased which have not been administered. He is entitled to all the goods and personal estate which remain in specie. Money received by the former executor or administrator, in his character as such, and kept by itself, will be so regarded; but, if mixed with the administrator's own money, it is considered as converted, or, technically speaking, administered."

The administrator *de bonis non* is entitled only to such goods or chattels of the testator as remained in specie in the hands of the executor at the time of his death, or to such money as belonged to the testator's estate, and had been kept by the executor separate and unmixed with his own. *Potts v. Smith*, 3 Rawle, 361. And see the very full notes to this case in 24 Am. Dec. 379.

This doctrine was fully and unequivocally sustained by this court in the case of *Waterman v. Dockray*, 78 Me. 141, 3 Atl. 49.

But the persons legally interested are not without ample remedy in such a case. An omission by an administrator to include in his inventory any assets of the estate known to him, is a breach of his official bond. *Bourne v. Stevenson*, 58 Me. 499. Or an administrator could be charged with any money belonging to the estate that was received by him in the settlement of his administrator's account; and a failure to present and settle an account, after being cited to do so, would also be a breach of his bond, for which he and his sureties would be liable.

Nor do we think that an administrator *de bonis non* can maintain an action against the estate of his predecessor for money wrongfully received by him, prior to his appointment as administrator, in the absence of allegation and proof that such money is distinguishable as a part of the intestate's property. If this money withdrawn from the savings bank was, in fact, the property of the intestate at the time of her death, her husband, by receiving it, became a debtor to the estate, and his subsequent appointment and qualification as administrator converted this indebtedness into cash assets in his hands, which, if the allegations of the bill are true, should have been included in his inventory, and accounted for as administrator. For a failure to do this, he and his sureties were liable upon the official bond.

That a debt due from a person to a testator or intestate becomes, by the debtor's appointment as executor or administrator, assets in his hands, was decided in Massachusetts in the case of *Stevens v. Gaylord*, 11 Mass. 256; and the doctrine of this case has been universally followed by every subsequent decision upon the question in that state. *Winship v. Bass*, 12 Mass. 198; *Hobart v. Stone*, 10 Pick. 215; *Manufacturing Co. v. Story*, 5 Metc. (Mass.) 310; *Sigourney v. Wetherell*, 6 Metc. (Mass.) 553; *Chapin v. Waters*, 110 Mass. 195; *Choate v. Arrington*, 116 Mass. 552; *Tarbell v. Jewett*, 129 Mass. 457.

"It is now well settled, whatever may have formerly been the rule of law, that a testator, by making his debtor executor, does not give him the debt, by way of legacy, nor release or discharge it. In this respect he now stands on the same footing with an administrator. But, as an executor or administrator cannot demand or receive payment of himself, and cannot sue himself, and yet is bound to account for his own debt, that debt must be considered as assets. Where the same hand is to pay and receive money, the law presumes, as against the debtor himself, that he has done that which he was legally bound to do, and charges him with the amount as a debt paid. * * * It is sufficient for the present case that the administrator is bound to account for his own debt as a debt paid, and as assets, without other acts or ceremony. The administrator's own

debt being assets, it becomes an item in his administration account; and the question whether such debt is due, and the amount of it, becomes a question of probate jurisdiction in the first instance, to be decided by the judge of probate, on all questions as well of fact as of law, subject to an appeal to this court." *Sigourney v. Wetherell*, supra.

In *Stevens v. Gaylord*, supra, it was said: "The case might have been very different if the defendant had denied that he owed this debt, and had refused to insert it in his inventory, and to account for it as the property of the deceased." And in some other of the Massachusetts cases above cited the rule as laid down contains the qualification, "when the debt is acknowledged," although we are aware of no case in which this has been decided to be the law; and we think, upon principle and authority, that there is no difference in the rule whether the debt is acknowledged or denied.

In *Winship v. Bass*, supra, the indebtedness was not acknowledged. The executor refused to treat his indebtedness to the estate as assets, claiming that it was extinguished by his appointment. The court held that the debt was not extinguished, but must be treated as assets; and that, as his sureties were liable upon his bond, he need not be removed.

In *Sigourney v. Wetherell*, supra, the indebtedness of the administrator was not acknowledged, but, on the contrary, was strenuously denied.

In *Tarbell v. Jewett*, supra, it was said: "The note, therefore, became assets of the estate, from which the liability of the estate to the guardian could properly be met, and it is immaterial that it was not named in the inventory or account. * * * The fact that an executor charges himself with his debt in the inventory or account is an important fact. It settles the question that he owes the estate, and the amount of his debt, and in those cases where the debt has thus been accounted for great stress has been laid upon the fact. * * * But an executor cannot escape his liability, or change the character of it, by failing to charge himself with his own debt. If he could, then by neglecting his duty there would be no remedy for the estate. Nor is charging himself with it the only way in which the fact of his indebtedness may appear or be proved; and if it appears, or is proved otherwise, then his liability is established as conclusively as if he had charged himself with the debt in his inventory, and his sureties become responsible if he fails to account for it."

In this state it was early decided in the case of *Potter v. Titcomb*, 1 Fairf. 53, that an administrator must inventory and account for any debt due from himself to the intestate, even though he should deny that there was such indebtedness. And in *Potter v. Titcomb*, 7 Greenl. 302, it was held that, in order to compel an administrator on his official bond to pay the amount of a debt due from him to the intestate, it is necessary that he should first

be charged with the amount in an administration account, by a decree of the judge of probate.

An indebtedness from an administrator to the estate, having been converted into assets by his appointment, is not revived by the death or removal of the administrator, so that it can be sued by an administrator *de bonis non*. In *Tarbell v. Jewett*, supra, it is said: "We are not aware of any case where it has been held that a debt due from an executor, having once become assets, can be revived, and an action maintained upon it by an administrator with the will annexed; nor of any case where a debt due to the executor has been held not to be extinguished if sufficient assets come to his hands."

In *Monroe v. Holmes*, 9 Allen, 244, it was held that, where an executor had died, leaving the estate unsettled, his administrator could not maintain an action at law against the administrator *de bonis non* to recover a balance due to the executor, but must present an account to the probate court for settlement. And in *Prentice v. Dehon*, 10 Allen, 353, it was held that upon the same principle such an action could not be maintained after the resignation of the executor.

Whether the debt is due to or from the executor or administrator, and the principle is the same in the case of either executor or administrator, the debt as such becomes extinguished by the appointment of the debtor or creditor, and is not revived by his death or removal from that position.

No action at law, under the circumstances of this case, could be maintained by the administrator *de bonis non* against the personal representative of his predecessor, for the reasons already considered, and we think that the complainant can have no better nor greater rights, in this respect, in a proceeding in equity.

The defendant was appointed executrix September 6, 1892. This bill in equity was commenced October 5, 1895. By Rev. St. c. 87, § 19, when a claim has not been presented within the time limited by statute against the estate of a deceased person, this court, if of opinion that justice and equity require it, and that such creditor is not chargeable with culpable neglect in not prosecuting his claim, may give judgment for the amount of the claim against the estate. The only object of this statute is to relieve a creditor, under certain circumstances, from the limitation of the statute in regard to the prosecution of claims against the estates of deceased persons. It does not create a cause of action in equity, after the bar of the statute, when there was none at law before.

Nor can the bill be sustained upon the ground, as contended, that this money was received by the defendant's testator charged with a trust in favor of the intestate, because, if this was so, the identity of the trust fund has been lost. There is no attempt here to hold a particular fund or property as charged with the trust. There is no allegation or testimony to the effect that this money can be

traced or distinguished from other property or money of the defendant's testator, the original administrator.

The identity of this trust fund, if such it was, having been lost, the cestui que trust can stand in no better position than other creditors. *Goodell v. Buck*, 67 Me. 514; *Steamboat Co. v. Locke*, 73 Me. 370; *Fowler v. True*, 76 Me. 43.

Bill dismissed, with costs for the respondent.

(90 Me. 534)

CUMMINGS v. GILMAN et al.

(Supreme Judicial Court of Maine. Aug. 2, 1897.)

SALE—TITLE—DELIVERY.

1. The general rule is that as between seller and purchaser, and as against strangers and trespassers, the title to personal property passes by sale without delivery, when no question arises in relation to the statute of frauds.

2. This rule does not operate against subsequent bona fide purchasers, attaching creditors without notice, and others standing in like relation. As against them there must be delivery of the property sold.

3. Where the same goods are sold to two different purchasers by conveyances equally valid, he who first lawfully acquires possession will hold them against the other.

4. In the present case the apples sold remained in the vendor's possession till the defendants hauled them away. The defendants having paid for them, and got the first possession, they will be entitled to hold as against the plaintiff who purchased from the owner, but never got the actual possession.

(Official.)

Exceptions from superior court, Kennebec county.

Action by Maurice E. Cummings against Ernest J. Gilman and another.

This was an action of trover for 45 barrels of apples, tried to a jury in the superior court for Kennebec county, where a verdict was returned for the defendants.

The plaintiff, in addition to a general motion, took exceptions to a part of the charge to the jury, as follows:

"But the defendants raise another legal point, and that is based upon a question of fact for you to determine. They claim that the testimony of Gordon himself shows that the delivery before payment could be demanded was to be made at the depot, and they claim that if payment was to be made at the depot, or if it was a condition of the sale that those apples were to be delivered at the depot, then the bargain was not completed, as is claimed by the defendants, until they were delivered at the depot.

"Well, gentlemen, it is undoubtedly true that all the conditions of the sale according to the contract must be complied with before the sale is completed. You must first get at the intention of the parties. What did they intend in this case? Was it intended that the sale should be completed there at Ingham's place, with the packing of the apples in the barrels? Could Ingham then have demanded payment? And, if payment had been refused,

could he have enforced it? If the sale was completed, if all the conditions and intentions of the parties had been complied with, then the sale was completed, and he could have demanded pay, and enforced it if the payment was not made thereafter.

"But if it was a condition of the sale, and if he had no claim upon Gordon for the price until they had been delivered at the depot, then the sale was not completed until they were delivered.

"So, that, gentlemen, it is a question for you to determine what was the contract. Was it for a delivery and completion of the sale,—a delivery to the agent of Gordon there in such manner that Gordon would then have been obliged to pay? Or was he not obliged to pay anything until the delivery at the depot? If so, it was an uncompleted sale. It was executory on his part, and a sale to these defendants, under the circumstances to which they have testified, would so put and vest title in them that Cummings could not maintain this action against them."

The presiding judge refused to give the following instructions requested by the plaintiff:

"If one sells property not belonging to him without consent of the owner, such owner may reclaim it in the hands of the buyer, although it was sold and purchased bona fide and for a valuable consideration."

"In a bargain and sale the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded, and without regard to the fact whether the goods be delivered to the buyer or remain in possession of the seller."

To these rulings and instructions and refusals to instruct, the plaintiff excepted. Motion and exceptions overruled.

E. O. & Fred E. Beane, for plaintiff. J. Williamson, Jr., and L. A. Burleigh, for defendants.

FOSTER, J. Trover for 45 barrels of apples. This case is before the court upon motion and exceptions by the plaintiff, verdict being for defendants. The apples were raised by one Ingham, who, as the plaintiff contends, sold the same to Gordon & Henry, traders at Readfield, and that they sold the same to the plaintiff.

The defendants assert that Ingham sold and delivered the apples to them, and that they were bona fide purchasers, with no notice of any sale by Ingham to any other party, they paying in full for the apples.

The principal point involved at the trial was in relation to delivery.

Although the general rule is that as between seller and purchaser, and as against strangers and trespassers, the title to personal property passes by sale without delivery (when no question arises in relation to the statute of frauds), nevertheless the same rule does not operate against subsequent bona fide purchasers, attaching creditors without

notice, and others standing in like relation. To render a sale valid against these, there must be delivery of the property sold. *Ludwig v. Fuller*, 17 Me. 162; *Vining v. Gilbreth*, 39 Me. 496; *McKee v. Garcelon*, 60 Me. 165.

When, therefore, the same goods are sold to two different purchasers, by conveyances equally valid, it is well settled that he who first lawfully acquires the possession will hold them against the other. *Lanfeur v. Sumner*, 17 Mass. 110; *Jewett v. Lincoln*, 14 Me. 116; *Brown v. Pierce*, 97 Mass. 46, 48.

In this case the apples remained in the vendor's possession until the defendants hauled them away.

The sale under which the plaintiff claims title was to Gordon & Henry while the apples were lying in a bin, unpacked. They never paid for the apples, and the only expense they had been to was the packing. The barrels belonged to Ingham. The court, under proper instructions, presented the contention of the parties to the jury. Defendants claimed that the first alleged sale was conditional; that, the conditions never having been complied with, it became merely an executory contract, unfulfilled by the parties to it.

If it was a conditional sale, and anything further remained to be done by either party as a condition precedent to the passing of the title, then there was no completed sale.

All questions of fact in relation to the contract of sale by Ingham to Gordon & Henry, and of delivery, were left to the jury, and from an examination of the evidence we see no reason for disturbing the verdict.

Nor do we think the plaintiff's exceptions can be sustained. There is nothing in that part of the judge's charge which is excepted to which will warrant the court in saying there was error; and the same may be said in reference to the exceptions in relation to the requested instructions. The first request was misleading, and could hardly be said to be applicable to the facts in issue. The second request, while it may be unobjectionable in its application between vendor and vendee, is not to be applied when the rights of subsequent bona fide purchasers are involved.

Motion and exceptions overruled.

(90 Me. 512)

DAVIS v. INHABITANTS OF MILTON PLANTATION.

(Supreme Judicial Court of Maine. July 29, 1897.)

STATE PAUPERS—ASSESSORS OF PLANTATIONS—DUTIES.

1. The obligations of towns and plantations in reference to the support of paupers result from provisions of positive law.

2. They have no elements of contract, express or implied.

Rev. St. c. 24, § 33, provide that: "Persons found in plantations having a population of more than two hundred, * * * and a state valuation of forty thousand dollars, and needing relief, are under the care of the assessors of such

plantations; and the duties and powers of such assessors relative to such persons, are the same in every respect as overseers of the poor in towns have in like cases; and such plantations shall assess and raise all moneys necessary to defray the expenses incurred in the care of such persons; and plantations so furnishing relief, have the same remedies against towns of their settlement, that towns have in like cases. But this section does not extend to or affect the laws concerning so-called state paupers or paupers' settlements."

The effect of this section is to impose upon the assessors of such plantation the duty of looking after that class of paupers for the support of whom they have their remedy against the towns where is to be found their legal settlement.

3. It does not impose on such assessors the duty of looking after so-called "state paupers."

4. That duty is imposed upon the assessors of the "oldest incorporated adjoining town, or nearest incorporated town where there are none adjoining," as specified in section 29.

(Official.)

Exceptions from supreme judicial court, Oxford county.

This was an action by Henry Davis against the inhabitants of Milton plantation to recover for the burial expenses of a state pauper who died in Milton plantation, and of which plantation the plaintiff was a resident.

In the course of the trial the presiding justice made the following pro forma ruling: "If you find the issues of fact in favor of the plaintiff,—if you find, in other words, that the plaintiff would be otherwise entitled to recover if the defendants had been an incorporated town,—he may also recover against these defendants, who are only an organized plantation, and not a town. It would be immaterial whether they were an organized plantation, merely, or an incorporated town. For the purposes of this trial, I give you that rule."

The defendant took an exception to this ruling, and also filed a general motion for a new trial, a verdict for the plaintiff having been returned by the jury. Exceptions and motion sustained.

J. S. Wright, for plaintiff. J. P. Swasey, for defendants.

FOSTER, J. The plaintiff, a resident of the defendant plantation, sues to recover for the burial expenses of a state pauper who died in said plantation.

Exception is taken to the ruling of the presiding justice that, if the plaintiff would be otherwise entitled to recover if the defendants had been an incorporated town, he might also recover against these defendants, who are only an organized plantation, and not a town.

We think this ruling cannot be sustained.

The obligations of towns and plantations in reference to the support of paupers result from provisions of positive law. Whatever there is originates solely from statutory enactment, and it has none of the elements of a contract, express or implied. There are no equitable considerations out of which presumptions will arise in favor of either party.

"The statutes upon the subject are in no sense remedial, and are not to be modified or enlarged by construction, or by any apparent equities, and nothing is to be deemed to be within the spirit and meaning of the statutes which is not clearly expressed in words." *Plymouth v. Wareham*, 126 Mass. 475, 477.

Therefore, unless the plaintiff can bring his case within the express provision of some statute, he must fail, for there is no moral obligation resting upon the defendant plantation to support its paupers. *Newry v. Gilead*, 60 Me. 154, 156.

It is admitted that the person for whose burial expenses this suit is brought was a state pauper.

Rev. St. c. 24, § 33, imposes upon certain plantations certain obligations with reference to "persons found" within their limits, and needing relief. It is as follows: "Persons found in plantations having a population of more than two hundred, to be determined by the returns of the county commissioners, as provided by section seventy of chapter three, and a state valuation of forty thousand dollars, and needing relief, are under the care of the assessors of such plantations; and the duties and powers of such assessors relative to such persons, are the same in every respect as overseers of the poor in towns have in like cases, and such plantations shall assess and raise all moneys necessary to defray the expense incurred in the care of such persons; and plantations so furnishing relief, have the same remedies against the towns of their settlement, that towns have in like cases. But this section does not extend to or affect the laws concerning so-called state paupers or paupers' settlements."

It is admitted that the valuation and population of the defendant plantation bring it within that section.

But it will be noticed that the duty imposed "does not extend to" state paupers, but only such as have a settlement in some town. The effect of this section is to impose upon the assessors of such plantation the duty of looking after that class of paupers for the support of whom they have their remedy against the towns where is to be found their legal settlement. This duty was formerly cast upon the oldest adjoining town (section 29), and this duty still continues in relation to the so-called "state paupers."

The closing period of the section expressly provides that "this section does not extend to, or affect the laws concerning so-called state paupers or paupers' settlements." The defendant plantation was under no obligation to provide means or raise money for the relief of state paupers, and there are no express provisions of statute giving it any remedy against the state. Any such claim for the support of state paupers in such plantations must come through the oldest incorporated adjoining town, or nearest incorporated town, where there are none adjoining, as specified in section 29, amended by chapter 31, Laws

1887. Such certainly must be the clear meaning of the law, else why did the legislature re-enact the law in 1887, and why did not the legislature except from the liability imposed on the oldest adjoining town to relieve state paupers in unincorporated plantations, such as were found in plantations having a valuation of \$40,000, and a population of 200?

This section, properly construed in connection with the last sentence contained in it, is as if it read, "Persons [other than state paupers] found in plantations having a population of more than two hundred," etc.

It is not the duty of unincorporated plantations to provide for support of state paupers, or raise money for their relief; but, by express statute, "persons found in places not incorporated and needing relief, are under the care of the assessors of the oldest incorporated adjoining town * * * and when such paupers have no legal settlement in the state, the state shall reimburse said town for the relief furnished," etc.

Neither does section 43 apply to a case like this, wherein it is provided that "towns shall pay expenses necessarily incurred for the relief of paupers by an inhabitant not liable for their support, after notice and request to the overseers, until provision is made for them."

If it was not the duty of the defendant plantation to provide support for deceased, who, it is admitted, was a state pauper, then it was under no legal obligation to pay for the expenses of burial for which this suit is brought; could not properly raise the money therefor, there being no statute authorizing it; and this action cannot be maintained.

Exceptions and motion sustained.

(90 Me. 536)

SEAVEY v. CLOUDMAN.

(Supreme Judicial Court of Maine. Aug. 16, 1897.)

TENANCY AT WILL—TERMINATION—NOTICE.

A tenancy at will is terminated by the alienation of the premises by the landlord, and without giving the tenant the notice provided for in Rev. St. c. 94, § 2.

Held, that the word "party," in Rev. St. c. 94, § 2, is to be understood as "party to the contract." The notice is to be given by one contracting party to the other contracting party, by the landlord to the tenant, or by the tenant to the landlord. This statute is not applicable when the relation of landlord and tenant does not exist. The words "and not otherwise" refer rather to the acts of the parties to the tenancy than to the effects of their acts by operation of law.

(Official.)

Report from supreme judicial court, York county.

Action by Asa M. Seavey against Walter H. Cloudman. Judgment for defendant.

Geo. F. & Leroy Haley and E. J. Cram, for plaintiff. Addison E. Haley, B. F. Hamilton, and B. F. Cleaves, for defendant.

SAVAGE, J. Trespass quare clausum. Prior to July 18, 1895, the plaintiff was tenant at will of the premises. On that day his landlord, the owner, conveyed the same by deed to Mousam Lodge of Odd Fellows. August 19, 1895, the plaintiff paid one month's rent to the trustees of Mousam Lodge. It is unnecessary to inquire what the effect of this payment was, for the lodge, on August 23d following, leased for the term of one year to Zebedee M. Cushman a portion of the premises conveyed; also the wooden building occupied by the plaintiff, and standing on the remaining portion, and in the lease agreed to remove the building to the land leased, and put it in a condition fit for occupancy as a dwelling house. The plaintiff had notice of this lease on the same day, and was then notified to remove from the premises. August 28th the plaintiff was forcibly evicted by the defendant and others. The defendant justifies as the servant of the lodge and of Cushman, the lessee.

The only question presented by counsel, and the only question decided by us, is whether the plaintiff's tenancy had been terminated prior to the eviction of the plaintiff. The plaintiff says it had not. The defendant contends that it had, by alienation, by the sale from plaintiff's landlord to Mousam Lodge, and by the lease from Mousam Lodge to Cushman. Either was an alienation, and, if either transaction terminated the tenancy of the plaintiff, it is immaterial which.

This court ruled in *Esty v. Baker*, 50 Me. 325, decided in 1862, that by alienation of the estate by the landlord, a tenancy at will is changed to a tenancy at sufferance. But the plaintiff urges that this rule was changed by chapter 199 of the Laws of 1863 (now Rev. St. c. 94, § 2), which provided that "all tenancies at will may be terminated by either party by thirty days' notice in writing for that purpose given to the other party, and not otherwise save by mutual consent."

The statutes in force when *Esty v. Baker*, supra, was decided provided that "a tenancy at will may be terminated by a written notice to quit, served on the tenant thirty days before the time named for its termination." And the plaintiff's argument is that the legislature, in 1863, intended to change this rule laid down in *Esty v. Baker*; and particularly it is urged that the use of the word "all" and the words "and not otherwise" are conclusive that no tenancy at will can be determined or ended in any other way whatever than by the statutory notice to quit, or by "mutual consent."

We do not think so. Prior to the revision of 1841, we had no statute on the subject of determining tenancies at will. The common-law rules were in force. In Rev. St. 1841, c. 95, § 19, it was provided that "all tenancies at will may be determined by either party by three months' notice in writing for that purpose, given to the other party." This was omitted in the revision of 1857. Rev. St.

1857, c. 94, § 2, was held in *Withers v. Larabee* (1861) 48 Me. 570, to be a re-enactment of the statute of 1840 (chapter 98), which provided for the maintenance of the process of forcible entry and detainer, although the relation of landlord and tenant did not exist between the parties; and of the statute of 1853 (chapter 39, § 1), which related to the termination of a tenancy at will on the part of the landlord. "These acts * * * have relation to the process of forcible entry and detainer alone, and have nothing to do with the determination of tenancies at will by either party upon notice in writing; * * * consequently tenancies at will are now as they were before the revision of 1841." Chapter 98 of the Laws of 1862 was the counterpart of the statute of 1853, supra, and gave the tenant the right to terminate the tenancy by giving notice in writing. It, like the former statute, related only to the process of forcible entry and detainer. Chapter 199 of the Laws of 1863, therefore, restored section 19 of chapter 95, Rev. St. 1841, and added the words, "and not otherwise except by mutual consent." As before stated, that statute is found now in Rev. St. 1893, c. 94, § 2.

It will be observed that the statute has reference to the determination of tenancies by the will and acts of the parties, and not by operation of law. The relation of landlord and tenant is created only by contract, express or implied. *Little v. Libby*, 2 Me. 242. We think that the word "party" in the statute is to be understood as "party to the contract." The notice is to be given by one contracting party to the other contracting party, by the landlord to the tenant, or by the tenant to the landlord. After alienation has taken place, how can the tenancy be determined upon the theory of the plaintiff? Can notice be given by the landlord? He has ceased to have any interest in the premises. Can notice be given by his grantee or lessee? He is not a party to the contract. The allenee does not become the lessor at will of the former lessee at will, nor does the tenant at will become tenant to the allenee. *Howard v. Merriam*, 5 Cush. 563.

It will also be observed that the statute in question does not assume to change the nature or essentials of a tenancy at will at common law. It only provides a new method by which the parties to the relation may terminate it as between themselves. Those incidents or limitations which attach themselves to the relation by operation of law are not affected by the statute.

Said Shaw, C. J., in *Howard v. Merriam*, supra: "It is an intrinsic quality in an estate at will, that it is personal, and cannot pass to an assignee; and that by an alienation in fee or for years the estate at will is, ipso facto, determined, and cannot subsist longer. This is a limitation of the estate, which is incident to its very nature. When, therefore, it is thus determined by operation of law, it is determined by its own limitation

without notice." It is, therefore, an incident to any tenancy at will that it is limited to such time as the lessor shall own the estate, as it is also limited to the lifetime of the parties. *Ferrin v. Kenney*, 10 Metc. (Mass.) 204; *Baker v. Smith*, 21 Me. 414; *Burdin v. Ordway*, 88 Me. 375, 34 Atl. 175.

The words "and not otherwise" refer rather to the acts of the parties to the tenancy than to the effects of their acts by operation of law. Were these words to have the enlarged meaning contended for by the plaintiff, not even the death of the parties, or the use of the premises for immoral purposes, would terminate the tenancy.

This construction of the statute seems to have been recognized as correct in *Smith v. Grant* (1868) 56 Me. 255, although the precise point decided was that replevin was not the proper process by which to oust the tenant and his family; also in *Robinson v. Deering*, 56 Me. 359. So, in Massachusetts, *Howard v. Merriam*, 5 Cush. 585; *Curtis v. Galvin*, 1 Allen, 215; *Rooney v. Gillespie*, 6 Allen, 74; *Pratt v. Farrar*, 10 Allen, 519; *Emmes v. Feeley*, 132 Mass. 346.

Our attention has been called to the case of *Young v. Young*, 36 Me. 133, in which it was held that the tenancy at will was not terminated by alienation. The tenancy at will in that case was such by statute, and not so at common law. See *Esty v. Baker*, supra, in which *Young v. Young* is commented upon and distinguished.

The case at bar is one of a tenancy at will at common law, and possesses all the qualities and incidents, and is subject to all the limitations, of such a tenancy.

It is the opinion of the court that the plaintiff's tenancy at will was determined by the lease from Mousam Lodge to Cushman prior to the eviction complained of.

Judgment for defendant.

(90 Me. 541)

FREEMAN v. LEIGHTON.

(Supreme Judicial Court of Maine. Aug. 17, 1897.)

DEED—CONSTRUCTION—CONVEYANCE OF UPLANDS—ADJOINING FLATS.

1. Under the colonial ordinance of 1641-47, concerning flats, conveyances of the uplands are commonly expected to convey the adjoining flats.

2. But the proprietor of the upland and adjoining flats or shore has "the propriety" of both, and hence may convey the whole or any part of his "propriety." He may convey the uplands alone and retain the flats, or convey the flats alone and retain the uplands.

3. In an instrument of conveyance of land bordering upon tide water, a description of the boundary lines as running "to the shore," and "thence by the shore and upland to the first bound," operates to sever the shore from the upland, and to exclude it from the conveyance. (Official.)

Report from supreme judicial court, Washington county.

Action by William Freeman against Eunice D. Leighton.

This was a writ of entry to recover one-sixth part of a piece of sea shore and flats lying in Milbridge. It was admitted that William Freeman, father of the plaintiff, on July 6, 1837, owned the shore and flats claimed by the plaintiff, together with the upland connected therewith; that on July 6, 1837, Freeman, Sr., conveyed to Solon Turner and Nathaniel Pinkham the following described premises: "Beginning at the southeast corner of the James Wallace lot, on the west side, and near the mouth, of Narraguagus river; thence running west one hundred and sixty-eight rods; thence south two hundred and seventy-six rods; thence east to the shore one hundred and ninety-two rods; thence northerly by the shore and upland to the first bound." The shore extends the whole length of the last-described line. The premises in controversy are the shore and flats between the upland and low-water marks of the described lot. Defendant claimed to own the shore and flats under the above deed through mesne conveyances, and the plaintiff by descent from his father.

The parties agreed that, if this deed from Freeman to Turner and Pinkham conveyed the shore and flats, the plaintiff was to become nonsuit, otherwise case to stand for trial. Action to stand for trial.

Geo. E. Googins and William Freeman, for plaintiff. H. H. Gray, for defendant.

EMERY, J. It is true, as contended by the defendant, that the colonial ordinance of 1641-47 concerning flats evidently intended their annexation to the adjoining upland in ownership. The language of the ordinance is: "It is declared that in all creeks, coves and other places about and upon the salt water where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to low water mark," etc. The flats are thus made, in a measure, appurtenant to the adjoining upland. Conveyances of the upland are commonly expected to convey the adjoining flats.

But the proprietor of the upland and adjoining flats or shore has the "propriety" of both, and hence may convey the whole or any part of his "propriety." He may convey the upland alone and retain the flats, or convey the flats alone and retain the upland. This is a familiar proposition, enunciated in numerous decisions from *Storer v. Freeman*, 6 Mass. 435, to *Brown v. Heard*, 85 Me. 294, 27 Atl. 182. The question, therefore, often arises, as in this case, whether the language used in the conveyance of the upland shows an intention to exclude and retain the adjoining flats or shore.

The land, the subject-matter of this conveyance, is situated upon the west side of the river, a river in which "the sea ebbs and flows." The grantor declared in terms that the south line should extend east "to the shore." He then declared that the next line, the east line, should extend northerly "by the

shore and by the upland" to the first bound.

He thus fastened this last line to the eastern edge of the upland and the western edge of the shore. He drew it between the upland and the shore. The court cannot draw it in any other place or direction. This line, drawn by the grantor, and accepted by the grantee, separates the shore from the upland, and excludes it from the conveyance.

The defendant reminds us that this last line is declared to run to the "first bound," which he urges is on the east, or river, side of the shore, and hence that the last line must run on that side of the shore to reach the first bound. Even if it were true that the first bound is on the river-side of the shore,—which fact does not appear,—the line in question is too firmly wedged between the upland and the shore, by the explicit language describing it, to be wrenched away by the description "first bound" as the end of the line. The "first bound" must be held to be the first boundary line, to which line or "bound" the last line extends, hitting it at a point between the shore and the upland.

Action to stand for trial.

(90 Me. 495)

WELLINGTON v. MONROE TROTTING PARK CO.

(Supreme Judicial Court of Maine. July 21, 1897.)

HORSE RACING—FRAUDULENT AWARD—ACCORD AND SATISFACTION—EVIDENCE.

1. In an action against the Monroe Trotting Park Company to recover an unpaid trotting premium, evidence of the existence of the Waldo & Penobscot Society has no tendency to rebut the plaintiff's claim that the first-named corporation is liable.

2. In an action to recover an unpaid trotting premium claimed to have been won by the plaintiff's horse in a horse race conducted by the defendant, *held*, that the judges constituted the tribunal to which the parties submitted when they entered their horses for the race; and by their decision, if honestly given, the parties are bound.

3. The plaintiff will not be debarred from recovering a premium which his horse has clearly won when the judges, through the fraud of one of their number, are led to award the premium to another horse.

4. In a final heat between two horses, at about dark, and when the stand was crowded, it appeared that the three judges did not meet in consultation, but that one of them assumed to communicate between the other two, and falsely informed each that the other and himself had decided to give the race to a horse which, in fact, had not won it, and that each of these two judges was thereby led to believe that a majority of the three had decided in favor of that horse, and, relying upon the information so received, each submitted to the supposed majority, and therefore a public decision was accordingly announced.

Held, that such conduct on the part of the judge who gave the false information to the other two judges was fraudulent, and that a decision so procured is not a bar to an action to recover the premium by the owner of the horse which actually won the race.

5. The defendant sent the plaintiff a check for \$30 for second money in this race. The premium offered was \$200, and the plaintiff, claiming

50 per cent. as first money, notified the defendant that he would not accept the check as second money, but would credit it on account. The check was cashed, and the defendant made no reply.

Held, that under the circumstances of this case the plaintiff cannot be considered as having received the check in settlement of the claim sued for.

(Official.)

Report from superior court, Kennebec county.

Action by Charles B. Wellington against the Monroe Trotting Park Company to recover a trotting premium which the plaintiff claimed had been won by his horse Combination, and reported by the presiding justice to the law court. It was not denied that the contract was valid under St. 1891, c. 70, which authorizes competition for such premiums. Judgment for plaintiff.

Following is the declaration:

"In a plea of the case, for that the said defendant is a corporation duly incorporated under the laws of the state of Maine, and is the owner and controller of the Monroe Trotting Park Company, and all the appurtenances thereto belonging; that during the year A. D. 1894, to wit, July 4, A. D. 1894, the defendant advertised for and gave a race meeting, for which purpose, among other things, was the purpose of its incorporation; that at said meeting it offered to the public in general, and owners of horses eligible to the 2:30 class at the gait of trotting, a purse or premium of \$200; the conditions of said race being that a horse winning three heats out of not less than five should have 50 per cent. of the purse thus offered for contest of speed at the trot on said course.

"The plaintiff avers that he was, on said 4th day of July, A. D. 1894, and for some time prior thereto, the owner of a horse, known by the name of 'Combination,' and that said horse was eligible to the 2:30 class trotting; that the plaintiff in good faith, and in strict compliance with all the rules and regulations of the defendant for its trial and contest to be held on its park at Monroe, Maine, duly entered said horse Combination in the '2:30 class,' so called, of said exhibition, to contend with other horses for the purse or premium of \$200 offered as aforesaid by the defendant; that he also paid the defendant, as required by the rules and conditions of said contest of speed, the sum of \$20, or, as is commonly known, '10 per cent. entrance fee'; that said defendant received said \$20, entered the name of said horse Combination in its list among the other horses contesting for said purse on said 4th day of July, A. D. 1894; that on said 4th day of July, A. D. 1894, at the defendant's said race course at said Monroe, the plaintiff's said horse Combination started in the 2:30 class in said race or contest of speed, and was driven in said race by the plaintiff; and the plaintiff charges that his said horse Combination was able in said race to show, and actually did make, the

greatest and fastest flight of speed in three heats of said contest, viz. the sixth, seventh, and eighth heats thereof, having trotted faster in each of said three heats than any other horse contending for said purse.

"And the plaintiff avers that his said horse Combination won the sixth, seventh, and eighth heats of said race, and that Bancroft H. Conant, Chas. E. Lane, and R. A. Robinson, agents and servants of the said defendant, were the judges, in the judges' stand, of said race and contest; and that when the last heat of said race had been trotted the said judges, acting within the scope of their lawful authority as agents and servants of the said defendant, decided, announced, and declared from the judges' stand of said race course that the plaintiff's said horse Combination had won said last heat, and had won the race and first money, the plaintiff's said horse Combination having won two previous heats, which decision of said judges thereby entitled the plaintiff to have and receive of the said defendant the sum of \$100, the same being 50 per cent. of said purse of \$200; that after said exhibition of speed had terminated, and said horse Combination had merited and was entitled to and had won said \$100 of said purse or premium of \$200, the defendant, through said judges, its servants and agents, and for whose illegal acts the defendant is, and on said 4th day of July, A. D. 1894, was, liable, wrongfully, unlawfully, and without any reasonable or just grounds therefor, and without the knowledge or consent of the plaintiff, took away from plaintiff's said horse Combination said last heat and race and said first money, and awarded and agreed to give the said race and first money, viz. \$100, to a mare called 'Hipponna,' which mare was one of the horses duly entered and started in said 2:30 class and race in competition with said horse Combination and other horses.

"Whereby, by reason of said illegal and wrongful acts of the said defendant, the said plaintiff's horse Combination was declared by said judges to have won only second money, or 25 per cent. of said purse or premium of \$200, viz. the sum of \$50; whereas, in truth and in fact, said horse Combination did win and he was entitled to \$100, the same being 50 per cent. of said purse of \$200; by reason whereof the plaintiff has lost said sum of \$100. And the plaintiff avers that he duly demanded payment of said sum of said defendant on July 4, A. D. 1894."

Edmund F. & Appleton Webb, for plaintiff.
J. & J. Williamson, Jr., and L. A. Burleigh,
for defendant.

SAVAGE, J. In this case the plaintiff sues to recover the balance of an unpaid trotting premium, which he alleges his horse won in a horse race conducted by defendant, July 4, 1894. The defendant claims that the wrong society has been sued; that the

plaintiff's horse did not win the race and "first money," but did win "second money"; and that the plaintiff, having received the sum of \$30 sent to him as "second money," must be deemed to have received it in full settlement of his claim against the corporation conducting the race.

1. The evidence of the plaintiff tends to show that it was the defendant corporation which conducted the race. The defendant offered no evidence upon this point, except an abstract from the printed report of the secretary of the Maine Board of Agriculture, as follows: "Name of Society, Waldo and Penobscot. President, M. C. Chapman, of Newburg Village. Secretary, E. H. Nealley, of Monroe. Treasurer, F. I. Palmer, of Monroe." This evidence, if admissible, had no tendency to rebut the plaintiff's claim that the defendant corporation was the party liable in this case. That there existed a Waldo and Penobscot Society may be true, and still this race may have been conducted by the defendant.

2. The undisputed testimony shows that at the end of the seventh heat the plaintiff's horse Combination and another horse—Hipponna—had each won two heats; that during the eighth heat, it being nearly dark, the judges caused patrols to watch the trotting upon that portion of the track where the judges themselves could not clearly see; that Combination came under the wire two or three lengths ahead of Hipponna; that the patrols reported to the judges that there had been no "running," "nothing wrong"; that two of the three judges, in the presence of the drivers, of whom plaintiff was one, said, "We shall give Combination first, and Hipponna second;" that afterwards, and after the drivers had gone away, the judges announced to the public their decision that Hipponna had won the race and "first money," and Combination second. Is this last decision binding upon the plaintiff? In the absence of proof of fraudulent practices, we think it should be. The "judges" constituted the tribunal to which the plaintiff submitted when he entered his horse for the race, and to their decision, if honestly given, he should bow.

In a letter written by defendant's secretary to plaintiff's counsel there is an allusion to an appeal made to the National Trotting Association, and the decision of that body; but no evidence was offered to show such appeal, or the rules under which it was taken, or its effect.

The plaintiff claims that the judges were, as to him, the defendant's servants and agents, and that the decision in favor of Hipponna was caused and procured by the false and fraudulent conduct of one of them,—Robinson. The other two were called as witnesses by the plaintiff, and their testimony, if believed, certainly tends to support the claim of the plaintiff, and their testimony is uncontradicted. It will not be prof-

itable to analyze the testimony at length. It appears that the "stand" was crowded, and that the judges did not meet in consultation, but that the third judge assumed to communicate between the others, and falsely informed each of the two, who were witnesses, that the other and himself had decided to give the race to Hipponna, and that each of these two was thereby led to believe that a majority of the three had decided in Hipponna's favor, and, relying upon the information received, each submitted to the supposed majority, and thereupon the public decision was announced.

Such conduct was fraudulent, and the decision procured thereby should not be permitted to bar the plaintiff from recovering a premium which his horse clearly won.

3. The defendant sent the plaintiff a check for \$30 for "second money" in this race. The plaintiff notified defendant that he would not accept it as "second money," but would credit it on account. He cashed the check. No reply appears to have been made.

We do not think, under the circumstances, that the plaintiff can be considered as having received the check in settlement of the claim sued.

The premium offered was \$200. The horse winning "first money" was entitled to 50 per cent. Plaintiff claims only \$50, deducting the entrance fee, \$20, and the cash received, \$30. Demand was made July 4, 1894.

Judgment for plaintiff for \$50 and interest from July 4, 1894.

(90 Me. 499)

INHABITANTS OF DRESDEN v. BRIDGE.

(Supreme Judicial Court of Maine. July 19, 1897.)

TAXATION — OMISSIONS OF PROPERTY — SUPPLEMENTAL ASSESSMENTS — EXECUTORS — LIABILITY FOR TAXES — PAROL EVIDENCE.

1. In an action of debt, under the statute, to recover a tax upon personal estate assessed to "Samuel J. Bridge, Est. of," for the year 1894, it appeared that after the death of Samuel J. Bridge and the appointment of the defendant as his executor the assessors adjudged the personal estate of said Samuel in gross, and which was liable to taxation, to be \$8,800 (no list of the personal estate having been furnished to the assessors according to the statute), and they assessed a tax upon that valuation, which was paid. In November following, the assessors made a supplemental assessment upon personal property of the estate, in gross, of the amount of \$359,503.94, and certified to the collector, in their committal of the tax, that this estate was omitted from the April assessment "by mistake."

Held, that the assessors had not "omitted" any item "by mistake," but had undervalued the gross amount, and that their supplemental assessment was unauthorized by law.

2. The "omission" mentioned in the statute does not mean that an erroneous judgment of the value of an estate can be corrected by a supplemental assessment, and the assessors cannot afterwards enlarge their estimate of the value of property under the form of a supplemental assessment.

3. The statute provides that "the personal property of deceased persons in the hands of their executors or administrators, not distrib-

ed, shall be assessed to the executors or administrators." Rev. St. c. 6, § 14, par. 8. An executor or administrator becomes personally liable for a tax so assessed, and a suit may be brought against them personally, and not against the property of the deceased in their hands. But the tax must be assessed against such executor or administrator to render them personally liable.

4. *Held*, that this tax was not assessed against the defendant, and he is not liable therefor.

5. Parol evidence is not admissible to show that the assessors meant the assessment should apply to the defendant as executor. It is not competent for the plaintiff to change the form and character of the assessment, and to make an assessment to "Samuel J. Bridge, Est. of" a personal assessment to the defendant.

(Official.)

Report from supreme judicial court, Lincoln county.

Action by the Inhabitants of Dresden against Edmund Bridge, executor of the will of Samuel J. Bridge, deceased, to recover a tax. Submitted on report. Judgment for defendant.

J. H. & J. H. Drummond, Jr., for plaintiff.
L. C. Cornish, for defendant.

STROUT, J. Samuel J. Bridge, an inhabitant of plaintiff town, died on the 6th day of November, 1893, testate. On the 5th day of December, 1893, defendant was duly appointed his executor. In the assessment of taxes in Dresden in April, 1894, after the statute notice to bring in lists of taxable property had been given, and no list of the Bridge estate had been furnished, the assessors, in accordance with Rev. St. c. 6, § 93, judged the estate liable for taxation upon personal property to the amount of \$8,800, and assessed a tax upon that amount, which has been paid. On November 28, 1894, the assessors made a supplemental assessment upon personal property of the amount of \$359,503.94, and committed the same to the collector, with their certificate that that estate was omitted from the April assessment by mistake. This supplemental tax was assessed "Samuel J. Bridge, Est. of," and amounted to \$7,369.83, to recover which this suit is brought.

Two principal grounds of defense are relied upon:

(1) That the supplemental tax was unauthorized, and is invalid, because there was no omission from the April assessment "by mistake"; and

(2) Because the tax assessed to "Samuel J. Bridge, Est. of" was not a legal assessment against the defendant as executor, and created no personal liability against him.

In regard to the supplemental assessment, the statute provides (Rev. St. c. 6, § 35) that, "when any assessors, after completing the assessment of a tax, discover that they have by mistake omitted any polls or estate, liable to be assessed, they may, during their term of office, by a supplement to the invoice and valuation, and the list of assessments, assess such polls and estate." Section 92 of the same chapter provides for notice to the in-

habitants to bring in lists of taxable property; and section 93 that, "if any person after such notice does not bring in such list, the assessors shall ascertain otherwise as nearly as may be, the nature, amount and value of the estate, real and personal, for which in their judgment he is liable to be taxed," and bars any application to the assessors or county commissioners for any abatement of the tax, unless he offers such list, and satisfies them that he was unable to offer it at the time appointed.

In this case no list was furnished, and the assessors, in the April assessment, acted under the provisions of section 93, and adjudged the value of the personal estate to be \$8,800. Mr. Cate, one of the assessors, testified that when the April tax was assessed, he knew Mr. Bridge was a man of large estate, that he had in his lifetime given to institutions in the town, for the benefit of the town, between forty and fifty thousand dollars,—such gifts as are only made, or can be made, by men of large wealth. With this knowledge, and with the right to doom this estate, without right of appeal for abatement, the assessors deliberately, as their judgment, inventoried the personal estate in gross at \$8,800, and assessed a tax upon that amount. They thus, in April, exercised and exhausted the right and power given them by section 93, and could not rejudge the matter after completion of the assessment and commit to the collector. The "mistake" mentioned in section 35 by which were "omitted any polls or estate," and which alone justifies a supplemental assessment, relates only to an "omission," and does not mean that an erroneous judgment of the value of an estate taxed can be corrected by a supplemental assessment. When the inventory of the estate was returned to the probate court, the assessors attempted, by the supplemental assessment, to revise and correct their estimate of the value of the personal estate, which they had once estimated and assessed. They had not "omitted" any item of personal property in April, but had doomed the personal estate in the aggregate. Finding subsequently that the aggregate personal property was more than their estimate, they sought to make a new valuation. No element of omission by mistake existed; no poll or estate was omitted. The personal estate, in the aggregate, was assessed and taxed in April. It was not omitted by mistake or otherwise. The judgment of the assessors was not accurate. If their doom of value had proved to be in excess of the value of the personal, the estate could not be relieved on that account.

The omission contemplated by the statute is of some specific item, as one parcel of land, or a building so situated as to be personal property, or a ship, when the items of personal property are named and separately appraised in the inventory. It is omission, and not erroneous judgment, that the statute provides for. The omission may be supplied by

the supplemental assessment; the erroneous judgment cannot be corrected in that way.

In this case, in April, the personal estate was valued and assessed in gross, and not by items. The supplemental assessment is also in gross, and covers the same personal estate. It had been estimated and appraised in gross in April. It could not be again estimated and appraised in November.

It would hardly be contended that, if the assessors had inventoried an estate specifically by items, and had appraised a specific piece of property—as, for example, a ship—at a certain value, and, after the tax had been completed, and committed to the collector, they found that the ship was worth more than their appraised and assessed value, they could by supplement assess such excess as estate "omitted" by mistake. Yet this supplemental assessment attempted to do that; nothing more or less.

Upon the facts of this case, the supplemental assessment was unauthorized and invalid.

Upon the second point:

The supplemental tax was assessed to "Samuel J. Bridge, Est. of." Rev. St. c. 6, § 14, par. 8, provide that "the personal property of deceased persons in the hands of their executors or administrators, not distributed, shall be assessed to the executors or administrators," until the property is distributed, and notice given. Such assessment makes the executor or administrator personally liable for the tax. Being personally liable, a suit for the tax should be brought against him personally, and not against the property of the deceased in his hands. This suit is so brought. But, to subject him to personal liability, the tax must be assessed against him. There is no statute which authorizes the assessment of a tax in the form of this assessment. "To sustain the action, it must be shown that the tax was so assessed as to make the defendant personally liable for its payment." This was decided in *Fairfield v. Woodman*, 76 Me. 350. So, in *Elliott v. Spinney*, 69 Me. 31, under a statute which authorized the assessment of a tax on undivided real estate of a deceased person to his heirs or devisees, without designating any of them by name, it was held that an assessment to the heirs, when the estate was held by devisees, was erroneous, and a suit for the tax could not be maintained.

It is true, that in *Fairfield v. Woodman*, *supra*, the tax was upon real and personal. But as the law requires, and the universal practice is, to value the real and personal separately, there could have been no difficulty in separating the two. The court did not base its decision upon the ground that the tax united real and personal, but upon the broad ground that a tax assessed to the "estate of Orin Woodman," in which personal estate was taxed, imposed no personal liability upon his administrator.

In November, when this tax was assessed,

there was an existing executor of Samuel J. Bridge.

Plaintiff claimed to show by parol that the assessors meant the assessment to apply to the executor, and claimed that the tax to the estate was, in effect, a tax to him; but such contention cannot prevail. It goes beyond a question of mere identity, which may be shown by parol, as in *Farnsworth Co. v. Rand*, 65 Me. 23, or as in *Bath v. Reed*, 78 Me. 276, 4 Atl. 688, where it was held that an assessment against the administrators of R. was good against the executors, under Rev. St. c. 6, § 142, and that parol evidence was admissible to show that the executors were intended to be taxed. The tax purported to be against the legal representative of the estate. The error was in designating that representative as an administrator, when he was an executor. It was an error rendered harmless by section 142. But here the plaintiff attempts to change the form and character of the assessment, and to make an assessment to "Samuel J. Bridge, Est. of" a personal assessment to Edmund Bridge. This would be a radical change of the record, which the law does not allow.

It is unnecessary to consider the other points raised. There must be—

Judgment for defendant.

(90 Me. 500)

BURR v. STEVENS.

(Supreme Judicial Court of Maine. July 22, 1897.)

HIGHWAYS—RIGHTS OF ADJOINING OWNERS— TRESPASS.

1. Whenever public necessity or convenience requires that the whole of a highway, or any portion greater than that previously traveled, should be built as a road for public travel, the duty and exclusive authority for doing such work as may be necessary for such purpose is given by statute to road commissioners or highway surveyors.

Held, that entering upon land within the limits of the highway, although outside of the wrought portion, and widening the road by excavations or embankments, to the prejudice of the adjacent owner, or in disturbance of his soil, is an unlawful act.

2. The parties were owners of adjoining lots of land, both on the highway. For the purpose of passing between his lot and the wrought portion of the highway, the defendant constructed a driveway by making excavations and piling up rocks and refuse across the plaintiff's land, but outside of the wrought or traveled part of the highway.

Held, that the defendant had no right to build the driveway upon the land of the plaintiff, although it was within the limits of the highway, for his private use and convenience, notwithstanding there was difficulty in passing directly from his land to the highway.

(Official.)

Agreed statement from supreme judicial court, Kennebec county.

Trespas q. c. f. by William F. Burr against Joseph B. Stevens, in which the plaintiff alleged that the defendant, with force and arms, broke and entered the plaintiff's close in West Gardiner, and then and there drove

his horse and wagon over the plaintiff's land, continually using the same for a driveway; also for digging up the ground, and depositing rags and refuse, and moving stones thereon; and also for digging and leaving a ditch there of more than 100 feet in length, 2 feet wide, and 10 to 15 inches deep.

The defendant pleaded the general issue, and also filed a brief statement, as follows:

"That it is true that he has used and maintained the driveway complained of, and says that he is justified in so doing, because:

"(1) Said way is wholly within the limits of the highway, and that he has a right to pass and repass over the same as his convenience may require, and incidentally thereto to remove any obstructions and make any repairs necessary to secure his safety as one of the public.

"(2) That, owing to the steep declivity in front of his homestead from the limit of the highway, it is necessary for him to take this diagonal course to reach the wrought or traveled part thereof with reasonable safety and convenience.

"(3) That this defendant and his predecessors in title have used and maintained said driveway for more than 20 years, and that all the acts complained of were done solely in maintaining and repairing said driveway, and were necessary therefor."

When the action came to trial, and after presentation of the evidence, and a view of the premises by the court and jury, it was agreed that the facts should be reported to the full court, and submitted for its determination upon the following agreed statement of facts:

"It is admitted and agreed that the defendant, Joseph B. Stevens, and his predecessors in title, have used the driveway in question substantially as it is now for more than twenty years.

"That on account of the declivity in front of the defendant's own premises to the traveled part of the highway the use of the driveway in question upon the fee of the plaintiff between the line of the highway and the wrought part thereof is reasonably necessary to obtain convenient and safe access to the traveled part of the highway.

"That the whole of the land on which the alleged trespasses were committed is within the limits of the highway.

"That the acts of the defendant complained of in the second and third counts of the writ were only such as were reasonably necessary to make and maintain said driveway safe and convenient for travel.

"If, upon the foregoing statement of facts, the plaintiff is entitled to recover, he shall have only nominal damages and costs of court, without witness fees; if otherwise, the defendant shall have judgment for costs of court without witness fees."

Judgment for plaintiff.

A. M. Spear and W. D. Whitney, for plaintiff. A. C. Stilphen, for defendant.

WISWELL, J. The parties are owners of adjoining lots of land, both upon the highway. For the purpose of passing between his lot and the highway, the defendant constructed a driveway by making excavations and piling up rocks and refuse across the plaintiff's land, within the limits of the highway as located, but outside of the wrought or traveled portion thereof. These acts, and the use of the driveway by the defendant, are the trespasses complained of. The case comes to the law court upon agreed facts, with the stipulation that, if the defendant is liable, the damages shall be nominal.

It is unnecessary to decide whether the defendant has the right to use any portion of the highway as located for the purpose of passing between his lot and the highway, or whether, as he claims, he has gained a right by prescription to use this driveway, under the facts stated; because, whatever his rights may be in regard to passing over the land of the plaintiff, he clearly had no right to make excavations or pile up rocks upon the plaintiff's land, even if this was reasonably necessary in making the driveway used by him safe and convenient.

"The owner of land over which a highway is laid retains his right in the soil for all purposes which are consistent with the full enjoyment of the easement acquired by the public. This right of the owner may grow less and less, as the public needs increase. But at all times he retains all that is not needed for public uses, subject, however, to municipal or police regulations." *Allen v. City of Boston*, 159 Mass. 324, 34 N. E. 519.

The public have no right in a highway, excepting the right to pass and repass thereon. *Stinson v. Gardiner*, 42 Me. 248.

It necessarily follows that the defendant had no right to build a driveway upon this land of the plaintiff, although within the limits of the highway, for his private use and convenience. In the use of this driveway he was not a traveler upon the public highway, but it was built and used by him for his private convenience, because of the difficulty of passing directly from his land to the highway.

Whenever the public necessity or convenience requires that the whole, or any greater portion than previously traveled, of a highway, should be built as a road for public travel, the duty and exclusive authority of doing such work as may be necessary is given by our statutes to the road commissioners or highway surveyors.

The law is thus stated in *Hollenbeck v. Rowley*, 8 Allen, 473: "But entering upon land without the traveled road, and by excavations or embankments widening the road, to the prejudice of the adjacent owner, or in disturbance of his soil, is an unauthorized act. Gen. St. c. 44, vests in the surveyors of highways the authority for making all necessary repairs on public highways; and individuals, unauthorized by such surveyors or other law-

ful authority, cannot lawfully enter upon the land of the adjacent owner situated without the limits of the worked road, and take and remove earth; nor can they interfere with the same by placing rocks, stones, and rubbish upon his land without the limits of the worked and traveled way."

The entry will therefore be:

Judgment for plaintiff.

Damages assessed at one dollar.

(90 Me. 519)

AMERICAN GAS & VENTILATING MACH. CO. v. WOOD.

(Supreme Judicial Court of Maine. July 30, 1897.)

BILLS AND NOTES — CONTEMPORANEOUS AGREEMENTS — CONSTRUCTION — ESTOPPEL.

1. Independent, collateral written agreements, though executed at the same time with a promissory note, do not affect the construction of such note, or afford any defense to an action upon it.

2. But this rule does not apply where the two contemporaneous writings between the same parties, upon the same subject-matter, may be read and construed as one paper.

3. In such case both papers may be read and construed together, notwithstanding one of the writings is a promissory note, when the action is between the parties to it, or their representatives.

4. The defendant gave to the plaintiff a promissory note for \$125, payable four months after date, with interest. At the same time the defendant executed and delivered to the plaintiff the following written agreement:

"Lewiston, October 15, 1890.

"It is mutually agreed between the American Gas and Ventilating Machine Co. that at the end of four months, if Mr. John N. Wood, the giver of note dated —, does not want to pay the same, he shall receive it back on the surrender by him to the American Gas and Ventilating Machine Co. one hundred shares of stock in the Maine Gas and Ventilating Machine Co. held by him.

"American Gas and Ventilating Machine Co.
"C. W. Waldron, Secretary."

Held, that the note and agreement are so connected by direct reference or necessary implication that they are to be construed together as an entire contract.

5. Such an agreement is executory in its nature, requiring some further act to be done by the defendant, or some good and sufficient reason for its omission, in order to render it available as a defense.

6. An estoppel in pais arises whenever an act is done or a statement made by a party, the truth or efficacy of which it would be a fraud on his part to controvert or impair.

(Official.)

Report from supreme judicial court, Androscoggin county.

Action by the American Gas & Ventilating Machine Company against John N. Wood. Submitted on report. Judgment for defendant.

J. W. Mitchell, for plaintiff. A. R. Savage and H. W. Oakes, for defendant.

FOSTER, J. This is an action upon a promissory note of the following tenor:

"Lewiston, Me., Oct. 15, 1890.

"Four months after date, I promise to pay the American Gas and Ventilating Machine

Co. one hundred and twenty-five dollars at Lewiston, Me., with interest. Value received. J. N. Wood."

The plaintiff, having proved the note declared on, is entitled to judgment unless, upon the facts disclosed, the other party has shown a legal defense. In support of such defense, the defendant introduces an agreement in writing, signed by the plaintiff, executed at the same time when the note was given, and which reads as follows:

"Lewiston, October 15, 1890.

"It is mutually agreed between the American Gas and Ventilating Machine Co. that at the end of four months, if Mr. John N. Wood, the giver of note dated —, does not want to pay the same, he shall receive it back on the surrender by him to the American Gas and Ventilating Machine Co. one hundred shares of stock in the Maine Gas and Ventilating Machine Co. held by him.

"American Gas and Ventilating Machine Co.

"C. W. Waldron, Secretary."

It is argued in behalf of the defendant that this note and agreement constitute together an entire contract, and that they are to be construed together as part of one and the same transaction.

The plaintiff, on the contrary, contends that, although made at the same time as the note, it must be considered as independent and collateral to it, repugnant to the very terms of the note, and destructive of it; that it is but a promise to accept payment of the note in a different manner than is provided for in the note itself.

The certificates of stock mentioned in this agreement, and which, from the evidence, appear to have been the consideration of this note, were never surrendered by the defendant to the plaintiff prior to the commencement of this action.

Viewed in the most favorable light for the defendant, the transaction shows only an executory agreement or contract between the parties, requiring some further act to be done, or some good and sufficient reason for its omission, in order to render it available as a defense.

We are aware that there is a class of decisions which hold that independent, collateral agreements, though executed at the same time as the note, do not affect the construction of the original contract, or afford any defense to an action on the note.

Thus, an agreement in writing, executed at the time of the making of a note which was payable at a certain day, to give indulgence to the maker for an indefinite period, which might extend beyond the specified time of payment, has been held not to be a part of the note, but only a collateral promise, upon which the promisee must rely. *Dow v. Tuttle*, 4 Mass. 414. There are other cases in the same line, and among which may be mentioned *Pitkin v. Frink*, 8 Metc. (Mass.) 12, where a note was given by the defendant, and the plaintiff at the same time gave the

defendant a writing in which he agreed to take his pay in horse hire, and not call on the defendant for the note so long as he kept the horse and carriage in good order for the plaintiff's accommodation; and the court held the stipulations independent, and constituted separate and distinct contracts, for a breach of which by either an action could be maintained. So, also, *Traver v. Stevens*, 11 Cush. 167, *Waterhouse v. Kendall*, Id. 128, and *Stanton v. Maynard*, 7 Allen, 335, where similar agreements by the plaintiff, made in consideration of notes given, were regarded as mutual and independent, executory stipulations, the performance of which was not a condition precedent to a recovery upon the notes. *Littlefield v. Coombs*, 71 Me. 110.

But there is another class of decisions wherein it is held that two contemporaneous writings between the same parties, upon the same subject-matter, may be read and construed as one paper; and this rule applies notwithstanding one of the writings is a promissory note, when the action is between the parties to it, or their representatives. *Rogers v. Smith*, 47 N. Y. 324; *Hunt v. Livermore*, 5 Pick. 395; *Hill v. Huntress*, 43 N. H. 480; *Davlin v. Hill*, 11 Me. 484.

In the latter case the court held that in an action on a promissory note, writings connected therewith by direct reference or necessary implication are admissible in defense as parts of the same contract.

So, in *Hill v. Huntress*, *supra*, an agreement made at the same time as the note, contained a stipulation that the promisors of the note were to pay the amount of it in tanning hides for the payee, and the court held that the note and written agreement, made at the same time, relating to the manner of payment of it, were to be construed as one special agreement as between the original parties and those standing in like situation. The court there say, in speaking of the note: "As between the original parties, notwithstanding its form, this instrument is but one part of a special contract, the other part of which, as it was made, was contained in the written agreement of the same date, and purporting to be executed at the same time. Different instruments are to be construed together, as parts of the same contract, where it is necessary to carry into effect the agreement and intention of the parties."

Many of the cases relate to instances where the stipulation, agreement, or memorandum is written upon the face or back of the note itself,—as in *Littlefield v. Coombs*, 71 Me. 110; *White v. Cushing*, 88 Me. 339, 34 Atl. 164; *Barnard v. Cushing*, 4 Metc. (Mass.) 230; *Costello v. Crowell*, 127 Mass. 293, and the cases therein cited,—and where such terms become a substantive part of the note, and qualify it, as if inserted in the body of the instrument.

But it was otherwise in the cases of *Hill v. Huntress*, 43 N. H. 480, *Hunt v. Livermore*, 5 Pick. 395, and *Davlin v. Hill*, 11 Me. 484, where the agreement was contained

in writings independent of the notes, which they were held to modify and govern in accordance with the intention as expressed in the several instruments.

In *Davlin v. Hill*, supra, the language of our court, as expressed by Weston, J., is this: "It is manifest that the note, the plaintiff's agreement in writing of the same date, and the instrument upon the back of which it was written, and which is referred to therein, were intended to be evidence of the stipulations of the parties in relation to the transaction. It was not necessary that the contract should be written on one piece of paper. If written on several, connected by direct reference or necessary implication, they form, together, evidence of what the parties have agreed."

In the case at bar the agreement bears the same date as the note, and refers expressly to the note in suit. In that agreement it is mutually agreed that if the defendant, at the date of maturity of the note, does not want to pay the same, he shall receive it back upon surrendering to the plaintiff the shares of stock held by him.

Can there be any doubt as to what the intention of the parties was? Are not the note and agreement "connected by direct reference or necessary implication"? We think so, and that the same should be construed together as an entire contract, the stipulations of which are mutual and dependent, rather than independent and collateral. Had there been a surrender or tender of the stock within the time limited by the contract, it would have constituted a defense to this action. There is no evidence or claim on the part of the defense that this was done.

What, then, is the justification offered by the defendant to exonerate him from the consequences of his failure so to surrender the stock? It is that by the acts and declarations of the authorized agent of the plaintiff corporation, the defendant was induced to retain the stock, and that the plaintiff is thereby estopped from claiming that the defendant was at fault in not making a surrender of the same before suit was commenced.

We think this position of the defendant is well founded.

It appears that C. W. Waldron was not only owner of one-third of the capital stock of the plaintiff corporation, but was a director, secretary, and general manager of the corporation in this state, and was generally empowered to act in reference to all matters pertaining to the business of the corporation. When the time mentioned in the note and agreement had expired, it was deemed advisable that an extension should be given upon this and other similar notes held by the plaintiff against other parties, in order to test the machines manufactured by the plaintiff, and to ascertain if they could be made to produce satisfactory results. Such extension appears to have been granted, extending

the time to May 15, 1891. But in the meantime letters were written in behalf of this defendant and others similarly situated, explaining the situation, and from all that appears in the case it is evident that all parties were co-operating to obtain a result in relation to the use of the machines that would be of value to all concerned. This appears from the correspondence, as well as from the whole tone of the evidence given by Mr. Waldron. The defendant and other stockholders had the assurance that the plaintiff would act in good faith for the furtherance of their material interests, and they were led to believe that the control and decision as to such matters was vested in Mr. Waldron. It appears from the testimony of Waldron that up to the time this note was sued the other directors agreed with him entirely. He had frequent conversations with the Lewiston stockholders, including this defendant, and he was in hopes they would be glad to pay their notes, and keep their stock; and it was understood that the result would be that, if they found the machines were good for nothing, they would want to get out of it. He had repeated conversations with the defendant, and told him, not only during the time covered by the extension, but afterwards, that he might hold on to the stock, and give it up when it was found that nothing could be accomplished with the machines. It is needless to further discuss the testimony, and it is sufficient to say that, in view of the repeated statements of Mr. Waldron, and his requests to the defendant to retain the stock till it was found that the success of the enterprise could no longer be assured, and finally his assurance in his letter to the defendant that the note had been sent for collection by mistake, and that there was nothing due upon it, we think the plaintiff may properly be held to be estopped from claiming that the defendant was at fault in not surrendering the stock before suit was commenced, or is without remedy in consequence of such failure to return it to the plaintiff within the time stipulated.

This doctrine of estoppel in pais has been frequently applied to prevent a party from taking advantage of his own wrong. It was applied in *Caswell v. Fuller*, 77 Me. 106, wherein Haskell, J., makes use of the following language: "That a man should be allowed by his own speech and conduct to lead another astray, and thereby take substantial benefit from the error of which he was the cause, is subversive of natural justice." To the same effect may be cited *Stanwood v. McLellan*, 48 Me. 275; *Ripley v. Insurance Co.*, 30 N. Y. 136, 164.

An illustration frequently given is that if a landlord, even without consideration, agrees that his tenant may pay after rent day, and by reason thereof he should omit to pay at the day, the landlord is estopped from enforcing a forfeiture.

Such an estoppel arises whenever an act is

done or a statement made by a party, the truth or efficacy of which it would be a fraud on his part to controvert or impair. *Mars-ton v. Insurance Co.*, 89 Me. 266, 272, 36 Atl. 389.

Judgment for defendant.

(90 Me. 546)

FAIRFIELD SAV. BANK v. SMALL et al.
(Supreme Judicial Court of Maine. Sept. 15, 1897.)

INTERPLEADER—WITNESSES—COMPETENCY—SAVINGS BANK DEPOSITS—GIFTS—INTENT—DELIVERY—HUSBAND AND WIFE.

1. A savings bank brought a bill in equity asking that the husband, on the one side, and the executor of the will of his deceased wife, on the other side, be required to interplead respecting the ownership of a deposit standing on the books of the bank in the name of the wife. Both contending parties filed their respective answers, each claiming the deposit as his own.

Held that, the existence of all the essential conditions upon which the equitable remedy of interpleader depends having been satisfactorily established, the bill was properly sustained, and a decree of interpleader duly entered.

2. By agreement of the parties, the answers filed were to be taken as the pleadings of the contending parties.

Held, that at the time of the trial the real contestants for the funds were the husband, on the one side, and the executor, on the other, and that thereafter the original plaintiff, the savings bank, occupies the position of a mere stakeholder, neither having nor claiming any interest in the subject-matter. The remedy of the bank is exhausted by the decree that the claimants do interplead with each other, and it is then "wholly without the controversy."

3. *Held*, that the husband is not a competent witness under the statute (Rev. St. c. 82, § 93), and that his deposition cannot be considered in determining the question of the ownership of the fund, pending between himself and his wife's executor.

4. When it appears that the evidence fails to disclose any indication, aside from the fact of the deposit itself standing in the name of the wife, on the part of the husband to make an absolute gift of the money so deposited with his wife, but, on the contrary, the inference is irresistible from the subsequent conduct and declarations of the parties that it was mutually understood by them to be his money, and subject to his control the same as other money deposited in his own name, *held*, that the deposit is the property of the husband.

5. Also, the fact that the wife prior to her death had access to the receptacle in which her husband's papers were kept, and took the book into her personal custody without his knowledge, does not constitute a delivery of the deposit book to the wife.

6. *Held*, that in this case there is an absence of proof of both the intent to give and of any delivery to complete a gift.

(Official.)

Report from supreme judicial court, Kennebec county.

Bill of interpleader by the Fairfield Savings Bank against Lumber Small and Howard W. Dodge, executor, to determine the ownership of a deposit in that bank. Both defendants claimed the fund, and, after a decree requiring the defendants to interplead was made in the court below, the case was reported to this court, to be heard on bill and answers of the defendants, and the testimony.

The deposition of one of the defendants, Lumber Small, was offered in evidence below, and was objected to as inadmissible under the statute. The parties agreed that the question of its admissibility should be determined by the law court.

Edmund F. & Appleton Webb, for defendant Small. S. S. & F. E. Brown, for defendant Dodge.

WHITEHOUSE, J. The Fairfield Savings Bank brings this bill in equity, asking that Lumber Small, on the one side, and Howard W. Dodge, executor of the will of Olive C. Small, the deceased wife of Lumber Small, on the other side, be required to interplead respecting the ownership of a deposit of \$786.76 standing on the books of the bank in the name of Olive C. Small.

It is alleged in the bill that at the time of the decease of Olive C. Small, on the 15th day of May, 1896, she had in her possession deposit book No. 2,384, issued by the plaintiff bank, showing an account of deposits and withdrawals, kept in her name from 1887 to 1895, with a balance of \$786.76 in favor of the depositor; and that this money was claimed by Lumber Small, the surviving husband of Olive C., as his property, on the ground that it was his money when deposited in the bank; and that it was only placed in the name of his wife in trust for himself, for the reason that he already had deposits in the same bank in his own name to the full limit of \$2,000 allowed by law.

Thereupon the contending parties filed their respective answers, Lumber Small claiming the deposit as his own in accordance with the representations in the bill, and Howard W. Dodge claiming it as a part of the estate of Olive C. Small.

The existence of all the essential conditions upon which the equitable remedy of interpleader depends having been satisfactorily established, the bill was properly sustained, and a decree of interpleader duly entered. By agreement, the answers filed were to be taken as the pleadings of the contending parties. Upon these pleadings, which duly presented the issue between the contending parties, the evidence was taken by the presiding justice, and reported for the consideration of this court. The cause is now ripe for a decision upon the merits of the controversy between Lumber Small and the representatives of the estate of his wife, Olive C. Small, upon so much of the evidence as shall be deemed legally admissible. *Farley v. Blood*, 30 N. H. 354; *Atkinson v. Manks*, 1 Cow. 691; *Bank v. Fogg*, 83 Me. 374, 22 Atl. 251.

In support of his contention, the deposition of Lumber Small, who was 92 years of age, and unable to attend court, was offered in evidence, and excluded; but, by consent of counsel, it was subsequently made a part of the report, to be considered if held admissible by this court.

It is the opinion of the court that Lumber

Small was not a competent witness under our statutes, and that his deposition cannot be considered in the determination of the question pending between himself and the representative of his wife's estate. Section 98, c. 82, Rev. St., providing that no person shall be excluded from testifying by reason of his interest in the result of the suit, is expressly declared by section 98 of that chapter to be inapplicable to cases "where, at the time of taking testimony, or at the time of trial, the party prosecuting, or the party defending, or any one of them, is an executor or an administrator," etc. It has been seen that at the time of the trial the real contestants for the fund in this case are Lumber Small, on the one side, and the executor of the will of Olive C. Small, on the other. This is the obvious and necessary result of the operations of a bill of interpleader. One of the principal elements involved in the remedy is that the original plaintiff must occupy the position of a mere stakeholder, neither having nor claiming any interest in the subject-matter. He must be entirely indifferent between the conflicting claimants, and be ready and willing to pay the money in dispute to the one found to be rightfully entitled. With the result of their dispute he has no concern. His remedy is exhausted by the decree that the claimants do interplead with each other, and he is then "wholly without the controversy." 3 Pom. Eq. Jur. §§ 1320-1325, and cases cited.

But it is contended that the substance of the testimony which Lumber Small might be expected to give in support of his claim, as stated in the interpleading bill and in his answer, fully appears in the direct testimony of other witnesses, and in the inferences to be drawn from the circumstances disclosed.

Lumber Small has had three wives, all of whom are deceased. By the first wife he has six children now living, but no children by either the second or third wife. It appears from the evidence that Olive C. Small, the third wife, had no property of her own at the time of her marriage with Lumber Small, and never afterwards acquired any in her own right. In November, 1891, Mr. Small made provision for the support of himself and wife, Olive C., by conveying to her brother, George F. Rowe, a farm, with other property in Benton, of the estimated value of \$1,200 or \$1,500 in the aggregate, and taking from Rowe a bond, secured by a mortgage of the same property, for the maintenance of himself and wife during their lives. Under this arrangement, Mr. and Mrs. Small both lived in the family of her brother until November 28, 1895, when Mr. Small became dissatisfied, and went to live with his daughter Mrs. Parkman, in Unity. Mrs. Small remained in her brother's family, and received her support there until her death.

It appears from the copies of the accounts on the books of the Fairfield Savings Bank, and from the deposit books in the case, that

Lumber Small commenced to make deposits in that bank in his own name December 3, 1873, first receiving deposit book No. 459, and has kept an account there from that time to the present. In January, 1886, the amount of his deposits was \$1,960.88, and, with the dividend added, on the 1st day of May following, \$2,020.87. It was in this state of his account that on January 6th a deposit of \$200 was made on a separate account, evidenced by deposit book No. 2,098, with the caption, "Olive C. Small in Account with the Fairfield Savings Bank." On this account three other deposits were made within six months following, aggregating, with the dividend, \$411.06, which was all withdrawn on November 5th of the same year, and that account closed. On the same day he closed the account standing in his own name on book 459, by withdrawing the entire balance of \$1,908.27, and opened a new account in his own name, by depositing \$1,319.33, receiving deposit book No. 2,236.

But November 1, 1887, this account again reached a total of deposits and dividends of \$1,960.88; and on October 6th, while this account was thus near the maximum limit for any one depositor, he again opened an account in the name of Olive C. Small, and deposited \$300 on that account, as shown by deposit book No. 2,384, which is the one here in question. The amount of this account was increased by two other large deposits to \$2,000, May, 1886, and reduced by subsequent withdrawals to \$786.76, the amount now in controversy. In the meantime the account in his own name, under the effect of numerous deposits and withdrawals, fluctuated between \$2,000, in May, 1888, and \$1,881, in June, 1895, when there was a withdrawal of \$800.

It appears from the testimony of Charles Rowell, who was treasurer of the bank from August, 1887, to 1894, comprising the entire period of the deposits and withdrawals on the account in question, that he issued this deposit book in the name of Olive C. Small, and delivered it to her husband; that Lumber Small afterwards brought the book to the bank, and made all the deposits and withdrawals on that account; that he had no acquaintance with Olive C. Small; and that all the business was done with her husband. Her signature does not appear upon the books of the bank.

Mr. Pratt, Rowell's predecessor as treasurer of the bank, died before this controversy arose.

From this evidence alone it is not difficult to discover the relation of cause and effect between the fact that the account in his own name equaled or exceeded the limit of \$2,000, at the dates above named, and the opening of a new account in the name of his wife at the corresponding periods. It is true that the statute (Rev. St. c. 47, § 99) provides that savings banks shall not receive from any one depositor, directly or indirectly, over \$2,000,

and that "no interest shall be paid to any one depositor for any amount of deposit exceeding said sum." But it is established beyond question by all the evidence that every deposit made in the name of Olive C. Small was the money of Lumber Small at the time it was deposited; and, whatever effect any such evasion of the law respecting the limit of the individual deposit might have upon his right to recover either principal or interest from the bank, it cannot of itself operate to confer any title upon Olive C. Small. Her right to the deposit must depend upon proof of an intent on the part of Lumber Small to make an absolute gift of the money to her, and of the delivery requisite to effectuate such intent. *Brabrook v. Bank*, 104 Mass. 228; *Parkman v. Bank*, 151 Mass. 218, 24 N. E. 43; *Bank v. Fogg*, 83 Me. 374, 22 Atl. 251. It is a matter of common knowledge that, when a depositor's account in his own name has reached the maximum limit allowed by law, he often opens a new account in the name of some other member of his family, but in fact for his own benefit; and in such a case evidence that he had thus deposited the full amount allowed in his own name "is admissible as offering a possible explanation of the form adopted other than the intention to make a gift." *Parkman v. Bank*, *supra*.

In the case at bar, careful examination of all the evidence, aside from the fact of the deposit, fails to disclose any indication whatever of a purpose on the part of Lumber Small to make an absolute gift of this money to his wife; but, on the contrary, the inference is irresistible from the conduct and declarations of both parties, for more than seven years after the deposit was made, that it was mutually understood by them to be his money, subject to his management and control to the same extent as the money deposited in his own name.

It does not appear from the testimony of treasurer Rowell that any declaration of a gift to the wife was made at the time of the deposit, but it affirmatively appears that Lumber Small continued to have possession of the deposit book in question, and to exercise dominion and control over the account, personally making all the deposits and withdrawals precisely the same as he did respecting the accounts and deposit books standing in his own name.

G. F. Tarbell, a disinterested witness, states that in May, 1895, at the request of Mr. Small, he prepared a draft of a will to be executed by him; that he was present when it was shown to Mrs. Small; and that she objected to it because it contained no provision in her favor, saying that all she wanted was a maintenance out of the property, but she had no property whatever, and if her brother, Mr. Rowe, should give up the farm, and leave her, she would have nothing but the place. No reference was made by either of them to the money deposited in her name. His only reply was that he considered the

arrangement made with Mr. Rowe sufficient for her support; but he consented to have a provision inserted in the will that a certain amount of personal property should be held by the executor of the will in trust for her support if required, and with that she then seemed satisfied.

But her subsequent helplessness from rheumatism appears to have been the occasion for renewed anxiety in regard to her means of support, and thereupon, apparently without the knowledge of her husband, she removed the bank book in question from the trunk or basket in which it had been kept, and thereafter held it in her own custody.

Martha A. Parkman, the daughter of Lumber Small, testifies that she had a conversation with her stepmother, Mrs. Small, a short time before she died, in relation to the bank book, as follows: "I told her there seemed to be a bank book that father was very much worried over. I asked if she would tell me about it, so I would understand it. She said she would. She said father put some money into the savings bank, and took out a book in her name. * * * He wanted the book one day,—called for it. She told him she could keep it just as well; it would be just as safe with her as it would with him. 'Now,' she says, 'I will tell you why I kept it,—because these people [meaning George Rowe and his wife, with whom she was then living] never had anything of their own in the world until they came there; * * * and they are liable to get through—make way—with what he has earned.' And she says: 'If your father should die before I do, what would become of me? And, if I die before he does, there is his book. * * * He will find it just as he left it.'" In this interview there was no suggestion on the part of Mrs. Small that she ever understood that the deposit was made or intended as a gift to her, and her excuse for holding it in her custody was not placed upon that ground. It is true that Mrs. Parkman, as an heir of Lumber Small, is interested in the result of this suit; but equally significant, if not more important, testimony upon this feature of the case, is given by Mrs. Rowe, the wife of George Rowe, with whom Mrs. Small was living. She was called as a witness by the other side, and on cross-examination testified as follows on this point:

"What did Mr. Small leave for?

"I don't know what he left for. I think he got mad because she wouldn't let him have the book,—all I know about he left for. He wanted to lend some money, and she wouldn't let him have the book to keep it. And she said, 'You have made your will, and you have left nothing for me;' and says, 'I don't know what might happen to George and his family, and I think I will keep it myself.' * * *

"What did he say?

"He said he wanted the book, and, if she didn't give it up in such a time, he would

send somebody after it. * * * That was when he left, November 28, 1895.

"And he claimed the money to be his, and she claimed she would hold the book and make the most of it?

"Yes, sir.

"What did she do with it?

"I took care of it,—put it away for her."

After this colloquy, and after her husband went to live with his daughter, it is true that George F. Rowe, claiming to be acting for Mrs. Small, made an ineffectual attempt to draw money from the bank on this account; and, about a month before her death, Mrs. Small appears to have signed a will bequeathing this money to her brothers and sisters; but from all the evidence it is impossible to resist the conclusion that this deposit was never intended as an absolute gift to Olive C. Small.

Again, "to constitute a valid gift *inter vivos*, the giver must part with all present and future dominion over the property given. He cannot give it, and at the same time retain the ownership of it. There must be a delivery to the donee. * * * There must be an intention to give, and this must be carried into effect by an actual delivery." *Robinson v. Ring*, 72 Me. 140. See, also, *Northrop v. Hale*, 73 Me. 66; *Bank v. Merriam*, 88 Me. 146, 33 Atl. 840.

In this case there is no evidence that Lumber Small ever delivered this deposit book to his wife to be retained as her property. The fact that she had access to the receptacle in which his papers were kept, and took the book into her personal custody without his knowledge, does not constitute such delivery. No act is shown to have been done by him for the purpose of passing the title to her. There is an absence of proof of both the intent to give and of any delivery to complete the gift.

It is therefore the opinion of the court that the deposit in question is the property of Lumber Small.

Decree accordingly.

(90 Me. 528)

SMITH v. SWEAT.

(Supreme Judicial Court of Maine. Aug. 2, 1897.)

DEED—DESCRIPTION—BOUNDARIES—MONUMENTS.

1. Plaintiff claimed title to the premises demanded under three mortgages of different dates, the last two of which have been foreclosed; defendant, under a fourth mortgage from same mortgagors, and also under a deed from the assignees of the mortgagors, in which the mortgagors join,—the description in the deed being such, as the defendant contended, as to embrace a larger tract than that covered by the plaintiff's mortgages.

The land described in the several mortgages was bounded in each as follows: "On the north by the street sometime called 'West End Avenue'; on the east by land formerly of James Hamor, deceased; on the south and west by land of John A. Rodick."

The premises demanded were conveyed to the mortgagors by three separate conveyances, the last two being additions to the first purchase.

The descriptive words of the bounds contained in the title deeds, of the first purchase, to the mortgagors, are identical with those contained in the several mortgages. But the boundaries, although identical in each mortgage, and although the mortgages were given at different times, are true and correct as applied to the facts existing at the times when the several mortgages were given.

The mortgages are not to be construed together, but as separate instruments, and in reference to the facts existing at the different times when they were given.

The same terms or words of description, therefore, although identical in the several mortgages, may properly cover and include distinct and different tracts, being descriptive of such tracts as bounded at the date of the different mortgages, and hence may cover more land in one case than in another, and follow a receding line.

The boundaries may have receded, and yet the same words may be aptly used to meet the changed conditions at the time when the mortgages were written.

2. A particular description of premises conveyed, when such particular description is definite and certain, will control a general reference to another deed as the source of title.

3. Nor will a clause in a deed, at the end of a particular description of the premises by metes and bounds, "meaning and intending to convey the same premises conveyed to me," etc., either enlarge or limit the grant.

4. When a deed gives a boundary by land of another, the true line of the ownership of the adjoining land is the monument.

5. And it matters not whether the deed of the land referred to is recorded or not.

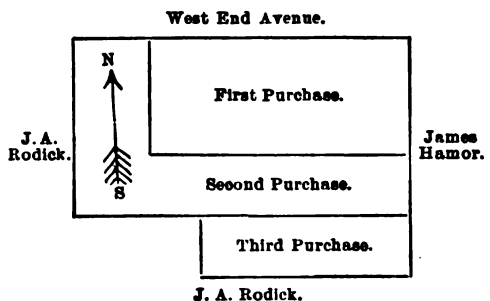
(Official.)

Report from supreme judicial court, Hancock county.

Action by Henry St. John Smith against Lorenzo D. M. Sweat. Submitted on report. Judgment for plaintiff.

H. E. Hamlin, for plaintiff. J. W. Symonds, D. W. Snow, and C. S. Cook, for defendant.

FOSTER, J. This is a real action to recover possession of a parcel of land in Bar Harbor known as the "West End Hotel Property," which parcel, as described in plaintiff's writ, includes three lots, marked, respectively, "First Purchase," "Second Purchase," and "Third Purchase," on the plan which is made a part of the case.



The plaintiff claims title under three mortgages, and foreclosure of the second and third mortgages. In each of these three mort-

gages the description of the premises is substantially the same.

The defendant claims under a fourth mortgage from the same mortgagors, in which the description is substantially the same as in the three mortgages of the plaintiff, and also under a deed from the assignees of the original mortgagors, in which the mortgagors join, the description in the deed being much fuller, and, as the defendant contends, conveys a larger tract than is conveyed by either one of the four mortgages.

The defendant claims that the four mortgages conveyed the lot which upon the plan is marked "First Purchase," and nothing more; that the later deed to him from the mortgagors and their assignees conveyed to him the lots which are marked "Second Purchase" and "Third Purchase."

The defendant seasonably disclaimed any right, title, or interest in the lot marked "First Purchase;" and, as it is admitted that he was not in possession of the premises marked "First Purchase" at the time this action was commenced, the real question, therefore, is whether the plaintiff's mortgages cover the second purchase and third purchase, or only so much as is marked "First Purchase" upon the plan.

The question at issue, then, is in reference to the true construction of the three mortgages under which the plaintiff claims title. He cannot prevail upon the issue raised by the pleadings, unless he proves title as against the defendant to the part not disclaimed.

All the property was at one time owned by Oren M. Shaw and Fred A. Shaw, who for a long time conducted the West End Hotel under the firm name of O. M. Shaw & Son, and from whom both parties to this action claim title.

At the time when the first mortgage was given to plaintiff (March 17, 1881), the Shaws were owners of the first purchase and second purchase,—the first purchase, by deeds of undivided halves from one James P. Armbrust dated May 7, 1880, and March 17, 1881; and the second purchase, by deed from John A. Rodick dated May 26, 1880, though not recorded till November 26, 1881.

The description of the premises contained in the mortgage is as follows: "A certain parcel of real estate, situated at Bar Harbor, in the town of Eden, Hancock county, state of Maine, to wit, the parcel known as the 'West End Hotel,' or 'Haywood House Lot,' and bounded as follows, to wit: On the north by the street sometime called 'West End Avenue'; on the east by land formerly of James Hamor, deceased; on the south and west by land of John A. Rodick,—and containing one acre, more or less. Also, all the plant of said West End Hotel, including the furniture, fittings, tools, apparatus, and all other personal property used in the business of carrying on said hotel, and appertaining thereto, wherever the same may now be situate.

"Meaning and intending hereby to convey all the right, title, and interest which we acquired by deed of James P. Armbrust to us, dated May 7, A. D. 1880, recorded in Hancock registry of deeds, Book 172, page 190, and deed from said Armbrust to us of even date herewith. Also, all renewals of the aforesaid personal property, and all personal property which may hereafter be put upon the premises for hotel uses; but all groceries and other supplies for consumption by guests or servants are excluded from this mortgage."

The second and third mortgages, dated, respectively, September 20, 1882, and September 15, 1883, are identical in description of the premises, so far as the language is concerned, except in the clause "meaning and intending," etc., the word "include" is used instead of the word "convey."

The two Armbrust deeds, to which reference is made in all the mortgages, and by which the Shaws received title to the "first purchase," contain the following description: "A certain parcel of real estate, situated at Bar Harbor, in the town of Eden, Hancock county, state of Maine, to wit: The parcel known as the 'West End Hotel,' or 'Haywood House Lot,' and bounded as follows, to wit: On the north by the street sometimes called 'West End Avenue'; on the east by land formerly of James Hamor, deceased; on the south and west by land of John A. Rodick,—and containing one acre, more or less. * * * Also, * * * all the plant of said West End Hotel, including the furniture, fittings, tools, apparatus, and all personal property used in the business of carrying on said hotel, and appertaining thereto, wherever the same may now be situate."

The descriptive words, therefore, not only of the Armbrust deeds, but of the several mortgages, may be said to be identical. The fact that the Armbrust deeds cover only the first purchase, and that in the mortgages reference is made to the Armbrust deeds, "meaning and intending hereby to convey all the right, title, and interest which" the mortgagors acquired by those deeds, is the cause of whatever contention there is in this case, and compels the court to determine whether the plaintiff's mortgages cover the first purchase only, or the first purchase, second purchase, and third purchase. To ascertain this, we must consider, not only the language contained in the mortgages, but the existing state of facts at the time when the several mortgages were given. When this is done, we think the question propounded by the defense may be properly answered, viz.: How is it possible to enlarge the exact description contained in the title deeds to the mortgagors of the first purchase so as to make the same terms, without diminution or change, cover and include a larger tract?

When the first mortgage was given, the mortgagors owned both the first purchase and the second purchase. The first purchase, by description in the Armbrust deeds of con-

veyance to the mortgagors, was bounded on the west and south by land of John A. Rodick; on the east by land formerly of James Hamor, deceased; and on the north by West End avenue. When the first purchase was enlarged by adding to it the second purchase, the first purchase was no longer bounded on the south and west by land of John A. Rodick, but by land of the mortgagors themselves, which they had purchased from said Rodick. Notwithstanding the language, descriptive of the premises, contained in the first mortgage is identical with that in the deeds from Armbrust conveying the first purchase, yet, when that mortgage was given, the mortgagors being the owners of the first purchase and second purchase, it is not correct as bounding the first purchase merely, but is correct in bounding the first purchase as enlarged by the second purchase.

But the defense claims that inasmuch as the language of the description in the Armbrust deeds and the plaintiff's mortgage are identical, the clause, "meaning and intending thereby to convey all the right, title, and interest which we acquired by deed of James P. Armbrust to us, dated May 7th, A. D. 1880, recorded in Hancock registry of deeds, Book 172, page 190, and deed from said Armbrust to us of even date herewith," limits the grant to only so much as was covered by the Armbrust deeds, or the first purchase. This, it is claimed, is strengthened by the fact that reference is also made to the quantity of "one acre, more or less."

We do not think the position of the defense can be sustained.

It is too well settled to require the citation of authorities that a particular description of premises conveyed, when such particular description is definite and certain, will control a general reference to another deed as the source of title.

So a clause in a deed, at the end of a particular description of the premises by metes and bounds, "meaning and intending to convey the same premises conveyed to me," etc., does not enlarge or limit the grant. *Brown v. Heard*, 85 Me. 204, 27 Atl. 182; *Hobbs v. Payson*, 85 Me. 498, 27 Atl. 519, and cases cited. The exception to this rule is where the particular description of land by metes and bounds is uncertain and impossible. Then a general description in the same conveyance will govern. *Sawyer v. Kendall*, 10 Cush. 241; *Hathorn v. Hinds*, 69 Me. 328, 329.

In the present case the land described in the first mortgage was particularly described and definitely bounded, "on the north by the street sometime called 'West End Avenue'; on the east by land formerly of James Hamor, deceased; on the south and west by land of John A. Rodick." Any reference to the source of the mortgagor's title, or what was meant or intended to be conveyed, cannot limit the grant with bounds as definite as those contained in this mortgage. To hold

otherwise would give a construction to the mortgage as embracing only the first purchase, with boundaries on the west and south, not as they existed at the date of the mortgage, but as they formerly were,—not by land of John A. Rodick, but by land of the mortgagors that was formerly land of John A. Rodick.

What has been said in reference to the first mortgage applies equally to the plaintiff's second mortgage, of September 20, 1882, which contains precisely the same description as the first. The mortgagors owned the same property at the date of the second mortgage as at the date of the first,—the first purchase and the second purchase. If the plaintiff's first mortgage embraced these two purchases, then the second mortgage did also. The boundaries named in each were the same, and the same boundaries existed at the time when the second mortgage was executed as when the first one was.

The third purchase was made February 16, 1887, thereby enlarging the parcel embraced in the first and second purchases. After this, the third mortgage was given to the plaintiff, dated September 15, 1888, the descriptive words of the real estate thereby conveyed being identical with the two previous mortgages. After the third purchase had enlarged the premises embraced in the first purchase and second purchase, the whole parcel, as thus constituted, was bounded the same as before the enlargement, viz. on the north by the same avenue, on the west and south by land of John A. Rodick, and on the east by land formerly of James Hamor, deceased.

When, therefore, the description contained in plaintiff's third mortgage is applied to the parcel thus enlarged, it certainly is a description which by metes and bounds embraces the enlarged parcel, notwithstanding the words of the description are identical with those in the deeds conveying title to the first purchase from Armbrust to the mortgagors.

Therefore it is possible that successive mortgages, each describing the mortgaged estate by words identically the same, may embrace and convey different parcels, when such is the intention of the parties. This intention may be considered as effectually expressed in the writing, when the description is plain, specific, and adequate to convey the same. *Hathorn v. Hinds*, supra. There is no ambiguity in these descriptions. Fixed and definite boundaries are given, and these boundaries must prevail, unless we are to attach more importance to a mere reference to source of title, or an intention clause, than to specific descriptions; and this, as we have seen, cannot be done. Words of reference or of explanation or intention never destroy a specific grant.

It is true that the particular descriptions in plaintiff's first two mortgages are the same, and it is proper that they should be, for

they cover the same land, the first purchase and the second purchase; but, while the particular words employed in the third mortgage are identically the same as in the other two, yet in fact the description is not the same, because by its definite and precise boundaries it covers more land. Each mortgage is to be construed by itself. The one has not necessarily any connection with either of the others. Hence the same words of description employed in successive mortgages may cover more land in one case than in another, and follow a receding line. The words of description in the successive mortgages may be the same, and yet may refer to different boundaries. The boundaries may have receded, as in the present case, and yet the same words may be aptly used to meet the changed conditions at the time when the mortgages were written.

To illustrate: A. owns a piece of land bounded on the south and west by land of B., and mortgages to C. with such boundaries. Subsequently A. buys another piece of adjoining land from B., but, with this addition, A.'s land is still bounded on the south and west by land of B. A. again mortgages to C., using the same words of description as in the first mortgage; that is, bounding his land on the south and west by land of B. Can there be any doubt that C. would acquire title by mortgage to both of A.'s lots? Yet here is a receding line. Here is a case where the words of description in A.'s second mortgage are the same as in the first mortgage, and yet cover and convey more land. "When a deed gives a boundary by land of another, the true line of the ownership of the adjoining land is the monument." *Jewett v. Hussey*, 70 Me. 433. And it matters not whether the deed of the land referred to be recorded or not. *Bryant v. Railroad Co.*, 79 Me. 312, 9 Atl. 736.

With the view which we have taken in reference to the plaintiff's mortgages, it becomes unnecessary to enter further into detail in reference to the facts in the case, or what might be adduced in support of the intention of the mortgagors to convey by their mortgages the land described in each.

The entry must be:

Judgment for the plaintiff for the land demanded.

(30 Me. 555)

MULLEN v. PENOBSCOT LOG-DRIVING CO.

(Supreme Judicial Court of Maine. Sept. 20, 1897.)

LOG-DRIVING COMPANIES—CHARTER—CONSTRUCTION—WATERS—DAMS—CONSTITUTIONAL LAW.

1. By the act incorporating the Penobscot Log-Driving Company, passed in 1846, the legislature in terms authorized, and in effect required, the company to "drive all logs and other timber that may be in the West Branch of Penobscot river between Chesuncook dam and the East Branch to any place at or above the Penobscot boom

where logs are usually rafted." At that date the only rafting place was, and ever since has been, at the Penobscot boom, and no one then expected there ever would be any other. To enable the company to successfully perform the imperative and responsible duties imposed on it, the legislature granted to it the superior and controlling use of the waters of the West Branch for its purposes. To that end, it was authorized to clear the river of any obstructions to log driving; to maintain dams and booms, and other necessary erections; to create flowage upon lands of private owners, and pay for any injury caused thereby, under the exercise of the power of eminent domain; and to adopt modes and methods generally by which it could collect together great masses of water, and control and utilize them for driving all the logs in that branch of the river together.

An unbroken practice of this kind continued until 1895, when the plaintiff had a quantity of pulp logs in the West Branch, below Chesuncook dam, and above the East Branch, which he intended to have driven down to Montague, not a place where logs are usually rafted, situated some distance on the main river above the Penobscot boom. He claimed that he was entitled to a head of water through the gates of Chesuncook dam to drive his logs in advance of the company's general drive, while the company claimed that it had the right to drive his logs with its own.

Held, that the company was not obliged to drive the plaintiff's logs, nor had it the right to drive them without the owner's consent, inasmuch as Montague was not at the time a usual rafting place for logs.

2. *Held*, also, that the plaintiff was not entitled to any portion of the stores or reserves of water at the time already accumulated within the dams of the defendant company, and that the company could not be required to release any portion of the same through its gates or works for the benefit of the plaintiff.

3. *Held*, further, that the plaintiff was not entitled to draw through the company's dam what would be the natural run of the river, so long as the company was retaining it for the acquisition of stores of water, provided it needed the same, or would be likely to need the same, for driving its own logs.

4. It is too late in the history of the question in this state to contend that the state has not the constitutional power to grant superior, or even exclusive, privileges, in the use of its public rivers, either to persons or corporations.

(Official.)

Report from supreme judicial court, Penobscot county.

Action on the case by Charles W. Mullen against the Penobscot Log-Driving Company. Submitted on report for decision as to the question whether the action can be maintained. Action to stand for trial.

The defendant corporation was chartered by the state of Maine to improve the navigation of Penobscot river and its tributaries, to facilitate the driving of logs. The plaintiff claimed that he was injured by withholding of the water needed to drive his logs; that he was entitled by law to enough of the water stored by the dams of the defendant corporation to drive his logs. He also claimed that he was entitled to the use of the natural flow of the river, and, in an additional count, charged the defendant corporation with depriving him of water for his drive in a needless and unreasonable manner.

The defendant, by its pleadings, claimed

that under the provisions of its charter it was alone entitled to drive the logs in question; that the plaintiff had no right to drive his logs at this place,—although admitting that Montague, the destination of the plaintiff's logs, and which place of destination was made known to the defendant, was not a place where logs were usually rafted, within the meaning of the provisions of its charter, and also admitting that such of the plaintiff's logs as it took into its drive it did not deliver at said Montague.

The defendant further claimed that it was entitled to the natural flow of the river for driving purposes, to the exclusion of the plaintiff, and that it was entitled to the use of all the water in the river stored by its dams for driving purposes, to the exclusion of the plaintiff.

Upon the reading of the writ and the pleadings in the case, and after admissions by the defendant that Montague, the place of destination of plaintiff's logs, while above the Penobscot boom, was not a place where logs were usually rafted, within the meaning of the provisions of defendant's charter, and that such of plaintiff's logs as were in its drive it did not deliver at Montague, though plaintiff himself there stopped such of his logs as he could, the justice presiding reported the case to the full court, to see if the action was maintainable, and upon what grounds maintainable, before an expensive trial upon the facts. The case was then submitted to the full court upon the following propositions: If the action can be maintained by proof upon the count in the writ alleging damages for being deprived of the natural run of water in the river, or if maintainable upon the count in the writ which declares for damages sustained by the plaintiff by the defendant's refusal to allow him the use of the waters kept in reserve by the defendant's dams, then the action was to stand for trial; or, if the court should be of opinion that the action may be maintained under the other count of the writ, declaring for damages in general terms, but covering, perhaps, no more than the causes alleged in the other two counts, then the action was to stand for trial; and if, in the opinion of the court, the action was not maintainable upon either of the counts in the writ, then the plaintiff to be nonsuit.

All the public and private and special acts of the legislature touching the subject to be regarded as facts proved in the case.

C. F. Woodard, for plaintiff. F. H. Appleton and H. R. Chaplin, for defendant.

PETERS, C. J. The plaintiff had certain pulp logs that had been driven out of a stream tributary to the West Branch of the Penobscot river, at a place below the Chesuncook dam, a structure maintained by the defendant corporation on the West Branch for the purpose of creating a head of water for

driving logs; and, designing to have his logs driven down the West Branch as far as Montague, where there was a mill for manufacturing such logs into pulp, he desired to drive them along in advance of the main body of logs to come down the West Branch, knowing that, if his logs became mixed with those logs, many of them would necessarily be carried into Penobscot boom, some miles below Montague, there being no booms and gap for the separation and sorting of logs at the latter place,—the Penobscot boom being the place of destination of logs generally coming down all the branches of Penobscot river. Having a scarcity of water for driving his logs in the manner and at the time desired by him, the plaintiff claims that he was by law entitled to water enough from the stores reserved within the corporation dam for effectuating his purpose. And that is the principal question presented here.

It cannot reasonably be questioned that the legislature intended to impose important responsibilities on the company, and to grant to it powers and privileges commensurate with the responsibilities and duties to be by it assumed, and that, to enable it to perform the duties of its trust effectually, it conferred upon the company, if not an exclusive, certainly a superior and prior, right to the use of all the head of water available on the river for the purpose of driving logs. The company has no stock, and can declare no dividends. It represents the public, and not individuals.

There was great reason for such legislation. Experience had demonstrated that a combined drive of all the logs in that branch of the river and its tributaries could be successfully made by a use of all its waters combined, when separate drives by a separation and division of the same water would, as a rule, result in failure. It was apparent that logs could be driven more cheaply and expeditiously together. Further, individual owners could not afford to improve the navigation of the river, while the company could. Under the old experience, some owners would get their logs, to the exclusion of others, and thereby useless competitions and strifes were engendered. Under the new experience, all owners get their logs alike. And the new system has stood the test of time, for just half a century, successfully and well.

A glance at some portions of the acts affecting the company will illustrate the legislative intent in relation to the exclusiveness of both the duties and powers belonging to the company. All of such acts are enumerated in the special plea or brief statement filed by the defense, there being 14 of them in all.

Section 1 of its charter, approved August 10, 1846, describes what its active duties shall be: "Said company may drive all logs and other timber that may be in the West Branch of Penobscot river between the Chesuncook dam and the East Branch, to any place at or above the Penobscot boom, where

logs are usually rafted, at as early a period as practicable. And said company may for the purpose aforesaid, clear out and improve the navigation of the river between the points aforesaid, remove obstructions, break jams and erect booms where the same may be lawfully done, and shall have all the powers and privileges and be subject to all the liabilities incident to corporations of a similar nature."

Section 3 of the charter informs the owners of logs of their duties, as follows: "Every owner of logs or other timber which may be in said West Branch, between said Chesuncook dam and said East Branch, or which may come therein during the season of driving and intended to be driven down said West Branch, shall on or before the fifteenth day of May, in that year, file with the clerk a statement in writing, signed by such owner or owners, his or their authorized agent, of all such logs or timber, the number of feet board-measure of all such logs or timber, and the marks thereon; and the directors or one of them shall require such owner, or owners, or agents, presenting such statement to make oath that the same is, in his or their judgment and belief, true, which oath the directors or either of them are hereby empowered to administer. And if any owner shall neglect or refuse to file a statement, in the manner herein prescribed, the directors may assess such delinquent or delinquents, for his or their proportion of such expenses, such sum or sums as may be by the directors considered just and equitable."

By a special act approved July, 1849, the jurisdiction of the company was extended to the head of Chesuncook Lake, instead of at the foot of the lake, as before, and certain additional duties were imposed on the company by the act, which are as follows: "Section 1. The Penobscot Log Driving Company may drive all logs and lumber between the head of Chesuncook Lake and the East Branch, instead of between the Chesuncook dam and the East Branch, and with all the powers, rights and privileges, and under the same conditions, limitations and restrictions, as is provided in the act, to which this is additional; and may assess according to the provisions of said act, a sum not exceeding twenty-five cents for each thousand feet, board measure, in addition to the sum of sixty-two and one-half cents, as provided for in the fourth section of said act, for the purpose of paying the expenses of driving said logs and lumber across said lake.

"Sec. 2. The said corporation may, and it shall be their duty to build all the boom or booms which may be necessary above the lake, but not to impede the navigation of the same."

By an act approved March 2, 1864, the duties of the company are defined and limited in a certain respect, as follows: "Section 1. Said company shall adopt as the basis of their assessments the boom scale of the Pen-

obscot boom, or what shall be equal to that scale, to be determined in all cases of doubt by the directors.

"Sec. 2. Said company shall be under no obligation to drive any logs coming into the Chesuncook Lake at any other point than from the main West Branch, unless seasonably delivered to them at the head or outlet of said lake."

Again, by an act approved February 11, 1869, the powers of the company are enlarged, as follows: "Sec. 2. Said company may make contracts for driving or assist in driving logs outside of the limits of the company, on the Penobscot waters; and for any sum due for such driving, the same lien shall exist and be enforced in the same manner as is provided for other logs.

"Sec. 3. Said company may build or assist in building, and keep in repair any steamboat or other craft, that in their opinion or in the opinion of the directors may be advantageous in facilitating the progress of the drive, the expense of which may be apportioned upon the logs of different years as they may think proper."

Still again, by act approved January 28, 1876, the duties of the company were in part defined as follows: "Sec. 2. Said company shall be under no obligation to drive any logs coming into the Chesuncook Lake at any other point than from the main West Branch or the Caucomgomoc stream, unless seasonably delivered to it at the head or outlet of said lake, or at the mouth of said stream."

By an act approved February 24, 1883, in order that the company might increase its supplies of water, and for other purposes, it was further provided, as follows: "Section 1. The Penobscot Log-Driving Company may build and maintain a dam across the outlet of each of the lakes Caucomgomoc, in the county of Piscataquis, and Millinocket, in the county of Penobscot, to raise a head of water on each of said lakes for log-driving purposes only. Said corporation may take land on which to build each of said dams, and may flow contiguous lands. For land taken, and for land flowed, the parties may agree upon the damages, but if the damages are not mutually adjusted, the owner, or party injured, may be compensated in full by the payment of such sums as may be determined by the commissioners to be appointed by the supreme judicial court in and for the county where the land is situate," etc.

Now there was an obstacle in the way of a complete control of the river by the defendant company, in the existence, within its limits under its amended charter, of a company owning a dam at the outlet of Chesuncook Lake, with a right of collecting a toll on all logs passing over such dam. The company could not purchase the dam, having neither money, nor the means of raising money, to buy it with, as it was empowered to assess logs only for the legitimate and necessary expenses of driving the logs. But a scheme

was hit upon to allow the toll to continue until the owners should be reimbursed for the balance due on its cost, with expenses and interest, and the dam then to become the property of the log-driving company. And so the legislature provided, among other details, by chapter 86 of the Laws of 1847, certain rights for the owners of Chesuncook dam, "upon the further condition that if said corporation shall collect the sum in tolls as provided in the second section of this act, under and by virtue of this act, it shall be in full compensation to said corporation for their said dam, and then the same shall become the property of the Penobscot Log-Driving Company, and be free to the public without the payment of toll." The same act contains precisely the same provisions as to the North Twin dam, situated on a lower lake,—the defendant company to have and own the same when the owners should receive compensation for their outlay by collection of the tolls prescribed by the legislature. The words in this act, "and shall be free to the public without the payment of toll," was an awkward way of saying that the franchises of such corporations should be terminated, but the words are without special significance in this connection. The legislature takes the property in these dams from those corporations, and gives it to the Penobscot Log-Driving Company, for the purpose for which the company has been for well nigh 50 years using such dams. For that period have both the dams been kept constantly in repair, and been many times rebuilt, by the log-driving company. No toll is demanded or received for logs passing them. No West Branch drive can be made without the stores of water held in reserve by such dams.

It is plainly manifested by the foregoing quotations from the statutes that the legislature intended to impose upon the defendant company the duty of including in its drives all logs of all owners in the West Branch waters; and it is just as strongly manifested that the legislature also intended that the company should possess the exclusive control and management of the waters of the river, so far as necessary to enable it to successfully execute the obligation resting upon it,—an obligation in some respects partaking of the character of a public trust. The permission of the state was to take all the water for the purpose of driving all the logs. There can be no doubt that the company would be liable in damages for negligence in omitting to drive any owner's logs, and it has been so decided in *Weymouth v. Log-Driving Co.*, 71 Me. 29. No occasion has hitherto arisen requiring any decision of the question whether the company is entitled to drive the logs of an owner against his consent, and for the reason that no owner has ever had any motive to reject the benefits of having his logs driven by the corporation. And in the present case the plaintiff would have had no such motive, could his logs have been left at

Montague, instead of in the boom at Old-town.

But it is argued in behalf of the plaintiff that the state does not possess the right to create a monopoly in the use of any of the public waters, in favor of this corporation. It is, however, too late in the history of that question to set up such a contention now. The state represents all public rights and privileges in our fresh-water rivers and streams, and may dispose of the same as it sees fit. The principle is settled in no state more firmly than in this. *Parker v. Milldam Co.*, 20 Me. 353; *Lee v. Iron Co.*, 57 Me. 481; *Treat v. Lord*, 42 Me. 560; *Moor v. Veazie*, 32 Me. 343; *Id.*, 31 Me. 860; *Veazie v. Moor*, 14 How. 508; *Brooks v. Improvement Co.*, 82 Me. 17, 19 Atl. 87; *State v. Leighton*, 83 Me. 419, 22 Atl. 380; *Gould, Waters* (2d Ed.) § 86, and cases.

In view of the foregoing considerations, it is contended in behalf of the defendant company that the plaintiff can have no standing in court, for the reason that the company had the right to take his logs and include them with the mass of logs in the main West Branch drive. While that would undoubtedly be the rule so far as any logs are concerned which may come legitimately into the possession and under the control of the company, the court is of opinion that the same rule should not apply as to the plaintiff's logs whose place of destination was Montague, instead of the Penobscot boom. As the company were allowed or required to drive all logs and timber "to any place at or above the Penobscot boom where logs are usually rafted," and as Montague is not such rafting place, and logs cannot be stopped there when the main drive is passing that point, the interpretation is that these logs never came within the possession or jurisdiction of the company for the purpose of being driven under the authority of its charter. Nor could the company be compelled to receive and drive logs not bound, for the Penobscot boom. It might be otherwise should the company establish a rafting place at Montague. Undoubtedly there was no expectation in 1847, when the log-driving company was incorporated, that logs would ever be driven down Penobscot river whose place of destination would be other than the Penobscot boom, and the changes of the present day could not have been anticipated. Possibly changes in legislation may be necessary to meet such changes of business, such as will be just and equitable.

What, then, were the rights of the plaintiff in the waters of the West Branch, with logs in his possession, below Chesuncook dam, whose place of destination was Montague? He undoubtedly possessed such common-law right of passage for his logs as had not been granted to the Penobscot Log-Driving Company by the state,—such and so much use of the water as would not hinder or prevent the company from its enjoyment and use of all

the water necessary for its purposes under its prior and privileged right thereto.

The plaintiff was under no circumstances legally entitled to more than the natural flow of the stream. That would be the extent of his common-law right, and he was not included in the statutory right granted by the legislature. *Pearson v. Rolfe*, 76 Me. 380; *Foster v. Block Co.*, 79 Me. 508, 11 Atl. 273; *Stratton v. Currier*, 81 Me. 497, 17 Atl. 579. Therefore he had no right to require the defendant to provide him with any part of the stores of water which it had in reserve within its dam or dams, unless he was entitled to the natural flow, and it became necessary to use some of the reserved stores in order to create a flow equal to the natural run or flow. And, if the dam was full and overflowing, then he got the full natural flow. The natural amount of water may flow over a dam, as well as under it or through its gates. It is not just or equitable for log owners outside of the company to claim to use without compensation its stores of water, which have cost many thousands of dollars to produce. And, if one person after another should have the privilege of tapping such stores, it would soon deprive the company of all power to perform its most imperative obligations.

But the plaintiff was not entitled even to the natural flow, or to draw from the reserves of water in order to create what would at the time and place be equivalent to the natural flow, so long as the company needed, or would be likely to need, the same water for driving its own logs to market. The defendant's right was the superior right. The plaintiff's right was secondary and conditional. Such is the inevitable effect of the grants to the company by the legislature. The stores of water are accumulated by using the natural flow until the necessary head is obtained. It was not that the defendant company would not let the water down when it needed its use itself, but the plaintiff desired the use and advantage of it in advance of the use of it by the company.

Upon the question whether the company could safely spare any of its accumulated stores of water in order to supply the plaintiff's logs with what would be equivalent to the natural run, all circumstances affecting the situation should be carefully considered, both present and prospective. Certain geographical facts should be taken into the calculation. It is generally known that the West Branch drive usually consists of about 50,000,000 feet of lumber; that the drive has to travel in the crookedness of the river 80 or 90 miles after being turned over Chesuncook dam before it reaches its destination within Penobscot boom; that the drive starts late in the season, because it is detained in the lake until the last contributory drives come into the lake from the streams and brooks above; that the drive arrives usually in the drought of summer, scarcely ever earlier than some time in August, depending entirely

for its success in reaching Penobscot boom upon the accumulations of water held back by the dams at the outlets of several lakes; that all the sources of water are not always enough for successful driving, portions of the drive being not infrequently left on the way for the want of sufficient water; that the company sometimes finds it necessary to send water along in advance of its drive to clear the river of obstructions caused by drives of logs from the other branches of Penobscot river that have become crippled and stuck for want of sufficient freshet to move them along; and that for the causes named, as well as other reasons that might be named, the duties of the company to the public are responsible in the extreme in bringing such mass of logs to the possession of their many owners with safety.

Action to stand for trial.

(90 Me. 576)

CITY OF AUBURN v. UNION WATER-POWER CO.

(Supreme Judicial Court of Maine. Oct. 29, 1897.)

WATERS—GREAT PONDS—COLONIAL ORDINANCE—CONSTITUTIONAL LAW—TAKING WATER FOR PUBLIC USE WITHOUT COMPENSATION.

1. It is a rule of law peculiar to this state and Massachusetts, under the colonial ordinance of 1641-47, that all great ponds—that is, ponds containing more than 10 acres—are owned by the state.

2. The legislature may permit towns and cities to take water from great public ponds and lakes, for the domestic use of their inhabitants, without being liable to pay damages to those who want the water for the use of mills.

3. This right to the use of water for domestic purposes is primary, and the right to its use as a mechanical power is secondary.

4. It is sometimes said that there must be no diversion of the waters of a stream; that the riparian proprietors above must allow the water to flow on in undiminished quantities to the riparian proprietors below. But this is not a correct statement of the law. The true rule is that there must be no unlawful or unreasonable diminution or diversion of the water.

5. *Held*, that the diversion and consumption of water from great ponds and lakes, for domestic purposes by the public, is neither unlawful nor unreasonable.

6. *Held*, that the right of the people living in the vicinity of our great ponds and lakes to a reasonable amount of their waters for domestic purposes is sustained by the rules of the common law of this state, as well as by reason and the principles of natural justice.

7. The court affirms these principles here only of great ponds and lakes, the titles to which are held by the state for the use of the public, under the colonial ordinance of 1641-47. It does not declare or attempt to define in this case the rights that appertain to wells, springs, rivulets, or small ponds.

8. While private property cannot be taken for public use without compensation, the waters of great ponds and lakes are not private property.

9. Wilson pond is a great pond. Its supply of water is 15,000,000 of gallons daily. Of this quantity the city of Auburn now uses probably half a million of gallons daily,—about one-thirtieth of the entire supply. Allowing that in the future the inhabitants of the city will consume one million of gallons daily, leaving fourteen-fifteenths of the water to flow onto the works of

the Union Water-Power Company, *held*, that this is not an unconscionable or unreasonable division of the water.

10. Under an act of the legislature (Priv. & Sp. Laws 1891, c. 82), the city of Auburn was empowered to take water from Wilson pond sufficient for domestic purposes, etc. The Union Water-Power Company claimed a superior and paramount right to the entire water of the pond, "including all the natural flow of the same, and that, if any portion of the water was diverted by the citizens of Auburn for domestic purposes, the company would be entitled to damages." *Held*, that the claim cannot be sustained.

11. *Held*, that the Union Water-Power Company has not become entitled to the whole of the water of Wilson pond by adverse use. Its prior use of the water has no element of adversity in it; and the governmental powers of the state are never lost by mere nonuse.

12. In this case the city of Auburn is the only party that has a charter from the legislature. The Union Water-Power Company, organized as a corporation under the general law of the state, and having created a storage of water by dams, etc., in Wilson pond, has neither asked nor obtained from the legislature any property rights or special privileges in the waters of the pond.

Held, that the Union Water-Power Company has no such rights in the waters of that pond as entitles it to damages from the city of Auburn for the taking of water from that pond for domestic purposes.

13. Water for use as a mechanical power is important, and should receive reasonable protection; but water for domestic use, and by which the health and cleanliness of the people, and protection against fires, are to be secured, is also important.

Held that, when water for both purposes is drawn from the same public fountain, neither of the parties should be required to pay damages to the other.

Watuppa Reservoir Co. v. Fall River, 18 N. E. 465, 147 Mass. 548, approved.

(Official.)

Report from supreme judicial court, Androscoggin county.

Proceeding by the city of Auburn against the Union Water-Power Company for the taking of water for public purposes, under the provisions of Priv. & Sp. Laws 1891, c. 82. On petition of the company, damages were assessed by the county commissioners at the sum of \$24,500, and the city appealed. Submitted on report. Petition dismissed.

The fourth section of the act authorized the taking, and provides that, in any case in which damages are to be allowed, if the city and the landowner were unable to agree upon the damages to be paid for such taking, application should be made to the commissioners of the county of Androscoggin, "who shall cause such damages to be assessed in the same manner and under the same conditions, restrictions, limitations and rights of appeal as are by law prescribed in the case of damages for the laying out of highways so far as such law is consistent with the provisions of this act."

The case was submitted to the law court on report, the parties stipulating that, if the Union Water-Power Company was not entitled to damages, judgment should be rendered in favor of the city as the appellant, but that, if it should be determined by the law court that the Union Water-Power Company

was entitled to damages, then the amount of such damages should be determined at nisi prius.

The petition of the Union Water-Power Company, praying for an assessment of damages, represented that "it is the owner of certain water rights, water sources, and easements in the waters of 'Wilson Pond,' so called, situated in Auburn, in said county, and of certain lands and rights of flowage around said pond and the outlet stream thereof, and also of certain lands, dams, water power, water rights, and privileges upon said outlet stream, and of the right to hold, accumulate, and store the waters of said pond by means of said dams, and to draw off the same by means of gates and sluices in said dams.

"And said company also says that it is the owner of an extensive system of dams, canals, water rights, and privileges on the Androscoggin river, at said Lewiston, and of certain lots of land at said Lewiston, situated on the main canal of said company at said Lewiston, and known as the 'Mill Site Lots,' and which lots, by the terms of the conveyances thereof to said company, can only be used for manufacturing purposes. And said company says that the value of said lots for manufacturing purposes depends upon the quantity of water and water power capable of being furnished by the Androscoggin river at said Lewiston. And said company owns and controls all the rights of flowage on both sides of the Androscoggin river above said dam at said Lewiston to the point and beyond where the outlet stream from said Wilson pond flows into said Androscoggin river, and it has the right to hold and store the waters of said river by means of its dams at said Lewiston in the same manner and to the same height at which it and its predecessors in title for a long time hitherto have done.

"And said company says that it and its predecessors in title have heretofore made perpetual leases and conveyances of water and water power to certain individuals and corporations at said Lewiston and Auburn, all of which leases and conveyances are now in full force; and said company is bound by the terms and obligations thereof to furnish and supply the quantity of water and water power specified in said leases and conveyances.

"And said company says that heretofore all the flow of water from said Wilson pond ran through said outlet stream to said Androscoggin river, and from thence commingling with the waters of said river into the mill ponds and canals of said company at said Lewiston; and that said company, as the owner of the dams, water rights, and privileges at the outlet of said Wilson pond, has the right to have the natural overflow of said pond flow through said outlet stream without any diminution or diversion thereof; and that, as the owner of the lands, water power,

water rights, and privileges on the Androscoggin river, at said Lewiston, it is entitled to the full benefit of the natural flow of said pond into said river, as the same has heretofore forever been accustomed to flow.

"And said company alleges that it has the right to raise and store the waters of said pond by means of said dams at the outlet thereof to the present height of said dams, and to draw off all of said stored waters, from time to time, by means of the gates and sluices in said dams through said outlet stream for the use and benefit of its lands, mill sites, water power, and privileges at said Lewiston, and to enable it to furnish and supply its said several lessees and grantees with water and water power as it has for a long time heretofore been accustomed to do; and that it has the right to manage and control, accumulate, and draw off the waters of said pond by means of said dams, gates, and sluices, for its own use and benefit, and in such manner as it has heretofore for a long time done.

"And said company further alleges that it has heretofore for a long time used, managed, and controlled all the waters of said Wilson pond for its own use and benefit, and accumulated and stored the waters thereof by means of its said dams upon the outlet stream thereof, and drawn off the same through said outlet stream at such times and in such quantities as it deemed necessary for the use and benefit of the water power and privileges owned by it, and located on the Androscoggin river, at said Lewiston; and that said company has the right to so manage, hold, store, control, and draw off the waters of said pond, including all the natural flow of the same, as well as all the stored waters thereof through said outlet stream, without any denial, diversion, or interruption of the same or any part thereof by the city of Auburn or any person or corporation whatsoever, except so far as the same has heretofore been conveyed by the Franklin Company, its predecessor in title, to the Auburn Aqueduct Company, of said Auburn.

"And said company alleges that the entire natural flow of said pond through said outlet stream into said river, and the right to hold, use, and draw off all the stored waters of said pond from time to time through said outlet stream, is necessary to enable said company to furnish and supply the quantity of water and water power required to operate the various mills, manufacturing establishments, and industries located at said Lewiston and Auburn, during all seasons of the year, as the same has heretofore for a long time been done; and that from time to time during each year, for a period of more than thirty years hitherto, said company and its predecessors in title have used and drawn the waters of said pond, by means of its dams, sluices, and gates upon said outlet stream, for the purpose of supplying water and water power at said Lewiston; and that,

during all said time, said pond has been used by said company and its predecessors in title as a reservoir from which to draw in times of drought and shortness of water in the Androscoggin river at said Lewiston.

"And said company alleges that the city of Auburn, acting under and by virtue of the power and authority conferred upon it by chapter 82 of the Private and Special Laws of Maine, approved February 19, 1891, have taken the waters of said pond for the uses and purposes specified in said act, by means of pipes leading from said pond to various parts of the city, of the dimensions and locations particularly specified in the notice of such taking filed by said city in the registry of deeds for this county," etc.

"And said company alleges that, by such taking, the city of Auburn has thereby diverted the natural flow of the waters of said pond from said outlet stream, and have drawn off the waters accumulated and stored in said pond, as hereinbefore set forth, and diverted the same from said outlet stream, and prevented this company from drawing and having the natural flow of the waters of said pond run through said outlet stream, and prevented this company from holding, storing, accumulating, managing, and controlling the waters of said pond, and from drawing off the stored waters thereof through said outlet stream, as it has the right to do, and has thereby destroyed this company's property rights in the waters of said pond, and the water sources, water rights, and easements therein owned by said company, and caused this company great and irreparable injury and damage.

"And in and by the premises your petitioner has been greatly damaged in its property by the taking of and injury to its land, real estate, water, and water rights, and by said interference with and injury to the use and management of the water of said pond, to which the petitioner at the time of said taking was legally entitled.

"And your petitioner alleges that it has been unable to agree with said city as to the amount of damages sustained by it in its property on account of the taking of the waters, water sources, water rights, and easements, as hereinbefore set forth.

"Whereupon your petitioner applies to this honorable court, in accordance with the provisions of said act of February 19, 1891, and asks that the damages sustained by it in this behalf be assessed and determined."

An appeal from the award of damages, made by the county commissioners, having been taken by the city of Auburn, a complaint on appeal by the city was duly filed in this court below on the third Tuesday of January, 1896.

The material portions of the appeal are as follows:

"That your said complainant was aggrieved by said determination and adjudication that the said Union Water-Power Company

was damaged as aforesaid by the said taking of the waters of said pond—

"First. Because said Union Water-Power Company was not entitled to any damages.

"Second. Because the damages awarded as aforesaid were excessive.

"That said pond is of more than ten acres in area, and is a 'great pond,' within the terms and meaning of the colonial ordinances of 1641 and 1647.

"That your said complainant has purchased and owns a right of way, fifty feet in width, to said pond, together with the perpetual right and easement of laying and maintaining therein the pipe line mentioned and described in said city's notice of taking, etc.

"That the said Union Water-Power Company, at the time of the said taking of the waters of said pond by the said city of Auburn, had no private property, ownership, or lawful title in or to the waters of said great pond, or any easement of a private nature therein.

"That the acts of said Union Water-Power Company in managing and controlling the waters of said pond, accumulating and storing its waters therein, and drawing off the same at times and in quantities as it saw fit, as alleged in its said petition, were unlawful, and without legislative authority or sanction.

"That the said city of Auburn, in taking said water from said pond at the time and in the manner aforesaid, did not take or do any legal damage or injury to any of the land, real estate, water, or water rights of said Union Water-Power Company.

"That your said complainant duly and seasonably appealed from said award of damages of the said county commissioners to the supreme judicial court, held as aforesaid, being the term of said court first held in the county where said pond is situated, more than thirty days after the expiration of the time within which such appeal might be taken, excluding the first day of its session, and filed with the county commissioners for said county of Androscoggin notice of said appeal before the third day of the regular term of court of said county commissioners succeeding that at which said commissioners' return was made, to wit, on April 12th, A. D. 1895."

Among other admissions by the parties, it was agreed that the purposes of the Union Water-Power Company, organized under the general laws of the state, are as follows:

"Of carrying on business as owners of property, real and personal, consisting of land, mills, factories, dams, canals, water rights, and water power, and other estate, situated in said Lewiston and at other points upon, adjacent to, or in the neighborhood of, the Androscoggin river and its tributaries, and around its sources, in both of the states of New Hampshire and Maine; such business to consist in the holding of said prop-

erty and the purchase of any new or other property of a similar character, or in holding, managing, selling, leasing, and otherwise using all of said property in any legal manner for their own profit and advantage, under and in accordance with the laws of said states respectively, and, if need be, through the agency of any acts of incorporation or organization of companies.

"Also, as owners of such dams and other property, to produce or create water power or privileges, and to sell, lease, or use the same, and, in connection therewith, to manage and control the use and flow of the waters of said river in any legal manner for their own benefit, as well as for the public use and benefit, receiving the proper and legal toll or compensation.

"And also for the purpose of transacting and carrying on the business of manufacturing cotton or woolen fabrics, or iron or wood, as may be determined by the corporations, by means of water mills in said Lewiston."

N. W. Harris, J. A. Pulsifer, W. W. Bolster, J. W. Symonds, D. W. Snow, C. S. Cook, and A. R. Savage, for appellant. W. H. White, S. M. Carter, and J. A. Morrill, for appellee.

WALTON, J. This is a petition for the assessment of damages. It is presented by the Union Water-Power Company of Lewiston, and the question is whether, under the circumstances disclosed by the evidence, the company is entitled to damages.

It appears that in 1891 the legislature authorized and empowered the city of Auburn to take water from Wilson pond sufficient for domestic purposes and the extinguishment of fires and the supply of hotels and livery stables and laundries, and for sprinkling its streets. Priv. & Sp. Laws 1891, c. 82.

For water taken under the authority of this act, the Union Water-Power Company of Lewiston claims that it is entitled to compensation. The company claims that it has a superior and paramount right to the entire waters of the pond, "including all the natural flow of the same," and that, if any portion of the water is diverted and used by the citizens of Auburn for domestic purposes, the company is entitled to damages. The question is whether this claim can be sustained. It is the opinion of the court that, under the circumstances disclosed by the evidence, the claim cannot be sustained.

It is a settled rule of law in this state and Massachusetts that all great ponds—that is, ponds containing more than 10 acres—are owned by the state. This is a rule of law peculiar to this state and Massachusetts. It is said to have been derived from the colonial ordinance of 1641-47. The rule, as stated by Chief Justice Morton in a recent Massachusetts case, is as follows:

"Under the ordinance, the state owns the great ponds as public property, held in trust

for public uses. It has not only the *jus privatum*, the ownership of the soil, but also the *jus publicum* and the right to control and regulate the public uses to which the ponds shall be applied. The littoral proprietors of land upon the ponds have no peculiar rights in the soil or in the waters, unless it be by grant from the legislature." *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 18 N. E. 465.

In the case cited, the reservoir company had constructed an expensive dam, and had paid large sums of money for flowage rights, and had controlled the waters of the Watuppa pond for nearly 60 years. The legislature then authorized the city of Fall River to take water from the pond for domestic uses and the extinguishment of fires and all other public uses of the city, without liability to pay any other damages than the state itself would be legally liable to pay. The peculiar wording of this statute in relation to damages was undoubtedly intended to test the authority of the legislature to confer upon towns and cities the right to take water from great ponds for domestic purposes without being liable for damages; and the court so treated it, and a majority of the court held that the authority existed. The majority opinion was by Chief Justice Morton. The minority opinion was by Mr. Justice Knowlton.

We have examined the opinions with care. The minority opinion rests apparently upon the assumption that all of the waters of our great public ponds and lakes are dedicated, primarily, to the use of mills, and that no town or city can take any portion of the waters for domestic purposes without being liable in damages therefor to the owners of the mills. The majority opinion recognizes the right of the people to have pure water for domestic use, and affirms the authority of the legislature to permit towns and cities to take water from great public ponds and lakes for the use of their inhabitants without being liable to pay damages to those who want the water for the use of mills.

We think the doctrine of the majority opinion is correct. It is sustained by reason as well as authority. Water for domestic use is a necessity. Man cannot exist without it. Water for the use of mills is a convenience only; and there is no conceivable reason why those who want it for domestic use should be compelled to buy it of those who want it for the use of mills.

In *Philadelphia v. Collins*, 68 Pa. St. 106, the jury were instructed that every individual residing upon the banks of a stream has a right to the use of the water to drink, and for the ordinary uses of domestic life, and that where large bodies of people live upon the banks of a stream, as they do in large cities, the collective body of the citizens has the same right; and the instruction was held to be correct.

The right to the use of water for domestic purposes is primary, and the right to its use

as a mechanical power is secondary; and, to the extent that the two rights conflict, its use as a mechanical power must be surrendered. *Evans v. Merriweather*, 3 Scam. 492.

True, it is sometimes said that there must be no diversion of the waters of a stream; that the riparian proprietors above must allow the water to flow on in undiminished quantities to the riparian proprietors below. But this is not a correct statement of the law, and the inaccuracy of the statement has often been pointed out. The true rule is that there must be no unlawful or unreasonable diminution or diversion of the water. The diversion and consumption of water for domestic purposes is neither unlawful nor unreasonable. As said by Mr. Justice Dickerson in *Davis v. Winslow*, 51 Me. 264: "Water, air, and light are the gifts of Providence, designed for the common benefit of man, and every person is entitled to a reasonable use of each. * * * A reasonable use is the touchstone to which cases of this description must be subjected."

And in another case Mr. Justice Rice said that this right to a reasonable amount of water for domestic purposes necessarily implies a right to diminish the volume of the water. *Davis v. Getchell*, 50 Me. 602.

A gallon of water withdrawn from Moosehead lake will diminish the quantity that would otherwise flow down the Kennebec river. But, surely, no one will doubt the right of the people who live near that lake to take and use for domestic purposes a reasonable amount of its waters. Nor can any one believe that such a use would be a wrong to the owners of any of the dams across the Kennebec river. The right of the people living in the vicinity of our great ponds and lakes to a reasonable amount of their waters for domestic purposes is sustained by the rules of the common law of this state, as well as by reason and the principles of natural justice, as the cases cited will show. And it is only of our great public ponds and lakes that we are now speaking. We are not declaring or attempting to define the rights appertaining to wells, springs, rivulets, or small ponds. It is only of great ponds and lakes, the titles to which are held by the state for the use of the public, that we are now speaking; and, of these great public ponds and lakes, we affirm that, by the rules of the common law of this state, the people are entitled to a reasonable portion of their waters for domestic purposes without being obliged to buy it of the owners of mill privileges. And we affirm, further, that by virtue of the rule of property derived from the ordinance of 1641-47, as interpreted in this state as well as Massachusetts, the title to all great ponds—that is, ponds containing more than 10 acres—is in the state, and that the legislature may confer upon towns and cities the right to take water from such ponds for domestic purposes without making such towns and

cities liable for the losses thereby sustained by the owners of mill privileges. Health is of more importance than wealth, and cleanliness is next to godliness; and we hold that the right of the people to an abundant supply of pure water, by which their health and cleanliness may be secured, is paramount to the right of mill owners to have the water for propelling their machinery, and that, to the extent that the two rights conflict, the latter must yield. Of course, private property cannot be taken for public use without making compensation for it. But the waters of great ponds and lakes are not private property. They are owned by the state, and the state may dispose of them as it thinks proper.

Wilson pond is a great pond. Its supply of water is 15,000,000 of gallons daily. Of this quantity, Auburn probably uses about a half a million of gallons daily. This is only about one-thirtieth of the entire supply. It is a quantity comparatively so small that its withdrawal from the pond does not perceptibly lessen the size of the stream at the outlet. The quantity used by Auburn will probably be somewhat increased in the future; but there is no probability that the quantity used daily will ever exceed a million of gallons. Auburn is a city large in territory, but the number of its inhabitants does not exceed 15,000; and a considerable portion of them do not, and never can, receive their supply of water from Wilson pond. But allowing that 10,000 of its inhabitants will at some future day receive their water from the pond, and that each one of these inhabitants will consume 100 gallons daily, then the quantity will be only a million of gallons, leaving fourteen-fifteenths of the water to flow on to the works of the Union Water-Power Company, as heretofore. Surely, the Union Water-Power Company cannot complain that this is an unconscionable or unreasonable division of the water.

But we are asked to consider if the Union Water-Power Company has not become entitled to the whole of the waters of Wilson pond by an adverse use. We do not think the use has been adverse. The company and its predecessors in title have used the water of the pond, or so much of it as has flowed out of the pond through its natural channel, and become mingled with the waters of the Androscoggin river; but this has been a rightful use. It has had no element of adverse-ness in it. It has encroached upon no one's rights, and no one has had a right to suppress it. Such a use can never ripen into a prescriptive title. *Pratt v. Lamson*, 2 Allen, 275. And, besides, the authority of the state to control the waters of great ponds, and determine the uses to which they may be applied, is a governmental power, and the governmental powers of the state are never lost by mere nonuse. In the Watuppa Case, 147 Mass. 548, 18 N. E. 465, the reservoir com-

pany has had the entire control and use of the waters of the Watuppa ponds for nearly 60 years. But the court held that the legislature might, nevertheless, confer upon the city of Fall River the right to take water from the ponds for domestic purposes without being liable to pay damages.

The Watuppa Case was embarrassed by the fact that both parties had charters from the legislature. The reservoir company had been chartered as early as 1826, and granted the right to construct a reservoir dam that would raise the water two feet higher than it had before been raised, and to draw off the water in such quantities and at such times and in such manner as it should judge proper; and, under authority of this charter, the corporation had expended large sums of money, and had had the entire use and control of the waters of the ponds for nearly 60 years, when the authority to Fall River was granted to take water from the ponds for domestic purposes; and the reservoir company claimed that it had thereby become invested with property rights in the entire waters of the ponds, of which it could not be divested without compensation. Upon this question the court was divided, three judges holding that the reservoir company was entitled to damages, and four judges that it was not.

We are embarrassed by no such question. In this case only one of the parties has a charter from the legislature, and that party is the city of Auburn. The Union Water-Power Company is a self-created corporation, organized under the general law. It has no charter from the legislature. It has never asked for and has never obtained from the legislature any property rights or any special privileges in the waters of Wilson pond. It has no property rights in the waters of the pond which are taxable in the city of Auburn, and we think it has no such rights in its waters as entitles it to damages from the city of Auburn. See *Union Water-Power Co. v. City of Auburn*, 90 Me. 60, 37 Atl. 331.

The state's ownership of great ponds, and the authority of the legislature to permit water to be taken from such ponds for domestic purposes without the payment of damages, were affirmed in *Fay v. Salem & Danvers Aqueduct*, 111 Mass. 27.

No reason is perceived why the same doctrine should not prevail in this state. The colonial ordinance of 1641-47 is in force in this state; and it is settled law that, by virtue of it, the title to all great ponds is vested in the state. The right of the people to a sufficient quantity of water for domestic purposes is incontrovertible. And when, by permission of the legislature, this supply is taken from ponds which are owned by the state, no reason is perceived why the takers should be required to pay damages to persons or corporations who do not own the water. If water is taken from wells or springs or small ponds or small streams, which are owned by

private persons or corporations, of course compensation must be made; but if taken from great ponds, which are owned by the state, no reason is perceived why damages should be exacted. Water for use as a mechanical power is important, and should receive reasonable protection. But water for domestic use, and by which the health and cleanliness of the people, and protection against fires, are to be secured, is also important. And, when water for both purposes is drawn from the same public fountain, no reason is perceived why either of the parties should be required to pay damages to the other.

Tested by the rules of the common law, which require a reasonable use, and, in case of conflict, a just and fair division, of water, and the claim of the Union Water-Power Company must fail. Tested by the rules of law derived from the colonial ordinance of 1641-47, and the result is the same. No property rights of the Union Water-Power Company have been invaded by the city of Auburn. The water which the city of Auburn is using is a donation from the state. The claim of the Union Water-Power Company that it is entitled to the entire waters of Wilson pond is not sustained by the evidence; and it is the opinion of the court that its claim to recover damages must be rejected.

Petition dismissed. No costs for either party.

(63 N. H. 7)

SCOTT v. SCOTT.

(Supreme Court of New Hampshire. Rockingham. July 27, 1894.)

RESULTING TRUSTS—ILLEGAL CONTRACTS—RES JUDICATA—PROPERTY IMPOUNDED BY COURT—EQUITY—TRANSFER—COMPULSION.

1. He in whose name stock was placed to evade Gen. Laws, c. 148, § 18, prohibiting stockholders from voting on more than one-eighth of the whole number of shares in the corporation, and to enable him to be a director of the corporation, in violation of a by-law requiring ownership of stock to enable one to be a director, may subsequently make a valid agreement that the stock belonged to the real owner thereof, and that he would convey it to him upon request.

2. Nor could he set up his illegal acts as a defense against a bill to compel a transfer to the real owner.

3. In a suit to compel the transfer of shares of stock, the finding of the trial court in another suit, where the certificates are impounded, that the property in the shares belongs to plaintiff, though the certificates are in defendant's name, is conclusive.

4. Where plaintiff is entitled to the possession of certificates of stock made out in defendant's name, defendant may be compelled to make such assignment thereof as may be necessary for plaintiff's beneficial use.

Bill by Annie G. Scott, administratrix of the estate of George Scott, against Ellen Scott, executrix of the will of Mark A. Scott. Decree granted.

Bill in equity to compel a transfer to the plaintiff, who is administratrix of the estate of George Scott, of 10 shares of the capital

stock of the Portsmouth Brewing Company, standing in the name of Mark A. Scott, and alleged to have been held by him in trust for George Scott. The plaintiff is administratrix of the estate of George Scott, and the defendant is executrix of the will of Mark A. Scott. The plaintiff put in evidence a declaration of trust, signed by Mark A. Scott, in which he acknowledged and declared that the stock of said company standing in his name did not belong to him, but was a part of the estate of George Scott, and that he held the same for the benefit and to the use of George Scott's estate, and promised and agreed to transfer the stock to the estate or to the plaintiff as administratrix, on request. The plaintiff then rested. The defendant introduced evidence of the nature of the corporate business, the way in which it was managed, and the circumstances under which the stock was put in Mark's name; and the plaintiff introduced evidence in rebuttal. The corporation was organized under the general laws, for the purpose, as stated in the articles of association, "of manufacturing, brewing, and exporting from the state of New Hampshire, for lawful sale and consumption, beer, ale, and other malt liquors, by whatever name called, and for making malt, casks, and barrels, and carrying on all other lawful business connected therewith," in Portsmouth, N. H. Its capital stock is divided into 80 shares, of \$500 each. The object of its incorporation was, and its business has been and is, the manufacture of intoxicating malt liquors, and the selling of the same in this state and elsewhere. The stock in controversy was held by Mark in trust for the benefit and use of George, to whom it belonged, and to whom Mark was to transfer it whenever requested. It was originally placed in Mark's name to evade the law (Gen. Laws, c. 148, § 18) prohibiting stockholders from voting on more than one-eighth of the whole number of shares in the corporation (George then owning 10 other shares), and also to evade a by-law of the corporation requiring ownership of stock to enable one to be a director, George desiring Mark to be a director. There were at the time two factions among the stockholders, one led by Arthur Harris, to which George belonged, and the other by John Conlon. The arrangement of George's stock, as above stated, was one means by which the Harris faction got control of the corporation. George and Mark were both directors for a number of years prior to their deaths, and knew what business the corporation was engaged in. Mark was treasurer during the last nine years of his life, and, as such, was general manager of the corporate business. After George's death, Mark made and delivered to the plaintiff the declaration of trust above mentioned. Soon afterwards the plaintiff requested him to transfer the stock to her, but he did not do it. She has had no actual control of the stock, and has taken no active part in the

business of the corporation, but has known what it was, and has made no objection. She would have acted with the Conlon faction if she had had control of the stock. The certificates for the stock are impounded with the clerk of the court by an order made in an equity suit (Harris against Scott, administratrix). The defendant refuses to transfer the stock to the plaintiff, and claims that the certificates should be delivered to her.

Calvin Page and Frink & Batchelder, for plaintiff. T. E. O. Marvin and S. W. Emery, for defendant.

BLODGETT, J. Whatever view may be taken of the transaction between the deceased in respect of the stock in controversy, or of the corporate business, the defense in this case cannot be sustained. The fact that the stock was put to an unlawful use did not divest it of its character as property, or place it outside the protection of the law; nor does the plaintiff require the aid of any illegal transaction to establish her right to its recovery. Her cause of action is not founded upon her intestate's transfer of the stock to the defendant's husband for an unlawful use, which has, however, ceased, but upon the subsequent acknowledgment and agreement of the husband to and with the plaintiff that the stock belonged to her intestate's estate, and that he would assign and convey it to the estate or to herself, as its representative, upon her request. Certainly, this agreement was not illegal. No vice or taint in the original transaction entered into or attached to it, and it was made upon sufficient consideration. The only ground upon which the defendant seeks to be relieved from it is that the transfer was made and the stock used in furtherance of an unlawful enterprise, in which the deceased were mutually engaged. But she is not entitled to relief upon this ground. As the representative of the husband, she cannot set up his crime in order to defeat the plaintiff's recovery. She stands in his place, and has his rights, but no more. *Fletcher v. Grover*, 11 N. H. 368, 369. His infamy cannot be her defense. It is forbidden by every consideration of law, justice, and fair dealing, and no less by a decent regard for his reputation and memory. But it is not necessary to apply the principle embodied in the maxim, "No man shall set up his infamy as a defense." The same result follows from the consideration of the existing situation. A paper representing property is impounded with the court. A and B. both claim it. The paper title of the property is in A., but the trial court has found upon competent evidence that the property belongs to B. One or the other of them is entitled to the impounded paper. The sole question is, which has the better right? It can hardly be necessary to say that the question is not an open one. The finding of the trial term conclusively estab-

lishes B.'s right to the paper, and with the possession goes the accompanying right to such an assignment of it by A. as may be necessary for B.'s beneficial use and enjoyment of it.

Other grounds debarring the defendant suggest themselves (*Manchester & L. R. R. v. Concord R. R.*, 66 N. H. 100, 126, 127, 131-133, 20 Atl. 383), and still others have been suggested in argument; but her claim to the property in controversy is so vicious in its character and tendency, and so repugnant to all just notions of right and equity, that it is unnecessary to pursue the subject further. The plaintiff is entitled to the possession of the certificates now impounded with the clerk of the court, and to an assignment of the same to her by the defendant. Decree accordingly.

OHASE, J., did not sit. The others concurred.

(183 Pa. St. 66)

DELAWARE & H. CANAL CO. v. HUGHES
et al.

(Supreme Court of Pennsylvania. Oct. 25, 1897.)

ESTATES—SEVERANCE—NOTICE—ADVERSE POSSESSION—MINES AND MINERALS.

Plaintiff, a mining company, owned and began mining operations upon a tract of land some time between 1830 and 1835, and has continued to the present time in possession of its mineral deposits by actual mining. Defendant's grantor was employed about said mine by plaintiff, and in 1836 or 1837 entered upon the surface of said land, and began a residence upon and cultivation of six acres of said tract. The company was not engaged in mining immediately under the said six acres. For a period of more than 21 years from 1850 the possession of defendant's grantor and his vendees was open, notorious, hostile, and exclusive. Held that, though defendant's grantor acquired a title to the surface of the six acres by limitations, he acquired no interest in the mineral estate, since plaintiff by its acts had severed the mineral estate from the surface, and defendant had actual notice of the severance.

Appeal from court of common pleas, Lackawanna county.

Bill in equity by the Delaware & Hudson Canal Company against David Hughes and others. From a decree for defendants, plaintiff appeals. Reversed.

Jessup & Jessup and James H. Torrey, for appellant. S. J. Strauss, for appellee Hughes.

WILLIAMS, J. This case presents a question of considerable importance to the owners of mineral lands, which does not seem to have been decided by the courts, or to have been discussed by text writers, so far as we have been able to discover. It will be readily understood from a brief statement of the facts out of which it arises. The plaintiff company is engaged in mining and selling anthracite coal. As early as 1825 it was the owner of a considerable body of contiguous lands which had been purchased by it because

of the coal underlying it. A tract known as the "Porter Tract," containing 200 acres, was part of this body of coal land. The coal upon it was opened by the company at some time between 1830 and 1835, and mining operations begun under it. From that time to the present the company has been in the possession of its mineral deposit under the surface of the Porter tract by actual mining, and by the use of the openings and gangways for purposes connected with the removal of coal from adjoining lands belonging to it. The defendant derives his title from one Alexander McDonald, who was an employé of the plaintiff, and who entered upon the surface of the Porter tract in 1836 or 1837, and began a residence upon, and the cultivation of, a small portion of it. It does not seem to admit of serious doubt that from 1850, and perhaps somewhat earlier, down for a period of more than 21 years, the possession of McDonald and his vendees of the land in controversy has been open, notorious, hostile, and exclusive. As to the surface, therefore, the defendant has acquired a title under the statute of limitations. The question raised by this record is whether he has also, under the circumstances just stated, acquired a title to the underlying coal. The general principles regulating the titles to upper and lower estates in the earth's crust are pretty well settled by our own cases. The ownership of the surface carries with it, if there be no obstacle to the application of the general rule, title downward to the center of the earth and upward indefinitely. So long as mineral deposits remain in place, they are part of the freehold, and pass with it by deed, gift, or other form of conveyance; but when the minerals are removed from their position or bed by mining they become personal property, and are sold like other personal chattels. If the owner grants to another the right or privilege of taking coal from his lands, this grant, if not an exclusive one, is not the grant of an interest in land, but of an easement or incorporeal right, which leaves the title to the coal in place remaining in the grantor. But a grant of all the coal, or of the exclusive right to mine the coal, is a sale of the coal in place. The conveyance of the coal creates in the vendee an interest in land. The deed or other conveyance is within the recording acts, and is subject to all the rules and regulations governing conveyances of the surface. It may convey an estate in fee simple in the coal or other mineral, or any lesser estate, in the same manner, and by the same words of grant, made use of in conveyances of the surface. When such a conveyance has been made of the coal or other mineral, it works a severance of the estate so conveyed from the surface; and, if the deed be recorded, it is constructive notice to all the world of the fact of severance. Thenceforward the owner of the soil may cultivate, inclose, and reside upon his estate for any length of time, but his possession will not ex-

tend below it. It will not grasp or affect in the slightest degree the estate below him which has been severed by the deed. In like manner the owner of the mineral estate may enter upon and operate it while the owner of the surface is leaving his estate unoccupied and wild, but the possession of the lower estate will not reach upward, and attach to the surface. Each estate may be occupied, conveyed, incumbered, sold by the sheriff, or allotted in partition, without any effect upon the other. If a trespasser enters either estate, and maintains possession, he can acquire title by the statute of limitations after 21 years to so much as he has actually held for that length of time; but his title will not extend above or below the estate on which he enters. If he would acquire any part of the mineral, he must make his entry upon, and maintain his position within, the limits of the mineral estate for the requisite period of time in an open, notorious, exclusive, and continuous manner. *Caldwell v. Copeland*, 87 Pa. St. 427; *Armstrong v. Caldwell*, 53 Pa. St. 284; *Kingsley v. Iron Co.*, 144 Pa. St. 613, 23 Atl. 250. A covert or clandestine entry will not do. Such an entry will confer no right on the wrongdoer until his entry is, or by the exercise of due diligence might be, discovered by the owner. Until then the owner cannot know that his possession has been invaded. Until he has, or ought to have, such knowledge, he is not called upon to act, for he does not know that action in the premises is necessary, and the law does not require absurd or impossible things of any one. *Lewey v. Coke Co.*, 166 Pa. St. 536, 81 Atl. 261; *Scranton Gas & Water Co. v. Lackawanna Iron & Coal Co.*, 167 Pa. St. 136, 31 Atl. 484. Possession, to be adverse, must be open, as well as continuous. The intruder must keep his flag flying in a visible and hostile manner. *Plummer v. Iron Co.*, 160 Pa. St. 483, 28 Atl. 853. So far on in our inquiry we have a well-beaten path to travel, but from this point forward we are without any definite landmark to guide us. The real question presented is, may there be a severance of the mineral estate from the surface by the acts of the owners of the original freehold? And, if so, may there be notice in fact of such severance to other persons that will affect them in the same manner as the constructive notice arising from the recording of a deed? It is very clear, as we have seen, that if the deed to the plaintiff had been for the coal under the Porter tract only, the entry of McDonald upon the surface, and his inclosure of a part of it, would have had no effect upon the lower estate. The rule is well settled by the cases cited above. The reason of the rule is that the sale of the coal severed it from the surface, and the recording of the deed gave constructive notice to McDonald of such severance, whether he had any knowledge of it or not. But the plaintiff's deed was for the whole of the land, including the soil and the minerals. The con-

pany had the right, however, to develop and operate the mineral estate alone, if that was to its interest, and leave the surface untilled and uncleared. It elected to do so. It erected its breaker, opened its mine, extended its gangways, arranged its tracks and sidings, and began the production of coal for the market from beneath the surface of the Porter tract and its adjoining lands. In this manner it entered upon the actual possession of its mineral estate. For more than 60 years it has continued its possession without interruption in a manner that has been obvious to all persons in the neighborhood. No person could pass or enter upon the land without being confronted with the unmistakable proofs of the possession and active operations of the plaintiff in this, its subterranean estate. These proofs, including the structures, the culm piles, the prepared coal, the movements of men and cars about the pit's mouth, brought the knowledge of the plaintiff's operations to even the most casual observer in a much more effective and satisfactory manner than it could have been done by the mere existence of a recorded deed. Why should it not have the same legal effect? In this case there is still another element of notice, for the defendant not only made his entry upon the surface with full knowledge, from the acts of the owner, of his severance, and the occupancy of the lower estate by it, but he was in its employ, assisting in its mining operations. He was one of the persons by whose labor the plaintiff preserved its possession, and kept its own flag flying. Surely, notice could go no further than this. The recording of a deed is notice, notwithstanding the party to be affected by it may never have known of its existence, or of the severance wrought by it, because he might have known, if he had exercised the vigilance the law requires of him, and examined the record. So, it is well settled, possession is notice, although the person to be affected did not know of it. It was his duty to take notice of the possession as well as of the record, and, if he failed to do it, it was his folly. He is held to know, because he might have known if he had made the examination which it was his duty to make. Here the possession of the owner was known. The estate in which it was at work was known, and the defendant was in its service, contributing by his own labor to the development of the mineral estate, and to the maintenance of his employer's possession. This was notice by, and because of, the clearest knowledge of all the facts. McDonald had this knowledge when he first entered upon the surface, and he was affected by it. He knew of the actual severance of the estates in the Porter tract. He knew the owners were in the exclusive possession of the lower one, and himself assisted as an employé in the work by which that possession was made visible and notorious. He never did anything to challenge their possession of the mineral estate. On the contrary, all he did, aside

from the erection of a shelter on the surface, was as servant of the owner, under its direction, and in the clearest recognition of, and subserviency to, its title. Under such circumstances it is plain that, if he acquired a title to the surface of the six acres he claims, he could not clutch also the mineral estate, or any part of it, that lay below the surface. It would be inequitable and unjust to hold otherwise in this case. He had stolen in upon the surface while at work for the company that owned both it and the coal. He knew of the severance in fact of these estates, and aided in the general work that made the severance evident to the world. If, entering under such circumstances, he could acquire the surface, he is limited to it. Knowing all the facts, he was bound, if he desired to acquire title to his employer's mine, or any part of it, to enter upon the mineral estate at some point, take possession, hold it openly and adversely for 21 years, so that his position and claim could have been known to the owner. Any different holding would lead to very absurd results. It would require us to hold that constructive notice is better than actual notice. Even this is short of a full statement of the result of the contrary doctrine, for in reality it would require us to hold that notice in fact had no significance, and bound no one. If McDonald was not bound by the complete knowledge he possessed and the opportunity for inquiry which his relations to the owner afforded him, it would follow that actual knowledge did not so much as put him upon inquiry. It would be much more reasonable to strike down the constructive notice which the law raises from the recording of a deed than thus to put it out of the power of an owner to protect himself by the clearest disclosure of his possession of his estate, and its purpose, to one of his own employés. But it is said that the company was not engaged in mining immediately under the six acres of surface occupied by McDonald, and that there was considerable unmined coal in place directly below his inclosure. McDonald entered upon the surface of the Porter tract knowing of the severance of the coal under it from the surface. The plaintiff's mineral estate was protected as fully by this actual knowledge as it would have been by constructive notice, and no title by the statute of limitations could be acquired within the limits of that estate without an entry upon it. An entry upon another estate—that upon the surface—can have no effect outside the estate entered. If there is no severance, an entry upon the surface will extend downward, and draw to it a title to the underlying minerals; so that he who disseises another, and acquires title by the statute of limitations, will succeed to the estate of him upon whose possession he has entered. But, if a severance is made before his entry, and he has notice of that severance, either by the record, or by the state of the possession acquired both by observation and by years of

service in the employment of the owner, his entry upon either of the estates will not affect the other. Possibly the question of the extent of the possession of a trespassing miner acquired by reason of his entry upon the mineral estate may some time be presented. If so, it will be time to consider it when it comes before us. It is not in this case. As applicable to the facts now before us, we hold that the Porter tract, or so much of it as was accessible from the pit's mouth in use, so that coal could be mined and removed therefrom by the ordinary methods of mining, was in the actual possession of the plaintiff, and that no inclosure upon the surface of that tract by one who had notice of the severance would draw to it any part of the mineral estate within its limits. This disposes of the suggestion that the unmined coal under the six acres has been or could be acquired by McDonald by virtue of his possession on the surface. He acquired the surface because he put his actual possession against the constructive possession of the owner. He did not acquire the coal because he had actual notice of its severance from the surface by the owner. This limited his possession to the estate on which he entered. These views require us to reverse the decree of the court below, to restore the preliminary injunction, and upon the facts that are undisputed to make the injunction perpetual; the costs of this appeal to be paid by the appellee.

(123 Pa. St. 551)

CARTER v. PRODUCERS' OIL CO., Limited.
(Supreme Court of Pennsylvania. Oct. 11, 1897.)

PARTNERSHIP ASSOCIATIONS—RULES—TRANSFER OF STOCK.

A rule of a partnership association denying to a member purchasing additional shares, the same as to any other transferee of shares, the right to vote them, unless elected to membership in respect to such shares, is authorized by Act June 2, 1874 (P. L. 271) § 4, as amended by Act June 25, 1885 (P. L. 182), providing that interests in such associations may be transferred under such rules as they may prescribe, and in the absence of such rules the transferee of any interest in any such association shall not be entitled to participate in its business, unless elected to membership therein.

Appeal from court of common pleas, Warren county.

Suit by John J. Carter against the Producers' Oil Company, Limited. Decree for defendant. Plaintiff appeals. Affirmed.

The following is the opinion of the court:

"I have found as a fact that the plaintiff is the bona fide owner of the stock which he seeks by his bill to have transferred to him. In so doing, I have negatived so much of paragraph c of the defendant's 5th proposition of law as avers that the plaintiff has not overcome the responsive denial of the answer as to the bona fides of his ownership. The proof of ownership offered by the plaintiff consisted of the production of the certificates issued by the

Producers' Oil Company, Limited, evidence establishing their genuine character, and the due execution by the holders thereof of the transfers printed on the back of the certificates. To this was added his own testimony that he purchased the shares from the National Transit Company, and paid for the same in cash with his own money, and that no other person had any interest therein. He produced the check by which payment was made, the receipt of the National Transit Company, and other documents corroborating his testimony. This was certainly enough, in the absence of countervailing proof, to establish his unqualified ownership against the general and vague denial of the answer. It was declared in *Riegel v. Insurance Co.*, 153 Pa. St. 134, 25 Atl. 1070 (the present chief justice delivering the opinion), that an averment of a fact in an answer which could not, in the nature of the case, be within the personal knowledge of him by whom it is sworn, and which is no more than 'an expression of his strong conviction of its existence, or what he deems an infallible deduction from the facts which were known to him,' is not responsive in the sense that it is evidence in his favor, so as to put the plaintiff upon proof by two witnesses. But it is unnecessary to invoke this principle, for the proof was abundant and practically uncontradicted.

"The proposition, however, raises the question of the good faith of the plaintiff in bringing this suit, and this is a broader question. It is said that he is 'shown to be acting in conspiracy with the Standard Oil Trust, in furtherance of its interests and purposes, and not for the welfare of the defendant.' The findings of fact establish that the plaintiff, in purchasing the stock in question, sought to obtain the control of the company; that his avowed purpose is to change its policy, so as to make it unobjectionable to the Standard Oil Trust, and so that it will be against the wishes and purposes of the other members of the company; also, that the Standard Trust is engaged in the same business as the defendant company, and that, at the time the National Transit Company sold the stock to the plaintiff, its agents received assurances, not amounting to an enforceable contract, that his action would be such as they desired. In my opinion, the motives and intentions of the persons composing the Producers' Oil Company, Limited, in organizing that company, are not material, except so far as they are expressed in the contract which they made with each other. We deal exclusively with the means which they adopted to carry out their purposes, whatever they were. A large amount of testimony was given relating to the preliminary steps looking towards the organization of the company, but, as it failed to show an agreement between the body of subscribers to the capital, we give it no consideration. Its only relevancy, if fully proved, would be to show that the purpose in the minds of the promoters was to deprive the Standard Trust of the Producers' oil, and to furnish a competitive market for the same.

These purposes are not unlawful, and, if the means adopted were adequate, might be accomplished. But whether accomplished or not must depend upon the adequacy or inadequacy of the means.

"Nor can I see my way clear to refuse the relief prayed for on the ground that the plaintiff's motives and intentions are at variance with the purposes and wishes of his fellow members. If what he desires and intends to do as a member of the company, controlling a majority in value of interest of its capital, is legally and equitably his right, the court cannot refuse to aid him because it may think he ought not so to act; and, if it is not legally or equitably his right, the power of the court may be invoked to prevent his abuse of his power, but it does not justify refusing him such rights as he clearly has. The action of the court is not invoked by reason of any supposed equity in the plaintiff, but by reason of an alleged deprivation of his legal rights as a member of an association over which the court is given, by express statute, the supervision and control. Nor does the fact, which is apparent, that the policy which the plaintiff desires to adopt is also desirable to the Standard Oil Trust, in my mind furnish a reason for refusing relief, since we are compelled to believe that, although agreeing with that organization in opinion and policy, the plaintiff appears in his own right as a bona fide owner of shares.

"The cases cited for the defendant on this point are clearly distinguishable from the case in hand. *Baker's Appeal*, 108 Pa. St. 510, 1 Atl. 78, and *Gould v. Head*, 41 Fed. 240, turned upon the fact that the plaintiff was not the real owner of the stock. *Kenton v. Railway Co.*, 54 Pa. St. 452, and *Camblos v. Railroad Co.*, 4 Brewst. 592, were cases in which it was attempted to control the action of a corporation by suits brought in the character of stockholders by persons who had bought stock for the mere purpose of bringing suit in the interest of outsiders. *Foll's Appeal*, 91 Pa. St. 434, was a bill to compel specific performance of a contract to deliver stock in a national bank. The mere right of the plaintiff under his contract furnished no ground for the specific performance sought in equity, but the relief was demanded on the supposed equity arising from the fact that the plaintiff was already the owner of stock which with the stock contracted for would give him control of the bank, and enable him to elect himself and his friends directors and officers. Specific performance was refused, on the ground that the circumstances relied upon raised no equity in the plaintiff. It was said that the bank was a quasi public corporation, and that it was against public policy that the control should be in the hands of a single individual. *Gage v. Fisher* (N. D.) 65 N. W. 809, was similar, but there was only a contract to permit the plaintiff to control the stock without actually buying it. None of the cases cited involved the right of a stockholder to be recognized as

such; nor do any of them involve the denial of the ordinary equitable remedies to one standing wholly upon a legal right. On the other hand, the case of *Rice v. Rockefeller*, 134 N. Y. 174, 31 N. E. 907, seems to me fully in point upon the present question; and *Railroad Co. v. Elkins*, 37 N. J. Eq. 273, furnishes even a closer analogy. If the plaintiff is the bona fide owner of the interest in the capital of the defendant company which he claims, and is entitled, under the laws and rules of the company, to represent that interest in the meetings of its members, it cannot be that any legal or enforceable equitable right of the company can be infringed by requiring it to recognize his title. If, by his action or attempted action, the rights, legal or equitable, of any other member are infringed, that action may be restrained or controlled. But no other member of the company is before the court as a party in that character. The real contention of the defendants seems to be not so much that the company will suffer if the relief prayed for be granted to the plaintiff as that other members in their individual character as producers of oil will be injured; and this is a controversy which we are manifestly unable to determine in this proceeding.

"I turn, therefore, to the questions raised upon the undisputed facts by the plaintiff's 1st, 2d, 3d, 4th, 5th, 7th, 8th, and 10th, and the defendant's 1st, 2d, 3d, and 4th, propositions of law. Under the law governing 'partnership associations' formed under the act of June 2, 1874, and its amendments, and the agreement, rules, and regulations governing the Producers' Oil Company, Limited, is a member of that company who purchases additional shares entitled to represent such additional interest in the capital in the meetings of the company, without being elected to membership in respect to such additional interest? The fourth section of the act of June 2, 1874, as amended by the act of 25th of June, 1885, provides as follows: 'Section 1. Interests in such partnership associations shall be personal estate, and may be transferred, given, bequeathed, distributed, sold or assigned, under such rules and regulations as such partnership associations shall, from time to time, prescribe, by a vote of a majority of the members in number and value of their interests, and in the absence of such rules and regulations the transferee of any interest in any such association shall not be entitled to any participation in the subsequent business of such association, unless elected to membership therein by a vote of a majority of the members in number and value of their interests. And any change of ownership, whether by sale, death, bankruptcy or otherwise, which occurs in the absence of any rules and regulations of such associations regulating such transfer, and which is not followed by election to membership in such associations, shall entitle the owner or transferee only to the value of the interest of the date of acquiring such interest, at a price and upon terms to be mutually agreed upon, and in default of such agreement

at a price and upon terms to be fixed by an appraiser to be appointed by the court of common pleas of the proper county, on the petition of either party, which appraisal shall be subject to the approval of said court.' The provisions of this section affecting the status of transferees of interests are only operative in the absence of rules and regulations prescribed by the association by a vote of a majority of the members in number and value of their interests. June 5, 1894, over a year before the plaintiff purchased any of the shares involved in this controversy, the Producers' Oil Company, Limited, in the manner prescribed by the act, and also in conformity with the provision in the rules governing amendments thereto, adopted the amended rule set forth in the findings of fact. It is conceded that this rule, if valid, is conclusive against the rights claimed by the plaintiff in his bill. But it is contended that the rule is invalid, because no authority to make such a rule is given by the statute, because it is against the terms of the statute, and because it is in restraint of trade, in derogation of the rights of the members, and unreasonable in its provisions.

"The provision forbidding sales of shares except to a particular class of persons, and that requiring a member purchasing additional shares to be elected to membership in respect to such shares, are independent; either may stand though the other fall. The plaintiff, although he had never been lawfully expelled from membership in the P. P. A., was not at the time he purchased this stock qualified for membership therein by reason of his business associations with the Standard Oil Trust. But the first clause of this rule deals with the right of a member to sell, and not to buy. No member of the company sold his stock to the plaintiff; nor are we able to determine whether or not the persons to whom they did sell were or were not qualified under this clause. We pass it by, therefore, to consider the last paragraph of the rule, which specifically covers the case in hand. Many cases are cited for the plaintiff to show that the right of a corporation to make by-laws for the regulation of transfers of stock does not include the right to place restrictions upon transfers. For the protection of the corporation, its stockholders and creditors, it may prescribe, by by-laws, the mode of transfer; but it cannot, without express authority in the charter, impose restrictions upon the free alienability of its shares, which is an incident of such property. The argument, however, fails when it is attempted to apply it to a 'partnership association'; for it is quite clear that the rules and regulations authorized by the act of 1885 are intended to govern more than the mere mode of transferring shares, and to embrace the status of a transferee in respect to the association. The language is: 'Interests may be transferred, given, bequeathed, distributed, sold or assigned under such rules and regulations as such partnership association shall from time to time prescribe.' And as the act prescribes, not the

manner of registering transfers, but the status of a transferee who has become the owner of an interest in the capital by gift, bequest, distribution, sale, assignment, or other mode of transfer, only in the absence of rules and regulations, it is necessarily implied that these rules and regulations, which are to take the place of the statutory provisions, may cover the same subject; and this is precisely what the first sentence of this section declares. If the association may not make rules and regulations covering the status of transferees as well as the manner of transfer, it follows that, in every association having rules and regulations governing the formal transfer of interests, any transferee becomes immediately a member without election, for the statute operates only in the absence of rules and regulations. Every association, if this be a correct construction of the law, will be required to choose between doing business without any rules at all governing the transfer of shares and the loss of all control over the membership through the adoption of such rules.

"It is quite too clear for argument that the power of partnership associations under the statute to make rules and regulations extends to the general subject of the status of transferees, and the manner in which they may become members, as well as to the mode of transfer; and the question is therefore narrowed to this: Is the provision requiring members of the company purchasing additional shares to be re-elected in respect thereto within this general power, or is it void as against the spirit and intention of the law? Whether the partnership association ought to be classified by the professor of legal science as a species of the genus corporation, or the genus partnership, or whether it should be set apart as a new genus, seems to me unimportant. If a corporation, it is so peculiar in its features that the general law of corporations cannot be applied to it without important modifications; if a partnership, it so differs from the common type that the general law of partnerships is but slightly applicable. Both the law of corporations and the law of partnerships are to be resorted to in the absence of statutory regulations, the choice being determined by the nature of the feature under consideration. In the present case we derive little assistance from either. The general rule of corporations invoked by the plaintiff has been laid down to meet the conditions existing in corporations in which the ownership of stock carries with it ipso facto membership in the corporate body. If there are corporations in which the conditions are different, it is manifest that the rule is inapplicable to the extent of the difference.

"The *delectus personarum* as it exists in partnerships grows out of the contract of the partners to be associated with each other, and with no others. The reason for it is found in the right of each partner to act as agent for all the others, the liability of each for the partnership obligations, and the right of each to contribution from the others. None of these conditions

exist in partnership associations. The case of a transfer of interest from one partner to another is not analogous to the case in hand, for the dissolution is caused in such a case, not by the addition to the interest of one of the partners, which adds nothing to his power, but by the dropping out of the assigning partner, whose continuance is necessary to the partnership existence. A partnership association differs from the common type of partnerships in that the members vote, and do not act with the powers of partners, and in that they are subject to no joint liability. It differs from the common type of corporations in that the members have a right to admit or refuse membership in the company to the transferee of the interest, as well as in some other particulars. In determining whether the act of 1885 should be strictly construed against the power of the association to limit the right of one of its members to acquire control by increasing his interest, we ought to look to the spirit and intention of the act. The peculiar form of *delectus personarum*, so carefully guarded in partnership associations, cannot be based upon the same consideration which gives rise to the common form in partnerships, for there is no mutual agency, no joint liability. Looking at the general scheme of the act, it seems apparent that it was intended to enable persons desiring to combine their capital in any business enterprise to do so without incurring, on the one hand, the general liability of partners, or, on the other, the risk of having the business taken out of the control of those in whom it was originally placed without their consent, which exists in ordinary corporations. If this be true, it is manifest that transfers of interests from one member to another are within the mischief sought to be prevented, for the members vote by value of interest as well as number upon most important questions.

"If the case of a member transferee is not included within the provisions of the statute, it is not because the letter of the law does not include it, but because the court is moved by the context to limit its literal meaning. 'Interests,' the act declares, without indicating any exception, 'may be transferred * * * under such rules and regulations as such partnership association shall from time to time prescribe,' etc. 'Any change of ownership which occurs in the absence of any rules and regulations of such associations regulating such transfer * * * shall entitle the owner or transferee,' etc. But the term 'election to membership' is not happily chosen to express the consent of the members to the acquisition of a greater interest by one of their number. One who is already a member cannot be, in any proper sense of the term, elected to membership. The broad and general terms used in the act, together with the use of this phrase, inappropriate to the case of transfer between members, indicate that the particular case of such transfer was not present in the legislative mind. Had it been, the general terms would have been modified if it were intended to ex-

clude it, and some modification of the term 'elected to membership' would have been made had the intention been specifically to include a transfer to one already a member. We can only ascertain the legislative will in a particular case by determining whether or not it falls within the general intention expressed in the law. And, while my mind inclines to the belief that such a case was not within the intention of the legislature, it is not without much doubt and some hesitation that I so decide. But it seems clear to me that the power of the association to regulate the status of transferees of interests in capital is not limited by the regulations prescribed by the act. In conferring upon the association authority to legislate for itself, it is implied that it may make rules which differ from those prescribed in the act. If the case of a transfer to one already in the membership be not included in the terms of the act, it is, at most, an omitted case, which the association itself may provide for. The rule adopted by the defendant is not against the terms of the act, for, at best, the act does not cover it at all. Nor is it unreasonable, for it is in line and harmony with the general spirit and intention of the act. Nor does it infringe any right of the members, for the owners of the shares may still freely sell them to whom they please, the only difference being that a sale to a member is put in the same category as a sale to other persons. No member can claim a vested right to a greater voting power than was given him by the articles of association. The full value of the interest is guaranteed to the purchaser in any event.

"Thus far we have considered the rules and regulations of the defendant as mere by-laws, imposed by a majority under the authority of the statute. The original rules were, however, agreed to and signed by all the members at the time the company was organized, and as part of its organization. They have therefore the effect of articles of association additional to the certificate filed as required by law. The plaintiff had notice of them, both actual and constructive. He is therefore bound by this agreement, and one of its provisions is that it may be altered by a vote of the majority of the members in number and value of their interests. It was so altered long prior to his purchase of the shares in question, no vote being against it except his own. Conceding that the authority thus given to alter cannot be carried so far as to permit a change in the general scope of the instrument; that no change can be made against the mandate of positive law, or contrary to the certificate of association, or which is unreasonable or oppressive,—still, I think, this alteration is not an undue exercise of the power, for the same reasons which have been already adverted to, and which, considered in this aspect, are still more forcible and cogent.

"Being of opinion that the last clause of rule 25, which excludes the plaintiff from participation in the business and profits of the defendant in respect to the shares purchased by him until he shall be elected to membership in re-

spect to such shares by the majority of the members in number and value of their interests, is valid, it follows that he is not entitled to the relief prayed for in his bill. His counsel in the argument distinctly disclaimed any desire to have the stock transferred upon the books of the company unless such transfer carried with it the right to vote and participate in the profits; and hence we do not consider the question whether so much of the relief prayed for might not properly be granted on the facts disclosed.

"It remains to consider the case for affirmative relief presented by the defendants upon their cross bill. At the time the plaintiff presented the certificates for 13,913 shares to the secretary of the company, and had new certificates issued to himself for the same, he was not, in fact, the owner of the interest represented by the certificates. He, in effect, represented himself to be owner by presenting them indorsed as they were in the usual form, and demanding the transfer to himself. But he is now the owner of the same shares by a subsequent purchase. And the National Transit Company, which was at the time owner, is clearly estopped by its own acts from asserting that ownership as against the defendant. We are required to note a difference here between partnership associations and ordinary corporations. In the latter the transfer of stock on the books invests the transferee with the full rights of a stockholder, including the right to vote the stock and to receive the dividends. In the former this right does not follow the transfer on the books, which is a merely ministerial act of an officer or clerk, but is obtained only by election to membership by the members of the company. We have held in the principal case that the plaintiff cannot participate in the business or profits of the defendant company as to purchased stock without re-election, and it follows that no clerk or officer can confer that right upon him by permitting a transfer upon the books. Apart from membership, and pending the appraisalment of the value of the interest, or the sale of it to another who may be acceptable to the remaining members, it may be important, and it seems to me it is quite proper, that the interest should stand on the books of the company in the name of the true owner, both for its protection and his own. If we now grant the relief prayed for in the cross bill, we shall restore the interest owned by the plaintiff on the books of the company to the names of the original members, and invest them with an apparent right to dividends and participation in the business to which they are not entitled, and which might be an injury to all concerned. The books of the company defendant do not show that the plaintiff is entitled to vote or participate in profits in respect to these shares, and it can therefore suffer no injury from an unauthorized transfer. Let a decree be drawn dismissing both the plaintiff's bill and the cross bill filed by the defendant, at the costs of the plaintiff; and, at the time of settling the decree, the court will hear either

party upon any exceptions to the findings of fact or of law which they may file, respectively, within 10 days after notice of the filing of this opinion."

Knox & Reed, Hinckley & Rice, Well & Thorp, and Roberts & Carter, for appellant. Watson & McCleave and Samuel S. Mehard, for appellee.

McCOLLUM, J. We think the court below entered the proper decree in this case. The plaintiff filed his bill to compel the defendant company to concede to him the rights of a member as to shares of which he was merely a transferee. The shares so held by him, together with the shares he subscribed for, represented a clear majority of the capital of the company. On payment of his subscription in accordance with its terms, he was duly elected to membership in the company, and he then received from it a certificate for 300 shares of its capital, of the par value of \$10 each, that being the number of shares for which he had subscribed. Afterwards, and prior to the institution of this suit, he purchased from the National Transit Company 29,764 shares, and from other persons 131 shares, making in all 29,875 shares in addition to his original 300 shares. The shares thus purchased by him were shares which members of the defendant company had sold, and which the parties from whom he had purchased had bought. The National Transit Company was then one of the companies affiliated with the Standard Oil Company, and controlled by what is known as the "Standard Oil Trust," in which the plaintiff was a shareholder at the time of his purchase. His avowed purpose in making the purchases mentioned was to obtain control of the defendant company, and change its policy from what he characterized as "gad fly" competition with the Standard to such competition as he believed would be unobjectionable to it. There is reason to believe that he could not have obtained the stock but for the assurance that he would use the power he supposed it would give him to accomplish his declared purpose. While it is probable the accomplishment of his purpose would be advantageous to him, it is very clear that the other members of the defendant company regarded his scheme as fatal, if carried out, to the principal object intended to be achieved by the organization of the company, and as destructive of their interests in it. The principal and controlling question raised by the bill and answer is whether the plaintiff is entitled, by reason of his election to membership in the defendant company, on payment of his subscription, to have transferred to him on the books of the company and to vote the shares purchased as above stated. The plaintiff contends that he is, and the defendant company contends that he is not. The arguments in support of and against their respective contentions are exhaustive and able, but an extended review of them is not deemed essential to a proper determination of the question we have to consider.

It is conceded that the plaintiff has no right to vote the shares he purchased as above stated if the rule of June 5, 1894, is valid. It appears from the tenth finding of fact that the rule was adopted by the vote of a majority in number and value of interests of the members of the defendant company. To determine whether it was within the power of the company to establish the rule, we must look to the statutes under which it was organized. As bearing on this question, it is sufficient to refer to the act of June 25, 1885 (P. L. 182), which is amendatory of the fourth section of the act of June 2, 1874 (P. L. 271). It is as follows: "Interests in such partnership associations shall be personal estate, and may be transferred, given, bequeathed, distributed, sold, or assigned, under such rules and regulations as such partnership associations shall from time to time prescribe by a vote of the majority of the members in number and value of their interests; and in the absence of such rules and regulations the transferee of any interest in any such association shall not be entitled to any participation in the subsequent business of such association, unless elected to membership therein by a vote of a majority of the members in number and value of their interests. And any change of ownership, whether by sale, death, bankruptcy or otherwise, which occurs in the absence of any rules and regulations of such associations regulating such transfer, and which is not followed by election to membership in such association, shall entitle the owner or transferee only to the value of the interest so acquired at the date of acquiring such interest, at a price and upon terms to be mutually agreed upon, and in default of such agreement, at a price and upon terms to be fixed by an appraiser to be appointed by the court of common pleas of the proper county, on the petition of either party, which appraisal shall be subject to the approval of said court." It will be observed that the statute makes no distinction between a transferee who is a member of the partnership association and a transferee who is not a member of it. The language of the statute fairly excludes such distinction, and there is nothing in the articles of association which warrants it. It is a distinction which, if made, would enable a member of the association to obtain a controlling interest in it by a purchase of a sufficient number of its shares, to defeat the controlling purpose of its organization, and to impair, if not absolutely destroy, the interests of the other members. If the legislature had intended to make this distinction, it could and presumably would have done so in a few words. The absence of anything in the statute indicative of a purpose to make it tends to confirm the view that members who purchase shares sustain the same relation to them as purchasers who are not members. Of what avail is it to deny to a stranger who buys shares of the capital of the association the right to vote them without its consent, manifested by his election to

membership therein, while a member of the association who desires to obtain control of it, to defeat the purpose for which it was organized, and to change its policy, in the interest of a rival company, is allowed to vote without its consent the shares he has purchased? It seems to us that a construction of the statute which admits of such results is opposed to the spirit as well as the letter of it, and that so much of the rule of June 5, 1894, as puts the member who purchases shares on the same footing with respect to them as the strangers who purchase shares, is in clear accord with and authorized by it. We cannot assent to the plaintiff's claim that the defendant company is a corporation, and restricted in the adoption of by-laws, rules, and regulations for its government to such as it is within the power of the latter to prescribe. It may be conceded that the defendant company has some of the qualities of a corporation, but it is, nevertheless, a partnership association, governed by the statutes and articles under which it was organized, and the rules and regulations it may prescribe in execution of the powers with which the statutes have invested it. We concur in, and need not add anything to, what the learned judge of the court below has so well said on this point, and in respect to the agreement or understanding between the parties when the company was organized. In accordance with the views expressed in this opinion, we overrule the specifications of error. Decree affirmed, and appeal dismissed, at the cost of the appellant.

(123 Pa. St. 642)

STRAW et al. v. MURRAY, DOUGAL & CO., Limited.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

JOINT-STOCK COMPANIES—CONTRACTS OF OFFICER—LIABILITY OF COMPANY.

S., who had a contract with plaintiffs for the purchase of logs, contracted to sell them to defendant partnership association, which agreed to pay \$2,000 in its notes when the logs were broken into the stream, and the balance when they had all been rafted out of the boom and accepted. Thereafter, in order to induce plaintiffs, who still had possession of the logs, to break them into the stream, S. persuaded defendant's treasurer to draw two checks for \$1,000 each, payable to the plaintiffs, or order. *Held*, that the checks changed the original contract between S. and defendant, creating a new liability on the latter's part, within the act of June 2, 1874, and the supplements thereto, which provide that no liability for an amount exceeding \$500 shall bind a partnership association unless reduced to writing and "signed by at least two managers," and that defendant was not therefore liable on the checks, in the absence of any evidence that it ratified the act of its treasurer.

Appeal from court of common pleas, Northumberland county.

Assumpsit by Isaac Straw and James Woods, doing business under the firm name of Straw & Woods, to the use of H. B. Powell, trustee, and another, against Murray, Dougal & Co., Limited, to recover the amount of two checks.

The court directed a verdict for defendant, and plaintiffs appeal. Affirmed.

Charge of the Court Below.

"Gentlemen of the Jury: The defendant in this case is a limited partnership association, organized and doing business under the act of June 2, 1874, and its supplements. Their place of business is Milton, this county. During the logging season of 1890 and 1891, Straw & Woods undertook to deliver upon the banks of Chest creek, in Clearfield county, a large quantity of white oak, rock oak, white pine, hemlock, beech, and other hardwood logs, to one W. H. Stevenson. Stevenson was to pay a certain portion of the contract price when the logs were scaled, and a certain other portion when they were banked on said stream, and the balance when they were broken into the stream for the spring drive of 1891. 300,000 feet of the logs, or more, were delivered upon the banks of the stream according to the contract, and in the early part of March, 1891, were ready to be broken into the stream when the spring drive came along. The contract on Stevenson's part had been but partially complied with, as I recollect the testimony, only that portion of the purchase money due when the logs were scaled having been paid, and at this time Stevenson was largely indebted to Straw & Woods on account of the contract. Stevenson, on the 23d day of March, 1891, contracted to sell to the defendant the white oak logs then on the banks of Chest creek, and still in the possession of Straw & Woods. The contract is in writing, properly executed by both parties. The logs were to become the property of the defendant on the signing of the contract. They were to be delivered out of the West Branch boom at Williamsport, during the season of 1891. The quantity of white oak contracted for by the defendant was 300,000 feet. The logs were to be paid for by the defendant's note for \$2,000, at four months, when the logs were broken into the creek, the balance to be paid in note at four months flat when the logs should all be rafted out of said boom, and accepted by said Murray, Dougal & Co., Limited. It seems there was difficulty in securing the possession of these logs from Straw & Woods, they having refused to break them into the creek until they were paid, or payment secured to them by Stevenson. Stevenson induced Murray, Dougal & Co., Limited, to execute two checks, each for \$1,000, dated March 23, 1891, being the date of the agreement between him and the defendant, payable to the order of Straw & Woods. Armed with these checks, he went to Westover, Clearfield county, near where these logs were banked, and made use of the checks,—as we are bound to assume, because there is evidence to that effect, and it might be so found by the jury,—for the purpose of inducing Straw & Woods to break these logs into the stream. Both checks were indorsed 'Straw

& Woods, per Woods.' Check No. 1 was by Stevenson, and Woods left it with a justice of the peace by the name of Fry, at Westover, to be cashed, and the proceeds either delivered to Straw & Woods, or applied to certain uses for their benefit, when the one-half of the said logs were broken into said stream. The possession of check No. 2 was retained by Stevenson with the understanding that it was to be delivered to Fry for Straw & Woods when the other half of the logs should be broken in.

"Differences arose between Straw & Woods, the members of this firm, resulting in a bill in equity filed in the Clearfield county court, the object of which was to restrain the collection of these checks by Woods. Up to this time, about one-half of the logs had been broken into the stream. Upon this bill being served, operations ceased, and check No. 2 was returned by Stevenson to Murray, Dougal & Co., Limited. On April 1, 1891, Stevenson and Straw & Woods came together at Clearfield, in the office of Murray & Gordon, attorneys, and adjusted their differences by written agreement. In the meantime, Woods had telegraphed and written Murray, Dougal & Co., Limited, stopping payment on the checks. By the terms of that agreement, these checks were assigned, one to H. B. Powell for certain purposes, and the other to Enoch I. Straw, the use plaintiff in this action. It was provided that the check called No. 2, which had at that time been returned to Murray, Dougal & Co., Limited, should be by them returned to Isaac Straw, and it was agreed that Stevenson should give an order on Murray, Dougal & Co., Limited, for that purpose. The check No. 1, which was then in the hands of Fry, was to go to Powell. One of the members of the firm of Murray, Dougal & Co., Limited,—Mr. Kramer,—was present when this agreement was entered into, and heard the agreement read, but refused to be a party to it, or to bind the defendant by it, or to have anything to do with it. There was, however, a notice served upon Mr. Kramer to return to Isaac Straw the check No. 2, then in the hands of Murray, Dougal & Co., Limited. The next day Isaac Straw and Stevenson and Kramer went to Westover, and Stevenson and Straw directed Fry, who held check No. 1, to return the check to Murray, Dougal & Co., Limited, which he refused to do, until it should be agreed to by Woods, the other member of the firm. Subsequently Woods joined in the order, and the check was returned to Murray, Dougal & Co., Limited. It is contended, and there is evidence to the effect, that before the check had left Fry's hands, Straw countermanded the order; and you may assume, for the purposes of this case, because it will be your duty, if warranted in so finding, that at the time Fry returned the check he had forgotten that Straw had changed his mind, and countermanded the order. It is contended, and there is evidence to the effect, that at

the time Straw and Stevenson consented to the return of this check in Fry's hands, Kramer promised that Murray, Dougal & Co., Limited, would send other checks in its stead. Kramer then went with Straw to the place where these logs were, and looked them over, and made inquiry as to whether they could be all broken in the stream for the then passing drive. Straw responded in the affirmative, and the logs were soon after broken into the stream. Upon the receipt of the checks, Murray, Dougal & Co., Limited, destroyed them. Shortly afterwards they paid Stevenson on account \$500. A claim to these logs was then made by a party by the name of Kremer, of Lock Haven, to whom it appears they had been subsequently sold by Stevenson, and into whose possession they came. Murray, Dougal & Co., Limited, were obliged to bring replevin for them. The outcome of this litigation was to give Murray, Dougal & Co., Limited, the white oak logs to 123,146 feet, worth at the place of contractual delivery between \$1,300 and \$1,400. Deducting from this sum the costs to the defendant in litigation in securing the delivery of the logs, together with the boonnage and the \$500 paid Stevenson on account of them, there appears to be, as between Stevenson and the defendant, very little due,—no more than \$200 or \$300, at most. Straw & Woods have nothing for their logs, except the few hundred dollars paid for them at the time they were scaled. That portion of them bought by Murray, Dougal & Co., Limited, and which came in their possession thus far, cost them, also, all they were worth, and nobody seems to have profited by the transaction, unless it be the Lock Haven Kremer, who seems to have taken the advantage in some way of both parties. This man got all the logs, except the white oak logs, and made it cost Murray, Dougal & Co., Limited, half of what the white oak logs were worth to obtain possession of these.

"This suit is brought upon the checks, counsel for the plaintiffs claiming in no other way. They frankly state to the court that, unless entitled to recover upon the checks, they have no cause of action under the pleadings. These checks were signed by C. H. Dickerman, treasurer of Murray, Dougal & Co., Limited. They were not signed by two managers, as required by the act of May 10, 1889, supplemental to the act of 1874. That act provides that 'no debt shall be contracted or liability incurred for said association except by one or more of the said managers, and no liability for an amount exceeding \$500 except against the person incurring it shall bind the said association, unless reduced to writing, and signed by at least two managers.' It is contended by the plaintiffs that these checks created no new liability, and, inasmuch as the contract of March 23d was properly executed, and these checks, as they contend, given in payment, or part payment, of the consideration money of that contract, it was not necessary that they be signed by two man-

agers. If I could come to the conclusion that these checks did not create a new liability, I would feel that I would have to submit the case to you for your determination; but I am of opinion that the checks did create a new liability on the part of Murray, Dougal & Co., Limited, that their effect was to so change the contract of March 23d as to make it a different undertaking on the part of the defendant. By that contract, the \$2,000 was to be paid by note, at four months. It was not to be paid until the logs were broken into the creek. The logs, as per the contract between Straw & Woods and Stevenson, were not to become the property of Stevenson until they were broken into the creek. These checks, when delivered to Straw & Woods, would create a liability on the part of Murray, Dougal & Co., Limited, to pay them, without regard to the possession of the logs in question, or without regard to whether they might ever come into the possession of Murray, Dougal & Co., Limited, whereas, by the contract of March 23d, Murray, Dougal & Co., Limited, were not even to execute and deliver the notes until the logs were actually in the stream. By the checks, had they been so executed or so issued by Murray, Dougal & Co., Limited, as to bind them, they would have been liable for the property, that might never get beyond the possession of Straw & Woods, where these logs actually were at the time the checks were given. It seems to me, therefore, as I said before, that these checks did create a new and different liability from that created by the contract of March 23d. Therefore, I am of the opinion that Murray, Dougal & Co., Limited, were not bound by the act of C. H. Dickerman, treasurer, in issuing the checks, although it may be that Mr. Dickerman made himself personally liable.

"It is contended by the plaintiffs that there was a ratification by the defendant, through the act of their manager, in this way: that what Mr. Kramer did at Westover, and especially afterwards, when upon the grounds where the logs were, induced the plaintiffs to break the logs into the stream upon the faith of the checks. I do not think that his acts could be so construed, nor had he the power to bind the company by anything he might have done there. Principally for this reason, gentlemen, I have concluded there can be no recovery by the plaintiffs in this action. * * *

Geo. B. Reimensnyder and Harry S. Knight, for appellants. C. Larue Munson, Addison Candor, and W. H. Hackenberg, for appellee.

McCOLLUM, J. There was no contract, verbal or written, between the plaintiffs and the defendant company for the sale and delivery of logs by the former to the latter, but the plaintiffs had a written contract with Stevenson, by which they agreed to sell and deliver logs to him on the terms stated

therein, and he had a written contract with the defendant company, by which he sold to it, "to be delivered out of the West Branch boom during the season of 1891," the logs the plaintiffs had agreed to sell and deliver to him. The plaintiffs' contract with Stevenson was entered into on the 2d of August, 1890, and his contract with the defendant company on the 23d of March, 1891. At or about the time appointed by the contract between the plaintiffs and Stevenson for the delivery of the logs, there was a disagreement between the plaintiffs, which resulted in a suit that terminated in a settlement on the 1st of April, 1891, which settlement was reduced to writing, and signed by Straw, Woods, and Stevenson. The defendant company had no connection with the settlement, and was not in anywise affected by it. In its contract with Stevenson, it had agreed to pay him for the logs \$11.50 per 1,000 feet, free of boomage, as follows: \$2,000 in its notes at four months, when the logs were broken into the creek, and the balance to be paid in its note at four months flat, when they had all been rafted out of the West Branch boom, and accepted by it. Assuming that this contract created a liability which the company was bound to discharge in accordance with its terms, it furnishes no ground for a recovery in this suit. The liability imposed by the contract is not to the plaintiffs, but to Stevenson, who has not surrendered any of his rights under it to them. It appears that Stevenson, after the execution of the contract, induced the treasurer of the defendant company to draw and deliver to him two checks of \$1,000 each on the First National Bank of Milton, payable to Straw & Woods, or their order. It nowhere appears in the evidence that there was any formal or other authorization by the company of the issuance of these checks, or of a ratification of it. If they were intended as payments on the company's contract with Stevenson, or as payments on account of the plaintiffs' contract with him, it can hardly be contended that the treasurer, by virtue of his office, was authorized to issue them. If such a power inheres in, or is incident to, his office, he may, of his own volition, materially change the provisions of the company's contracts defining its liabilities, and the manner of discharging them, and create liabilities which the company must discharge, and for which no consideration has been received or bargained for. It is quite certain that no such power is vested in any officer or member of a partnership association organized under the act of June 2, 1874, and the supplements thereto. The maintenance, therefore, by the plaintiffs of their suit on the checks required the production of evidence showing authorization or ratification by the company of the issuance of them. The plaintiffs, recognizing the importance of this, sought to show ratification by the company, predicated on Kramer's presence when the settlement of April 1st was made, and when some of the

logs were broken into the creek. Their offer to establish ratification was a failure. Kramer distinctly refused to have anything to do with the settlement, and the undisputed evidence is that he declared at the time of it that the checks would not be paid. In his presence at the creek when some of the logs were broken into it there was no element of ratification, nor can we find from the evidence that anything was said or done by him, there or elsewhere, which estopped the company from denying its liability upon the checks. Besides, it was not shown that he was clothed with authority to obligate the company to pay them. The matters to which we have referred are, considered by themselves, sufficient to warrant the action of the court in instructing the jury to find for the defendants.

Aside from these, however, there are other matters which deserve notice. The checks were not delivered to Straw & Woods, although they indorsed them. Stevenson returned one of them to the defendant company, and it was destroyed, and he placed the other in the custody of Fry, who, by direction of Straw, Woods, and Stevenson, sent it to the company, and it was also destroyed. It is true that Woods testified that he once had possession of the check Stevenson lodged with Fry, and that Straw testified that he said to Fry, after he directed the check to be sent, as above stated, that he (Fry) had better keep the check until he (Straw) heard from his attorneys. But this testimony cannot be regarded as nullifying the surrender of the checks, or establishing fraud on the part of Fry or the company in connection with it. The checks were surrendered and destroyed early in April, 1891, and this suit was brought on the 30th of July, 1896. In the meantime, the defendant company has, after a protracted and costly litigation with Stevenson, Kramer, and the West Branch Boom Company, recovered less than one-half of the logs called for by its contract with Stevenson. It has paid on the contract with Stevenson an amount which, together with the expenses of the litigation forced by Stevenson and his confederates, equals four-fifths of the price it agreed to pay for the logs. It will thus be seen that the equity, as well as the law, accords with the judgment entered by the court below. The specifications of error are overruled. Judgment affirmed.

(182 Pa. St. 442)

HEIST v. TOBIAS.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

JUDGMENT—STRIKING OFF—OPENING—RIGHTS OF Co-SURETIES.

1. A judgment entered on a judgment note cannot be stricken off on motion, where it was regular in every respect, was intended to be entered of record, and there was no breach of faith or contract on the part of plaintiff in so doing.

2. On an application to open a judgment it appeared that defendant's son was indebted for about \$1,000 under circumstances which might

involve his liberty; that, to get the money temporarily and immediately, an arrangement was made by which the son was to make his note for \$900 at a certain bank at 30 days, which was indorsed by defendant, plaintiff, and B.; that the note was discounted by the bank, and the money was paid to the creditor; that plaintiff was one of the sureties on the son's bond to said creditor; and that, on plaintiff indorsing such note, said judgment was given. The evidence showed that the judgment was given to secure plaintiff against liability by reason of his indorsement. B. borrowed the money, and paid the \$900 note in bank, and plaintiff, without defendant's consent, assigned said judgment to B.'s wife. Held that, as the judgment was given to secure plaintiff on his indorsement on the note, and as the note was paid, he had no right to assign the judgment to the use plaintiff.

Appeal from court of common pleas, Carbon county.

A judgment in favor of S. B. Helst against Esther Tobias was entered on a judgment note, and was assigned by plaintiff to Penninah Brodhead. Defendant applied to the court by petition to strike off or open the judgment, and a rule to show cause, as prayed, was granted. From a judgment discharging the rule to show cause, defendant appeals. Reversed.

The opinion of the court below is as follows (Craig, P. J.): "The controlling facts of this case, as we gather them from the petition, answer, and testimony, are not seriously disputed. The point raised is a legal and equitable one. This judgment note for \$900 was given by the defendants to S. B. Helst on the 8th of December, 1893, and was entered up the same day. On the 26th of January, 1894, Helst assigned it to Penninah Brodhead, wife of W. F. Brodhead, and on the 13th of August, 1895, she issued a fieri facias thereon. This rule was granted August 21, 1895, on petition of Esther Tobias, one of the defendants. The circumstances under which the judgment note was given seem to be as follows: U. S. Grant Tobias is the son of Esther Tobias, and a son-in-law of W. F. Brodhead and Penninah Brodhead. Previous to the giving of the judgment note, U. S. Grant Tobias had become indebted to the Penn Mutual Life Insurance Company, for about \$1,200, money which he had collected as agent, and could not pay over. In order to raise \$900 of this sum, a note for \$900 was drawn by U. S. Grant Tobias to the order of W. F. Brodhead, Esther Tobias, and S. B. Helst, payable in thirty days, and was by them indorsed. This note was discounted by the Linderman National Bank on the 9th day of December, 1893, and its proceeds paid to the insurance company. Helst had refused to indorse this discounted note unless he was secured by the petitioner, Esther Tobias; and the judgment note now in question was given by her and her son to secure him on his indorsement. Before the discounted note matured, Penninah Brodhead raised \$900 by mortgaging her real estate to the Enterprise Building & Loan Association, and on or about the day the note was payable in bank she and

her husband, W. F. Brodhead, came to Mauch Chunk, where she gave him the money to hand to Helst. She did not go with her husband to Helst, but her husband delivered the \$900 to him at his place of business, and then both of them went to the bank, and paid off the note, and had it canceled. Helst got the note, and destroyed it. Subsequently, on the 26th day of January, 1894 (about fourteen days after the payment of the note in bank), Helst assigned the judgment note on the record to Penninah Brodhead, the present assignee and holder. The evidence seems clear that the \$900 which was used to pay off the discounted note in bank was the individual money of Penninah Brodhead. And there is no contradiction of the evidence of W. F. Brodhead, S. B. Helst, and Penninah Brodhead that on the payment of this money by Penninah Brodhead the judgment in question was to be assigned to her; and that, in pursuance of this agreement, it was subsequently assigned to her on the record. There is some further evidence tending to show that Esther Tobias knew of and recognized this assignment of the judgment; and also some to the contrary effect, and that she knew nothing of the assignment until about a year thereafter. But, as we look at this case, this evidence has little to do with the main and controlling question. As Penninah Brodhead furnished the money by the hand of her husband, who paid off the whole of the discounted note in bank to Helst, who then assigned the judgment to her, we are of the opinion that she is legally entitled to the full ownership of it. She had a right to do this. She was not a mere stranger or volunteer. Her relation to W. F. Brodhead and U. S. Grant Tobias furnished a sufficient moral duty in this regard to sustain a legal assignment or an equitable subrogation. If it be conceded, for the sake of argument, that she was a stranger to the judgment, yet, having paid off the whole debt the judgment was intended to secure, she thereby became by implication the purchaser of the debt, and the equitable owner of the judgment. This is ruled in Brice's Appeal, 95 Pa. St. 145. But we have, in addition to this, the testimony of S. B. Helst, W. F. Brodhead, and Penninah Brodhead, already alluded to, and contradicted by no one, that the judgment was assigned to Penninah Brodhead to secure her for the money she furnished to pay off the \$900 note in bank. Under this evidence Penninah Brodhead was entitled to conventional subrogation. In Beach on Modern Equity Jurisprudence (section 803) it is said: 'A stranger may, however, become, upon his payment of a debt, entitled to the benefit of the security held by the creditor by what is known as conventional subrogation. Conventional subrogation is the result of an agreement between a stranger and either the debtor or the creditor that, if he pays the debt, he will be subrogated to the rights of the creditor; and this agreement may be accompanied by a formal

transfer of the securities, though this is not necessary to consummate the agreement.' The same rule is laid down in 24 Am. & Eng. Enc. Law, p. 290; Bisp. Eq. (5th Ed.) § 336; Cottrell's Appeal, 23 Pa. St. 294; Mosier's Appeal, 56 Pa. St. 76; Bender v. George, 92 Pa. St. 36; Miller's Appeal, 119 Pa. St. 620, 13 Atl. 504; Association v. Thompson, 32 N. J. Eq. 133; Receivers v. Wortendyke, 27 N. J. Eq. 658; Ooe v. Railway Co., 31 N. J. Eq. 105; Payne v. Hathaway, 3 Vt. 212; Pom. Eq. Jur. (2d Ed.) § 1214; 1 Ping. Mortg. § 1092; Bouv. Law Dict. 554. The petitioner refers us to the case of O'Hara v. Baum, 88 Pa. St. 114, and claims that under the rule there stated she is not liable on this judgment to the assignee. In that case the mortgagee had a mortgage to indemnify him for any loss he might sustain by reason of indorsements made or to be made of the paper of Michael O'Hara. And it was held that the mortgagor was liable only to the extent of such of the O'Hara notes as the mortgagee paid, or was obliged to pay, and that the mortgage in no manner inured to the benefit of other holders and indorsers of the notes of O'Hara. Applying the principle decided to the case in hand, we do not see how it can help the petitioner's contention. It cannot be doubted that, if Heist had paid the discounted note with his own money, whether before or after protest, he could hold the judgment note for his security. By paying it before or at maturity he waived or avoided its protest. Hence, when Penninah Brodhead furnished the money with which he paid the identical note for the indorsement of which the judgment note was given, it seems to us he had the right to assign to her the security he held. The act made her a purchaser. She stood in his shoes, and owned his right. So that, if there had been no assignment, according to the agreement already alluded to, she nevertheless became the equitable owner of the judgment. Having paid the money for the debt secured by the judgment under the circumstances, and taken an assignment thereof on the record, we do not see how her title to the security can be successfully assailed. Both in law and in equity she is entitled to all the rights Heist had at the time of the purchase. And now, to wit, April 13, 1896, the rule is discharged."

Wm. G. Freyman, Horace Heydt, and E. O. Nothstein, for appellant. Theodore A. Snyder and Frederick Bertolette, for appellee.

GREEN, J. This proceeding was an application by petition to the court below to strike off or open a judgment. The plaintiff in the judgment is S. B. Heist, and the defendant Esther Tobias. The defendant set forth certain facts in her petition affecting the giving and entering of the judgment, and the purpose it was intended to subserve, which, if true, entitled her to the relief she asked. A very considerable amount of testimony was taken on

both sides, under the rule to show cause, and the application was disposed of by the learned court below upon the views expressed in the opinion filed of record. Upon that portion of the testimony which was considered by the court the conclusion reached would be apparently correct. But, as it seems to us, there was considerable testimony of a material character, which does not seem to have received the attention of the court (at least, it was not a subject of comment), which, in our opinion, affects in a serious—indeed, in a vital—manner the ultimate result. We do not think the application to strike off the judgment can be entertained. It was regular in every respect. It was intended to be entered of record, and there was no breach of faith or contract on the part of the plaintiff in so doing. Under all the authorities, he had a lawful right to have it entered, and hence it cannot be stricken off upon motion. Upon the other ground of relief, however, the question fairly arose whether the judgment should be opened, and the defendant let in to a defense. As we have already said, if the facts set forth in the petition are true, the judgment should have been opened, and an issue granted to determine what, if anything, was due upon the judgment. Being fully aware of the rule that the opening of judgments is a matter largely within the discretion of the court in which the application is made, and is not to be reviewed on appeal except for plain error, it becomes our duty to consider with much care the testimony returned with the record, the whole of which was also submitted to the learned court below. The opinion of the court is not based upon a consideration of the credibility of witnesses. It is rather founded upon the legal and equitable aspects of the case in certain points of view, and in reference to certain well-established rules, both of equity and law, which, in the abstract, are entirely correct, but which, in the concrete, depend upon their adaptability, not to a part, but to the whole, of the testimony. Thus the learned court said: "As Penninah Brodhead furnished the money by the hand of her husband, paid off the whole of the discounted note in bank to Heist, who then assigned the judgment to her, we are of opinion that she is legally entitled to the full ownership of it. She had a right to do this. She was not a mere stranger or volunteer. * * * If it be conceded for the sake of the argument that she was a stranger to the judgment, yet, having paid off the whole debt the judgment was intended to secure, she thereby became by implication the purchaser of the debt, and the equitable owner of the judgment." Now, while this might be altogether true if the judgment had been given to secure the payment of the debt, especially if it had been given by the drawer of the note to his indorser, it might or might not be true when the judgment was given by one who was a co-indorser of that note with the plaintiff. If it was given merely as a security to the co-indorser to protect him against his liability

as an indorser, and not as absolute security for the payment of the debt, the proposition would not necessarily be true, and might not be true at all. The view of the learned judge as to the application of the rule to the testimony before him is expressed in the next sentence of the opinion thus: "But we have, in addition to this, the testimony of S. B. Heist, W. F. Brodhead, and Penninah Brodhead, already alluded to, and contradicted by no one, that the judgment was assigned to Penninah Brodhead to secure her for the money she furnished to pay off the \$900 note in bank. Under this evidence Penninah Brodhead was entitled to conventional subrogation." We are not able to take the same view of the testimony of these witnesses as expressed in the opinion, for reasons which will be hereafter stated; but, if we were, the conclusion does not depend upon that testimony. If, by the terms of the original agreement under which the judgment was confessed, S. E. Heist had no legal right to assign the judgment, as against Esther Tobias, then such assignment, though actually made, and for the purpose stated, would not be obligatory upon her, and therefore would confer no right upon the assignee to enforce it against her. Now, it is just here that we think the learned court fell unwittingly into error from the application of a correct principle to a state of facts which, as we think, did not justify the application of the principle. It is those facts which we will now proceed to consider, premising that the learned judge did not found a judgment upon the insufficiency of the testimony as to the truth of those facts, but rather upon an omission to regard them.

It will be perceived that what we consider of controlling importance in the contention is the question as to what was the agreement upon which the judgment was given. The parties to that agreement necessarily were the plaintiff, S. B. Heist, and the defendant, Esther Tobias. It was the plaintiff who received and the defendant who gave the judgment, and, if there were any terms upon which the transaction was based, those terms would have to be observed, and would bind not only the parties to them, but those claiming under them, or either of them. We are therefore remitted at once to a consideration of the facts and circumstances which constituted the transaction of giving and receiving the judgment in question. The preliminary facts are not in dispute. U. S. Grant Tobias, a son of Esther Tobias, was indebted to the Penn Mutual Life Insurance Company in a sum of ten or eleven hundred dollars, in circumstances which might involve his personal liberty. It was necessary to raise \$900 of this amount at once. W. F. Brodhead, who was his father-in-law, was willing, according to his own testimony, to raise the money by a loan from a building and loan association, but that could not be done for a period of about 30 days, and the practical difficulty was to get the money temporarily, and immedi-

ately. In order to do this, an arrangement was made by which U. S. Grant Tobias was to make his note for \$900 at the Linderman Bank, at 30 days, which was indorsed by Esther Tobias, S. B. Heist, and W. F. Brodhead. The note was discounted by the bank, and the money was paid to the agent of the life insurance company on the 8th day of December, 1893. Heist was one of the sureties of U. S. Grant Tobias on his bond to the insurance company, and he agreed to indorse, and did indorse, the \$900 note. Upon his doing so the judgment in question was given. The person who principally conducted the negotiations which led to the indorsing of the note and the giving of the judgment was U. S. Grant Tobias. He was examined as a witness, and, after describing the interview at which were present Mr. Butterfield, the agent of the insurance company, Mr. Heist and Mr. Murray, the bondsmen of Tobias to the company, Mr. Brodhead, and himself, he said: "It was then suggested by Mr. Butterfield that a note be given in the bank for 30 days for the \$900. Mr. Brodhead said that he would go on that note as one indorser. Mr. Heist and Mr. Murray were then asked if they would go on. Mr. Murray refused. Mr. Heist agreed to go on, but suggested that my mother be called down, and asked whether she would not go on. I then left the office, and went to Upper Mauch Chunk. When I came back from there, I found my mother and sister in my office, and Mr. Brodhead telling my mother what she was called down to the office for. She was told about signing this note. She said she would sign it. Mr. Heist then said to my mother that he would like her to give him a judgment exemption note on her property to secure him as an indorser on this bank note, and when the bank note was paid he would be released, and he would see my mother released. Now, the note in bank was executed, and the money was handed to me in my office, and I paid the money to Mr. Butterfield, and got a receipt in full for all claims due the Penn Mutual Life Insurance Co. The judgment note was then executed. * * * Q. What was the judgment note given to Mr. Heist for? A. That judgment was given to Mr. Heist by my mother to secure Mr. Heist's indorsement on my bank note." Miss Clara E. Tobias, a daughter of the defendant, was examined at some length as to the main facts of the transaction. As to the giving of the judgment she was asked: "Q. When they came back to Grant's office from the bank, when your mamma signed the judgment note, what did they say to her about that? A. Mr. Heist spoke to mamma and I alone. He said, 'Mrs. Tobias, when the note in the bank is paid, I will be released, and I will see you released.' He said, 'This is only given for security for me.' He only asked her for himself. Q. Then your mother signed the judgment? A. Yes, sir; she signed the judgment note." P. F. Murray, one of the bondsmen for U. S. Grant Tobias

to the insurance company, was examined, and testified in relation to the giving of the \$900 note in bank, and as to what was said by Brodhead in regard to his paying it off, and was asked: "Q. Now, about that judgment Mrs. Tobias gave to Heist. What was that given for? What was said at the time? A. Well, if that was the note you have reference to they wanted me to go on, it was given to pay the insurance company shortage,—the bank note. Q. Was there anything said about a judgment being given by Mrs. Tobias to Mr. Heist? A. Yes, sir; Mr. Heist was to be secured by Mrs. Tobias. Q. For his indorsement? A. Yes, sir; so he would be perfectly safe." S. S. Smith, cashier of the Linderman National Bank, testified in regard to the discount of the \$900 note by the bank, and was asked: "Q. There was a judgment note given by Esther Tobias to S. B. Heist? A. Yes. Heist did not want to go on the note, and she gave him a judgment note to secure his indorsement. I remember he had the record examined, to see whether her judgment was good. Q. That note was given to secure him on his indorsement? A. Yes. * * * Q. The judgment note, as you understood it, was given to secure Heist against any claim made on him by reason of this indorsement? A. Yes, sir." Mrs. Esther Tobias, the defendant, was asked: "Q. Then, after you indorsed that bank note, you executed a judgment note to Mr. Heist for \$900? A. Yes, sir. Q. You may state what that judgment note was given for? A. It was to secure Mr. Heist. Q. For what? A. For the note in the bank. Q. What did Heist say to you when he asked you to sign that judgment note? A. He said when the note was paid he would be released, and would release me." S. B. Heist, the plaintiff in the judgment, being examined for the appellee, was asked: "Q. At the time when you agreed to indorse that note in the bank, you took from Mrs. Tobias a judgment note to secure you? A. Yes. Q. That note was given to you to secure that indorsement? A. To secure me, I presume. It was on the strength of that I indorsed the note. * * * Q. That judgment was given to you to secure you for that indorsement on the note in bank, and for no other purpose? A. That is why I went on the note,—because they gave me security I thought sufficient. Q. For the indorsement? A. Yes, sir. Q. That was the only purpose that note was given to you for? A. Yes, sir. * * * Q. You would not have gone on that note as indorser without that security? A. Oh, no." It must now be observed that the foregoing is the whole of the testimony in the cause which relates directly to the fact of the giving of the judgment. It is the testimony of no less than six witnesses, every one of whom was disinterested except the defendant. It is entirely uncontradicted by any witness. It is absolutely uniform in its substance, and it establishes beyond all controversy the proposition that the judgment was given for the one sole, exclusive purpose

of securing Heist, the plaintiff in the judgment, against liability by reason of his indorsement. He so testifies himself. This being so, it must be further considered that it was not given as indemnity against the debt itself; it was not given as security that Grant Tobias, the maker of the note, would pay the note. There was an abundance of testimony in the case that W. F. Brodhead agreed to raise the money to pay off the note, and, as a matter of fact, that is precisely what he did do, and he did actually pay off the note with money which he raised. It is not necessary to consider that testimony in detail now. It is sufficient to say that, while Brodhead claimed that the money was furnished in consequence of Heist's agreement to transfer the judgment, there was no evidence to show that Mrs. Tobias ever agreed that the judgment should be used for any such purpose. Neither Brodhead, nor his wife, nor any one else gave any such testimony. The question, then, recurs, how could Heist, by any act or declaration of his, subject Mrs. Tobias to any liability growing out of such a use of the judgment against her? Most clearly he held it for one specific purpose only, to wit, the protection of himself against any liability arising from the mere fact of his indorsement. That liability never arose. The note was actually paid by another, and he never incurred any liability as an indorser. Therefore he had no claim under his judgment against Mrs. Tobias to indemnify him against anything. How, then, can he confer any right upon Mr. Brodhead or his wife to collect the money on his judgment? As he did not possess such a right himself, he could not transfer such a right to another. The case is very different from the cases in which a debtor gives a security to his creditor as collateral to the debt. There it is no matter to the debtor who holds the collateral, and, inasmuch as it was given to secure the payment of the debt itself, either the creditor, or any stranger who buys the claim of the creditor, can enforce the collateral for his own benefit. But here is a totally different situation. Heist was only subject to a contingent liability at the best. To protect himself against that contingent liability, he took and held the judgment. It was the defendant's right, as well as his (Heist's) right, that the judgment should be used for that purpose. But when the contingency against which the judgment was given never happened, all right to use the judgment was gone. It was a matter of no consequence to Mrs. Tobias where the money came from which paid off the note. It was none of her concern. She was no party to it, and she was just as much entitled to be released from the judgment as Heist was to be relieved from his indorsement. We are quite clear that upon the undisputed testimony the rule to open the judgment should have been made absolute, and an issue awarded to try whether anything, and, if so, what, was due upon the judgment; and if, upon the trial of that issue,

the facts are the same as now appear of record, an instruction should be given to find for the defendant. The judgment is reversed, the rule to show cause why the judgment should not be opened is made absolute at the cost of the appellee, and the record is remitted for further proceedings.

(183 Pa. St. 450)

**HUGHESVILLE WATER CO. et al. v.
PERSON et al.**

(Supreme Court of Pennsylvania. Oct. 11,
1897.)

RIPARIAN RIGHTS—DIVERSION OF WATER—PRESCRIPTION.

The fact that headgates, erected for the purpose of regulating the flow of water into a branch stream so as to preserve uniformity of volume for the use of successive mills along its banks, have for over 21 years been controlled by owners of the upper mill, without regard to the needs of the lower owners, does not give the former a prescriptive right to close the headgates, and divert the water into the main stream, whenever they do not require it for their own use, to the injury of the lower owners, who have had no notice of any claim of right to so interrupt the flow of water.

Appeal from court of common pleas, Lycoming county.

Bill by the Hughesville Water Company and another against Clarissa V. Person and others to enjoin defendants from diverting the water in a stream. From a decree dismissing the bill, in accordance with the report of a master, plaintiffs appeal. Reversed.

W. C. Gilmore and Andrew A. Leiser, for appellants. W. E. Crawford, for appellees.

WILLIAMS, J. This case presents an interesting question. Fortunately the report of the learned master furnishes us with the facts in a very clear and orderly manner, and, if his general theory of the situation and rights of the parties be adopted, his legal conclusions seem well drawn. Let us look first at the relative situation of the parties and their rights as riparian owners. We shall then understand the complaint made by the plaintiffs, and be able to determine the sufficiency of the answer made, and of the theory upon which the case was tried and decided. A considerable stream, known as "Muncy Creek," flows southerly past the borough of Hughesville to the West Branch of the Susquehanna river. Not far from Hughesville its waters are separated, so that for some hundreds of rods a channel carries a portion of the water at some little distance from the main stream, and then returns to and unites with it again. The smaller, easternmost channel was taken possession of by riparian owners for manufacturing purposes early in the present century. Four manufacturing plants have been maintained along it for many years. Those of the defendants are near the beginning of this short channel. That of the plaintiffs is near the place of its return to the main stream. There is another intermediate one,

owned by parties who are not on the record in this case. To increase the flow of water from the main stream through the branch or arm on which the factories were located, a low dam had been thrown across it, the purpose of which was to secure the even flow of a sufficient body of water to the factories to provide them with the power needed. The residue of the water of the stream would pass over the low dam, and follow the bed of the main stream. Headgates were put into the smaller stream above the upper mill or factory, by which, in times of high water, the surplus current would be shut out of it, and turned back into the stream, leaving the volume passing down to the factories practically undisturbed. The dam, the headgates, and the wasteways along the branch, called a "race" by the witnesses, were put in place many years ago. It is not definitely known just when, or under what arrangement, this was done. The upper owners, being near the headgates, were looked to for the care and handling of them for the purposes for which they had been erected,—the regulation of the flow of the water so as to preserve uniformity of volume for the use of the successive factories along its banks. Each of these riparian owners had an equal right to the use of the water, and an equal right to insist that its volume should not be lessened, or its flow interfered with, except as the necessary consequence of its use by owners above him. The upper owner could not turn the water back into the main stream at his own pleasure, and so deprive the lower owners of its use. Such conduct would not be the exercise of his right as a riparian owner, but a wanton disregard of the rights of his neighbors below him. His right was the right to use, not the right to destroy the use of his neighbors; and it is by no means clear that he could acquire a prescriptive right to vex or injure them by practices not connected in any manner with his own use of the water, no matter how long the injurious practices may have been continued. What is acquired by prescription is the right to some benefit, privilege, or property which has been enjoyed so long as to raise a presumption that its enjoyment began in consequence of a grant now lost. The commission of acts injurious to another, and which give to the perpetrator no benefit, privilege, or property, would hardly be justified by the plea that the defendant had habitually for more than 21 years been guilty of doing the same wrong to the same person. Moreover, the occasional exercise of a power over the lands or property of another during a period of 21 years is not enough to make title by prescription or limitation. The exercise of the power must be continuous, uniform, and adverse. The occasional theft of a timber tree from the lands of one's neighbor could not, no matter how long continued, confer a right on the thief to take away a timber tree at his pleasure. If, however, he goes upon his neighbor's land, and

remains in open, continuous, adverse possession for the requisite time, he will acquire title to the land and the timber upon it. There must be something to call the attention of the owner to the adverse claim; such as an invasion of the possession of the land, the assertion adversely to himself of a right, and the like. *Cooper v. Smith*, 9 Serg. & R. 26; *Demuth v. Amweg*, 90 Pa. St. 181; *Dexter v. Tree*, 117 Ill. 532, 6 N. E. 506. In the case of a claim to use the water of a stream it was held in New Jersey that it must appear that the acts that are the basis of the claim were injurious to the plaintiff, and gave to him or those under whom he claims title a right of action. *Holsman v. Bleaching Co.*, 14 N. J. Eq. 335. The alleged user relied upon as furnishing the basis of a title by adverse possession must be adverse, and continued as against an owner who is in life, and *sui juris*. A lunatic, or one under any legal disability, is not affected by an adverse entry or possession. *Reimer v. Stuber*, 20 Pa. St. 462. The same must be said of acts that do not bring to the knowledge of the owner, either actual or constructive, the assertion of any right adverse to him. Neither the clandestine taking of water from a neighbor's well for more than 21 years, nor the taking by his permission for an equal length of time, will confer any right upon the taker. The statute runs from the time when the owner is, or with proper attention to his own property should be, warned of the adverse claim set up.

Let us now ascertain just what is alleged in the bill as the ground for relief. Substantially it is that the plaintiffs are riparian owners upon the branch of Muncy creek which was many years ago supplied with a sufficient and uniform flow of water by means of the dam across the main stream and the headgates in the branch; that they have a right to the uninterrupted flow of the water to and along the banks of the branch on which they have valuable machinery and buildings erected to supply the borough of Hughesville with water and with electric light; that the defendants interrupt this uniform flow of the water down the branch to them by practically closing the headgates above their mills, thus turning the water, when not wanted by themselves, back into the main stream; that in consequence of this practice, and of an increase in the height of the wasteway by the use of a splash board upon it, the flow of the water is so reduced as to render it impossible at times for them to move their machinery, or make any use of the small amount of water that is permitted to flow down to them. This, if true, is a serious injury to the plaintiffs, for relief against which they have a clear right to come into a court of equity. The defense rests upon a claim of right which the master seems to adopt. In his ninth finding upon controverted questions of fact he reaches this conclusion: "That the defendants, and those under whom they claim, for a period of twenty-one years and upward before the time of filing the

bill in this case, have controlled and operated the headgates above their plants according to the necessities of their mills, and without reference to the needs of the lower owners on the stream." The legal conclusion which the decree requires should follow is that, because the defendants have paid no attention to the rights of riparian owners below them heretofore, they have now acquired the right, as matter of law, to disregard them for all time to come. There is nothing on this record to justify such a conclusion, and it is wholly unwarranted. The character of the business done at all four of these manufacturing establishments prior to the purchase by the plaintiffs may have been such as to require the flow of the stream only in the daytime. The turning it back into the main stream at night may have been of no consequence to any of them, and may not have attracted attention for that reason. They all had the right to the flow of the stream by night as well as by day, if it was important to them; and until it did become important there was nothing to call their attention to the claim of right now set up by the upper owners to turn it back. But turning the water back is not a use of the stream; it is an obstruction of it. It does him who makes the obstruction no good. It does great harm to any lower owner who wishes to use the flow of the stream, as he has a clear right to do, for propelling his machinery. If a right to do wrong to others could be acquired by limitation, the period of limitation would not begin to run in this case until the lower owner could be fixed with notice of the claim of the owner above him to withhold from him the uninterrupted use of the stream. No evidence of such adverse act to the plaintiffs or their predecessors in title is pretended. It is said that the water was but little used by the predecessors of the plaintiffs for some years before their sale to them. This is wholly unimportant. The right of user to the extent of all the water flowing, whether by night or day, existed, and by the sale passed to and vested in the plaintiffs. The volume passing down to the plaintiffs when the headgates were open was, as appears by the testimony, equal to 3,363 square inches. With the gates as they were kept by the defendants for considerable periods of time, this was reduced to 892 square inches, or about one-quarter the amount of water which the stream was capable of furnishing. The disastrous effect of such a reduction of the supply at the plaintiffs' works is apparent. The fact that such a reduction has been made at times is not seriously denied. On the other hand, the right to make it, and to handle the headgates as the defendants please, is the only serious effort at defense that the case discloses. It must not be overlooked that the right claimed by limitation here is not a right to use, by the defendants, for their own benefit or profit, the waters of the stream as they come to them, but the right to obstruct their flow, and so to destroy

the title of the lower riparian owners. This appears very clearly by the declarations of Mr. Person, one of the defendants. When asked by John Andrews, one of the witnesses, why "he did not give the boys water last night," his reply, not denied by himself when on the witness stand, was, "I don't care a d—n whether Hughesville has light or water." This was an admission of his shutting off the stream at the headgates, and a declaration that he did not care for the consequences to others of his conduct in so doing. For such conduct the only justification set up is the assertion of a right thus to destroy the business of his neighbors, and subject the public to the consequent inconvenience and injury. Such a right, if it could have an existence, would not be readily accepted in a court of equity, which is a court of conscience; and would not be tolerated as a defense for the conduct alleged in this case, unless every requisite of a title by limitation was shown with the utmost clearness and certainty. If all this was done, there yet remains the question whether a mere right to do wrong, without advantage to the wrongdoer, can be acquired by any lapse of time. The decree is reversed, the preliminary injunction is restored, and the record remitted for further proceedings in accordance with this opinion; the costs of this appeal to be paid by the defendants.

(183 Pa. St. 283)

KEEBLER et al. v. SHUTE.

(Supreme Court of Pennsylvania. Nov. 10, 1897.)

PROBATE COURT — CERTIFYING SPECIAL ISSUES — ANSWERS OF JURY.

1. The orphans' court, in certifying issues into the common pleas, should not present the same question by different issues; as, whether testator had testamentary capacity, and whether he had a full and intelligent understanding of the nature of the will and the dispositions it contained.

2. Questions contained in issues certified by the orphans' court to the common pleas should be answered separately by the jury.

Appeal from court of common pleas, Allegheny county.

Action by Elizabeth Keebler and others against Martha Louisa Shute to determine validity of the will of Jacob Keebler, deceased, which defendant questioned, and of which plaintiffs were the beneficiaries. Judgment for defendant. Plaintiffs appeal. Affirmed.

J. S. & E. G. Ferguson, Kirk Q. Bigham, and E. H. Moore, for appellants. Albert H. Moeser and James E. O'Donnell, for appellees.

WILLIAMS, J. The will of Jacob Keebler was executed by him on the 24th June, 1891. He died in 1894, and his will was presented for probate. The testimony of the subscribing witnesses was of such a character that the register hesitated about granting letters

testamentary, and, when he did so, an appeal was at once taken to the orphans' court. After a hearing, that court framed four issues of fact, and certified them into the common pleas for trial before a jury. These were: First, "whether the said Jacob Keebler in fact signed and executed the said paper writing," which had been presented to the register as his last will and testament; and, if so, then, second, "whether at the time of signing said paper writing the said Jacob Keebler had testamentary capacity." The third issue was "whether there was undue influence used to procure the execution by the said Jacob Keebler of said paper writing." The fourth and last issue was to determine "whether the said Jacob Keebler had a full and intelligent understanding of the nature of said paper writing, and of the dispositions it contained." The first of these issues was submitted to the jury with an expression of opinion by the court that "the great weight and strength of the evidence" was in favor of the execution of the will by the testator. The third was withdrawn from them by a blinding instruction "that there is no evidence in this case whatever of undue influence." This left the question of testamentary capacity, which was raised distinctly by the second issue, and repeated with a slight change of phraseology in the fourth. Upon this question the charge of the learned judge was clear, impartial, and adequate. He carefully instructed the jury what constituted testamentary capacity, and directed their attention in a general way to the evidence relating to the mental condition of Keebler at the time of the execution of his will, telling them that whether testamentary capacity existed at that time or not was for them to determine from the evidence before them. Whether the jury reached a wrong conclusion is not a question for our examination upon this record; but we are satisfied that the learned judge did his full duty in furnishing them with the legal rules by which they were to be governed in reaching a verdict.

There are two questions of practice, however, about which a few words seem to be needed, and this is a proper place in which to say them. First. The fourth issue certified into the common pleas in this case is wholly superfluous. The second covered the whole ground. If testamentary capacity is found to exist, it is all the law requires. A repetition of the question in different phraseology is not only unnecessary, but is calculated to cause confusion, and to embarrass the trial judge in his effort to present the subject clearly and concisely to the jury. It should be omitted. Second. It is better that the jury should answer the questions propounded by the orphans' court separately. Thus, in answer to the question contained in the first issue, they could say: "The jury find upon the first issue in favor of the plaintiff" (or defendant, as the case may be).

"Upon the second issue the jury find in favor of the plaintiff" (or defendant). "Upon the third issue the jury find in favor of the plaintiff" (or defendant). In this way the exact findings upon the several issues can be returned to the orphans' court, and the ground on which the judgment finally rendered depends will be definitely shown by the record. Concurring in the opinion of the learned judge in this case, we affirm the judgment appealed from.

(183 Pa. St. 142)

NUGENT v. PHILADELPHIA TRACTION CO.

(Supreme Court of Pennsylvania. Nov. 10, 1897.)

APPEAL — ENTERING SUCH JUDGMENT AS LOWER COURT SHOULD HAVE RENDERED—CONSTITUTIONAL LAW—TRIAL BY JURY.

1. Where the supreme court reversed a judgment for plaintiff, which rested on a mistake of law by the trial court, but declined to award a new trial, because the evidence disclosed no cause of action, the judgment of reversal may be amended by adding thereto a formal judgment for defendant, pursuant to Act May 20, 1891, § 2, authorizing the supreme court to affirm, reverse, amend, or modify a judgment as it may deem proper and just, without returning the record to the court below.

2. Such act is not unconstitutional, as infringing on the right of trial by jury.

Action by Patrick Nugent against the Philadelphia Traction Company. A judgment for plaintiff was reversed by the supreme court (37 Atl. 206), and defendant moves to amend the judgment of reversal. Motion granted.

Harvey K. Newitt, for plaintiff. Thomas Leaming, for defendant.

WILLIAMS, J. This is an application to this court to amend the judgment of reversal entered in this case by adding thereto a formal judgment in favor of the defendant, under the authority conferred by Act May 20, 1891, § 2. The provision referred to declares that "the supreme court shall have power in all cases to affirm, reverse, amend or modify a judgment, order or decree appealed from and to enter such judgment, order or decree in the case as the supreme court may deem proper and just, without returning the record for amendment or modification to the court below, and may order a verdict and judgment to be set aside and a new trial had." This phraseology is comprehensive enough to authorize the entry of the amended judgment now asked for. Two preliminary questions require a brief consideration: First. Is the act constitutional? Second. Ought the judgment to be entered upon a consideration of the merits of the case?

The general question of the constitutionality of the act was before us in *Smith v. Publishing Co.*, 178 Pa. St. 481, 36 Atl. 296, in which we held, after full consideration, that it did not infringe upon the right of trial by jury, and was constitutional. In that case the assignments of error to the rulings of the court

below were not sustained, but we reviewed the exercise of the discretionary powers of the court in the refusal of a new trial, and, finding such action to have been an abuse of discretion, we set aside the verdict and judgment, and ordered a new trial to be had. What is now asked is that, as this court "deemed it proper and just" to refuse a *venire facias de novo* because no cause of action was disclosed by the evidence, it should make an end of the contention by entering a formal judgment for the defendant. The whole case is before us. It shows that the plaintiff ought not, either as matter of law or as a matter of justice, to maintain his action, and we know of no rule of public policy, nor of any constitutional guaranty, that should prevent our saying so.

Second. Is the amendment one that ought to be made? The recovery rested on a mistake of law by the court below. We have corrected the mistake, and reversed the judgment for that reason; but we have declined to award a new *venire*, because, on the evidence, the plaintiff was himself responsible for the injury he received. We do therefore, by allowing this amendment, what the court below should have done. We apply the correct rule of law to the established facts of the case, and enter the judgment to which the defendant is entitled, and which the act of 1891 expressly authorizes. The motion is granted. Let judgment be now entered in favor of the defendant *nunc pro tunc* as of the date of the judgment of reversal heretofore entered.

(183 Pa. St. 179)

YOUNG v. DOHERTY.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

ACTION ON NOTE — EVIDENCE — PRESUMPTION OF PAYMENT—LAPSE OF TIME.

1. In an action on a sealed note, the note itself was properly admitted, after its genuineness had been sworn to by several witnesses and denied by none, though it was not signed on the line with the seal at the end, provided in the printed form, but below, with an added scroll for a seal.

2. In an action by the payee on a sealed note, with warrant of attorney to confess judgment, purported to have been executed by defendant's testator 16 years before his decease, evidence that plaintiff frequently boasted of claims which he held against different persons, but never alluded to the note in suit during testator's lifetime; that he was prompt to enforce payment of debts due him, and that he had often attempted to enforce unjust demands,—was not admissible, in connection with the lapse of time, to support a presumption of payment.

3. Nor was it competent to show from the records that plaintiff had not returned said note for purposes of taxation, it appearing that no return was ever made by him.

Appeal from court of common pleas, Westmoreland county.

Action by A. H. Young against Phillip Doherty, executor of Henry Snyder, deceased, to recover on a note. From a judgment for plaintiff, defendant appeals. Affirmed.

The note was under seal, contained a warrant of attorney to confess judgment, and was signed, not on the line with the seal at the end, provided in the printed blank, but below the same, with an added scroll for a seal. The charge of the trial court and defendant's specifications of error were as follows:

Charge of the Court.

"Gentlemen of the Jury: Although this case involves a large sum of money, it comes down to a single question of fact, which is a matter for your determination under the evidence which you have heard. The suit is on a note. The note is under seal, and is dated on the 27th of September, 1878, payable in six months after the date thereof, and signed, as alleged by the plaintiff, by Henry Snyder, whose executor is the defendant in this action. The plaintiff, in order to make out his case, calls several witnesses. Four witnesses are called upon the question, and the only question, of fact involved in the case. Three of these had a personal acquaintance with Henry Snyder in his lifetime. They testify that they were familiar with his handwriting; that they had acquired familiarity with his signature by having business transactions with him, and by seeing him write; and these three witnesses all testify that, in their opinion, this is the genuine signature of Henry Snyder. In addition to this, the plaintiff calls one J. B. Flack, who is an expert in handwriting. After an examination of this paper, and after a comparison of it with admittedly genuine signatures, he testifies that, in his opinion, this signature is genuine, and not forged. After the introduction of this testimony, the plaintiff offers the note, which is admitted in evidence. In answer thereto, there is no testimony on the part of the defendant expressing an opinion different from the opinion given by the witnesses on behalf of the plaintiff. There are admitted, however, a number of papers bearing the signature of Henry Snyder. These are admittedly genuine. A great many have been offered on behalf of the plaintiff, and a great many others—being checks, we believe—are offered on behalf of the defendant. These all contain the genuine signature of Henry Snyder, according to the admission of both parties; and, being admitted in the case, they are also for your consideration in connection with the other testimony which you have heard; and it is for you to take into consideration the evidence that bears upon this question, and take into consideration and make a comparison of this paper in suit with the admittedly genuine signatures of Henry Snyder, and then to determine whether or not this is genuine. The defendant, as we have said, in answer to this, calls no witnesses at all to give any opinion,—neither those who are familiar by long acquaintance or association with Snyder, nor any experts to give an opinion as to the genuineness of this

signature. The defense is that there is presumption of payment. The law fixes the period of twenty years where a presumption of payment arises about an instrument such as this. After a period of twenty years, there could be no recovery. Sometimes, however, a presumption of payment arises in a less period than twenty years; as, for instance, if it were shown that the plaintiff were in needy circumstances, and that the defendant was abundantly able to pay, the inference would naturally arise from such circumstances that some demand or effort to collect the note would have been made at a much earlier period than within sixteen years, which is about the time that has elapsed since this suit was instituted. But there is no evidence in this case to show any circumstances that would justify any such inference in this case. There is some evidence which was introduced to show the receipt of money, or the payment of money by D. C. George to Henry Snyder, but this standing alone proves nothing. It does not establish the fact that Henry Snyder is a man of abundant means; and, even if it did establish that fact, standing alone it would prove nothing that would raise the presumption that this instrument was paid. This is about all that is in the case. There is a single, simple proposition for your determination, and that is whether this is the genuine signature of Henry Snyder. If so, the plaintiff is entitled to recover the face of the note, with interest thereon from the 27th day of September, 1878. In determining that question, you must have recourse to the evidence which you have heard, and, after carefully reviewing it, decide that question. If you decide that it is the genuine signature of Henry Snyder, find a verdict for plaintiff for the amount of his claim. If the signature is not the genuine signature of Henry Snyder, your verdict ought to be for the defendant.

"On behalf of the plaintiff we are asked to say: '(1) Under all the evidence and the law in this case, we direct you to return a verdict in favor of the plaintiff for the amount of the note, with interest.' Answer: As we have intimated in our general charge, we cannot affirm this proposition, because we believe that under all the evidence the question remains for your determination. You may retire."

Specifications of Error.

"(1) The court erred in charging the jury as follows: 'There is a single, simple proposition for your determination, and that is whether this is the genuine signature of Henry Snyder. If so, the plaintiff is entitled to recover the face of the note, with interest thereon from the 27th day of September, 1878. In determining this question, you must have recourse to the evidence, which you have heard, and, after carefully reviewing it, decide that question. If you decide that it is the genuine signature of Henry

Snyder, find a verdict for the plaintiff for the amount of his claim.'

"(2) The court erred in its answer to the plaintiff's point for charge; the point and answer thereto being as follows: Plaintiff's point: '(1) Under all the evidence and the law in this case, we direct you to return a verdict in favor of the plaintiff for the amount of the note with interest.' Answer: 'As we have intimated in our general charge, we cannot affirm the proposition, because we believe that under all the evidence the question remains for your determination.'

"(3) The court erred in admitting the note in evidence, against the objection of defendant; the objection and ruling thereon being as follows: 'The note in suit is offered in evidence. (Objected to, because upon its face it purports to have been signed by Snyder as surety, and the absence of the signature in the customary place is not explained.) By the Court: Objection overruled. (Exception for defendant. Bill sealed.)'

"(4) The court erred in excluding the testimony of James McCabe and other witnesses to the fact that Young, in Snyder's lifetime, never claimed to have a note against Snyder, although given to boasting of his means and the people in his debt; the offer and ruling thereon being as follows: 'James McCabe sworn. Defendant's counsel propose to prove by the witness on the stand and other witnesses that he is an intimate friend or acquaintance of the plaintiff, and has been such for a number of years; that plaintiff has frequently boasted of claims that he had against different people, but never alluded to note in suit until after the death of Henry Snyder. This, with other facts and circumstances, for the purpose of submission to the jury to presume the fact of payment. (Objected to as incompetent and irrelevant.) By the Court: Objection sustained. (Offer overruled. Exception for defendant. Bill sealed.)'

"(5) The court erred in excluding defendant's offer of evidence to show the character of the plaintiff respecting the collection of his claims. The offer and ruling are as follows: 'We propose to prove by the records the fact that plaintiff, Young, has entered in this court a great number of judgments and brought suits for the purpose of securing and enforcing payment of debts due him. This, coupled with the fact that he failed to enter the note in suit, to show that he made no claim to any indebtedness during the lifetime of the decedent; this fact to be shown in connection with other facts and circumstances to be submitted to the jury, upon which they would be justified in presuming the fact of payment. (Objected to as incompetent and irrelevant.) By the Court: Objection sustained. (Offer overruled. Exception for defendant. Bill sealed.)'

"(6) The court erred in excluding defendant's offer to show the fact that plaintiff, Young, had frequently endeavored to enforce at law the collection of unjust and unconscion-

able claims; the offer and ruling thereon being as follows: 'By Mr. Williams: I desire to prove by A. Shumaker and other witnesses that the plaintiff in this case, not content with trying to enforce valid claims, is in the habit of endeavoring to enforce unjust ones,—equally as unjust as we believe the note in suit to be,—for the purpose of showing the habit and practice of the plaintiff. This, with other circumstances, to justify the jury in presuming the fact of payment. (Objected to as incompetent and irrelevant.) By the Court: Objection sustained. (Offer overruled. Exception for defendant. Bill sealed.)'

"(7) The court erred in excluding defendant's offer to show by the records in the commissioners' office the failure of plaintiff to make return of the note in suit for purposes of taxation; the offer and ruling thereon being as follows: 'Defendant's counsel offer the records in the commissioners' office for the purpose of showing that the plaintiff never returned the claim in suit for purposes of taxation since 1835. (Objected to as incompetent and irrelevant, and for the further reason that a disclosure of the records will show that the plaintiff never made any return.) By the Court: Objection sustained, on the ground that the record shows that no return was made by plaintiff. (Offer overruled. Exception for defendant. Bill sealed.)'

Williams, Sloan & Griffith, for appellant.
Galther & Woods, for appellee.

PER CURIAM, There was no error in charging the jury as recited in the first specification, nor in answering the point quoted in the second specification. The note referred to in the third assignment of error was rightly admitted. The subjects of complaint in the remaining four specifications are the rejection of the several offers of evidence specified therein. Each of these offers was rightly excluded. If evidence such as that proposed was received and submitted to a jury, the security of sealed instruments would be greatly impaired, if not entirely destroyed. The case was carefully and correctly tried. We find nothing in any of the specifications that would justify a reversal of the judgment. Judgment affirmed.

(183 Pa. St. 186)

FRAZER et al. v. LINTON.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

WITNESS—CORROBORATION—DECLARATIONS OUT OF COURT—PARTNERSHIP—DIVISION OF PROFITS.

1. Statements made by a party to a suit before there was any likelihood of a controversy are incompetent to corroborate his testimony, where his credibility is not assailed.

2. An arrangement whereby parties are to cooperate in securing a sale of land, on which one of them holds an option, and share in the profits, constitutes a partnership agreement.

3. In the absence of any provision in a partnership agreement as to division of profits, the presumption is that they are to be equally divided.

Appeal from court of common pleas, Allegheny county.

Bill by W. E. Frazer, Jr., and others, against Robert J. Linton for a partnership accounting. From a decree for plaintiffs, defendant appeals. Affirmed.

The following are the finding of facts, law of the case, decree of the trial court, and the assignments of error:

Finding of Facts.

"Some time during July, 1895, W. Y. Parkinson and W. E. Frazer met together, and had a conversation about procuring options on some coal in the Fourth pool of the Monongahela river. It was then agreed between them that Parkinson would look the matter up after he returned from a trip he was then about to make. When he returned, he went to Robert Linton, the defendant, who was in the glass business at Belleverson, and talked to him about coal, and asked if he knew of any that could be bought. Linton said he did, and spoke of coal belonging to McKee, and also other coal. Parkinson told Linton that he had some parties in town who had a purchaser for some coal. Linton said he thought the coal was optioned, but wasn't certain. He could look the matter up, and let Parkinson know about it. On the 3d of August, 1895, Linton sent Parkinson, who was then in Kittanning, a telegram, saying, 'Have secured option to August 15th.' About the 10th of August, Parkinson arrived at his home, in West Elizabeth, and in a day or two received the letters dated August 10th and August 12th (Exhibits 3 and 4), from Linton. In the first he says:

"I saw Mr. Phillips this morning. He is coming to Belleverson Monday, and we are going out to see Montgomery, if he [Montgomery] will sell for 200 dollars per acre. He will, but not less. Will wire you Monday p. m. If I get these two pieces, it might be best to meet in Pittsburg, Monday night, at Seventh Avenue Hotel and make an arrangement. Write me about this.'

"In the second (Exhibit 4) he says:

"Your postal of the 10th received. Do not think it would be wise to see Brown about extending until the parties come up. Make your arrangements to come Wednesday, sure; and, after examining the property, I will promise to get sufficient time. I am going out with Mr. Phillips to Montgomery's this morning, to get their option, if possible, from them. Don't think they will do better than \$200 per acre. This will make it cost us \$115 per acre, if Brown puts his 80 acres at \$100. Think we can put it in at \$140. This will make \$30,000 for us. Wire on receipt of this, if you can come Wednesday. Yours, truly, R. J. Linton.

"P. S. You might say to your people that

they must come Wednesday, sure, as there is another party after it, and I will not wait longer. If they are anxious for the property, this will hurry them up. In case they could come to-morrow, it will suit as well. R. J. L.'

"In answer, Parkinson telegraphed Linton, August 12, 1895, 'Meet me at Seventh Avenue Hotel at 8:30 p. m. this evening.'

"Parkinson and Linton, when coming to Pittsburg in pursuance of this arrangement, met on the cars, and came to Pittsburg together, and had a conversation about the option, the substance of which was that it would be necessary to get somebody up there (Belleverson) to get an extension of the option,—'that it was about expired.' The same evening, Linton, Frazer, and Parkinson met at the Seventh Avenue Hotel, and there it was understood and talked about that the option held by Linton on the Brown and McKee land, taken at the suggestion of Parkinson, was about to expire, and that somebody should go upon the field right away, as soon as he could be gotten, in order to get an extension of time. Frazer said that it was rather short notice, but he would do the best he could to get the party up there. There was also some figuring done, and the prospective profits talked about, but no arrangement made as to what share each should receive. Frazer said he thought he could get a party to go up the next or following day, and Linton agreed to meet him and show him over the ground. In pursuance of this arrangement, Frazer, through H. W. Strickler, got Daniel McWilliams to take the matter in hand, with a view to obtain a purchaser for the coal for which Linton held the option, and which was the subject-matter of the arrangement entered into at the Seventh Avenue Hotel. Frazer sent word to Linton that McWilliams would be up on the 14th. On the 15th, McWilliams went to Belleverson with a letter of introduction from Frazer to Linton, and there met Linton; and the two went to Brown's house together, and after an interview with him the option of purchase was extended. After this Frazer seems to have been dropped by defendant out of any actual participation in the subsequent proceedings. It was understood by all the parties to the suit that McWilliams was not himself a proposed purchaser, and that he was only acting as agent for others. On August 16th, Parkinson writes to Linton: 'McWilliams has moved out of town, and could not learn of his address, but left word for him to meet me at 10 a. m. Will wire you Monday, if anything new. I feel confident that we can sell the coal.' The negotiations were started through McWilliams, with the co-operation of Parkinson, Frazer, and Linton; and by this means the option held by Linton on the Brown land was extended, and ultimately a purchaser secured. It is true that, to secure the co-operation of McWilliams, Linton

was induced to allow him one-half of the profits (see Exhibit No. 16, dated October 5, 1895); and Parkinson, by his letter of August 19th to Linton, showed a disposition to turn his back on Frazer. Parkinson and Linton, however, continued for some time thereafter acting and working together to secure a purchaser for the coal. Parkinson's last letter on the subject was dated August 30th (Exhibit 10). After this date, Linton and McWilliams conducted the negotiations, entirely ignoring both Frazer and Parkinson, obtained a renewal of option of the Brown and McKee tract, but with terms somewhat different from the original option, and finally a sale was consummated. It is true that, to accomplish this end, there were changes made in the terms of the original option, and some additional coal optioned or contracted for by Linton, and put into the transaction, to secure the purchaser represented by McWilliams; and through this means (through the intervention of McWilliams) a sale of the lands was made to a certain Johnson Coal Company at prices in advance of the prices fixed in the said options, and defendant realized considerable profit therefrom. There is no evidence that Linton at any time during the negotiations for sale of the coal notified either Parkinson or Frazer that they were no longer in the transaction, or that he desired or he intended to conduct the transactions upon his sole responsibility, or that they were no longer to be interested in the transaction."

Law of the Case.

"We think the evidence sufficiently shows that the plaintiffs and defendant, by agreement, entered into an arrangement by which their labor and skill were engaged in a common enterprise; and that they were to divide the profits therein constitutes, as between them (Parkinson, Frazer, and Linton), a partnership therein. In pursuance of this arrangement the parties began to operate to secure the land contemplated. Frazer, through Strickler, induced McWilliams to go to see the land. Linton meets him, and they go together to Brown, and get an extension of the option. Parkinson is in constant communication with Linton in regard to the matter till August 30th. And then it appears that Linton, without communicating the facts to either Frazer or Parkinson, undertook to conduct the business thereafter upon his own responsibility and in his own way, ignoring entirely the rights of Parkinson and Frazer, and with the intention of securing all the profits of the joint enterprise to himself. This, we think, he had no right to do, and that he is therefore liable to account to Parkinson and Frazer for one-half of the profits of the transaction which he made. It might be for two-thirds, but as plaintiffs only claim one-half of the net profits in their bill, and Linton avers that the arrangement made at the Seventh Avenue Hotel, while it differs radically from that alleged by plain-

tiffs in other respects, was upon the basis of one-half of the profits to him and one-half to the others, we adjudge that defendant account for only one-half of his net profits. We are of the opinion, however, that there is no evidence justifying the conclusion that H. W. Strickler ever was in any sense a partner with defendant, and therefore the bill is dismissed as to him. The points to which answers are attached, submitted by plaintiffs, are affirmed, except so far as affects H. W. Strickler. So far as he is concerned, the first point is refused. Let a decree be prepared, sec. reg., directing defendant to pay W. E. Frazer, Jr., and W. Y. Parkinson, plaintiffs to this suit, the one-half of \$1,004.74, with interest thereon from April 1, 1896, payable forthwith, and also the one-half of the amounts now paid or hereafter received by defendant on account of the four notes received by him from the Johnson Coal Company on account of his share of profits arising out of the sale of coal lands described in plaintiffs' bill from them to him, as the said notes mature and are paid to defendant."

Decree.

"And now, October 26, 1896, this cause having been fully heard by the court upon bill, answer, and evidence produced, and argued by counsel, and the court having found and declared that a partnership was formed and existed between the plaintiffs, W. E. Frazer, Jr., and W. Y. Parkinson, and the defendant, Robert J. Linton, for the sale of certain coal lands, and that the profits derived from such sale by defendant amount to the sum of five thousand and twenty-three and $70/100$ dollars, of which defendant has received the sum of \$1,004.74, and has also received four notes of the Johnson Coal Company, each for the sum of \$1,004.74, with interest, payable in one, two, three, and four years, respectively (said four notes being secured by mortgage of the said Johnson Coal Company against coal lands in Fayette county, Pennsylvania); and the court having further found and declared that the defendant was liable to the plaintiffs for the one-half of the said profits, to wit, the sum of twenty-five hundred and eleven and $85/100$ dollars (\$2,511.85),—it is therefore ordered and decreed that the defendant forthwith pay the plaintiffs the one-half of the cash received by him aforesaid, to wit, \$502.37, with interest from April 1, 1896, and that the defendant also pay to plaintiffs the one-half of the amount now paid or hereafter received by defendant on account of the four notes received by him from the Johnson Coal Company on account of his share of profits arising out of the sale of coal lands described in plaintiffs' bill, from time to time as the said notes mature and are paid to him; and it is further ordered and decreed that defendant pay the costs of this proceeding."

Assignments of Error.

"First. The court below erred in affirming the plaintiffs' first point, which point and the

answer thereto are as follows, to wit: 'The arrangement entered into between the plaintiffs and the defendant for the sale of the coal and division of the profits constituted a partnership for a single transaction; the parties being the plaintiffs, W. E. Frazer, W. Y. Parkinson, and H. W. Strickler, and the defendant, R. J. Linton. Affirmed, except as to Strickler.' Second. 'The court below erred in affirming the plaintiffs' second point, which point and the answer thereto are as follows, to wit: '(2) There having been no definite arrangement as to the division of the profits, the presumption of law would be that the profits were to be equally divided; and the plaintiffs, among themselves, being jointly interested, and their joint interests being represented by the plaintiff Frazer at the making of the agreement, plaintiffs are jointly entitled to one-half of the profits, and defendant is entitled to the other one-half. Affirmed.' Third. 'The court below erred in affirming the plaintiffs' third point, which point and the answer thereto are as follows, to wit: '(3) The defendant, Linton, is liable to the plaintiffs for one-half of the profits realized by him, being the sum of \$2,511.85. Affirmed.' Fourth. 'The court below erred in entering the following decree, to wit: [Setting out decree.] Fifth. The court erred in not entering a decree dismissing the plaintiffs' bill. Sixth. The court below erred in excluding appellant's offer of testimony by Levi J. Jeffries, as follows: 'Counsel for defendant proposes to prove by the witness on the stand, for the purpose of corroborating the defendant by a statement of his declaration to the witness prior to any difference between him and the plaintiff, or the moving of litigation here, that within a day or two after August 12, 1895, the date of the alleged agreement at the Seventh Avenue Hotel, the defendant told the witness, as his confidential business adviser, the agreement that he had made with the plaintiff and Parkinson at the Seventh Avenue Hotel on August 12, 1895, and what the terms of that agreement were, and particularly that the plaintiff and Parkinson had a purchaser, who was mentioned as the Browns, of Buffalo, or Brown Bros., of Buffalo, at the price of \$140 an acre, and that the agreement was, in the event of the plaintiff and Parkinson producing that purchaser at that price, that the defendant, Frazer, and Parkinson were to share the profits equally between them, one-third to each, and that the profits so to be divided would be in the neighborhood of \$40,000.00. (Objected to as incompetent. Objection sustained and bill sealed for defendant.)'

D. F. Patterson, for appellant. R. B. Petty, for appellees.

PER CURIAM. We find no error in the decree, or in the rulings of the court leading up thereto. The defendant's offer, covered by the last specification, was rightly excluded for the reason that the proposed testimony was

incompetent. On the facts properly found by the court, there was no error in affirming the points quoted in the first three specifications, or in entering the decree set out at length in the fourth specification. There is nothing in any of the questions presented by the record that requires discussion. Decree affirmed and appeal dismissed at appellant's costs.

(183 Pa. St. 213)

WOELFEL v. FEDERAL ST. & P. V. PASS. RY. CO.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

TRIAL—TAKING CASE FROM JURY.

Judgment cannot be disturbed, the only error assigned being the refusal to charge "that under all the evidence * * * the verdict should be for the defendant," and there being testimony from which all the material facts could be found for plaintiff.

Appeal from court of common pleas, Allegheny county.

Action by Mollie Woelfel against the Federal Street & Pleasant Valley Passenger Railway Company for death of plaintiff's husband, killed by a collision between his wagon and one of the cars of defendant. Judgment for plaintiff. Defendant appeals. Affirmed.

Stone & Potter, for appellant. J. A. Langfitt, for appellee.

PER CURIAM. The only error assigned in this case is the refusal of the court to charge, as requested in defendant's point, "that under all the evidence * * * the verdict should be for the defendant." There is nothing in the record to sustain this specification. On the contrary, it clearly appears that there was testimony, bearing on the questions of fact in issue, which it was the plain duty of the court to submit to the jury; and that was accordingly done, with instructions to which no exception appears to have been taken. The result was a verdict in favor of the plaintiff, impliedly finding that the material facts were as claimed by her. In view of all the testimony, it would have been plain error to have withdrawn the case from the jury by affirming the point in question. There is nothing in the case that requires discussion. The specification of error is dismissed and the judgment affirmed.

(183 Pa. St. 196)

BOYD v. BOROUGH OF WILKINSBURG.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

STREET IMPROVEMENTS—ASSESSMENT OF BENEFITS—EVIDENCE.

A property owner who appeals from an assessment of benefits for the cost of a street improvement, and admits that the improvement as a whole has benefited his land to the amount assessed against it, cannot show that such property was not specially benefited by the improvement of a part of the street not adjoining the same.

Appeal from court of common pleas, Allegheny county.

Appeal by Louise A. Boyd from an assessment of benefits made against her property by a board of viewers, upon the improvement of a street in the borough of Wilkinsburg. The court directed a verdict for the borough, and said property owner appeals. Affirmed.

Following are the specifications of error, and the charge of the trial court:

Specifications of error: "First. The court erred in refusing plaintiff's offer, which offer and refusal was as follows, viz.: 'Counsel for plaintiff offers to follow the foregoing offer by evidence showing that the cuts made upon these several properties were of no peculiar or special benefit to the property of Mrs. Louise A. Boyd. (Objected to.) The Court: The objection is sustained. We will permit the plaintiff here to show that her property was not specially benefited to the amount assessed against her, but we do not think that the offer made, as made, is competent for that purpose, or is the proper way to show that fact. To which ruling of the court counsel for plaintiff requests an exception. Exception allowed and bill sealed.' Second. The court erred in refusing plaintiff's offer, which offer and refusal was as follows, viz.: 'Counsel for plaintiff proposes to show that the result of the action of the viewers in assessing benefits for damages awarded by reason of changes of grade along the line of the improvement was to prorate the damages allowed as benefits upon all the properties abutting upon the whole length of the improvement, with allowance for flankage and variance in depth of lots. (Objected to as incompetent and irrelevant in this issue.) The Court: Objection sustained. To which ruling of the court counsel for plaintiff requests an exception. Exception allowed and bill sealed.' Third. The court erred in sustaining an objection to the following evidence of S. H. McKee, a witness produced on behalf of plaintiff, viz.: 'Question. Mr. McKee, you have stated that you were acquainted with the properties abutting upon the line of the improvement of Hill avenue before and after the improvement, and their relative positions with reference to the improvement, as to grade. I wish you would state whether or not, in your judgment, the change in the grade of Hill avenue between— Or do you know whether or not there was a change on Hill avenue between Coal and Center streets in connection with this improvement? Answer. I know there was a cut in Hill avenue, but I don't know whether you would call it a change of grade, at the upper end of Hill avenue. Question. Between Center and Coal? Answer. Between Center and Coal. But whether it was a change in grade or not, I don't know. It was a change from the original contour of the ground. Question. Well, Mr. McKee, if that was a change of grade between those points connected with this improvement, was that change of grade on

Hill avenue between Center and Coal streets of any special or peculiar advantage to the property of Mrs. L. A. Boyd? (Objected to as incompetent and irrelevant.) The Court: Objection sustained. To which ruling of the court counsel for plaintiff requests an exception. Exception allowed and bill sealed.'"

Oral charge of the court: "In this case it is conceded by counsel that it has practically resolved itself into a question of law; that is, that the rulings of the court with regard to the principles upon which this matter is to be decided have settled what your verdict should be. The counsel for plaintiff here admits the truth of the testimony of the witnesses to the effect that, regarding this whole improvement, there is a peculiar benefit to the plaintiff's property to the amount of the assessment, \$1,473.94. He maintains that he has a right to separate the two portions of the street, and maintains that there is part of this improvement, which perhaps was the most costly part, which does not benefit his client's property. We are unable to see how we could permit him to go into that matter, because, if we go into one, we must go into all of these cases, and we would have an inextricable mix in trying these various issues. It seems to us that we have gone as far as we can in allowing him to show matters which would reduce the assessment of his client. Counsel does not claim that there has been anything improperly assessed upon the property along this entire street. The cost of the improvement, he concedes, was all right, and was not improperly increased; but he thinks that he ought to be allowed to show that his client's property would have been as much improved if they had only improved part of this street,—had not improved it clear through. We think he must take the improvement as a whole, and the question is whether he has had benefits which justify this assessment. Under that ruling, as I have said, while the borough was prepared to submit further testimony, counsel for plaintiff candidly concedes that the assessment should be sustained; and therefore, under this concession, your verdict would be properly in favor of the borough. The issue here, possibly, is not made up as it should be, logically. Probably the borough should be plaintiff. But we will arrive at the same end by taking your verdict in the form that I suggest. That would be verdict for the defendant, and that the peculiar advantage resulting to the plaintiff's property from the improvement in question is equal to the amount of the assessment, to wit, \$1,473.94."

A. W. Duff, for appellant. Wm. G. Stewart, Borough Sol., and T. S. Brown, for appellee.

PER CURIAM. There was no error in refusing plaintiff's offers of evidence recited in the first and second specifications, respectively, nor in sustaining objection to the evidence of plaintiff's witness S. H. McKee, recited in the third and last specification. These rulings

of the court below are so obviously correct that neither of the questions involved requires discussion. Judgment affirmed.

(183 Pa. St. 238)

CURRY v. PATTERSON.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

DEVISE—FEE SIMPLE.

Testatrix, after devising certain land to her son in fee simple by apt words, provided, "The residue of my real estate * * * I will that my son * * * have all the income or emoluments arising from the same during his natural life," except enough to pay her debts and funeral expenses and to keep the property in repair, "and at his death the same shall descend to his heirs." *Held*, that he was also given the residue in fee simple.

Appeal from court of common pleas, Allegheny county.

Case stated between Frank Curry, as plaintiff, and Edmund B. Patterson, as defendant. Judgment for plaintiff. Defendant appeals. Affirmed.

The opinion of the court below is as follows: "The first clause of the will is as follows: 'First of all, I direct that all my just debts and funeral expenses be paid, together with the costs of a burial lot and a suitable monument * * * out of rents accruing from real estate of which I may be seised at death. Second. I give and bequeath unto my son, Frank Curry, seven acres of ground * * * in fee simple.' Third. The residue of my real estate, known as seven acres (pasture lot), also two houses and lots on Ohio street, I will that my son, Frank Curry, have all the income or emoluments arising from the same during his natural lifetime, except so much of sd. income as may be necessary to carry out the provisions of the first article of my will, and the payment of such sums to keep said property in good repair, together with all taxes assessed on the same; and at his death the same shall descend to his heirs.' No disposition is made of personal property, and no executor is named. The question is whether Frank Curry, the plaintiff, has a fee-simple title. We think this case is clearly within the principles of *Hlester v. Yerger*, 166 Pa. St. 445, 31 Atl. 122, and the cases upon which it was ruled. By devise of rents, profits, and income of lands the corpus of the estate passes. *Silkknitter's Appeal*, 45 Pa. St. 365; *Wilson v. McKeehan*, 53 Pa. St. 79; *Drusadow v. Wilde*, 63 Pa. St. 170; *Dale v. Dale*, 13 Pa. St. 446. The fact that the gift was charged with the payment of debts and other expenses would not tend to lessen the estate, but rather to enlarge it. Such a charge was held to indicate an intention to grant a fee simple without words of inheritance, before the passage of Act April 8, 1833, § 9, giving such an effect to a general devise.

No other person is, or can become, interested in the income of this estate; and the amount to be expended, except for payment of debts, is left to the discretion of the devisee. There can be no doubt that the plaintiff took a life estate in the lots mentioned. In this case there is no devise over. There is no devise of the remainder at all. It is simply provided that at the death of the life tenant 'the same shall descend to his heirs.' Not only as to the persons to take, but as to the mode of taking, the words are strictly technical. 'Technical words, or words of a definite meaning, in a will, must be construed according to their legal or definite effect, unless from other inconsistent words in the will it be clear that the testator intended to use them in some other definite sense.' *Carroll v. Burns*, 108 Pa. St. 386. In most of the cases in which the question has been considered there was a specific devise to heirs, and in many of them qualifying words,—as in *Criswell's Appeal*, 41 Pa. St. 288, 'to their heirs jointly, to such of them as be then living'; in *Appeal of Cockins*, 111 Pa. St. 26, 2 Atl. 363, 'in equal amounts to all heirs living at the time of their deaths'; in *Hlester v. Yerger*, 166 Pa. St. 445, 31 Atl. 122, 'unto his then surviving heirs in fee simple.' In these and many other cases the rule in *Shelley's Case* was held to apply, and to create an estate in fee simple; and surely it must be applicable to this case, in which the words are unqualified, are purely technical, and have a well-defined legal meaning. The rule in *Shelley's Case* is applicable without regard to the actual intent of the testator. *Carroll v. Burns*, 108 Pa. St. 394. But in this case it is questionable whether the actual intent of the testator was different from the legal effect. All her real estate was given to her son, and the personal estate, if any, passed to him under the intestate laws. The only doubt arises from the fact that in the second clause of the will she devised to him one piece of ground in fee simple by apt words. Her purpose in not doing so, as to the residue, is not apparent, but it is probable that she had some undefined notion that it should be held until the debts and the cost of a burial lot and monument were paid out of the income. However this may be, the estate granted is clearly a fee-simple estate, which the plaintiff has the right to convey, and judgment must be entered in favor of plaintiff on the case stated."

Edmund B. Patterson, in pro. per. George D. Riddle, for appellee.

PER CURIAM. The facts upon which this contention depends are set forth in the case stated, and need not be repeated. As to the questions arising upon those facts, all that need be said will be found in the opinion of the learned judge of the common pleas. On that opinion the judgment is affirmed.

(123 Pa. St. 227)

CRAWFORD v. BELLEVUE & G. NATURAL GAS CO.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

WRITTEN LEASE—PAROL MODIFICATION.

A written lease granted to the lessee the right to produce gas from certain land, and to hold such premises for one year, the lessor to extend the lease from year to year in case the lessee found gas in paying quantities within said year. The lessee agreed to pay a specified royalty every six months should gas be obtained in paying quantities and marketed, and to furnish gas for the lessor's house. If sufficient gas was found for domestic, but not for marketable, purposes, the lessee was to leave the well for the use of the lessor. *Held*, that it was competent for the lessee to show a parol modification of such contract, whereby he was released from payment of royalties.

Appeal from court of common pleas, Allegheny county.

Assumpsit by J. M. Crawford, Jr., devisee of J. M. Crawford, against the Bellevue & Glenfield Natural Gas Company, to recover on a written lease. From a judgment for defendant, plaintiff appeals. Affirmed.

The following are the material parts of the lease, and the points submitted by plaintiff, the refusal of which is assigned, *inter alia*, as error:

Lease.

"This lease, made this 28th day of November, A. D. 1887, between J. M. Crawford, of Ohio township, of Allegheny county, Pennsylvania, first part, and G. H. Dimmick, of Allegheny county, Pennsylvania, second part, witnesseth: That the said first party, in consideration of the covenants, stipulations, and rents to be kept, fulfilled, and paid by the second party, has granted, demised, and let unto the second party the sole right to produce petroleum and natural gas from the following named tract of land, situate in Ohio township, Allegheny county, and state of Pennsylvania, bounded and described as follows, to wit: * * *. To have and to hold the said premises unto the second party for and during the term of one year from this date, and granting to second party the exclusive right to drill and operate oil and gas wells. * * *. It is further agreed that, should a paying production of oil or gas be found on said land by second party within said term of one year, then first party agrees to extend this lease from year to year so long as said production continues. * * *. The second party hereby agrees, in further consideration for this lease, to deliver unto the said first party the full one-eighth ($\frac{1}{8}$) part of all the oil he may produce and save from said land, to be delivered in pipe line free of charge to first party. It is further agreed that if gas is obtained in paying quantities, and marketed, the consideration in full to the first party shall be two hundred and fifty dollars every six months for each well drilled on the premises herein leased. * * *. Second party also agrees that first party may use gas free of charge for

domestic purposes at the farm house of himself and his son Aleck from any productive gas well found on said land, the second party to give use of pipe free which may be necessary to convey the gas from the well to said houses. A failure to make any payment or to operate as above provided renders this lease null and void. In case gas is found sufficient for domestic purposes of first party, but not sufficient for marketable purposes, second party agrees to leave such well for use of first party, so that small pipe can be put into it. * * *"

Points submitted orally by counsel for plaintiff:

"First. It being admitted that the defendant entered into possession under an agreement dated November 28, 1887, between J. M. Crawford, Sr., and G. H. Dimmick, and the defense being a subsequent modification of such agreement, whereby defendant was relieved from the payment of royalty, such subsequent agreement is required by the statute of frauds to be in writing; and, the defendant, not having shown any such writing, the plaintiff is entitled to a verdict. [Refused.] Second. That a parol modification of a contract in writing must be clearly and distinctly proven, and that the evidence in this case is not sufficient to show such clear and distinct agreement, and the verdict should therefore be for plaintiff. [Refused.] Third. That, under all the evidence in this case, the verdict should be for plaintiff. [Refused.]"

R. B. Petty, for appellant. J. S. & E. G. Ferguson, M. A. Woodward, and E. G. Hartje, for appellee.

PER CURIAM. This case appears to have been carefully and correctly tried. We find nothing in either of the specifications of error that is sufficient to justify a reversal of the judgment; nor is there anything in the questions involved that requires discussion. Judgment affirmed.

(123 Pa. St. 162)

SOMMER v. HUBER et al.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

JUDGE AND JURY—COMMUNICATIONS.

Instructions having been privately communicated to the jury, and it being impossible to ascertain with any certainty what they were, a new trial will be granted.

Appeal from court of common pleas, Lancaster county.

Action by Frederick Sommer against Joseph H. Huber and another. Judgment for plaintiff. Defendants appeal. Reversed.

George Nauman, for appellants. J. L. Steinmetz and William H. Keller, for appellee.

McCOLLUM, J. The general and well-settled rule is that instructions to the jury must be given in open court, where they may be heard by the parties and their counsel.

It is said in 11 Am. & Eng. Enc. Law, p. 257, that there must be no private communication between the judge and the jury; and it was held in the cases cited on pages 257 and 258 of the same volume that "he must not go to the room where they are deliberating, even for the purpose of giving additional instructions, or to answer certain questions, or, in the absence of counsel, at the request of the jury, to expound the charge to them; or to go to their room, and suffer them to put certain questions to him, though he do not answer them; or to visit them in their room merely for the purpose of informing them that, if they should desire any further information on matters of law, they should ask him for it, even though he hold no other communication with them; or at their request to send a paper to them in the absence of counsel; or to write a letter to them; or to send a written instruction to them as in answer to a request made by them in writing." In *Hill. New Trials*, p. 284, § 157, the author says: "For the court to give instructions to the jury during the hour of recess, without notice to the parties or their counsel, and in their absence, is error. So, after the jury have retired, it is error to allow them to come into court, and instruct them, in the absence of the parties or their counsel; and such instructions will be considered important, if the contrary is not shown, from the fact that the jury have asked for them." See, also, *Proff. Jury*, p. 415, § 348. The quotation we have made from the encyclopedia is a summary of the points determined by the cases cited in the notes. It was not intended as an indorsement of the decision in each case. It was made for the purpose of showing the trend of the decisions in other states on the subject of private communications between the judge and the jury. This explanation is made to prevent misapprehension of our purpose in making the quotation. In the case under consideration there was a clear and unwarranted departure from the rule as we have stated it. After the jury had retired to their room to deliberate upon their verdict the learned trial judge received from them two written requests for instructions, to one of which he admits he returned a written answer. The communications between the judge and the jury were not preserved, and there was nothing on the record to give notice of them. Neither the defendants nor their counsel were advised of them until some time after the verdict was rendered and the jury were discharged. When the defendants learned that there had been private communications between the judge and the jury, which related to, and possibly affected, the verdict in the case, they promptly moved for a new trial, which was refused. The learned judge, however, frankly admitted that he erred in communicating with the jury as above stated, and said that, if he was permitted to consult his own feelings in regard to it, he would order a retrial. The principal ground

of his refusal to correct his mistake by granting a new trial was that it would give the defendants an advantage, because they were residents and influential business men in the community, while the plaintiff was a foreigner by birth, and a stranger in it. This certainly was not tenable ground for the refusal, or a justification of it. Before the court and jury the litigants were equals, and alike entitled to have their dispute settled in accordance with the testimony and the law of the land. The inconvenience to which one of them might be subjected by the correction of a mistake prejudicial to the other cannot, therefore, be considered as a bar or obstruction to the rectification of it.

The learned judge, in his opinion refusing a new trial, discussed at considerable length the question whether the plaintiff was entitled to interest on the damages recoverable for a breach of the contract. The relevancy of this question to the application for a new trial is not apparent. It was not raised by the reasons filed in support of the application, or by the defendants' exceptions to the instructions to the jury. Besides, we find nothing in the specifications of error which suggests it, or requires us to consider it. It is true that the learned judge stated, in the opinion we have referred to, that he answered but one of the requests made by the jury for instructions, and that his reply to it was, "The plaintiff is entitled to interest." On this statement, and the cases cited in connection with it, he concluded that his instruction to the jury was not erroneous, although he considered that the private communication of it was a mistake. We are unable to find in the opinion, however, any reasonable excuse for a departure from the settled rule respecting instructions affecting the rights of litigants and the issues between them. It was five months after the verdict was recorded before the opinion was filed, and it is obvious that the latter was based on the recollection of the judge of the instructions privately communicated by him to the jury. But his recollection concerning the instructions appeared to be at variance with, and directly opposed to, the recollection of the jurors who testified in regard to them. In view of the disagreement as to the nature and effect of the private communications between the judge and the jury, it was the plain duty of the former to set aside the verdict and order a new trial. Under the circumstances shown, it is impossible to ascertain with any certainty what instructions were solicited or given in the forbidden communications. While this condition may be acceptable to the successful party, it is not satisfactory to the defeated litigants, who, we think, have just cause to complain of it, and of the action of the court which created it. It is important that the litigants should know what instructions affecting the issues between them were given to the jury in their absence. For them to know that instructions had been pri-

vately communicated to the jury, and to be unable to ascertain what they were, is quite likely to create a suspicion of unfairness, and to impair their confidence in the court. An erroneous instruction given to the jury in open court, and in the presence of the parties and their counsel, is not so objectionable as the secret instruction, of which there is no record, and the nature and effect of which cannot be definitely ascertained. The former may be intelligently reviewed, while the latter cannot be. The verdict, however, may be set aside, or the judgment entered upon it may be reversed, on the ground of an unwarranted departure from the rule which condemns secret instructions to the jury in relation to questions raised by the pleadings or the evidence, as opposed to the proper administration of justice. Judgment reversed, and venire facias de novo awarded.

(123 Pa. St. 145)

THOMAS et al. v. O'DONNELL.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

MECHANIC'S LIEN—PROCEEDING TO ENFORCE—AFFIDAVIT OF DEFENSE.

Judgment for want of sufficient affidavit of defense, in proceedings to enforce a mechanic's lien, is properly denied; it being alleged therein that plaintiff agreed to finish and deliver the house to defendant by a certain time, free of all claims and liens, and that, in addition to plaintiff's claim for balance of contract price, there were three other claims filed against the building for services rendered and materials used in its construction.

Appeal from court of common pleas, Lackawanna county.

Scire facias on a mechanic's lien by T. W. Thomas and another against A. P. O'Donnell. Rule for judgment for want of sufficient affidavit of defense was discharged, and plaintiffs appeal. Affirmed.

W. S. Hunslander and A. A. Vosburg, for appellants. M. A. McGinley, for appellee.

McCOLLUM, J. In this case the plaintiffs obtained a rule to show cause why judgment should not be entered for want of a sufficient affidavit of defense. On the hearing of the rule it was discharged, and from the order discharging it this appeal was taken. The suit is on a claim filed by the plaintiffs for the balance alleged to be due to them on their contract with the defendant to build for him a house in accordance with the plans and specifications furnished or to be furnished by Henry Miller, architect, and to finish and deliver the same to him on or before the 25th of May, 1896, "free and discharged from all claims, liens, and charges whatsoever." In the affidavits filed by the defendant, his grounds of defense to their claim were specified as follows: (1) The house was not built according to the plans and specifications; (2) in addition to their claim for the unpaid balance of the contract price, there were three other claims

filed against the building for services rendered and materials used in the construction of it. The departures from the specifications, and the defects in the work, were specified, but the allowance or deduction claimed on account of them was not stated. The defective work and the noncompliance with the specifications, considered by themselves, appear to have been regarded by the learned judge of the court below as insufficient to prevent judgment because of the failure of the defendant to state the amount of the resultant damage, but he obviously thought that he ought not to enter judgment for the balance of the contract price while the claims filed by the mechanics and material men were unsatisfied. In view of the averments in the affidavits of defense and of the stipulations in the contract in regard to liens and the completion of the building, we cannot say that he erred in discharging the rule for judgment. The order discharging the rule is therefore affirmed.

(123 Pa. St. 269)

COMMONWEALTH ex rel. STEWART v. STEWART et al.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

LUNACY—ACCOUNTING.

Application for an account of the property of a lunatic which came into the hands of his committee, being made, without explanation of the delay, 14 years after the death of the lunatic, who died but a year before the committee, will be denied.

Appeal from court of common pleas, Allegheny county.

On the relation of George Stewart, inquiry was had as to the sanity of Samuel Stewart, and he was found to be a lunatic, and Thomas Verner was appointed his committee. After the death of said Samuel Stewart, Sarah Leisser, his administratrix, petitioned for rule on Smith Shannon, administrator of said Thomas Verner, to show cause why he should not file an account of said Verner, committee as aforesaid. Petition dismissed, and petitioner appeals. Affirmed.

The opinion of the court below is as follows: "We think the application for an account comes too late. Thomas Verner was appointed committee of Samuel Stewart, a lunatic, on the 15th of June, 1861, and received as such some \$8,000 belonging to the lunatic. The latter died 28th of June, 1882. Verner, his committee, died 22d of August, 1883, never having filed an account of any of the property of said lunatic which had come to his hands. After his death, his son, Melchoir Verner, was appointed administrator of his estate, and died in 1894, leaving his widow, Matilda C. Verner, executrix of his will, who died in July, 1896, leaving no issue. Smith H. Shannon, administrator d. b. n. of the estate of Thomas Verner, deceased, was appointed by the register of Allegheny county upon the petition of Sarah

Leisser, administratrix of the estate of Samuel Stewart, deceased, October 10, 1896, who, upon this application, answers that he has no knowledge whatever respecting the material allegations set out in the petition except that no account was ever filed by Thomas Verner, and that he died intestate about August 22, 1883; that Thomas Verner left to survive him one son, and no other relations, said son being Melchoir Verner, who resided in or near Pittsburg until 1894, when he died, leaving no children or other relations except his wife to survive him, who resided in Pittsburg until July, 1896, when she died, and that he has been unable to ascertain that any one living has any personal knowledge of the personal or business affairs of said Thomas Verner, and that he has been unable to obtain any material information pertaining to said business, and that he believes said estate was settled, or supposed to be settled, many years ago by said administrator, Melchoir Verner. It is clear that the statute of limitations does not operate as a bar to this application, but we think that the principles indicated in *Gress' Appeal*, 14 Pa. St. 463, should be applied in this case, and the petition dismissed."

Wm. L. Monro, for appellant. Dalzell, Scott & Gordon, for appellees.

PER CURIAM. On the petition of the appellant, Sarah Leisser, administratrix of Samuel Stewart, deceased, a rule was granted on Smith Shannon, Esq., administrator de bonis non, etc., of Thomas Verner, deceased, late committee of said Samuel Stewart, a lunatic, to show cause why he should not file an account of said committee. The discharge of the rule and dismissal of appellant's petition are the subjects of complaint in this appeal. We find no error in the record. The decree is affirmed on the opinion of the learned president of the common pleas, and the appeal is dismissed, at appellant's costs.

(183 Pa. St. 187)

SAYLOR v. PENNSYLVANIA CANAL CO.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

CANAL COMPANIES — FAILURE TO RESTORE CANAL — ACTION BY PRIVATE INDIVIDUAL.

Failure of a canal company to restore its canal destroyed by flood, though in contravention of its statutory duty, does not give a private individual a right of action against it for damages, he being merely prevented thereafter from using his boat for transportation between points on the canal, and the injury not being peculiar to him, as the privilege of using the canal was open to any one.

Sterrett, C. J., dissenting.

Appeal from court of common pleas, Perry county.

Action by W. H. Saylor against the Pennsylvania Canal Company. Judgment for defendant. Plaintiff appeals. Affirmed.

William H. Sponsler, for appellant. B. F. Junkin and L. E. Atkinson, for appellee.

McCOLLUM, J. It was held in *Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co.*, 50 Pa. St. 91, that a bill in equity to enforce the performance of public duties by a corporation cannot be maintained by a private party, in the absence of a special right or authority. Thompson, J., in delivering the opinion of the court, said: "There are many authorities in England and in this country which deny the right of private parties in their own names,—in the absence of special laws,—when their interests are only in common with the public, to compel the performance of a duty to the public. The reason is that, if one individual may interpose, any other may; and, as the decision in one individual case would be no bar to any other, there would be no end to litigation and strife. The general laws of order, so necessary to good government, forbid anything like this." It follows from the decision in the case cited that the plaintiff in the case under consideration cannot maintain an action to compel the performance by the Pennsylvania Canal Company of the duty imposed by the act of May 16, 1857 (P. L. 519). The commonwealth may compel it, but a private citizen cannot. The learned counsel for the plaintiff concedes this much, but contends that a party who is injured by the company's neglect to perform it may have an action for damages. The duty of the defendant company undoubtedly was to keep the canal open and in repair as a public highway, "for the use and enjoyment of all parties desiring to use and enjoy the same." That portion of the Juniata Division of the canal to which the contention of the plaintiff relates was virtually destroyed by the flood of 1889. It has not been navigable since, and the company has made no effort to reconstruct it. It extends from the Millerstown dam to the New Hamilton dam, a distance of 54 miles. No claim is made that prior to the flood referred to the company was remiss in the performance of its duty to keep this canal in repair. It was not, therefore, responsible for injuries occasioned by the flood. *Railroad Co. v. Patterson*, 73 Pa. St. 401, and *Canal Co. v. Burd*, 90 Pa. St. 281. The plaintiff's boat was not destroyed or injured by the flood or by the failure of the defendant company to reconstruct the canal between the points above mentioned. He could not, after the flood, use his boat for the transportation of goods and passengers between these points, nor could any other lessee or owner of a boat use his for a like purpose. The business in which the plaintiff was engaged was open to all persons using or desiring to use the canal for the purpose for which it was constructed. The privilege he exercised and enjoyed was not special or peculiar, nor was the injury he alleges he sustained by the neglect or

failure of the company to repair or reconstruct the highway it was required, as a purchaser, to maintain. The privilege was such as any person who chose to exercise it was entitled to, and the injury done by the abandonment of the highway was not to the plaintiff alone, but to him in common with the public. The difference, if any, was only in degree, and this will not sustain his suit. The cases cited by the plaintiff from our own reports are plainly distinguishable in their facts from the case under consideration, and are not applicable to it, as an examination of them will clearly show. It follows from what has been said that the learned court below did not err in directing a verdict for the defendant. Judgment affirmed.

STERRETT, C. J., dissents.

(183 Pa. St. 260)

In re HINDS' ESTATE.

Appeal of BANK OF PITTSBURGH.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

GUARDIANS—POWER TO BORROW MONEY—RIGHT OF WARD AGAINST THIRD PERSON.

1. A guardian has no power, without sanction of the orphans' court, to borrow money for the improvement of the ward's real estate, and pledge the bank stock of the ward as security for the loan.

2. Where a guardian obtains an order allowing him to improve his ward's real estate, averring in his petition that he has on hand sufficient funds of the estate for that purpose, one who lends him money on the security of bank stock belonging to the ward, relying on the guardian's representation that the sum so borrowed is for improvements authorized by the court, and without further inquiry, may be compelled to restore to the ward the pledged stock.

Appeal from orphans' court, Allegheny county. Petition by William Hinds and another against the Bank of Pittsburgh and others for the recovery of certain bank stock. From a decree for petitioners, the Bank of Pittsburgh appeals. Affirmed.

The orphans' court rendered the following statement and opinion:

"In 1884 Thomas H. Chapman applied, as guardian of the minor children of said decedent, to the Bank of Pittsburgh for a loan, representing that the proceeds were intended to be used in the improvements, which this court had authorized, of his wards' real estate; and that bank, upon the strength of the representations thus made by the guardian, without examination of the record of this court, made the loan, taking in pledge stock of this bank owned by the wards. Had examination of the records of this court been made, it would have appeared that the guardian had asked authority to make improvements on certain real estate of his wards, to the extent of five thousand dollars, 'with the receipts and revenues arising' from the estate of said minors during the current year, together with the funds already in the

hands of your petitioner, will afford a sufficient sum of money for to make said improvements,' and that an order had been made on the petition, authorizing such improvements. An additional loan was afterwards (1888) made in like manner; and the record showed that the guardian had asked authority to make improvements on certain other real estate of his wards, to the extent of five thousand dollars; that he had, 'belonging to said wards, ample funds available to pay for the erection of said buildings,' and that an order had been made, on this (second) petition, authorizing such improvements to be made. Renewal notes were given in these instances, from time to time, fluctuating in amounts,—sometimes increased and sometimes diminished, as shown by the attached schedule,—until the loans seem to have been reduced to two thousand dollars. An application was then made for a loan of twenty thousand dollars, for an alleged purpose similar to that of the former loan. It was not asked upon the strength of an order alleged to have been made, authorizing an improvement, but upon an allegation that, because similar orders had been made heretofore, this court would make another order; and upon the strength of this statement the loan was made; stock of the Merchants' & Manufacturers' National Bank being substituted for that of the Bank of Pittsburgh, as security. The promised order of this court was never made, nor even applications made therefor. Two thousand dollars of the proceeds of this loan went in satisfaction of the balance of the former loans, which the guardian now alleges had gone in fact into the improvement authorized; and eighteen thousand dollars was invested by the guardian in a private corporation, of which he was the president. When the guardian filed his final account he claimed credit for this loan, and exception was taken to this and other items. This court suspended action on this item until liability for the loan and pledge, as between the estate and bank, should be ascertained, and surcharged the guardian on the other items with an amount exceeding one hundred thousand dollars, and judgment was entered thereon as against the guardian and his sureties. A petition was shortly afterwards presented to court, on behalf of the succeeding guardian, setting forth that these sureties had made an offer of compromise of these judgments, and this offer being, in the petitioner's opinion, after investigation, advantageous, asked that authority be given to accept it, whereupon the court granted an order, with the following qualification: 'The compromise herein authorized be a complete and effectual release and discharge of each of said sureties, making such payment from all liability upon judgments at Nos. 762, 763, and 764, April term, 1896, and also to be a full release from all further liability upon a bond on which said judgments are based, ex-

cept that in event of a recovery being had by William Hinds against the Bank of Pittsburgh of certain stocks in proceedings instituted and now pending in this court, at No. 132, June term, 1896, or a recovery in any similar suit hereafter instituted by or on behalf of the other beneficiaries of said bond, the liability of said sureties, as to the subject-matter of said proceeding or proceedings, shall be in no way compromised, affected, or discharged. And the carrying in to effect of said compromise or compromises to be in no way construed as creating or admitting any liability on the part of said sureties to the Bank of Pittsburgh or others by reason of the exceptions herein contained.' The present proceedings were instituted with a view to compel the retransfer of these stocks to the credit of the petitioners, and the question submitted to the court is whether said loan and pledge were a valid exercise of the authority of the guardian. Both the Bank of Pittsburgh and the Merchants' & Manufacturers' Bank were made parties respondent.

"Opinion.

"It is conceded that, if the loans and pledges in this case were made with notice of the breach of trust, the prayer of petitioner must be granted; but it is insisted that there was neither breach of trust nor notice. These are the issues, and in respect of both the decision must be in favor of petitioner.

"1. The guardian had no power by virtue of his office, nor of any order of court, nor was there any occasion, to borrow. It may be conceded that this guardian had power to sell his ward's personal estate for purposes incidental to his trust, as with a view to make other more advantageous or safer investments, but what reason could he have to borrow? Certainly for no ordinary purpose. The reasons which gave rise to the rule that a power to sell implies a power to mortgage do not exist here. These powers are simply alternative modes to raise funds for the payment of debts used in the administration of estates by executors or administrators. A guardian has ordinarily nothing directly to do with the payment of debts of an estate. That is a peculiar function of the administrator, while his function is to receive, hold, and invest the 'surplusage.' He has no power to create new debts (*McCreery's Appeal*, 31 Pa. Law J. 230), consume any part of the principal, nor change the course of descent by converting personal into real or real into personal estate, without the sanction of the orphans' court, but must maintain in its integrity and character the whole corpus. In the exercise of powers of sale, abuses are unavoidable. Thus, in this very estate the guardian sold a large number of valuable bank stocks, with a view to relieve himself of incumbered real estate, which his wards were afterwards compelled to accept, because of his insolvency. Such

instances as this are fortunately of rare occurrence. Necessity compels their endurance, but opportunities and temptations to abuse will be greatly increased, without any occasion, by concession to guardians of the power to borrow. Injudicious, improvident, or fraudulent transactions will happen, and the ward's property, pledged at an under-value, be forfeited for want of redemption, when sale at the market value in the first instance would have averted the loss; and difficulties in fixing the liability of guardians in such cases are increased, to the ward's great disadvantage. These are hazards which there is no reason to assume, and can only be prevented by the denial of any right to borrow, unless with the prior sanction of the orphans' court. The occasions are so rare, in the course of guardianship, in which borrowing becomes necessary or advisable, either on security of real or personal estate, that such a rule can cause no inconvenience. The guardian cannot engage in active business. His duty is to 'hold' and 'invest.' There is no reason why his power in respect of borrowing on security of personalty should differ from his restricted power over realty. There was not only no authority given by this court to borrow, but an implied prohibition. The decree was an adjudication (a) that petitioner's averment of sufficient available assets belonging to the estate with which to make the improvements was true; and (b) an appropriation of those assets to that purpose, which neither the guardian, nor those who claim under him, can now deny. As no modification of this decree was ever asked or made, it must be conclusively presumed that these funds were used as decreed. Power to convert a ward's personal into real estate by making valuable improvements ought not to be assumed, without sanction, because it affords the guardian an opportunity to act independently of the court, whose officer he is, alter the course of descent, or improve the ward out of his estate, contrary to the policy of the law. Where improvements have been made judiciously, the court may, of course, in its discretion, ratify them. *Miller's Estate*, 1 Pa. St. 326; *Eberts v. Eberts*, 55 Pa. St. 110; *Killpatrick's Appeal*, 113 Pa. St. 46, 5 Atl. 8. But the evidence here falls to show that more than the amount appropriated by this court was needed in making the improvements. Eighteen thousand of the twenty thousand dollars last borrowed was traced distinctly into another investment, and credit therefor stricken from the guardian's final account, as illegal. What became of the other money borrowed, has not been sufficiently shown. But the inconsistency of this transaction with the guardian's sworn statement, and his concealment of it from this court for so long a period, taken in connection with his waste of over one hundred thousand dollars of trust funds that have been placed in his care, are pregnant

with suggestion of suspicion. Done without and in defiance of authority, without occasion, and without apparent benefit to the estate, it was a palpable breach of trust.

"2. Those who deal with trustees are presumed to do so with notice of the legal limitations of their power; and, when they go outside of this, do so at their own risk. Absolute owners may do as they please with their property, so long as they do not infringe the laws of public policy; but trustees, whether bankers, attorneys, guardians, or others, act in a representative character, and are limited by the purpose of the trust which each holds. Administrators, executors, and guardians are quasi public trustees, with duties prescribed by law, which every one is obliged to know, and notice of whose character is notice of the limitation of their power. The application of this principle is aptly illustrated by the case of Marshall's Estate, 138 Pa. St. 285, 22 Atl. 24. An executor, without authority, offered in pledge stocks belonging to his trust to a bank, with a view to secure a loan, the proceeds of which he declared were intended to be used in the continuance of the business in which his testator had been engaged. Trusting to these representations, without further inquiry, the bank made the loan; and, proceedings having been thereafter taken to compel restoration of the stocks, it was held that there was enough to put the bank on inquiry, which would have led to a knowledge of the facts, and that it was therefore a party to the breach of trust. 'The absence of any reference in the will,' said the court, 'to the firm of James Marshall & Co. ought of itself to have excited inquiry. But there is no evidence that they even examined the will, or made any inquiry of the co-executors or co-legatees of James Marshall, Jr., or consulted an attorney in reference to the matter. They appeared to have trusted alone to the representations of James Marshall, Jr., and have themselves to blame for their credulity. It would be simply a perversion of justice to hold that in such circumstances this petitioner, without any default on her part, should lose her beneficial interest in these stocks.' An order of restoration was accordingly made. The facts are substantially these: Respondent dealt with Mr. Chapman in his representative character as guardian, and with stocks known to belong to his ward. It having been informed that the purpose was to improve the ward's real estate, respondent was bound to know that the guardian had no power to improve without the sanction of this court, and, when told that the court had authorized such improvements, was bound, in the exercise of ordinary prudence, to inquire into the extent of this authority. 'Every man is bound,' said the court in *Messinger v. Kintner*, 4 Bin. 97, 'to take notice of the record which is the foundation of his title. If they look into the title at all, the decree of the orphans'

court stares them in the face at the first glance; and, seeing the decree, they must take notice, at their peril, of the proceedings on which it is founded.' So, on the same principle, here, if respondent had examined the record, which, as already seen, he was bound to do, it would have found that not only was there no authorization nor occasion for a loan, but an implied prohibition. In making the last of the series of loans, they did not even wait, but took the risk of an anticipated order for improvement. The specific purpose in making all these loans was to provide means for carrying out alleged orders of court, made or anticipated, for the improvement of the ward's real estate. The attention of the respondent having been thus specifically directed, made the duty of inquiry the more imperative. If the guardian had offered for discount an ordinary promissory note, the bank would doubtless have made independent inquiry, as in the usual course of business, into the responsibility of the indorser, and had at least as much reason to do so here, in respect to the responsibility of this trust estate. *Bank v. Stiever*, 169 Pa. St. 574, 32 Atl. 603. The respondent, having thus had notice that the guardian was acting without authority, and without occasion for a loan, was a party to his breach of trust, and became answerable to petitioner for the loss which resulted."

D. T. Watson and Geo. P. Hamilton, for appellant. Ed. B. Scull, George C. Wilson, and Wm. D. Evans, for appellees.

PER CURIAM. There is nothing in this record that requires a reversal or modification of the decree. The questions presented were carefully considered and correctly disposed of by the learned president of the orphans' court. On his opinion the decree is affirmed and appeal dismissed at appellant's costs.

(133 Pa. St. 371)

FRICKE v. SAFE-DEPOSIT & TRUST CO.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

EJECTMENT—CLAIM FOR IMPROVEMENTS—INDEPENDENT ACTION IN EQUITY.

After plaintiff in ejectment has recovered on his legal title, defendant cannot bring an independent suit in equity for the value of improvements made by him while in possession; such claim being enforceable, if at all, in the ejectment suit, or by way of defense to any action for mesne profits.

Appeal from court of common pleas, Allegheny county.

Bill by J. R. Fricke against the Safe-Deposit & Trust Company, administrator d. b. n. c. t. a. of Arthur Hobson, deceased, to recover the value of improvements made by plaintiff on certain land. From a decree sustaining a demurrer to the bill, and dismissing the same, plaintiff appeals. Affirmed.

The bill of complaint and the opinion of the trial court were as follows:

"Bill of Complaint.

"To the Honorable the Judges of Said Court: Your orator complains and says:

"(1) That by deed from Mary Ann Menold et al., dated July 12, 1873, and recorded in the recorder's office in and for said county of Allegheny, in Deed Book, vol. 315, p. 156, Hannah Fricke, the wife of the plaintiff herein, acquired the title to a lot or piece of ground situate in the Sixteenth ward of the city of Pittsburgh, county of Allegheny, and state of Pennsylvania, being one of three lots marked 'A' in the plan of the subdivision of Union Park, attached to the proceedings in partition of the estate of Phillip Winebiddle, deceased, at No. 1 of March term, 1872, in the orphans' court of Allegheny county aforesaid, and bounded and described as follows, viz.: Beginning on the southerly side of a street fifty feet wide (now Mifflin street), parallel with Penn avenue, at a point distant four hundred twenty-three and $\frac{51}{100}$ (423.51) feet from Winebiddle street, at the corner of lot marked 'B' in said plan; thence southwardly along said lot B, at right angles with said street, two hundred seventy-one and $\frac{48}{100}$ (271.48) feet, to a point; thence northwardly, parallel with Winebiddle street, three hundred twenty-seven and $\frac{40}{100}$ (327.40) feet, to line, the street first herein mentioned; and thence eastwardly, towards Winebiddle street, one hundred eighty-three (183) feet, to the place of beginning. On October 8, 1874, she, the said Hannah Fricke, together with her said husband, by deed of said date, recorded in the recorder's office aforesaid, in Deed Book, vol. 327, p. 319, conveyed the said lot or piece of ground unto J. L. and W. H. Hastings, in fee simple.

"(2) That on December 23, 1875, the said J. L. and W. H. Hastings executed and delivered unto Arthur Hobson a mortgage on said described lot of ground to secure the payment of the sum of seven thousand five hundred (\$7,500) dollars; the said mortgage being of record in the recorder's office aforesaid, in Mortgage Book, vol. 218, p. 106.

"(3) That the said Arthur Hobson died on or about the 4th day of June, 1877, having first made his last will and testament, duly probated, and registered in the register's office in and for said county, in Will Book, vol. 20, p. 215, wherein and whereby, after numerous bequests and devises, he appointed James A. Sholes and Bella Hobson to be the executors thereof, to whom letters testamentary of said decedent's estate were duly issued; that in and by said last will and testament said Arthur Hobson, inter alia, devised and bequeathed unto his said executors, in trust for certain purposes therein mentioned and specified, certain of his property, of which said property the said mortgage from J. L. and W. H. Hastings, for \$7,500, upon said lot of ground, was a part.

"(4) That the said James A. Sholes and Bella Hobson, executors of said Arthur Hobson, deceased, issued a writ of scire facias on said mortgage for \$7,500, to No. 278 of March term, 1879, court of common pleas No. 1 of Allegheny county aforesaid, and on October 24, 1879, a judgment was entered therein against said J. L. and W. H. Hastings, in favor of said James A. Sholes and Bella Hobson, executors of said Arthur Hobson, deceased, for the sum of \$9,147.49; that a writ of levavi facias was issued on said judgment to No. 278, March term, 1879, of said court, and the said lot or piece of ground herein described was sold by the sheriff of said county to said James A. Sholes and Bella Hobson, executors of said Arthur Hobson, deceased, and pursuant to said sale a sheriff's deed for said lot of ground was acknowledged January 17, 1880, by Thomas H. Hunter, Esq., the then sheriff of said county, and delivered to said James A. Sholes, one of said executors aforesaid of said Arthur Hobson, deceased, which said sheriff's deed is of record in the prothonotary's office in and for said county, in Sheriff's Deed Book (Court of Common Pleas No. 1), vol. 4, pp. 32, 33.

"(5) That upon a lien for taxes assessed by the city of Pittsburgh against said lot of ground for the years 1877 and 1878, filed and entered at No. 25, September term, 1881 (D. T. D.), court of common pleas No. 1, in the name of said plaintiff, J. R. Fricke, husband of Hannah Fricke, the former owner, amounting to the sum of \$45.66, a writ of scire facias was issued to the first Monday of September, 1881; and service thereof was made upon said J. R. Fricke, the plaintiff herein, who was named as owner and defendant in said lien.

"(6) That, upon receiving service of said writ of scire facias as aforesaid, plaintiff gave the copy thereof left with him by the sheriff, before the return day thereof, to the said James A. Sholes, executor as aforesaid of said Arthur Hobson, deceased.

"(7) That on the 16th day of February, A. D. 1882, a judgment was entered upon said tax lien and scire facias thereon, in default of an appearance and affidavit of defense, for the sum of \$50.23; that upon said judgment so entered a writ of levavi facias was issued, returnable to the first Monday of March, 1882, and the said lot of ground was sold thereon by the sheriff of said Allegheny county to J. Charles Dicken, Esq., for the sum of \$306, to whom a sheriff's deed for said lot of ground, pursuant to said sheriff's sale, was duly acknowledged by Wm. McCallin, Esq., the then sheriff of Allegheny county, on the 19th day of April, A. D. 1882, which said sheriff's deed was duly delivered to the said J. Charles Dicken, Esq., and is of record in the prothonotary's office of Allegheny county aforesaid, in Sheriff's Deed Book (Court of Common Pleas No. 1) vol. 4, p. 374, and in the recorder's office in said county in Deed Book, vol. 478, p. 45.

"(8) That the said plaintiff herein, being advised and verily believing that the title of the said J. Charles Dicken, Esq., to the said lot of ground acquired as aforesaid by virtue of said sheriff's sale and deed therefor, on said tax lien, was an indefeasible title in fee simple, purchased the said lot of ground from him, the said J. Charles Dicken, Esq., and obtained from him, the said J. Charles Dicken, Esq., a deed of conveyance therefor, dated April 9, 1883; the same being of record in the recorder's office aforesaid, in Deed Book, vol. 478, p. 48.

"(9) That the said plaintiff herein, after purchasing said lot of ground as aforesaid, entered into the possession thereof, and, relying upon his title thereto, commenced the improvement thereof,—first, the grading and filling up of said lot of ground in order to make the grade thereof conform to the grade of said Mifflin street, on which said lot abutted (the said lot being then much below said street in grade), at the cost to said plaintiff, in the grading and filling of said lot, of the sum of \$1,000; and the said plaintiff, relying upon his said title as aforesaid, in the year 1888 commenced the erection of buildings upon said lot of ground, and from that time until the year 1890 he erected thereon twelve (12) brick dwelling houses, at a cost to him of \$30,000; making an aggregate amount expended by said plaintiff of \$31,000 in and about the improvement of said lot or piece of ground.

"(10) That the said James A. Sholes died on or about the 10th day of December, 1888, and the said Bella Hobson died on or about the 17th day of March, 1890, and the said Safe-Deposit & Trust Company was duly appointed by the register of Allegheny county aforesaid administrator de bonis non cum testamento annexo of the estate of the said Arthur Hobson, deceased, and as such the said Safe-Deposit & Trust Company took upon itself the duty of executing the trusts mentioned and contained in the said last will and testament of the said Arthur Hobson, deceased, and is now in the possession of said trust estate.

"(11) That the said defendant, administrator de bonis non cum testamento annexo of the estate of the said Arthur Hobson, deceased, commenced an action of ejectment, at No. 224 of February term, 1892, of the court of common pleas No. 3 of said county, against this plaintiff, J. R. Fricke, and others, tenants then in the possession of the said lot of ground and the said twelve dwelling houses erected thereon, for the recovery of the said lot of ground so as aforesaid in the possession of the plaintiff and his said tenants, on the ground that the said taxes for the years 1877 and 1878, not having been assessed in the name of the registered owners, J. L. and W. H. Hastings, and the proceedings not having been taken against them, the said sheriff's sale on said tax lien passed no title to J. Charles Dicken, Esq., the pur-

chaser, and the title of the executor of the estate of the said Arthur Hobson, deceased, acquired by virtue of said proceedings and sheriff's sale on said Hastings' mortgage, was not divested thereby; that the said action of ejectment was tried in said court, and a verdict in favor of said Safe-Deposit & Trust Company, administrator as aforesaid, was rendered therein on the 2d day of June, 1892, upon which verdict a judgment was entered on the 2d day of October, 1892; that, upon an appeal by this plaintiff to the supreme court of Pennsylvania from the judgment of said court of common pleas No. 3, said judgment was affirmed (25 Atl. 530), and the said defendant herein thereby recovered the possession of the said lot of ground, together with all of the said buildings and improvements erected and made thereon as aforesaid by the plaintiff herein.

"(12) The plaintiff avers that during the eight years and upwards that he was in possession of said lot of ground, to wit, from April, 1883, until the commencement of said action of ejectment, in December, 1891, his said possession of said property was undisputed by said defendant herein and its predecessors in said trust, or any of the beneficiaries under the said last will of said Arthur Hobson, deceased; that he had no notice or knowledge during said time from any party interested as aforesaid in said property, or from any other person or persons, that his title thereto was defective; that in the erection of said buildings on the said lot of ground, and in the making of all improvements thereon during the said time, he acted bona fide and innocently, relying on his said title and possession acquired by him as aforesaid under and by virtue of said sheriff's sale on said tax lien, and the conveyance to him as aforesaid by the said J. Charles Dicken, Esq., as an indefeasible title in fee simple in said lot of ground.

"(13) That the said buildings and improvements erected and placed upon said lot of ground by the plaintiff as aforesaid were such as were reasonable and proper for the improvement of said property, and have conferred a substantial benefit on the said estate of the said Arthur Hobson, deceased, in the hands of said defendant, in trust as aforesaid, and have enhanced and increased the value of the said lot of ground to the full amount of the cost thereof expended by this plaintiff, to wit, the sum of \$31,000.

"(14) Plaintiff avers that said defendant, administrator as aforesaid, in equity, and by right and justice, should pay to him, the said plaintiff, the aforesaid value of the said buildings and improvements erected and made as aforesaid by him on said lot of ground.

"Your orator, having no adequate remedy at law, therefore prays relief as follows: First, that an account be taken of the cost and value of the said buildings and improvements erected and made by said plaintiff on

said lot or piece of ground during the time he was in the possession thereof as aforesaid; second, that by a decree of your honorable court the said defendant, administrator de bonis non cum testamento annexo of the last will and testament of the said Arthur Hobson, deceased, be required to pay to your orator the value of said buildings and improvements; third, and that your orator be granted such further and other relief as to your honorable court may seem meet and just."

"Opinion of the Court (McClung, J.).

"Under the case as presented by the bill, it is clear that the plaintiff has no claim other than such as it was his right and duty to enforce either upon the trial of the ejectment (if, as he claims, the act of 1842 applies), or by way of defense to an action for mesne profits. The defendant here (plaintiff in the ejectment) recovered upon a legal title, and cannot be brought into equity and made to account for the value of the improvements. The demurrer should be sustained, and the bill dismissed, at plaintiff's costs. And now, to wit, June 19, 1897, it is ordered and decreed that the demurrer in this case be sustained and the bill dismissed at plaintiff's costs."

S. A. & Chas. M. Johnston and C. S. Fetterman, for appellant. Thomas M. Marshall and A. M. Imbrie, for appellee.

PER CURIAM. The learned judge of the court below was clearly right in sustaining the demurrer and dismissing the bill at plaintiff's costs. For reasons given in his opinion, the decree is affirmed and appeal dismissed at appellant's costs.

(183 Pa. St. 219)

In re JAMISON'S ESTATE.

Appeal of MARKER et al.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

HUSBAND AND WIFE—PREFERRING CLAIM OF WIFE.

An assignment of property by one to his wife, who had a separate estate, and had given therefrom to him more than he assigned to her, is valid against his creditors.

Appeal from court of common pleas, Westmoreland county.

Accounting by Armstrong Jamison, executor of James Jamison, deceased. From a decree affirming a report of the auditor to distribute the funds in the hands of the executor, distributing to Lizzie Jamison, wife of S. H. Jamison, son of said James Jamison, his interest in the estate of his father, which he, while insolvent, had assigned to her, N. H. Markham & Sons, judgment creditors of said S. H. Jamison, appeal. Affirmed.

A part of the report of the auditor, and the opinion of the court on overruling exceptions to the auditor's report, are as follows:

Auditor's Report.

"The account of Armstrong Jamison, the executor of James Jamison, shows that he had realized from the decedent's estate, after payment of debts, the sum of — dollars, out of the personal property, and afterwards realized on the sale of the realty, to wit, a lot in Pleasant Unity and a farm in Ligonier township, which, with various surcharges, made — dollars for distribution. The will of the decedent converted his estate into personality. In the distribution there are but two serious questions to be considered:

"First. The distribution of the share of Samuel Jamison. And in consideration of the matter a large amount of testimony has been taken, and many authorities have been cited and examined. Previous to the act of 1848 there could have arisen no question as to whether Lizzie Jamison, the wife of Samuel H. Jamison, had any standing whatever in pressing her claim to participate in the share of her husband in his father's estate. The act of 1848, with the long line of decisions under it, together with the acts of 1851 and 1887, have placed the rights of married women in Pennsylvania in a very different legal position than they enjoyed previous to their passage. Before the act of 1887 the intervention of a third party as trustee for the feme covert was requisite to secure her separate estate when she desired to make investments other than in real estate. Since that act a married woman may enjoy her own estate as she may see proper. She may invest it so as to secure its increase or loss; she may do anything with it that her husband may do with his own estate. In other words, her property is absolutely her own while living, and may be devised as she thinks proper after her death, subject to the laws relating to decedent's estate. The feme covert may loan to any person her money, her husband not even excepted; and it surely is not presuming too much to say that the wife will more quickly loan her property to her husband than to any other person. The following quotation is from End. & R. Mar. Wom. p. 256, § 12: 'Nothing can be more natural than that she will lend her money to her husband, and that he will give her a security for it whenever he sees financial embarrassment approaching. Such loans and securities are sanctioned by numerous decisions. She has the same right to loan to him as to a stranger. It is as lawful for him to secure that loan as any other.' End. & R. Mar. Wom. p. 256, § 12. See, also, Lahr's Appeal, 90 Pa. St. 507. It is further held that, where the feme covert has given as a gift or present her personal property to her husband, the burden of proof must be upon him to show that it was a gift. In this case it is upon the claimants who claim adversely to her interest. The following quotation in support of this proposition is

from Endlich (page 257, § 13): 'At common law, while a wife may, if she choose, in the absence of restraining provisions in the deed under which she holds personal property to her sole and separate use, give the property to her husband, yet there is no presumption, where he has received it, that she has done so. The burden of proof is upon him, and, failing to establish the fact of a gift, he is held accountable as a trustee for her in respect of the property thus received by him. Since the act of 1848, this doctrine applies to the corpus of all the wife's separate personal property. He is, therefore, in every such case, bound by legal implication, and without any special promise to that effect, to return the money to her, even though he received it with her assent. Whilst, therefore, with reference to property of the wife received by the husband with her consent, he is presumed to be her debtor to the amount thereof, without any promise to repay, in order to charge him with interest thereon, * * * it requires an explicit undertaking on his part to that effect. * * * Of course, where the husband agrees to pay interest, or the circumstances proved show an intention to create the ordinary relation of debtor and creditor, he is liable for interest.' There therefore can be no question as to this branch of the case. If Lizzie Jamison loaned, or even gave, money to her husband, she is entitled to recover; and the evidence shows no gift or present of it to him such as will prevent a recovery.

"A second phase is now reached. What right had her husband to make a preferred creditor of his wife? From the decisions and the authorities above cited we see that a married woman has a clear right to do with her own as she pleases. If she were deprived of the legal right to become in necessity a preferred creditor, the whole legal fabric as to her rights to loan her money to her husband would be defeated. But even here we have the authority of Endlich (*End. & R. Mar. Wom.* p. 246, § 207) and *Wilson v. Silkman*, 97 Pa. St. 509: "That where the husband is indebted to his wife and to others, he may, by confessing judgment, prefer her to his other creditors, the same as he might prefer one of the latter to the rest of them; and the mere fact that the judgment confessed includes interest on the loan, when there was in fact no agreement that the sum loaned should bear interest, does not make it fraudulent as against other creditors. But, as between the wife and the husband's creditors at the time of the confessing of such judgment, the burden of proving a good consideration for it rests with her." In the light of the above authorities, the question now is reached, did Lizzie Jamison have estate of her own, and, if so, how much of the same did she loan to her husband, Samuel Jamison? The account of David Myers, guardian of Lizzie Jamison, formerly Lizzie Sheffer, shows that previous to her marriage he gave to her at one time \$90, and that after-

wards, and before her marriage, by an order of the orphans' court, he gave to her the sum of \$200, to procure for her a wedding outfit. Some testimony was taken as to what became of this money, but the \$90 that was given to her, and the \$200 for the outfit, certainly could not have been given or loaned to Samuel Jamison. It is to be taken for granted that the money so given her was used in compliance with the court's order,—i. e. to procure a wedding outfit,—and more especially so, as her guardian testified that after giving her the money he saw in her possession clothing for the wedding. Now, rejecting all claim to any of the money paid to Lizzie Jamison by her guardian previous to her marriage, it appears by the settlement he made with her (in which her husband joined), recorded in Deed Book, volume 148, p. 555, on the 21st day of April, 1887, that he, on the 16th of February, 1885, gave to her \$200, on the 1st of July, 1885, \$25, on the 27th of October, 1885, \$20, on the 23d of January, 1886, \$25, and on the 18th of February, 1887, \$225.77. Out of the first money so received the testimony shows that she purchased furniture to the amount of \$50, and that the rest of this, as well as the subsequent moneys received, she gave to her husband; that out of this money a horse was purchased for her, and by her direction, which horse was afterwards traded for another horse and \$60, with some one in Donegal. The boot money, \$60, was then given to her husband. This horse was afterwards traded with David Myers, her former guardian, and \$140 to boot, which sum was given to her husband, and this horse was afterwards sold to ——— Walthour, at Manor, for \$200, and this money, too, was given or loaned to her husband. The testimony of Lizzie Jamison shows that James Jamison, the father of Samuel Jamison, gave her the sum of \$400 while living on his farm, and an inspection of the executor's account shows that he has taken credit for \$400 on a note given by her husband and herself to James Jamison, the decedent. It makes no difference how she received the money loaned her husband so long as it was her own money. If she then loaned it to her husband, she is entitled to repayment. Now, taking all these sums, and calculating the interest thereon at six per cent. direct, the sum of \$1,700.23 is found to be the amount now due to Lizzie Jamison by her husband. It has been contended before the auditor that these various sums received by her went towards keeping herself and family. James Jamison was a man of means, and an inspection of the account filed by his executor shows that he, in his lifetime, gave to his children various sums, and among them to Samuel at one time \$100 and at another \$647.75, for which he took his notes. While no evidence whatever has been offered as to the time this money was given by him, it certainly is a fair inference that he did not give it to him while his son was a member of his own household, and more likely that it was given after Samuel was married;

and, if such is correct, then it would be used to support his family. There is, however, no evidence that Mrs. Jamison used her money in keeping the family, excepting the purchase of furniture, which is not included in the amount allowed to her. Further, Samuel Jamison confessed judgment to his wife for \$2,159.58, at No. 787, August term, 1893. This judgment was entered upon the 19th day of July, 1893, the same day that the assignment of his interest in his father's estate to his wife was made and recorded. The note, it was testified, was made up by several other notes and interest computed, and then included in the new note until the amount of the last note was reached, which was then entered. It does not seem right that in this way compound interest should be computed between a husband and wife for a long series of years to the detriment of other creditors. If so, then in a series of years every month a little more money might be advanced, a new calculation made, and the interest thereon so computed would not be just. If this were true, then the law of married women and the decisions of our courts could be used to promote the greatest kind of frauds. The position has been taken that, whatever moneys Lizzie Jamison has loaned or given her husband, and the gains by the sale and trade of her horse, should be returned to her, with interest thereon from the date of each transaction, as near as can be ascertained. The assignment was to secure her rights, and if Samuel Jamison made error, and confessed judgment for what might not be fairly due to his wife, yet what is due to her must not be taken from her by his act."

Opinion of the Court.

"We discover no substantial error in the report of the auditor. The allegation that the judgment confessed by S. H. Jamison to his wife was collusive was the excuse for the inquiry into its validity. The question is not whether it was erroneous, but whether it was fraudulent and dishonest, and given with intent to hinder or delay creditors. The auditor has found that the transaction was an honest one, and that the assignment of the interest was in good faith, and for a valuable consideration. The evidence certainly shows that the wife had a separate estate, and that she had given her husband, at various times, sums which aggregate more than his interest in the estate. This is sufficient to support the assignment, and is decisive of the controversy with the attaching creditors. As we view it, it is unnecessary to inquire into the judgment, and immaterial whether it was given for more than was owing by the husband. The contesting creditor is not prejudiced by the giving of the judgment. It is not claimed that the judgment was a lien. The claim here is based on the assignment by the husband of his interest in his father's estate. The uncontradicted evidence justifies the findings of the auditor, and, as he was in the better position to pass on the credibility

of the witnesses, his findings of fact ought not to be disturbed."

S. A. Kline, Geo. S. Rumbaugh, and H. E. Marker, for appellants. John B. Steel, for appellee.

PER CURIAM. We find nothing in the record to justify either a reversal or modification of the decree. Nor do we think there is anything in either of the specifications of error that requires discussion. On the facts found by the learned auditor, and approved by the court, the decree is affirmed, and appeal dismissed, at appellants' costs.

(123 Pa. St. 248)

LEWIS et al. v. LINDEN STEEL CO. et al.
(Supreme Court of Pennsylvania. Nov. 8, 1897.)

RECEIVERS—DISTRIBUTION OF FUNDS—PRIORITIES.

The receiver of a manufacturing corporation was authorized to operate the works, and to borrow \$30,000, securing the same by receivers' certificates, which should be a lien on the personal property and earnings of the company prior to all other claims. The petition of his successor for right to issue \$70,000 of additional certificates asked that the same be made a prior lien, as in case of the old certificates; but the order granting the petition contained no such provision. The receiver thereafter issued \$65,000 of new certificates, using \$30,000 thereof to pay off the old, and, in addition to the amount borrowed, contracted \$41,000 of indebtedness for necessary materials. *Held*, that the holders of the new certificates had no priority over the creditors who furnished such materials.

Appeal from court of common pleas, Allegheny county.

Bill by W. J. Lewis and another against the Linden Steel Company for the appointment of a receiver. The prayer was granted, and thereafter an auditor was appointed to distribute a balance in the hands of the receiver. From a decree dismissing exceptions to the auditor's supplemental report, in which distribution was made according to the opinion of the court delivered on sustaining exceptions to the first report, the Second National Bank of Pittsburg appeals. *Affirmed*.

The auditor's first report, the opinion of the common pleas sustaining exceptions thereto, the supplemental report and exceptions thereto, and the final decree dismissing said exceptions, were as follows:

Report of the Auditor.

"To the Honorable, the Judges of Said Court: The undersigned auditor appointed by your honors to make distribution of the balance shown by the account of the receiver in this case to and among the parties entitled thereto respectfully represents that, after notice to all parties in interest, he met the various parties at his office on Monday, November 16, 1896, at 8 o'clock p. m., and at various times thereafter by adjournments, as appears from the minutes of proceedings and testi-

mony returned herewith. There is no conflict of testimony in this case, and the testimony taken by the auditor shows that on February 11, 1895, Henry Warner was appointed receiver of the Linden Steel Company, which operated a manufacturing plant in the city of Pittsburg, and was engaged in the manufacture of various kinds of steel. On February 16, 1895, the receiver presented his petition asking to be allowed to operate the works in whole or in part, and an order was made allowing him to operate these works until the 2d day of March, 1895. On March 2, 1895, another order was made, allowing him to continue operations for three months after that date. On June 1, 1895, a further order was made authorizing the receiver to operate the plant of the Linden Steel Company for six months, or until further order of the court. The receiver also presented to court a petition asking to be allowed to borrow money to be used in operating the plant, and on June 17, 1895, the court made an order authorizing the receiver to borrow a sum not to exceed \$30,000 for that purpose, and to secure the payment of the money so borrowed by issuing receivers' certificates in the form prescribed in that order. This order provides that the said certificates shall be a lien upon the personal property and earnings of the Linden Steel Company in possession of the receiver, prior in right to all other claims thereon, and shall be first payable thereout.' By an order of June 29, 1895, the form of the receivers' certificates provided in the order of June 17, 1895, was changed, but no other change was made in the order. Mr. Warner, as receiver, issued certificates to the amount of \$30,000. He continued to operate the works until the early part of September, 1895, when he died, and on September —, 1895, Charles F. Wells was appointed his successor. On October 12, 1895, Mr. Wells, as receiver, presented his petition to this court, setting forth the condition of the works, and alleging that it would be for the best interests of all concerned to authorize the receiver to issue additional certificates like unto those heretofore issued, and not exceeding the sum of \$70,000; and in the prayer of his petition he asked that 'such certificates should be a lien upon the personal property and earnings of the Linden Steel Company in possession of the receiver, and prior in right to all other claims thereon, and shall be first payable thereout.' On October 26, 1895, the court granted Charles F. Wells, as receiver, authority to issue certificates to the extent of \$70,000, making the following order: 'It is now ordered, adjudged, and decreed that the said receiver be, and he is hereby, authorized and empowered to issue receivers' certificates, of the form in said petition set forth, and to an amount not exceeding seventy thousand dollars, and in such sums, and for such time, and with such rate of interest, not exceeding six (6) per centum, as the receiver may deem proper; and that said receivers' certificates

may be issued by the receiver for borrowing money, or given for materials purchased, or otherwise issued as he shall deem proper in the condition of the business of the Linden Steel Company.' Mr. Wells continued to operate the works until about July, 1896. After being authorized to issue certificates, as above, Mr. Wells issued certificates to the amount of \$65,000. With the proceeds of these certificates he lifted and retired the \$30,000 of certificates issued by the former receiver, and the balance he used in the operation of the works. In addition to the sum borrowed, the receiver incurred debts in operating the plant amounting to \$41,486.36. These debts were all incurred for supplies furnished to the receiver, and used by him in the operation of the works, but no receivers' certificates were issued by the receiver to any one for supplies. The only use made of them was in borrowing money.

"One question raised in this case is that the parties who have thus furnished supplies to the receiver, which have been used in the operation of the works, and have been necessary to their operation, claim that they are entitled to be paid pro rata with the receivers' certificates issued as aforesaid; while the holders of receivers' certificates claim that the whole balance in the hands of the receiver shall be applied to their payment, and no part of it should be applied to what may be called the 'open book accounts.' Another claim made before the auditor is that of Naylor & Co., who claim a preference. In December, 1895, Naylor & Co. made a contract with the receiver, Mr. Wells, to supply to him 3,500 tons of Bessemer pig iron at the rate of \$12.75 per ton, to be delivered monthly, 500 tons per month. They continued delivering the metal called for by the contract, the last delivery being made on May 25, 1896, when all, or nearly all, of the metal called for by the contract had been delivered to the receiver. For the metal delivered during the months of April and May, 1896, there was a balance due Naylor & Co. of the sum of \$8,162.33. On July 1, 1896, Naylor & Co. presented their petition to this court, setting forth the contract, and the fact that part of the pig iron delivered during April and May, 1896, as set forth in said petition, was still unpaid for; that they had demanded payment for the same, but had never received it; that a large portion of the Bessemer pig iron so sold and delivered to the receiver was still in the metal yards of the Linden Steel Company under the control of the receiver, and could be readily identified, and asking the court to direct the receiver to redeliver to Naylor & Co., without further costs, the said pig iron, or a sufficient amount thereof, still retained by the receiver, to cancel this debt. An answer was filed by the receiver to this petition, which admits the making of the contract, and delivery of the pig iron, and the amount claimed, except a difference of \$15.27. The receiver alleges, however, that

the rights of creditors had intervened, and that Naylor & Co. were not entitled to a redelivery of the pig iron. Naylor & Co. presented their claim before the auditor for a preference out of the fund in court, claiming that in equity their claim should first be paid out of the funds in the hands of the receiver.

"As to the claim of Naylor & Co. for preference, the application was made to court, as above stated, for the return of the pig iron. The answer of the receiver was filed as stated, but no action was taken by the court. It was admitted at the argument that a large part of this pig iron is still in the yards of the Linden Steel Company, and could be returned if the court were to make such a decree. A large number of cases have been cited by the counsel for Naylor & Co., which go to show that the court could, in such a proceeding as commenced by Naylor & Co., make a decree of restitution of the property to Naylor & Co. It seems, however, to the auditor, that no court would make such a decree, unless the property of Naylor & Co. was obtained from them by reason of some fraud practiced upon them by the receiver. There is no such claim in this case, nor could there be, that the slightest misrepresentation was made by the receiver in the purchase of this pig iron. He bought it in his name as receiver, and the parties selling knew they were selling to the receiver of the Linden Steel Company, and the terms of the contract were such that the title to the pig iron passed upon delivery. In *Smith v. Smith*, 21 Pa. St. 367, the supreme court held that the intention of an insolvent buyer, at the time of purchasing, not to pay, will not amount to a fraud unless some false representation, trick, or artifice, or conduct which involves a false representation, be added. This is an extreme doctrine to lay down, and, while it is criticised in *Bughman v. Bank*, 159 Pa. St. 94, 28 Atl. 209, it is recognized as the law; and the supreme court, while declining to go any further, refused to overrule the law laid down in *Smith v. Smith*, supra. This decision, it seems to the auditor, will prevent any recovery by Naylor & Co. of the metal sold to Mr. Wells as receiver. But, even if Naylor & Co. were entitled to have a decree that the pig iron so sold be returned,—at least sufficient thereof to pay their claim,—the auditor does not think that the claim of Naylor & Co. is properly before him as auditor. The appointment of the auditor was to make distribution of the balance shown by the account of the receiver to and among the parties entitled thereto. In numerous cases, beginning with *Okie's Appeal*, 9 Watts & S. 156, it has been held that, where a voluntary assignment was made, any person claiming a preference over the assignment must establish his rights in an adverse proceeding, and he cannot come before an auditor, and claim that any part of the fund in the hands of the assignee belongs to a party claiming adversely to the fund. It is true that the bill filed in this case is a proceeding in equity, but the

funds in the hands of the receiver are funds raised in the same manner as the funds raised by the voluntary assignee; and, while the court could possibly proceed to adjudicate the claim of Naylor & Co. to have their property returned to them, it has not done so, and has not, in the order appointing the auditor, given him any power to adjudicate this claim. For the foregoing reasons, the auditor thinks the rights of Naylor & Co. will be the same as those of the other creditors who furnished supplies to the receiver, and who are represented by what the auditor calls the 'open book accounts' of the receiver.

"In regard to the claims of the open book accounts to pro rata share with the receivers' certificates in the distribution of the funds now in the hands of the receiver, there do not seem to be any direct rulings of the courts to guide the auditor in deciding this question. A number of cases have been cited by the counsel for the open book accounts, and a number by the counsel for the receivers' certificates, but none of the cases cited, in the auditor's view, control the decision of the present controversy. The principal case cited by counsel for the creditors not having certificates is that of *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. 809. This case is also cited by counsel for receivers' certificates. The question in that case, however, is stated by Justice Blatchford as follows: 'Many of the contested questions in this case arise out of the transactions of the receiver originally appointed and his successors, especially in issuing receivers' certificates. The contest, as presented to this court, is substantially one between Paris and Decatur, bondholders, on the one side, and those who claim a priority of lien over the bonds on the other.' It will thus be seen that the contest is 'chiefly between bondholders and receivers' certificates claiming a preference over those bonds. The decision of this question in the case as to the rights of certificates over first mortgage bonds can have no bearing upon the question before the auditor. The case further shows that the receivers had spent large sums of money in the management of the property, for which no receivers' certificates had been issued, but for which receivers' certificates should, and probably would, have been issued if application had been made to the court therefor, before incurring the indebtedness. These claims, being respectively for \$54,000 and \$32,000, the court held were not entitled to preference over the bonds, while it held that certain small sums, like office expenses, expended by the receiver in the management of the property, could come in on the same footing as the receivers' certificates, and be a lien prior to that of the first mortgage bonds. In the case before the auditor the court authorized the first receiver, Mr. Warner, to issue certificates to the amount of \$30,000, which certificates were issued, and were to be a lien upon the personal property and earnings of the Linden Steel Company in

possession of the receiver, 'prior in right to all other claims thereon, and shall be first payable thereout.' After the appointment of Mr. Wells as receiver, he was authorized to issue \$70,000 of receivers' certificates, in the same form as those issued by the former receiver. The prayer of Mr. Wells as receiver was to be authorized to issue certificates having the same priority of lien as those issued by the former receiver. The wording of the order of court authorizing this issue by Mr. Wells is slightly different from that of the former order. By this order Mr. Wells was authorized to issue certificates to the amount of \$70,000, either for the purpose of borrowing money, or giving same for materials purchased, or otherwise, as he should deem proper. With these certificates, or their proceeds, he paid off and retired the certificates which had been issued by the former receiver, to wit, \$30,000. He issued additional certificates to the amount of \$35,000, making a total issue by Mr. Wells of \$65,000. Mr. Wells, the second receiver, having paid or retired the certificates issued by the former receiver, it may be a question of some importance in this case whether or not he had exhausted within the sum of \$5,000 his power to issue further certificates, and, if he had not thus exhausted his power, whether the funds now in the hands of the receiver should not be applied wholly to the payment of the first certificates issued by Mr. Warner as receiver. The petition of Mr. Wells as receiver was for authority to issue certificates to the amount of \$70,000 in addition to those issued by Henry Warner as receiver, but in issuing the certificates Mr. Wells was to use them for whatever purpose he should deem proper in the management of the affairs of the Linden Steel Company. He thought proper to recall the certificates issued by Mr. Warner, and, unless there is some strong reason for holding otherwise, the auditor thinks that, having used the certificates which the court authorized Mr. Wells to issue for this purpose, it was a legitimate use of the power conferred upon him, and that, when Mr. Wells, as receiver, would have issued certificates to the extent of \$40,000 in excess of those needed to retire the certificates issued by Mr. Warner, he would have exhausted his power to issue certificates under the order of October 26, 1895. This being the case, we have the receiver, Mr. Wells, operating the plant, and issuing certificates to the extent of \$65,000, as authorized by the order of court of September [October] 26, 1895. In addition to the certificates thus issued, Mr. Wells incurred various debts amounting to over \$41,000, for supplies furnished to him that were necessary in the operation of the works. These supplies consisted of raw material and other things necessary for the successful carrying on of the operations of the Linden Steel Company.

"A number of cases have been cited by the counsel for the receivers' certificates to sustain his position that these open book accounts must be postponed in payment to the receivers'

certificates; among these being *Farmers' Loan & Trust Co. v. Bankers' & Merchants' Tel. Co.*, 148 N. Y. 315, 42 N. E. 707. The auditor does not think that this case has any bearing upon the matter which he is to decide, as in that case the money was loaned to the corporation before the appointment of the receiver, and was not loaned to the receiver at all. Another case cited is that of *Neafie's Appeal* (Pa.) 12 Atl. 271. While this case is not very fully reported, yet it seems to the auditor that the claim which was resisting the payment of the receivers' certificates was a claim against the insolvent company incurred prior to the appointment of the receiver. The law with regard to receivers' certificates seems to be somewhat peculiar, but, so far as the auditor can discover, no question has ever been raised as to the rights of the parties who furnish materials to the receiver, and who are entitled to get certificates, but do not get them, and the holders of receivers' certificates issued pursuant to an order of court. The principle decided in the case of *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. 809, is this: For small amounts, and the ordinary office expenses of the receiver, the courts will allow claimants to come in upon an equal footing with those holding receivers' certificates; but when it is a matter of incurring debts for large sums, the receiver must first obtain an order of court. In this case the receiver incurs debts to the amount of over \$41,000, when, if the position heretofore assumed by the auditor be correct, he could not have incurred debts to the amount of more than \$5,000. If this be so, then the parties trusting the receiver were bound to know the extent to which he could issue receivers' certificates; and, if they trusted him beyond the amount, it would seem to the auditor that they did so at their own peril.

"No question is raised, and there is no reason to think that any question could be raised, as to good faith of the receiver in contracting these debts. They were necessary in the proper management and operation of the plant, of which he had charge. They are proper debts to be paid out of the assets in the hands of the receiver, provided there are no other debts which have a first claim upon the fund. A receivers' certificate certainly means something, and the holders of these certificates are entitled to the protection of the court issuing them. In this case the court issued certain certificates, which are now held by various parties. The auditor thinks that, in view of the facts heretofore found in this case, that the funds in the hands of the receiver should be first applied to the payment of these certificates, and he reports accordingly. As no objection has been made to the payment of the fee of D. T. Watson, Esq., for \$750 for professional services rendered the receiver, as expenses of administration, the same is allowed in full. The auditor attaches to this report a schedule, marked 'Exhibit A, November 23, 1896, T. H. Aud,' which shows the

amounts due to various parties by the receiver on open book accounts. To these parties the auditor does not appropriate any part of the funds in the receiver's hands, but he finds that the amounts specified in the schedule are due to the parties therein mentioned." [Then follows a list showing receivers' certificates outstanding, names of holders, etc., and a schedule of distribution.]

Supplemental Report of Auditor.

"To the Honorable, the Judges of Said Court: The undersigned auditor, to whom the account of C. F. Wells, receiver of the Linden Steel Company, was 'referred back to make distribution of the funds pro rata among the creditors,' in accordance with the opinion of the court, respectfully reports: That, after notice to the parties interested, he has divided the fund pro rata among all creditors of the receiver of the Linden Steel Company, as shown by the schedule attached to the former report of the auditor, which states the amount of the claim of each creditor as found by the auditor in his said report. The distribution is as follows." [Then follow the names of a large number of creditors,—including both certificate holders and holders of the open book accounts, with the dividend awarded to each,—18.36 per cent. of the claims.]

Exceptions of Second National Bank to the Supplemental or Last Report and Distribution by the Auditor.

"And now, April 14, 1897, comes the Second National Bank of Pittsburg, holder of receivers' certificates which participate in the distribution in this case, and by its attorneys, Chantler, McGill & Cunningham, files the following exceptions to the supplementary or last report and schedule of distribution made by the auditor in this case, as follows: (1) The auditor erred in appropriating any part of the funds in the receiver's hands to the general creditors of the receiver who hold no receivers' certificates. (2) The auditor erred in not appropriating the whole of the said fund for distribution pro rata among the holders of receivers' certificates, including this exceptant. (3) The said report of the auditor is based upon two erroneous conclusions: (a) That the said receiver was authorized to buy materials or supplies on credit, without using certificates therefor; which is not correct. (b) That the court, after consideration, refused to provide in the order made October 26, 1896, that the certificates to be issued by C. F. Wells, receiver, should be a first lien, and have priority upon the property in the hands of the receiver; whereas, in truth and in fact, it was intended that the order of court should conform to the petition therein. The order of court was signed as it had been previously prepared in the office of the counsel for the receiver, and in the preparation of that order the clause expressing priority was inadvertently and unintentionally omitted by the draftsman."

Opinion of the Court (White, J., March 24, 1897) Sustaining Exceptions to the Auditor's First Report.

"The exception of Naylor & Co., claiming a priority in payment, is not sustained. They sold the Bessemer pig iron to the receiver, to assist in carrying on the business, as other parties furnishing supplies, with direct knowledge that the receiver was conducting the business under the order of court. They sold and delivered the pig iron, parting with their title, and relying upon the receiver for payment. So there was no fraud, deception, or misrepresentation in the purchase, they have no ground on which to claim a return of that portion of the pig metal not used up. They stand on precisely the same footing as other creditors who furnished supplies. This exception dismissed. The order of court authorizing Mr. Warner to issue certificates expressly made them a 'lien upon the personal property and earnings of the Linden Steel Company in possession of the receiver, prior in right to all other claims thereon and shall be first payable thereout.' The order of court authorizing Mr. Wells to issue receivers' certificates to the extent of \$70,000 omits this as to the lien and priority. The auditor says the order to Mr. Wells was 'slightly different' from the order to Mr. Warner. I think it was radically different in a most important particular. The court might well make the \$30,000 asked for by Mr. Warner when he first entered upon the receivership a first lien upon the personal property and earnings, but refuse to give that preference to \$70,000 more, which would make a total of \$100,000. Mr. Wells did not ask for \$70,000 to be used partly in lifting and retiring the \$30,000 issued by Mr. Warner. He might have used it all in contracting new debts. Possibly, that consideration may have influenced the court in not making these new certificates a prior lien, and possibly may have thought that with \$70,000 of new certificates there would be no necessity of incurring other debts. True, the petition of Mr. Wells asked that these new certificates be given a preference, like those issued by Mr. Warner; but, as the order of court did not contain that clause, we must conclude that the court refused that part of his petition. Under the discretionary power given to Mr. Wells, he could use \$30,000 of the new certificates in lifting and retiring the old, and probably acted wisely in doing so. That left \$40,000 for other purposes, of which he issued only \$35,000. But he incurred other debts to the extent of some \$41,000. These other debts, it is admitted, were all for supplies necessary to carry on the business, and were contracted by Mr. Wells after he applied to court for power to issue certificates. The holders of the certificates issued by Mr. Warner had, undoubtedly, a preference to other creditors, as specified in his order of court; and, if they had held on to those certificates, they would now have a preference. But they voluntarily surrendered

those certificates and accepted in lieu of them certificates issued by Mr. Wells. Before they accepted these new certificates they were bound to look into the order of court to see what power Mr. Wells had. Had they done so, they would have seen that these new certificates had no preference. Not having done so, they have no just ground of complaint. Mr. Wells, as well as Mr. Warner, was authorized to carry on the business of the Linden Steel Company, a large establishment, requiring a large expenditure of money, and almost daily purchase of materials and supplies. The purchase of the necessary materials and supplies was incident to, and impliedly granted in, the authority to carry on the works. The schedule of the other debts, attached to the auditor's report, aggregating \$41,486.36, is composed of sixty-three creditors, and most of them of small accounts. There is one for \$8,162, one for \$7,713, one for \$7,600, one for \$3,664, one for \$2,671, one for \$2,400, one for \$1,961, one for \$1,422, one for \$1,061, one for \$728, one for \$595, and all the others for less amounts, most of them, indeed, under \$100. All of these debts were contracted by the receiver under the authority given to him by the court, and they have as much claim upon the court for protection as the holders of the certificates. The receiver had no power to contract debts or issue certificates without authority from the court, and when that authority is given they stand on the same footing, unless the court expressly places the certificates on higher ground. If these other creditors had looked into the order granted to Mr. Wells, as they were bound to do, they would have seen that the certificates, under the order of court, had no priority or preference to their debts. It would, therefore, be manifestly unjust to them to give the certificates a preference. Perhaps this contention is useless, for the attorney of the receiver said in court, during the argument, that it was the opinion of the receiver he would be able, after disposing of all the personal property, to pay in full the certificates and all these debts. The exceptions to the auditor's report, giving a preference to the certificates, are sustained, and the matter is referred back to the auditor to make distribution of the fund pro rata among the creditors, in accordance with this opinion."

Decree of Court Dismissing Exceptions to Auditor's Second Distribution, and Confirming Same Absolutely.

"And, now, to wit, June 4, 1897, this cause having been referred back to Thomas Herriott, Esq., auditor, to make distribution of the fund in the hands of Charles F. Wells, receiver, in accordance with the order of March 24, 1897, pro rata among the creditors, and the said auditor having filed his second report, distributing said fund as ordered by the court, and exceptions having been filed thereto by different holders of receivers' certificates, this cause came on to be heard upon the auditor's

report and the exceptions thereto, and thereupon the said exceptions filed to said second report are dismissed, and said second report is confirmed absolutely; and it is ordered, adjudged, and decreed that said Charles F. Wells, receiver, pay out the said fund in accordance with the schedule of distribution reported in and by said second report, unless an appeal be taken within twenty days."

Chantler, McGill & Cunningham, for appellants. C. C. Dickey, W. S. Miller, George P. Hamilton, W. W. Wishart, and J. J. Miller, for appellees.

PER CURIAM. This appeal is from the final decree dismissing exceptions to the learned auditor's second report, and ordering distribution in accordance with the accompanying schedule. A careful consideration of the questions presented by the record has satisfied us that there is no substantial error in the decree. For reasons given in the opinion of the court filed March 24, 1897, the decree should not be disturbed. Decree affirmed, and appeal dismissed, at appellants' costs.

(183 Pa. St. 255)

PHILLIPS v. DUQUESNE TRACTION CO.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

APPEAL—REVIEW.

The only inquiry is whether there was any evidence for the consideration of the jury on the material questions, there being no other error assigned than the refusal of the court to charge that, under all the evidence, plaintiff cannot recover.

Appeal from court of common pleas, Allegheny county.

Action by Malcolm Phillips, by his father and next friend, John S. Phillips, against the Duquesne Traction Company, for personal injuries received by plaintiff, when nine years old, while in a street with a velocipede, from a collision with one of defendant's electric street-railway cars. Judgment for plaintiff. Defendant appeals. Affirmed.

Geo. C. Wilson and Wm. D. Evans, for appellant. D. F. Patterson and R. T. M. McCready, for appellee.

PER CURIAM. The only error assigned here is the refusal of the court below to withdraw the case from the jury by charging, in the language of defendant's point, that "under all the evidence plaintiff cannot recover, and the verdict must be for the defendant." The only inquiry, therefore, is whether there was any evidence for the consideration of the jury on the questions of defendant company's negligence, and the alleged contributory negligence of the plaintiff. A careful consideration of the testimony has satisfied us that there was, and that the court was clearly right in refusing the point, and in submitting the case to the jury on those controlling

questions of fact. There is nothing in the case that requires further discussion. Judgment affirmed.

(183 Pa. St. 378)

In re MARKLE'S ESTATE.

Appeal of BARBER et al.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

TRUSTS—PROCEEDINGS TO AUTHORIZE SALE—PARTIES—DECREE OF SALE—WHEN SET ASIDE.

1. Testator constituted his three sons and R. executors and trustees, and created a trust under which each of his children should receive an equal share of the income of the estate until he or she became 40 years old, and thereafter one-third of the principal of such share absolutely, and the income of the remaining two-thirds for life, with remainder over to children as the parent should by will appoint, and, in default, then to children absolutely. *Held* that, where R. petitioned for the sale of the property to testator's sons and daughters, their minor children, who were remainder-men, were in fact and in law parties to the proceeding, though no citation to them was issued.

2. M., who died, testate, in 1888, leaving three sons and two daughters surviving, was a partner owning a seven-sixteenth interest in a firm whose entire source of profit was its right, as lessee, to mine coal under two certain leases. One lease, which expired December 31, 1889, provided that at its termination the lessee should have the preference of re-renting on "as favorable terms as shall be offered by other parties," etc. The other lease expired two years later, contained the same provision as to renewal, and stipulated that the personnel of the lessees should not be changed without the lessor's consent. The partnership articles provided that the partnership should continue until "the expiration of the aforesaid leases, and of any extension thereof," and that "the death of any of the parties hereto before the expiration of the aforesaid leases shall not operate to dissolve the said partnership," etc. M., by his will, constituted his three sons and R. executors and trustees, and created a trust under which each of his children should receive an equal share of the income of the estate until he or she became 40 years old, and thereafter one-third of the principal of such share absolutely, and the income of the remaining two-thirds for life, with remainder over to children as the parent should by will appoint, and, in default, then to children absolutely. He then directed that his interest in said firm should be continued in said business for the benefit of his estate, and empowered his executors and trustees to enter into new leases of the same lands, and into new co-partnerships. Under any new agreement of partnership, he directed, out of the interest of his estate therein, the transfer to each of his sons of two-sixteenths of the whole value of the leases and improvements, to be charged against them, respectively, as part payment of their share of the principal of his estate. He also directed that everything to be done was to be subject to the absolute discretion of his son J., whom he entirely released from all liability for any decision he might make. The trustees were informed that the lease expiring in 1889 could be renewed only in conjunction with another and adjoining colliery. The latter could be operated only on an expenditure of over \$422,622. Such firm continued the business until 1890, when the sons and daughters became members of a new firm; and on application of R., the disinterested trustee, the orphans' court decreed a sale of M.'s interest in the partnership to such sons and daughters, fixing, as the interests of the purchasers, two-sixteenths each to the sons, and one-sixteenth to the daughters, in the purchase money of \$289,769.12, and directing

that the amounts so due by the sons should be charged against the principal of their several shares in the estate, and that the amounts due by the daughters should be paid by them in cash. There was a sale pursuant to the decree. Such decree was obtained under advice of counsel procured by J. and his co-trustees. The new firm renewed the leases and continued the business. *Held* that, in the absence of fraud, the decree and sale would not be set aside on the application of remainder-men made in 1896, and the trustees be required to account for the property.

Appeal from orphans' court, Philadelphia county.

Petition by S. A. Barber, guardian of George S. Markle, Jr., and E. S. Doud, guardian of Alvan Markle, Jr., Emily Markle, Donald Markle, and Eckley Markle, filed in 1895, to set aside a decree of orphans' court authorizing the sale by executors and trustees of certain property of the estate of George B. Markle, Sr., deceased, to John Markle and others, and for other relief. Petitioners' wards are children, respectively, of deceased's sons George B. Markle and Alvan Markle. From the decree, petitioners appeal. Affirmed.

George B. Markle, Sr., died 18th August, 1888, leaving a will, wherein he appointed his wife, Emily A. Markle, his sons, John Markle, Alvan Markle, and George B. Markle, and his friend D. Stuart Robinson, as executors. Mrs. Markle died soon after the death of her husband. George B. Markle, Jr., renounced his office of executor, but was afterwards appointed administrator with bonds. After certain specific bequests, the testator bequeathed all the remainder of his estate, real and personal, to his said executors, in trust for the use of his five children for life, subject to advancements made to them in his lifetime, and at their death to his grandchildren. The three sons, already named as executors and trustees, with their sisters, Clara and Ida, were all life tenants, and they are all placed by the will under a spendthrift trust. In addition to their life income, each, at the age of 40 years, is to have one-third of his or her share of the estate absolutely. The two sisters are the only ones now of that age. This portion is also protected by such spendthrift trust. At the time of his death, testator was the owner of a seven-sixteenths interest in the firm of George B. Markle & Co., miners and shippers of coal in Luzerne county, under articles of co-partnership providing that the firm should not be dissolved by the death of any of its members, and that the firm should "continue during the existing coal leases and any extensions thereof." At his death the firm was mining and shipping coal from two leases of coal lands, one expiring 31st December, 1889, and the other in February, 1892, both of which provide for a renewal of lease at the option of the lessees. One of these mines we will call "Jeddo" and the other "Highland." They are in no way connected with each other, are a mile apart, and are worked independently by the firm. The decedent directs and urges his executors

to continue the partnership business for the benefit of his estate, and to make new coal leases at the option of his son John Markle; but if, in his judgment, it would not be for the best interests of the estate, then, the will provides that, "in the event of the dissolution of the business of mining coal under the advice and discretion of my son John Markle, then I direct my executors and trustees to sell out all my improvements, machinery, and interest in the firm of George B. Markle & Co. for such price and in such manner as my son John Markle shall deem most advisable and best." About two months before the expiration of the Jeddo lease, and over two years before the expiration of the Highland lease, and consequently more than two years before the end of the then existing partnership, the whole Markle family entered into a new lease with the Jeddo Company, and in this they were joined by the surviving members of the firm existing at the death of the decedent. John Markle, Alvan Markle, and George B. Markle, three of the four executors who are also life tenants, each took a two-sixteenths interest in the new coal lease; and Clara and Ida, the other two life tenants, took each a one thirty-second interest in the enterprise. At the same time the parties entered into a new firm, the one now existing, and took into such firm the unexpired Highland lease, as also the renewed Jeddo lease, and all the improvements connected therewith. The assets of the old firm became the assets of the new, and there were no debts then existing. The new co-partnership embraced not only the renewal coal lease of the Jeddo property and the two years of unexpired lease of the Highland property, but also all the property, improvements, rights, and interest of the old firm, amounting in value to about \$600,000, for which the lessors were liable to pay the said old firm, as set forth in the leases, in case they were not renewed. Thus, in full possession of all the assets of the firm existing at the death of the testator, and having supplanted the old firm by a new one, with the estate omitted as a partner; the parties were advised by counsel that they should get the orphans' court to authorize a sale, etc.

The first step towards securing the approval of the court was the petition of D. Stuart Robinson, one of the executors, 6th February, 1890, setting forth that the testator was the owner of a seven-sixteenths interest in two coal leases and certain property connected therewith, followed by the statement that "it is necessary to sell this property, as the partnership of testator expired on the 31st of December, 1889, and the incoming tenants are willing to purchase; but, as they include three of the testator's executors, your petitioner is advised that the sale must be made under the direction of the court." This statement was followed by a prayer "that the court will make such order in the prem-

ises as to them shall seem proper to enable him to negotiate a contract of sale to be submitted to the court for its approval." This petition was referred to Horace Haverstick, Esq., as examiner, to take testimony, and report to the court, without citation to any one representing the remainder-men. The case then proceeded to a final decree, dated 14th June, 1890, authorizing all the executors and trustees to sell a six-sixteenths interest of the estate in the late firm to the three executors, John Markle, Alvan Markle, and George B. Markle, for the sum of \$248,373.53, and a one-sixteenth of the whole interest to Ida and Clara, for \$41,395.59; "the said amounts due from the sons to be charged against each one's share in the estate, and the amount due from the daughters to be paid by them in money." Mr. Robinson, on 28th June, 1890, in his petition to the court, alleged an error of \$27,892.77 against the purchasers, which on 5th July, 1890, was admitted by the court, and corrected by decree of July 5, 1890. This fund of \$261,876.35, thus ascertained, was afterwards accounted for by the executors, and distributed under the final decree. Thus matters stood on the record until 5th March, 1895, when the minor grandchildren of the decedent petitioned the court to set the sale aside, alleging—First, that they had no notice of the proceeding; second, that the property was worth at least three times its appraised value; third, that the respondents had paid nothing for the property. The court below ordered that \$28,000 should be added to the purchase money; and that the purchasers should pay the entire purchase money, with interest, and charged their interests in the present firm with the payment of the same. It will thus be seen that the sale was not completed until 28th March, 1896. To this last decree were filed the present exceptions, and this appeal taken.

The opinion of the orphans' court is as follows (Ashman, J.):

"The decisive points of this case are few, because the efforts of the petitioners were concentrated upon the showing of malfeasance on the part of the active trustee in depleting the estate of a single asset. That asset, however, was by far the most valuable property left by the testator. The respondent's scheme, it was admitted, was carried out with a scrupulous adherence to legal procedures, and was even perfected by means of a judicial decree; but its purpose was his own enrichment, and incidentally that of his co life tenants, to the total subversion of the rights of remainder-men. The only facts which at the outset need to be referred to are that the testator was partner in a firm whose entire source of profit lay in its right, as lessee, to mine coal under two certain leases. The mines gave an extraordinary yield, and, recognizing the value of his interest, the testator left minute instructions in his will for the continuance of his estate in the business, either in the

existing firm or in one to be established; and he intrusted the work of carrying out this design to his son John Markle, whom he vested with plenary powers. The son, assuming that the firm had dissolved, entered with his co-trustees and life tenants, as individuals, into a new partnership. Acting under his advice, these parties then applied, as trustees, for leave to sell the testator's interest in the mining improvements and fixtures of the late firm, and to become buyers at the sale; and, in lieu of paying over the purchase money, they obtained the order of court, which is now sought to be vacated, directing that it should be simply charged against their shares in the decedent's estate.

"The initial objection to the order of sale is the alleged nonjoinder upon the record of the grandchildren, parties in remainder, of whom two were then living. It is worth noting that the sons and daughters, all of whom appeared, were, as to a part of their interest, something more than life tenants. At their age of 40 years, one-third of their share of the entire estate was to vest in each of them absolutely; but, in case the trustees should decide to continue the business of mining, each of the sons was forthwith to be paid two-sixteenths of the value of the lease and improvements of the mining property, and that sum was to be taken in part payment of his interest under the will. The effect of this provision was to accelerate the vesting of so much of the son's shares, or rather to turn what had been a contingent into a vested estate. The character of the property, outside of the superstructures on the ground, was such that it was liable to be worked to exhaustion during the pendency of the life estates. Hence the interests of the grandchildren hinged upon a double contingency,—their survival of the children, and the possibility that the principal of the estate would be absorbed by the income. For the grandchildren who were unborn at the date of the decree, and of whom four have since come into being, no guardian could be appointed. The duty of guarding their interests devolved upon the trustees. It is said, however, that, with one exception, the trustees were, by the very terms of the decree itself, antagonistic to those interests, because they were buyers and sellers at their own sale. But the excepted trustee was wholly impartial. He was a stranger in blood to the parties, while, of his co-trustees, two were parents of the minors who are alleged to have been despoiled of their inheritance. He himself petitioned for the sale of the mining property, and, in his capacity as trustee, he represented in that transaction the remainder-men as fully as he did the tenants for life. In fact as well as in law, therefore, the minors were parties to the proceeding.

"Impartially read, the evidence points to the conclusion that the respondent trustee honestly sought the advice of counsel, and withheld from him no fact which would be of service in making up his opinion. Not only

were the sale and the negotiations which preceded it conducted under legal supervision, but the scheme itself of the sale was projected by counsel. It was said by an eminent judge that he knew of no case where a man who acted in good faith upon the suggestion of counsel had not been protected. *King v. Morrison*, 1 Pen. & W. 196. If we accept this statement in its entirety, we do not thereby end this inquiry; for the advice of counsel is not so potent a talisman that it will render his own errors invulnerable. It may shield the trustee from responsibility, but it will not be permitted to inflict loss upon the beneficiaries if the door to a remedy is open. The present case must be adjudged upon this theory, because, while the complaint is nominally against the active trustee, it is nevertheless, when analyzed, a criticism of the course which was recommended by counsel. The work assigned to counsel was rendered difficult and delicate by certain peculiarities in the provisions of the will, and still more in the character of that part of the testator's estate which is now the subject of controversy. At the time of his death, on August 18, 1888, the testator owned an interest of seven-sixteenths as partner in the firm of George B. Markle & Co. The partnership was engaged in coal mining, and its most valuable assets were the privileges it enjoyed under two leases, one with the Union Improvement Company, and the other with the Highland Coal Company. The testator held this property in high regard. It had engrossed much of his time and energy, and it had not only amply repaid the expenditure, but it promised to be even more remunerative in the future. Hence he was even painfully solicitous in his will to give the most elaborate directions respecting its care and control. After creating a trust under which each of his children would receive an equal share of the income of the estate until his or her age of 40 years, and thereafter one-third of the principal of such share absolutely, and the income of the remaining two-thirds for life, with disposition over to children as the parent should by will appoint, and in default then to children absolutely, the testator directed that his interest in the firm should be continued in the said business for the benefit of his estate; and he empowered his executors and trustees to enter into new leases of the same lands, and into new co-partnerships. He also declared that all of these acts were to be done only by the advice and in the discretion of his son John Markle. Under any new agreement of partnership, he directed, out of the interest of his estate therein, the transfer to each of his sons of two-sixteenths of the whole value of the leases and improvements, to be charged against them, respectively, as part payment of their share of the principal of his estate. He constituted his three sons and D. Stuart Robinson his executors and trustees. All of the five children survive, and three of them, the sons,

are still under the age of 40 years. The trustees continued the business up to January 1, 1890. One of the leases expired on the preceding day, and the other was within two years of expiring. On February 6, 1890, a petition was presented to the orphans' court for leave to sell the interest of the decedent in the partnership to the sons and daughters of the testator, who had become members of a new firm, and of whom three were trustees under the will. Thereupon a decree reported by a master was entered June 14, 1890, and amended July 5, 1890, authorizing the sale, and fixing, as the interests of the purchasers, two-sixteenths each to George B., Alvan, and John Markle, the sons, and one-sixteenth to Ida and Clara Markle, the daughters, in the purchase money of \$289,769.12. The decree further directed that the amounts so due by the sons should be charged against the principal of their several shares in the decedent's estate, and that the amounts due by the daughters should be paid by them in cash.

"The specific property covered by the lease with the Union Improvement Company was the Jeddo colliery. The buildings and mining appliances of every description connected with the colliery were owned by the firm, and the land alone was in the ownership of the lessors. The trustees were informed by the lessors that no lease of the Jeddo colliery could be had except in conjunction with the Ebervale colliery, which adjoined the former property. The question which thereupon confronted the trustees was whether the landlord had power to exact that condition, on the one hand, and whether they had the power to comply with it, on the other. The lease provided that, at its termination, the lessees should have 'the preference of re-renting the same premises on as favorable terms as shall be offered by other responsible parties, or shall be allowed the actual cash value at that time' of the improvements made by them on or under the land. The phrase 'as favorable terms as shall be offered by other parties' covered a wide latitude of meaning. It certainly comprehended more than the mere bid of a higher rental. Manifestly, more favorable terms would be had from a competitor who should agree, as a condition of leasing this property, to mine another and less desirable colliery than from these lessees, if the latter should refuse, on any terms, to go outside of the land which was described in the original lease. The sole power conferred by the instrument upon the lessees was the right to compel a re-leasing, provided better terms were not procurable from others. Counsel instructed the trustees that, under the will, they had no authority to accept a renewal of the old or to execute a new lease for any other land than that which the firm had thereto operated, and that the will in terms prohibited them from mining in other territory. We will not discuss the soundness of this opinion, nor decide whether the letter

of the will carried such an inhibition, or, if it did, whether the letter might not be disregarded in order to carry out its spirit. It is sufficient if the course advised by counsel can be vindicated by other considerations. The Ebervale mine, which was attempted to be sold upon the trustees, had been overflowed, and could be kept free from water by pumping only, at an enormous and continuing expense. Another expedient, however, which, if carried out, would be undoubtedly effectual, was to open a tunnel from the mine to Nescopeck creek. The tunnel, it was estimated, would be some three miles in length, and would cost several hundreds of thousands. When afterwards built by the new co-partnership, its actual cost was \$342,863.44, and the right of way \$79,758.82 in addition. Would the trustees have been justified, no matter with what hope of prospective advantage, in launching the estate upon such an adventure, and would not the parties who now object because the trustees refrained from attempting it have complained more vehemently if they had assumed the risk and wrecked the estate? It is not enough to say that the undertaking afterwards proved to be feasible, and was successfully carried out by the trustees when they had laid aside their official capacity. They could do as individuals what they might not do as trustees; and their acts and omissions are to be judged, not by the light of experience, but that of experiment. As far back as the time of Lord Hardwicke, it was held that a trustee deserves to be treated even with tenderness; and the decision in *Knight v. Plymouth*, 3 Atk. 480, has hardened into a formula which is as stable as any proposition in law, that a trustee shall not be held to a larger measure of vigilance than would be displayed by a man of ordinary prudence in the management of his own affairs. We think that, with or without the advice of counsel, the trustee had a legal excuse for refusing to make the estate a party to this lease.

"Upon the lease with the Highland Coal Company two years were yet to run at the time of the sale. It contained the same provisions as to renewal which appeared in the Jeddo lease; but it also stipulated that the personnel of the lessees should not be changed without the consent of the lessor. The opinion of counsel was that the death of the testator dissolved the partnership, and that, the firm having ended, the lease died with it, for the reason that a change had taken place in the lessees. We do not assent to this proposition. At common law, the death of a member puts an end *ipso facto* to a partnership, but the articles of co-partnership may, notwithstanding the death, provide for a continuance which shall be binding upon parties and privies. The authorities to this effect are many and explicit. We need name only *Laughlin v. Lorenz*, 48 Pa. St. 275; *Leaf's Appeal*, 105 Pa. St. 505; *Pars. Partn.* § 353. The exact sense in which the place

of the dead partner in the firm shall be filled by his estate has been the subject of more or less discussion. The representation may extend no further than to prevent a withdrawal of the capital or a settlement of accounts; or the estate may, if the phrase is permissible, so far take on the personality of the decedent as to be liable for post mortem debts contracted by the firm. The subject was treated in *Wilcox v. Derickson*, 168 Pa. St. 331, 31 Atl. 1080; and it was there held that the law of any particular case must be gathered from the contract of partnership or from the will of the partner. The contract in this instance is not open to the charge of vagueness. It reads as follows: 'The aforesaid partnership shall continue in existence until the date of the expiration of the aforesaid leases, and of any extension thereof; it being expressly understood and agreed that the death of any of the parties hereto before the expiration of the aforesaid leases shall not operate to dissolve the said partnership, but that the executors or administrators of any partner so dying shall, within thirty days thereafter, nominate some person satisfactory to the surviving partners or partner, who shall carry on the business in connection with them, and shall in all respects, both as to rights and liabilities, take the place of the partner so deceased.' The lease of the Highland Coal Company was with the firm of George B. Markle & Co., and it was therefore subject to this clause in the articles of that firm precisely as though the clause had been written in the lease. The result is that the estate was substituted for the testator as a partner and as a lessee, and was entitled to his share of the profits earned during the final two years of the term. But this point is of no practical value to the petitioners, because the life tenants have outlived the lease, and are entitled to all of the income. *Laughlin v. Lorenz*, 48 Pa. St. 275; *Leaf's Appeal*, 105 Pa. St. 505; and *Wilcox v. Derickson*, 168 Pa. St. 331, 31 Atl. 1080; *Pars. Partn.* § 353.

"But what, after all, would be the issue if the sale were set aside, and the parties were relegated to their status as of the date when it was ordered? We have seen that the lessors could successfully oppose any demand for a renewal of the leases,—in the one case by insisting upon making the leased territory servient to adjoining mines; and in the other by refusing, after the term should end, to accept the estate of a deceased lessee for the lessee himself. With this inability on the part of the trustees to renew existing leases, or to enter into new leases, of the lands in question, the interest of the testator in those lands, outside of the improvements which he had helped to erect, would vanish into air. We repeat it: The decedent was a partner in a firm whose assets were two mining leases, and whose profits were made by them as lessees, and not as owners. When the leases ran out, their profits and the source

from which they were derived ceased together.

"The reason has already been given why we are not called upon to debate the wisdom of the sale. Nothing short of conspicuous fraud would warrant us, after an interval of years, in going into the minutiae of the transactions which were necessarily involved in carrying it properly out. We are prepared to say, however, that due regard seems to have been paid to the proprieties. The appraisers were men of character and ability, and they were able to give a plausible account of the process by which they reached their valuations. Our attention was directed to the apparent discrepancy between the cost of the buildings and fixtures, which on the books of the firm was stated at \$591,804.45, and their value as fixed by the appraisers, which was \$207,752.97 less than the cost. The explanation was that on the books no allowance was made for articles which were worn out or obsolete. When one piece of machinery was replaced by another, the cost of the new was piled upon the cost of the old; and, as this practice had continued for years, the aggregate of the figures afforded no possible clue to the market value of what remained in use. One error, however, was pointed out by the appraisers themselves. By a slip of the pen, they marked the good will at \$64,000, when they intended \$128,000; and seven-sixteenths or \$28,000 of the former sum, being the proportionate interest of the estate in the firm assets, was carried by the trustees into the inventory, and thence into their account. The amount of the purchase money set out in the decree should be increased \$28,000.

"Thus far, in treating the case, we have kept strictly to the lines which were laid down by counsel, and we have left out of sight what might prove a powerful factor in its determination,—the sway which the testator voluntarily commissioned his son to wield. It was a gift, as respects the mining interests at least,—and they are all with which we have to deal,—of power which was practically absolute, because it was freed from responsibility. 'I release my said son from all liability for loss to my estate, occasioned by his deciding what is for the best interests of my estate in the mining of coal or other matter whatever,' is the language of the will. It does seem to be futile to undertake to examine through the glasses of an expert the methods of a trustee who holds a patent of authority like this, and to call him to account for what we may even believe to be folly, if it stops short of fraud, when the testator has expressly absolved him from accountability.

"This disposes, in a general way, of the testimony and arguments which were submitted concerning the transactions which culminated in the sale. In the decree itself which authorized the sale, a matter is involved which vitally touches the rights of

the parties in remainder. The decree authorizing the sale directs that the shares of purchase money due by the sons shall be charged against their respective shares in the principal of the estate. Of course, this does not mean that if the shares, or any of them, in the capital, should be less than the amounts due of the purchase money, the deficit shall be presented as a gift to the defaulting purchasers. For example, the share of one of the sons in the gross capital of the estate, as augmented by the purchase money, was, after deducting the third, which was paid to the widow, \$93,296.38. But he had been advanced by the testator \$102,897.72, so that he is still indebted to the estate, in the shape of advancements, \$8,601.34. Evidently, his proportion of the purchase money cannot be paid out of an interest which is \$8,601.34 less than nothing. No change in the decree, except to add to the amount of purchase money therein the sum which was omitted by the appraisers, is necessary. The order of sale was based upon the theory that the purchase money was cash, and that the shares of the purchasers in the estate were fully equal in cash values to their shares of the purchase-money debt, and it would never have been made upon any other hypothesis. To assume otherwise would be to put this court in the position of decreeing a positive wrong to the innocent remainder-men. The price at which the property was sold was no mere paper value to figure in a balance sheet or to serve the turn of a speculator. It was the actual sum in cash, less, perhaps, the value of the good will, which the lessors were bound to pay if the purchasing trustees had not assumed it; and, when the trustees petitioned for leave to pay the purchase money out of their testamentary interests, they pledged their faith that those interests were, at least, equal to the debt. We do not believe that they descended into the artifice of drawing upon a fund which they knew was in the clouds. The specific prayers for relief are refused; but the order of sale of June 14, 1890, as amended by the supplementary order of July 5, 1890, is corrected by adding \$28,000 to the amount of the purchase money, and increasing proportionately the amounts due by the respective purchasers therein; and the trustees are ordered to pay into the capital of the estate so much of the said purchase money as the shares of the children in the said capital are inadequate to pay, such deficit to bear interest from June 14, 1890. Counsel will prepare a decree accordingly."

Supplemental Opinion.

"It is claimed that the correction of the decrees of June 14, 1890, and July 5, 1890, by adding to the purchase money therein specified the sum of \$28,000, which had been omitted by the appraisers in their valuation, cannot be allowed to prejudice the rights of innocent third parties; and hence that Ida Hessenbruch, who purchased half of the in-

terest of George B. Markle, upon the basis of the sum fixed by those decrees, will be absolved from paying the proportion of that interest in the newly-found excess. As between her and her vendor, it is undoubtedly true that no change in the decree can affect the terms of her bargain; but, as between her and the estate, she stands in the shoes of her assignor. If on reversion, either by the appellate court or by the court of original jurisdiction, the purchase money had been ascertained to be as much less as it is now found to be greater, she, and not the assignor, would have enjoyed the benefit of the reduction. Her remedy, now that she is burdened with the excess, is against the party whose title she has taken. The decree is *subjoined*."

Decree.

"And now, this 28th day of March, 1896, this cause having heretofore come on to be heard on petition, answer, replication, and proofs, and having been argued by counsel and considered by the court, it is ordered, adjudged, and decreed as follows: The decrees both of 14th June, 1890, and 5th July, 1890, heretofore made, are sustained, saving to the extent of the following modifications: It is ordered, adjudged, and decreed in modification of said recited decrees that the purchase money payable by the purchasers to John Markle, George B. Markle, Jr., Alvan Markle, and D. Stuart Robinson, executors and trustees under the will of George B. Markle, deceased, be increased to the extent of \$28,000; and that each of the purchasers shall pay to said executors and trustees his or her proportion of said additional purchase money, which proportion shall be that in which he or she took said interest of said estate. And whereas, in consequence of an error in the entry of the decrees of the 14th June and 5th July, 1890, the executors and trustees did not collect from each purchaser under said decrees his or her proportion of the purchase money of said interests in said estate: It is now further ordered, adjudged, and decreed that, to such extent as the said purchasers did not pay their respective proportions of the purchase money for said interests in said estate, they shall now pay into the capital of the said estate the several amounts which by the said decrees, as hereby amended, they are bound to pay, with the right, on the part of said executors and trustees, to collect from each of said purchasers the amount of his or her deficiency; it being ordered that a credit shall be allowed to said executors and trustees, and to each of said purchasers, of the amounts of the shares of the purchasers in the capital of the estate such as are due to them respectively. It is further ordered that interest at the rate of five per cent. per annum shall be charged against the purchasers for all unpaid purchase money due by them, respectively, from the 1st day of January, 1890. It is further

ordered that the accounts of the executors and trustees as hereafter rendered shall be so stated as to conform to the modification of the accounts of the estate as altered and affected by this decree. And whereas, it appears upon proof before the court that the executors and trustees, in making the assignments or transfers of the interest of the said estate to the said purchasers, under the said decrees of June 14, 1890, and July 5, 1890, hereinbefore mentioned, assigned and transferred to John Markle two-sixteenths thereof, to George B. Markle, Jr., two-sixteenths thereof, to Alvan Markle two-sixteenths thereof, and one-half of one-sixteenth interest to Ida Markle, and one-half of one-sixteenth to Clara Markle; and whereas, it further appears to the court, upon proof in this case, that, since the entry of the said decree and the sales and assignments above mentioned, the interest purchased by and assigned to George B. Markle, Jr., has been assigned and transferred, to Ida M. Hessenbruch one-half thereof, and one-half thereof to Clara Markle, by way of pledge or collateral security for certain moneys advanced by them to him; and whereas, in order to work out the various equities of the parties in reference to the said interest, it is deemed just and equitable that the form of this decree should be such as to properly protect and preserve the equities of the several purchasers: It is therefore further ordered, adjudged, and decreed as follows: That if the said purchasers do not give security for the payment of the same, with interest as aforesaid, within the time aforesaid, then, in lieu of said security, the unpaid balance of the purchase money shall and it is hereby declared to be a charge upon the said six-sevenths in trust mentioned in the first paragraph hereof, and that the said balance shall be payable out of the income, earnings, and profits on the said six-sevenths interest in the mining partnership as the same shall accrue to the said George B., Alvan, and John Markle; such income, earnings, and profits to be paid over and accounted for by the said respondents last named, from time to time, to the trustees under the will of George B. Markle, deceased, until the entire unpaid balance due by the said George B., Alvan, and John Markle, with interest, shall have been fully paid and satisfied, with a right to the said trustees or any of them to apply to the court for such order or orders and such powers, from time to time, as may be necessary to carry out this decree. The costs of the proceeding to be paid by the contesting respondents, John Markle and Ida M. Hessenbruch."

D. L. Rhone and J. Q. Creveling, for appellants. Samuel Dickson and John C. Bullitt, for appellee John Markle. Geo. Tucker Bispaham, for appellees George B. Markle, Alvin Markle, and Clara Markle. John G. Johnson, for appellee Ida M. Hessenbruch.

GREEN, J. It must certainly be conceded that the testator, George B. Markle, Sr., had an absolute and undoubted right to direct the management and disposition of his estate according to the discretion of his son John Markle. He knew perfectly well the uncertainties and vicissitudes of the coal-mining business; the difficulties, the hazards, and risks, the extreme alternations of gain and loss, which constantly attended its prosecution; and, above all, he knew the complete, entire dependence, for its successful conduct, upon the skill, the foresight, the sound judgment, of the person controlling its operations. Being keenly alive to all these considerations, and knowing, by personal experience, the qualifications of his son for managing such a business, he clothed him with unusual and extraordinary powers in this respect, subjecting all transactions to the government of his discretion, and binding his executors and trustees by the same limitation. In ordering the business to be carried on after his death, he directed that it should be done "in the discretion of my son John Markle (who is familiar with the said business), so long as he shall deem it for the best interests of my estate"; and he then directed him "to do every and all things in the name of the executors and trustees of this my will which, by the terms of the present co-partnership of George B. Markle & Co., I might or ought to have done until the termination of the said articles of co-partnership of George B. Markle & Co. and the lease of the coal property in Luzerne county now operated by George B. Markle & Co.,"—that is to say, that John Markle, his son, should do all the acts and things necessary to be done both in the co-partnership business and in the matter of the lease, and he should do these things in the name of the executors and trustees. The same directions were given as to renewing the lease at its expiration, and the articles of co-partnership. These things were to be done by the executors and trustees, but "acting under the advice and in the discretion of my son John Markle." He also authorized and empowered his executors and trustees, "acting under the advice and in the discretion of my son John Markle, to make any new contract of partnership, to be known as George B. Markle & Co., for the purpose of mining and shipping coal in Luzerne county, with any person or persons whom my said executors and trustees, acting under the advice and discretion of my son John Markle, shall see fit"; and then, authorizing the executors and trustees to bind his estate for any covenants and conditions they may see fit to make, he adds: "Leaving the sole discretion in case of disagreement between my said executors and trustees as to what is for the best interests of my estate in the formation of said co-partnership unto my son John Markle." He then directs that if his son John Markle shall, at the termination of the present leases and co-partnership,

deem it best to buy out the interest of the other co-partners and co-lessees, and take new leases, the executors and trustees shall furnish the money necessary thereto, "for such price as my son John Markle deems proper and fair," and to carry on the business in the same firm name, John Markle to be the superintendent, and carry on the business, and "make all necessary contracts necessary for the proper and best means of mining and shipping coal and the necessary leases of such coal lands." He further directs that, if any new agreement is made for carrying on the business, his son John shall be the acting trustee, and shall have power to bind the estate for such contracts and engagements as are necessary for the business. He also provides: "If my said executors and trustees shall decide, acting under the advice of my son John Markle, to carry on the business of mining and shipping, either with others or by themselves, of coal in Luzerne county, then it is my will that my said executors and trustees shall transfer, out of my interest or that of my estate in the new business or undertaking, unto each of my sons, George B. Markle, Jr., John Markle, and Alvan Markle, two-sixteenths each of the whole value of the lease and improvements on said property to be mined, and such transfer to be made at such times as the new undertaking shall be commenced, which said bequests shall be considered as part payment of their share of the principal of my estate, and so charged against them at the valuation fixed." Then follows the direction that, in the event of a dissolution of the business, all the testator's interest in the partnership and in the improvements and machinery shall be sold "for such price and in such manner as my son John Markle shall deem most advisable and best." This is followed by a release of his executors and trustees from all liability by reason of their following the advice of John Markle, and the further release of John Markle in these words: "And I also release my said son from all liability for loss occasioned to my estate, occasioned by his deciding what is for the best interests of my estate in the mining of coal or other matter whatever."

It is almost impossible to conceive of a more full and plenary grant of control and power over a deceased person's estate than is contained in this will. Everything to be done was to be subject to the absolute and unfettered discretion of John Markle, and he was entirely released from all liability for any decision he might make. But ample and complete as these powers were, when a contingency arose which required legal advice and assistance, it was quickly sought and rigidly followed. What was subsequently done in the way of meeting and disposing of the questions which arose was done under and in pursuance of the advice and direction of most eminent counsel, distinguished alike for his learning and ability as a lawyer, and for his lofty integrity and uprightness as a man. The

questions to be met in the emergency when his assistance was sought were of the gravest importance, and of the most delicate character. They were carefully studied and considered, and written opinions were furnished by him as to what he considered were the rights and duties of the parties, and the necessary course to be pursued. He advised that the whole matter should be proceeded with under the order and direction of the orphans' court, which was done, and a solemn decree of that court was made directing the sale of the interest of George B. Markle, deceased, in the late firm of George B. Markle & Co., to wit, two-sixteenths of said interest to each of the three sons of the deceased, and one-sixteenth to the two daughters, and that the amounts payable to each of the sons should be charged against their respective shares of the estate, and the amount due by the daughters should be paid in cash.

Several objections are made on appeal to the proceedings and decrees made by the orphans' court in 1890. They are discussed at considerable length in the paper book of the appellants. We have carefully studied and considered them all, in the light of the testimony taken in the court below, and of the various propositions and arguments made in their support. As a matter of course, if it had not been for the extraordinary grant of discretion and power to John Markle, for the special directions of the will regarding the entering into a new partnership, the termination of the old one, and the termination of the leases, and the making of new leases, and for the provision directing the transfer of two-sixteenths of the testator's interest to each of his sons, and for the provision authorizing the sale of the testator's interest in the old firm and leases and in the property of the old firm, there would have been the greatest force in the propositions and arguments advanced by the able counsel for the appellants. But in all these particulars the case is widely and radically different from the ordinary cases of this nature, and the authorities cited fall of application to the facts, the circumstances, and the questions appearing on this record. As to the charge of fraud against John Markle, it is absolutely unsustained by any testimony in the cause, and we cannot give it a moment's sanction. As to the sale of the testator's interest, it was not only done by the advice of counsel, but under the decree of the orphans' court, with all the facts spread before them; and we are thoroughly convinced that it was wisely and properly done. A sale to strangers at a public auction would have been most unwise upon every consideration, and it would have been most unjust to the parties in interest. A sale to all the children of the testator assured to them all the benefits that could possibly arise from the transaction, and was in no sense injurious to those entitled in remainder. The impracticability of renewing the lease as it was before, on account of the objections of the lessors, and the utter impos-

sibility of the trustees undertaking to build the tunnel to drain the Ebervale mine, rendered the formation of a new firm a most urgent necessity. That the children of the testator, being the chief beneficiaries of his will, should have the right to purchase the interest of their father in the old leases and in the firm property, is a self-evident proposition. The property of the firm was appraised conscientiously and fairly by disinterested appraisers, and it cannot for a moment be believed that any larger price could possibly have been obtained at a public sale. In considering the contention of the appellants upon this subject, it is only necessary to think for a moment of what would have been the result if the opposite course, now suggested, had been adopted. An entire loss of the profits made by the new firm of which the parents of the appellants were members, an entire loss to the estate of the testator of the interest he formerly possessed in the leases, the business, and property of the firm, and only the advantage of a small price, would in all probability have been all that could have been gained by a public sale. We do not consider that the sale made to the children, just as it was, was injurious to the appellants, or that it was, in any point of view, void for want of legal authority; and we are clearly of opinion that it was within the power of the orphans' court to make the decree, precisely as it was made, for the sale of the testator's interest. The opinion of the learned court below is so full and complete, and sets forth the reasons for sustaining the decree of 1890 with such a force of argument, and in such clear and convincing language, that we deem it unnecessary to engage in a detailed discussion of the several propositions and contentions advanced for the appellants. Save in a single matter, we concur with the opinion in its rulings and conclusions. We do not think that a continuing lien could be imposed upon the share decreed to George B. Markle, so as to bind the purchaser from him of that share, and require her to pay the whole of the purchase money in cash. The question does not arise upon the present appeal, and it is only mentioned as a qualification of our affirmation. So far as the present appellants are concerned, the decree of the court below is affirmed, and the appeal dismissed, at the cost of the appellants.

(183 Pa. St. 333)

In re MARKLE'S ESTATE.

Appeal of HESSENBRUCH.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

EXECUTORS—SALES—LIEN FOR PRICE—DECREE—MODIFICATION—VESTED RIGHTS.

Executors sold to each of the sons and daughters of deceased an interest in a partnership of which deceased had been a member, the interest transferred to the sons being charged to their shares in the estate. The final decree authorizing said conveyance was made in 1890,

and a new partnership between the children and other persons was formed shortly after, and acquired much additional property. Three years later, one of the daughters loaned \$110,000 to one of the sons, taking as security an assignment of one-half his interest in the new firm, and on his default she purchased said interest. Subsequent to the sale of the partnership interest to the heirs, the supreme court upheld their title under the decree of 1890. Afterwards a petition was presented to the orphans' court to rescind said decree, but that court and the supreme court refused to disturb it. *Held*, that an order made in 1896, requiring that the purchase money upon the sale to the heirs in 1890 should be paid in cash, and that any deficiency should be a lien against the interests transferred, including the interest that the daughter had acquired from the son, interfered with vested rights of the daughter, and was invalid as to her.

Appeal from orphans' court, Philadelphia county.

Petition by S. A. Barber, as guardian of the estate of George B. Markle, Jr., and others, against John Markle and others, executors and trustees under the will of George B. Markle, deceased, and Ida Markle Hessenbruch, and others, to review and set aside certain decrees of the orphans' court made June 14 and July 5, 1890, in the estate of said decedent, and for further relief connected therewith. Under the decree of July 5, 1890, a partnership interest held by deceased was conveyed to his sons and daughters in certain proportions, and, by the terms of the decree, the price of the interests transferred to the sons was charged to their share in the estate, and the price of the interests conveyed to the daughters was to be paid in cash. This decree was modified so as to direct the price of the interests conveyed to the sons also to be paid in cash, and to provide that any deficit should stand as a lien against the property transferred. Ida Markle Hessenbruch appeals. Reversed.

John G. Johnson, for appellant. Geo. Tucker Bispham, for appellees.

GREEN, J. In this case the appellant is the sister of George B. Markle, Jr. In June, 1893, she advanced to her brother \$110,000 in money, for which she received his two promissory notes, one for \$85,000, and the other for \$25,000. On the same date, she took from him, as collateral security for the loan, an assignment of one-half of his interest in the new partnership of G. B. Markle & Co., and in all the partnership estate and property. Subsequently, upon default being made in the payment of the notes, this interest was sold at public sale, and the appellant became the purchaser, under authority to that effect contained in the deed of assignment. Immediately after the original decree was made, in 1890, the executors made and delivered a conveyance to each of the sons for two-sixteenths, and to each of the daughters for one-half of one-sixteenth, of the interest of the testator in the firm of G. B. Markle & Co.; and a new firm of the same name was then created, including all

the children of the testator and some other persons. This new firm took possession of the firm assets and property, and carried on business on a large scale, acquiring thereby very large additional assets and property. The final decree of the orphans' court authorizing the sale to the sons and daughters of the deceased was made on July 5, 1890, and the new partnership was formed July 11, 1890. It was almost three years later when the appellant loaned to her brother George B. Markle, Jr., the \$110,000, upon a pledge of one-half of his interest in this new firm, as collateral security for the loan. At that time the new firm was conducting a very large business, without any order or restriction upon their respective interests. Their title was unfettered by any lien for purchase money, and it had been derived under the authority of a decree of the orphans' court made after the most careful investigation, and upon a full consideration of all the facts and circumstances affecting the situation. We have held in Appeal of Barber, 38 Atl. 612, that that decree was a lawful exercise of the power of the orphans' court in the premises, and vested a good title in the purchasers. On the faith of this title, the present appellant loaned her money to one of those purchasers, and subsequently became the lawful owner of one-half of his share and interest in the firm. Two years after that time, a petition being presented to the orphans' court, the object of which was to rescind the original decree made in 1890 upon various grounds, that court, and this court on appeal, have refused to interfere, either to reverse those decrees or to set aside the sale to the sons and daughters of the deceased. But the orphans' court, having thought in 1890 that they made a mistake in 1890, by not ordering that the purchase money upon that sale should be paid in cash, have now made such an order, and have embraced the present appellant within its terms; and, if this decree is affirmed, she will now be compelled to pay, in addition to her \$110,000 loaned to George B. Markle upon the pledge of his interest as a partner, a large sum of money to make good the deficiency in the original sale. We do not think this can be done. The interest of George B. Markle in the new firm was personal property only, and it was not, at the time of the loan and subsequent sale, the same interest which was possessed by the deceased George B. Markle in the old firm. No charge or lien of any kind was imposed by the orphans' court upon this interest; and when the sale thus made and perfected was carried out by proper conveyances to the purchasers, and the purchasers, with other persons, had organized and established an entirely new firm and business, we do not understand upon what principle a lien can be imposed, five years thereafter, upon one of those interests in the new firm, for the original purchase money due the estate of the decedent upon the orphans'

court sale, after that interest has been bought and paid for by an innocent purchaser for value, without notice. It cannot be doubted that the present appellant was an innocent purchaser for value, and how can it be held that she had notice of a lien which had no existence when she purchased? It could only have existed by virtue of a lawful decree to that effect, and no such decree had then been made, and this court is of opinion that none such can now be made. The reason assigned by the learned court below is that she stood in the shoes of her assignor, and would therefore be subject to any decree to which he might be subject. We know of no authority for such a proposition in such a state of facts. The sale was a sale of the personal property of a decedent by his executors. Such sales are not attended with the incident that a right of lien will follow the property after delivery to the purchaser, and especially after the payment of the purchase money has been made in accordance with a decree of the orphans' court ordering the sale. If the orphans' court made a mistake in ordering such a sale, the vendee of the purchaser is not responsible for it. Even if the original purchaser might have been held to be responsible for the correction of such a decree, we cannot see how such a responsibility can be extended to one purchasing from him for value. If there was any fault attaching to the action of the executors in making such a sale, the fact that they might be held liable to account for such fault does not impart such a liability to an innocent purchaser from them. But, as we think the original sale was properly, lawfully, and wisely made, it is useless to speculate upon consequences which could only be possible under a different ruling upon that subject. In this respect, therefore, we are of opinion that the decree of the orphans' court was erroneous. The decree of the court below, so far as it affects the present appellant, is reversed, at the cost of the appellees, and the record is remitted for correction in accordance with this opinion.

(128 Pa. St. 124)

WILLIS v. ARMSTRONG COUNTY.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

NEGLECT—DEFECTIVE BRIDGE—PROXIMATE CAUSE.

After the wagon in which plaintiff was riding had passed over a bridge, and had gone 50 feet up the hill, the traces broke, and the wagon, running backward down the grade, missed the bridge, and went over the embankment into the stream. *Held*, that the proximate cause of the accident was the breaking of the traces, and not the absence of guard rails at the end of the bridge.

Appeal from court of common pleas, Armstrong county.

Action by Elizabeth Willis against the county of Armstrong to recover for personal in-

juries alleged to have resulted from defendant's neglect to erect guard rails at the edge of an embankment at one end of its bridge. The court refused to take off a compulsory nonsuit, and plaintiff appeals. Affirmed.

M. F. Leason, for appellant. McCain & Christy, for appellee.

PER CURIAM. It clearly appears from the evidence that the absence of guard rails was not the proximate cause of the accident which befell the plaintiff without any fault on her part. The undisputed evidence is that after the wagon, in which plaintiff and several others were riding had safely passed over the bridge, and proceeded up the hill 50 or 60 feet, the eyes in two of the traces gave way, and this resulted in freeing the horses from the wagon, and from the control of the driver. Being thus situated, the wagon ran back, down the grade, and, missing the bridge, went over the embankment, into the stream below. If the traces by which the wagon was drawn had not broken, the accident would not have occurred. Viewing the testimony in its most favorable light for the plaintiff, there is nothing in it to justify a verdict against the defendant. At most, the absence of guard rails was merely the remote cause of her injury. The sole efficient and proximate cause was the breaking of the harness, in consequence of which the control of the wagon was lost. The learned trial judge rightly refused to take off the judgment of nonsuit. Judgment affirmed.

(183 Pa. St. 197)

PFEIFFER v. SAFE-DEPOSIT & TRUST CO. OF PITTSBURG.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

TRIAL—BINDING INSTRUCTIONS.

Where the evidence presents questions of fact for the consideration of the jury, a refusal to give binding instructions is proper.

Appeal from court of common pleas, Allegheny county.

Assumpsit by Charles J. Pfeiffer, executor of Anna K. Kalbfell, deceased, against the Safe-Deposit & Trust Company of Pittsburg, administrator d. b. n. c. t. a. of John Kalbfell, deceased, to recover money alleged to have been loaned by plaintiff's testate to her husband, defendant's testate. From a judgment for plaintiff, defendant appeals. Affirmed.

J. McF. Carpenter, Alex. Gillilan, and Richard B. Scandrett, for appellant. John S. Lambie and Shiras & Dickey, for appellee.

PER CURIAM. The only assignments of error are to the refusal of the learned trial judge to affirm defendant's first, second, and third points for charge, in each of which he was requested to give binding instructions in favor of the defendant, and thus, in effect, withdraw the case from the consideration of

the jury. In view of the evidence properly before the jury, this could not have been done. It presented questions of fact which were properly for their consideration and determination. The case was accordingly submitted to them with instructions of which the defendant is not here complaining, and a verdict for plaintiff was rendered. There is nothing in the record to justify a reversal of the judgment entered on that verdict. Judgment affirmed.

(183 Pa. St. 206)

In re HAYS' ESTATE.

(Supreme Court of Pennsylvania. Nov. 10, 1897.)

EXECUTORS—COMPENSATION—PROVISION OF WILL.

Executors accepting the office with knowledge of provision in will fixing their compensation are bound thereby, in the absence of extraordinary circumstances.

Appeal from orphans' court, Allegheny county.

Accounting by Charles Hays and another, executors of Robert S. Hays, deceased. From a decree overruling their exceptions to the surcharging of their account with the amount of commissions charged in excess of the compensation fixed by the will, they appeal. Affirmed.

William R. Blair, for appellants. Kirk Q. Bigham, for appellees.

GREEN, J. We held in *Shippen v. Burd's Ex'rs*, 42 Pa. St. 461, under a will which prescribed the method and the extent of the compensation which was to be received by the executors for all the services to be performed by them, that the executors were bound by the provisions of the will in this respect. There was a trust to be executed in relation to certain real estate, and as to this the executors claimed additional compensation, because they were acting as trustees, which was a service outside of their duties as executors. But we held that, although this was a trust, the executors were bound to execute it as executors, and it was therefore a part of their duty as executors, and the compensation provided for them as executors must be regarded as conclusive upon them as to all duties which devolved upon them in the execution of the will. We said: "Executing the trust was but executing the will, and for this we have seen that provision was made in express words by the testator for the payment of commissions 'occurring for additional services to be rendered by them [the executors] in executing my will and codicils.' The intention of the testator, we think, is clear that for those services the executors are to be paid out of the estate, and not by the devisees." The fundamental principle upon which this decision was based was that the executors, having accepted their office under the will, were bound by its terms in respect of the compensation they were to receive as such. In *Harper's Appeal*, 111

Pa. St. 243, 2 Atl. 861, the testator gave a legacy of \$10,000 in cash to Mary A. Harper, and bequeathed also a sum of \$5,000 to J. Morrow Arnold, for his services as trustee for Mary A. Harper. The estate was not sufficient to pay these two bequests in full, and it was held both by the court below and this court that the bequest of \$5,000 to the trustee for his services as such must be paid in full, and the legacy of \$10,000 must suffer the whole of the abatement. The reasoning was that the \$5,000 was to be paid to Arnold as compensation for services to be rendered as trustee, and the legacy was therefore founded upon a valuable consideration. In the lower court, Hawkins, P. J., said: "An estate may be as effectually bound by a contract entered into in pursuance of a will as by a contract made with the testator in his lifetime. * * * The legacy to Mr. Arnold falls within the same class. It was made to him as a conditional offer of so much compensation for his services as trustee, and, when he accepted the appointment, his remedy against the estate for the amount of the legacy was as complete as though he had made a similar contract with testator in his lifetime." Paxson, J., delivering the opinion of this court, said: "There was therefore a consideration for the legacy to Mr. Arnold. All the authorities hold that such a legacy is entitled to preference over other legacies which are mere bounties. * * * It may be the testator placed an extravagant estimate upon the value of Mr. Arnold's services, but that is a matter with which the appellant, who is a mere volunteer, has no standing to complain. We need not pursue the subject further, as the case has been very carefully and intelligently discussed by the learned judge of the orphans' court." In the foregoing case the relation between the trustee and the estate of the decedent was viewed in the light of a contract for the payment of the services to be rendered, and was held obligatory upon the estate, and upon all others interested therein. We know of no reason why the same principle should not be applicable to an executor who accepts the trust with the compensation fixed by the will. He is under no obligation to accept the trust. If he does not like its terms, he is perfectly at liberty to decline it. But if he accepts it, and claims his right to act as executor under the will, certainly he is bound by the terms in which that right is given. If the provision as to his compensation is obligatory upon the estate, it certainly should be held obligatory upon the executor. It is the general rule relating to all contracts and grants of powers or rights that he who accepts them must take them subject to the duties or burdens with which they are charged. In Allen's Appeal, 125 Pa. St. 544, 17 Atl. 453, the same doctrine was enforced, and the compensation of the executor was fixed in strict accordance with the direction of the testator as contained in his will. In Bartollett's Appeal (decided in 1890) 1 Walk. (Pa.)

77, where the executor claimed compensation in excess of the amount allowed by the will, this court said, in a per curiam opinion: "None of the errors are sustained. The appellant accepted the office of executor under a will limiting the compensation he was to receive for his services as such, and it would have to be a case of an extraordinary character which would induce a court to allow more."

It is scarcely necessary to extend the discussion. We regard the question as settled by our own decisions, and hence references to the decisions of the courts of other states of a contrary character do not need to be considered. Nor is anything to be gained by discussing cases of an exceptional character, such as insolvency of the estate, or the presence of extraordinary circumstances. There is no such aspect of affairs in the present case. The executors took large interests under the will, and it was not only their duty, but to their advantage, to administer the estate in such manner as to yield the best results possible. Their compensation for services as executors was definitely fixed by the will at \$1,000 each. They accepted the office of executors with full knowledge of this provision, and there is no good reason why they should not be bound to comply with the conditions upon which they hold their title. The decree of the court below is affirmed, and the appeal is dismissed, at the cost of the appellants.

(123 Pa. St. 192)

BRADEN v. McCLEARY, Sheriff.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

WITNESS—INTEREST.

For purpose of showing interest of witness for defendant in action against a sheriff for wrongful levy and sale under execution, evidence is admissible that witness is a son-in-law of the execution creditor, and that she gave a bond to protect defendant.

Appeal from court of common pleas, Allegheny county.

Action by A. R. Braden against W. H. McCleary, sheriff, for value of boats taken under execution on judgment in favor of Rachel K. Pollard against W. W. O'Neil, Jr., and sold as the property of said O'Neil, notwithstanding notice that the property belonged to plaintiff. Judgment for plaintiff. Defendant appeals. Affirmed.

The specifications of error are as follows:

"(1) The court erred in overruling the defendant's objection, and admitting the following testimony of W. W. O'Neil on cross-examination: 'Q. Did Mrs. Pollard give a bond to the sheriff to protect him? (Objected to.) By the Court: How does that affect it? By Mr. Rodgers: To show the interest of this witness; his mother-in-law, the real party in the case, having given a bond to the sheriff to protect him in making this levy. By Mr. Petty: My objection is this: The sheriff did

get a bond which is worthless— By Mr. Rodgers: If the counsel goes out of his way to state that a bond was given, I have a right to ask the witness if a bond was given. By Mr. Petty: A bond of that kind was given, but the bond has proven worthless. This is a suit against the sheriff. By Mr. Rodgers: Counsel having stated in open court that a bond was given, I now propose to press the question whether a bond was given by Mrs. Pollard, his mother-in-law, to protect the sheriff in relation to this execution. (Objected to, as incompetent and irrelevant. Objection overruled.) To which ruling of the court defendant's counsel excepts, and at his instance bill of exception is sealed.

"(2) The court erred in sustaining plaintiff's objection, and excluding the following offer of testimony of Cal. Wilson by defendant: The plaintiff having testified that, after bringing down the boat of pit posts and boat of brace poles, he went back home, and before doing so left the boats in charge of John Shoup (who has since died) to take care of them for him (plaintiff), and that when plaintiff again came to Pittsburgh, on April 21st or 22d, Shoup was still in charge and possession of the boats, and the plaintiff took them off Shoup's hands. The defendant having up on the stand Cal. Wilson, the said witness was interrogated as follows: 'Q. Do you know Mr. Shoup? Do you know him? A. Shoup? Oh, yes; I saw him around there. Q. Did you hear him say anything about the boats? A. He was bailing them out. Q. Bailing out which boat? A. Bailing out Mr. Braden's boat. Q. Which boat do you mean? A. Well, he had been bailing around there at this pit post boat and brace pole boat, I think was the way of it. Q. Did he say anything about the pit post boat? (Objected to, as incompetent.) By Mr. Petty: Mr. Braden testified that he put Mr. Shoup in charge of certain boats. Now, I propose to prove by the witness on the stand that Mr. Shoup had charge of the brace pole boat, and turned the pit post boat over to him, and told him that that was O'Neill's, and he would like to have him take care of it. (Objected to, as incompetent.) By Mr. Petty: I offer to prove by the witness on the stand that Mr. John Shoup, referred to in the testimony of A. R. Braden, the plaintiff, turned over to the witness the boat loaded with pit posts, and said to the witness that was O'Neill's boat, and that he, the witness, would have to take care of it. (Objected to, as incompetent and irrelevant and immaterial under the proof in this case, and for the further reason that no time or place is mentioned.) By Mr. Petty: I will add to the offer that this was on the landing where Mr. O'Neil had his other boats at about the 12th of April, 1893, and several days before the boats were levied upon by the sheriff. (Objected to, as being too indefinite, and for the reason that it does not come within the scope of Shoup's authority as proven.) By Mr. Petty: This offer for the purpose of showing that the witness

as O'Neill's employé was in charge of these boats from and after April 12th, and at the time of the sheriff's levy, and that the boat was not in charge or possession of Mr. Braden, or Mr. Shoup, his agent. (Objected to.) By the Court: Objection sustained, as incompetent. The person put in charge of the property could not, in the line of his authority, subject the property to other ownership without the assent of Mr. Braden, whose agent he was, and the delivery of the property to others is not within the line of his authority.' To which ruling of the court defendant's counsel excepts, and at his instance bill of exceptions is sealed."

R. B. Petty, for appellant. Geo. F. Whitmer and W. B. Rodgers, for appellee.

PER CURIAM. This case depended on questions of fact, which appear to have been properly submitted to the jury, and by them determined in favor of the plaintiff. One of the specifications of error is in overruling defendant's objection, and admitting the testimony of W. W. O'Neil therein set forth. The other is in sustaining plaintiff's objection, and excluding defendant's offer of testimony therein specified. Our consideration of these rulings has led us to the conclusion that there is no error in either of them; and, inasmuch as there is nothing else in the record to justify a reversal of the judgment, both specifications of error should be dismissed, and the judgment affirmed. Judgment affirmed.

(188 Pa. St. 233)

JACKSON v. O'HARA et al.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

CONSTRUCTION OF LEASE—ASSIGNMENT.

1. An oil and gas lease for a term of years provided that, if the lessee failed to complete one well within one month, he should thereafter pay a fixed rental till a well was completed; and that failure to complete such well or pay said rental should annul the lease, the lessee "having the option to drill said well or not, or pay said rental or not, as he may elect." Held, that the lessee must drill the well or pay the rent, and could not relieve himself from liability by refusing to do either.

2. A written assignment of an undivided one-half of the lessee's interest in an oil and gas lease, together with his entire gas right therein, makes the assignee a joint owner of the lease, and jointly liable thereunder with the original lessee.

Appeal from court of common pleas, Allegheny county.

Assumpsit by Jane M. Jackson against C. K. O'Hara and another to recover on a gas lease. Judgment for plaintiff, and defendants appeal. Affirmed.

The court of common pleas delivered the following opinion (White, J.): "The plaintiff made an oil and gas lease to the defendant C. K. O'Hara, dated 29th January, 1891, for the term of five years, and as long thereafter as oil or gas should be obtained in paying

quantities. The lessee covenanted 'to commence operations and complete one well within one month, and, in case of failure to complete one well within such time, * * * to thereafter pay as rental to the party of the first part for such delay the sum of \$50 per month, payable monthly in advance at the Burgettstown National Bank, Pa.; and the party of the first part hereby agrees to accept such sum as full consideration, liquidation, and payment of all damages for any delays until one well shall be completed; and a failure to complete such well, or to make any of such payments within such time and at such place above mentioned, renders this lease absolutely null and void, and no longer binding on either party, and will revert the estate herein granted in the lessor, and release the lessee from all his covenants herein contained, he having the option to drill said well or not, or pay said rental or not, as he may elect.' On 1st May, 1891, O'Hara assigned an interest in the lease to the Ohio Valley Co., as follows: 'East Liverpool, Ohio, May 1st, 1891. For a valuable consideration, the receipt of which is hereby acknowledged, I hereby sell, assign, transfer, and set over to the Ohio Valley Gas Co. an undivided one-half ($\frac{1}{2}$) interest in and to the foregoing lease, together with my entire gas right in and to the said lease. C. K. O'Hara. [Seal.] No well was ever completed or commenced. The Ohio Valley Gas Company paid the rental for three months, but then ceased, and no more was paid. The contention of the defendant is: First, that the lessees had an option to sink a well, or pay the monthly rental, or to do neither, and by refusing to do either the lease was at an end, and they relieved from further liability; and, second, in any event, there is no joint liability of the defendants. On the first contention it is sufficient to say that in *McMillan v. Philadelphia Co.*, 159 Pa. St. 142, 28 Atl. 220, on a lease with a clause precisely similar to this, the supreme court held the lessee was not relieved from liability, even when he had tendered back the lease, which was not done in this case. The other contention is on the theory that the assignment by O'Hara to the Ohio Valley Gas Co. is in the nature of a subletting, and the gas company is only a subtenant. We cannot sustain that contention. The assignment is a sale of the one-half undivided interest in the lease. The two parties then became joint owners of the lease, and jointly liable to sink the well or pay the monthly rental. In the statement of claim by the plaintiff it is stated that the lease was assigned by O'Hara to the Ohio Valley Gas Company, which implies that O'Hara had parted with all his interest in the lease. Were that the fact, there could not be a joint action. The same general statement is made in the affidavit of defense. But the assignment, made part of the affidavit of defense, shows that it was only a one-half undivided interest that was assigned. In view of these

facts, and in order to have the case decided upon its merits, the plaintiff is allowed to amend the statement so as to set forth the assignment as it actually was. Rule absolute. Judgment ordered for the plaintiff against the defendants for \$3,382.86, being the monthly rentals from June 1, 1891, to January 1, 1896, with interest on each monthly rental to this date."

William R. Blair, for appellants. Ulysses G. Vogan and W. G. Crawford, for appellee.

PER CURIAM. This appeal is from the judgment entered by the court below against the defendants for want of a sufficient affidavit of defense. For reasons given by the court, we think there was no error in "holding that the facts set forth in the defendants' affidavit of defense" do not constitute a defense to the plaintiff's cause of action, and hence there was no error in making the rule for judgment absolute. The judgment is affirmed for reasons given in the opinion of the court below.

(123 Pa. St. 293.)

WHELAN v. WHELAN.

(Supreme Court of Pennsylvania. Nov. 10, 1897.)

DIVORCE—DESERTION.

A wife who leaves her husband merely because of a quarrel, and for over two years refuses his repeated requests to return, is guilty of willful and malicious desertion, entitling the husband to a divorce.

Appeal from court of common pleas, Allegheny county.

Libel by John A. Whelan against Emma M. Whelan for divorce. From a decree for defendant, plaintiff appeals. Reversed.

Frank P. Sproul and Thos. M. Marshall, Jr., for appellant.

GREEN, J. This is a libel for divorce on the ground of willful and malicious desertion, brought by the husband against the wife. The learned court below thought the evidence was not sufficient to prove a willful and malicious desertion on the 24th of December, 1893, and therefore refused a decree of divorce. We are unable to take that view of the testimony, and are very clear that the evidence establishes fully that the desertion was deliberate, intentional, and continuous from the time the respondent left the libelant's home, which was on December 24, 1893. On that day there was a quarrel in the morning between the parties, which was renewed in the evening; and thereupon the wife left her husband's home, although his mother entreated her not to leave, reminding her of her marriage vows at the altar. She replied she did not care what she had promised, and left. She went to the home of her parents, and in a few days sent for her clothes, which were taken to her, and from that time on she never returned to her husband's home. On January 4, 1894, less than

two weeks after she left, her husband sent her a kind and conciliatory letter, urging her to return, and promising to treat her kindly, and assuring her that she would be made welcome if she returned. To this letter she made no reply and paid no attention. It was testified that at a hearing before Judge Porter, upon an application for support, her husband, at the instance of the judge, made another effort at reconciliation, but it was in vain. She refused even to speak to him, and turned her back to him. It was also testified that the other members of her husband's family made efforts to bring about a reconciliation, both before and after the hearing, but she refused to negotiate with them. Another witness, a friend of hers, to whom the libellant spoke, expressing a desire to speak with his wife, repeated this wish to the respondent, who replied: "No, I will never speak to him. If he speaks to me on the street, I will have him arrested." This occurred about a year after separation. The libellant testified to repeated efforts he had made to have her come back, and to similar efforts made by members of his family, but said she always refused. He said he was always willing to take her back, and desired her to come, but that she would not do so, saying she intended staying with her mother. Another witness, Adams, testified that he went with the libellant to see his wife, and they did see her, and libellant asked her to come back, and she refused to do so. This was in the spring of 1896. The witness further said the libellant was urgent to have her come back, and that he knew he was acting in good faith in making the request. Against all this testimony there is not a particle of opposing evidence. The husband's efforts to induce his wife to return and live with him commenced a week or two after she left him, and continued persistently and repeatedly until the filing of the present libel. It was testified to by a number of witnesses that they lived pleasantly together until the time the respondent left her husband, and none knew of any reason for her leaving him. It is impossible to regard such conduct on the part of the respondent as other than willful and malicious desertion, persisted in for considerably more than two years, without any cause that the law can recognize. A mere quarrel at the time of the desertion is no justification. It is neither alleged nor proved that any personal violence was inflicted by the husband, nor any abusive language used. We consider it fully proved that the respondent intended to desert her husband when she left their home, and that she persisted in that purpose continuously from that time forward. That it was malicious and willful is a necessary conclusion from all the circumstances. We know of no cause but the quarrel; and that is no cause at all, in any legal sense. We are therefore of opinion that the decree of divorce from the bonds of matrimony should be granted. In *Bauder's Appeal*, 115 Pa. St. 480, 10 Atl. 41, we held that a wife who refuses the repeated

requests of her husband, for the period of two years, to return to him, and live and cohabit with him, is guilty of such desertion as will entitle the husband to a divorce, even though during this time the husband has paid her a fixed sum per week for her support, under an order of the court of quarter sessions of the peace, made in a proceeding for desertion against him by his wife. In *Van Dyke v. Van Dyke*, 135 Pa. St. 459, 19 Atl. 1061, we held that a desertion which is without consent and without sufficient legal cause is presumed to be willful and malicious, and, if persisted in for two years or more, it will entitle the injured party to a decree of divorce. The decree is reversed, at the cost of the appellee, and the record is remitted, with instructions to enter a decree of divorce for the libellant.

(183 Pa. St. 279)

STROUP v. RAYMOND.

Appeal of CROW.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

EXECUTION SALE—INADEQUATE PRICE—MISTAKE.

While gross inadequacy of price does not of itself authorize the setting aside of execution sale, sale for \$400 of property worth \$2,500 may be set aside where all parties supposed it was subject to a mortgage of \$2,000, which was in fact discharged.

Appeal from court of common pleas, Dauphin county.

Sheriff's sale was made under judgment of Anna H. Stroup against Charles N. Raymond. Rule to show cause why it should not be set aside was made absolute, and the sale was set aside. Wilmer Crow, the purchaser, appeals. Quashed.

Benj. L. Forster and John E. Snyder, for appellant. Meade D. Detweiler, for Jacob Overdeer.

DEAN, J. Charles N. Raymond borrowed from Anna H. Stroup \$2,000, and, to secure the loan, executed to her a mortgage in that sum on a lot of ground and dwelling house in the borough of Middletown. The value of the property was not less than \$2,500. A judgment bond accompanied the mortgage. Default having been made by Raymond in payment of the debt and interest, judgment was entered on the bond, execution issued, and the mortgaged property was seized and sold by the sheriff on December 30, 1896, to Wilmer Crow, this appellant, at his bid of \$400. There were other bidders, but it is found as a fact by the court below, from the testimony, that all parties interested, which would include plaintiff, defendant, and purchaser, believed the sale was made subject to the mortgage. It appears clearly from the testimony that Crow, the purchaser, until some time after the sale, assumed the property had cost him over \$2,400. It was then discovered that, as the sale had been made on the bond the mortgage had been given to

secure, the lot was discharged from the lien of the debt. This rule was then taken, at instance of an intending bidder and plaintiff and defendant, before the sheriff's deed was acknowledged, to set aside the sale. A bond with ample security was tendered, to be filed in court, stipulating that on a resale a bid sufficient to cover mortgage debt, interest, and costs would be made. After testimony taken, the court set aside the sale. The purchaser, Crow, appealed to this court; and counsel for plaintiff and defendant, in the judgment, now move to quash the appeal, assigning several reasons, only one of which we notice, viz.: "No appeal lies from the discretionary exercise of a power resting with the common pleas."

It is settled that the setting aside or refusing to set aside a sheriff's sale is in the sound discretion of the court below; and, unless there be a manifest and gross abuse of that discretion, this court will not disturb the decree. All our cases touching the question are so fully cited in the opinion of the superior court in *Laird's Appeal*, 2 Super. Ct. Rep. 300, that we need not repeat them; and it is held in the same cases that this court may either affirm the decree or quash the appeal. But it may be argued that there was a manifest abuse of discretion here, because the learned judge of the common pleas sets out, as a reason for setting aside the sale, gross inadequacy of price, which the law has settled is not of itself a sufficient reason. If this were the only reason on which the decree rested, the argument of appellant would be sound. Clearly, it is an abuse of discretion when, to reach a decree, the court itself overrides the established law. Substantially the same position was taken by the court below in *Young's Appeal* (decided in 1831), 2 Pen. & W. 380, as is taken by the court below in the case before us. All the judges concurred in dismissing *Young's Appeal*, because no appeal was given by the act of 1827. Two of the judges, Ross, J., and Gibson, C. J., wholly dissented from the reasons given by the court below for setting aside the sale. The other three judges declined to express an opinion as to this part of the case, because it had not been argued. But the opinion of Ross, J., concurred in by Gibson, C. J., has ever since been followed by this court as the law, and is conceded by the learned judge of the court below to have been the law so late as *Ritter v. Getz*, 161 Pa. St. 648, 29 Atl. 112. But he thinks "the time has arrived when the hoary pretense of 'belzing upon other circumstances' might safely be sent to keep company with the many other useless fictions, that have been abandoned in the modern desire for a more straightforward administration of the law, and that the courts should admit that, when the price is grossly inadequate, that of itself is a valid reason for setting aside a sheriff's sale." We do not think this statement meets the reasoning in *Young's Appeal*, *supra*. The opinion there states: "The bona

fide purchaser at a sheriff's sale of land, the moment it is knocked off to him, if he complies in all respects with the conditions of sale, instantly acquires a vested right to the property sold. Such a purchaser would be bound by his bargain thus made, although his bid greatly exceeded its value. And if he purchase at a bona fide sale greatly below the value, the vendor would be bound by the sale. Equality, in this case at least, is equity." The opinion then goes on to show that any other rule would necessarily affect sheriffs' sales very injuriously, because buyers would not attempt to purchase at such sales when they could be set aside for mere inadequacy of price. We do not see that lapse of time has changed the rule that equality is equity into the opposite one, that inequality is equity. The same reasons for adhering to all other formal solemn contracts exist where such contracts are regular, and made under no misapprehension as to material facts. We are clearly of the opinion that the rule was founded upon the soundest reason, and should be adhered to. If the decree of the court below had for its foundation only the reason that inadequacy of price was sufficient to set aside the sale, we would reverse it as a palpable abuse of discretion. But it also rests upon a much sounder one. The court states that all parties interested acted on the mistaken belief that the purchase was subject to the mortgage. This was such a mutual mistake as would in most cases relieve parties from the obligation of their contracts. Undoubtedly, courts have, in cases where the purchaser believed he bought the land discharged from the lien of a mortgage, relieved him from the obligation incurred by his bid, if he made prompt application before acknowledgment of deed. And, on the other hand, there is no reason here why this purchaser should get for \$400 a property which he thought he was paying more than \$2,400 for. This mutual misapprehension, coupled with inadequacy of price, warranted the decree, and therefore there was in fact no abuse of discretion. There being no such abuse apparent from the record or averments of appellant, the appeal is quashed.

(188 Pa. St. 210)

DURNING v. HASTINGS.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

HUSBAND AND WIFE—CRIMINAL CONVERSATION—PROOF OF MARRIAGE.

In an action by a husband for seduction of his wife, cohabitation, reputation, and general surroundings, which indicate the reasonable probability of the conclusion that said parties are married, is sufficient to establish that fact.

Appeal from court of common pleas, Allegheny county.

Action by Charles Durning against John Hastings to recover damages for the seduction of plaintiff's wife. From a judgment for plaintiff, defendant appeals. Affirmed.

One of the assignments of error was as follows: "The court erred in charging the jury as follows: 'The first question for you to determine is whether or not you believe the plaintiff and the woman who is alleged to be his wife were actually married. I presume upon that subject you have very little, if any, doubt that the Reverend Mr. Lea did marry a woman and a man with the same names,—the names borne by the plaintiff and the plaintiff's so-called wife. Those people were recognized in the community as being married. They lived together for years, and had children; and that, perhaps, will be entirely sufficient to satisfy the jury of the marriage. If it required absolute proof of marriage between a man and a woman, it would be a very difficult thing for most of us, particularly very old people, and more particularly people coming from another country, where they were married, to produce evidence that would clearly and unquestionably establish the fact. Therefore cohabitation, reputation, and general surroundings that indicate the reasonable probability of the conclusion that the parties were married are recognized as being sufficient evidence to establish that fact.'"

Levi Bird Duff and L. B. D. Reese, for appellant. John P. Hunter, for appellee.

PER CURIAM. This record contains nothing that would justify us in sustaining either of the specifications of error. The case was ably and correctly tried. It was clearly for the jury on the questions of fact presented by the evidence, and was submitted to them with full and adequate instructions, of which the defendant has no just reason to complain. Judgment affirmed.

(183 Pa. St. 203)

COMMONWEALTH ex rel. KELLY et al. v. CITY OF PITTSBURGH et al.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

MUNICIPAL CORPORATIONS—APPROPRIATIONS—VALIDITY.

1. A city ordinance was passed in 1895 appropriating \$10,000 out of the revenues for the fiscal year commencing February 1, 1896, for the purpose of the "Provisional Committee of the Lake Erie and Ohio River Ship Canal," a committee appointed by the chamber of commerce of Pittsburgh to determine the practicability of such a canal. An ordinance passed in February, 1896, headed "Appropriations for 1896," contained an item, "Lake Erie Ship Canal, \$10,000." No corporation or association of that name existed, and there was no appropriation to the provisional committee by name. *Held*, that the appropriation was intended for the committee, pursuant to the prior ordinance.

2. An appropriation of a reasonable sum by the city of Pittsburgh for the use of a committee appointed by the chamber of commerce, to determine the practicability of a ship canal between said city and Lake Erie, and whether it would benefit the city, is not within the inhibition of Const. art. 9, § 7, forbidding the legis-

lature to authorize a city "to appropriate money or loan its credit to any corporation, association, institution, or individual."

Appeal from court of common pleas, Allegheny county.

Mandamus, on the relation of George A. Kelly and others, a committee of citizens unincorporated, known and styled the "Provisional Committee of the Lake Erie and Ohio River Ship Canal," against the city of Pittsburgh and H. I. Gourley, controller of said city, to compel the latter to issue and approve a warrant. From a decree for plaintiffs, defendants appeal. **Affirmed.**

The court of common pleas rendered the following opinion (WHITE, J.):

"This case comes before us on an amicable submission, to decide the legal questions involved. The original petition, answer, and demurrer were filed the same day, January 22, 1897. At the hearing, certain facts seemed to be necessary to a proper decision of the case, and the relators were allowed to amend. The amendment, answer thereto, and demurrer were filed at the same time, March 13, 1897, and the case submitted for final disposition. The relators were the 'Provisional Committee of the Lake Erie and Ohio River Ship Canal,' appointed in pursuance of a resolution of the board of directors of the chamber of commerce of the city of Pittsburgh, passed 2d July, 1894, for determining the practicability of such a canal, and the benefits and advantages that would accrue from it to the trade and industries of Pittsburgh, and, if found such, to secure a corporation of private capital to undertake it, or the national government to undertake it. Pursuant thereto, the committee raised, by voluntary subscriptions, \$20,000, which were expended in the employment of engineers, gathering statistics, etc., and were unanimously of opinion that the proposed canal 'was entirely practicable and feasible, and would be of inestimable value to the city of Pittsburgh and its citizens, by increasing the trade and commerce of said city.' Finding that the fund voluntarily subscribed was not sufficient to complete their work, and 'to remove all doubts as to the practicability of the project, and to establish clearly its great utility to the commerce, trade, and industries of the city of Pittsburgh,' they wished 'to employ impartial experts to test and examine the work, and to complete the work in the most perfect detail,' and for that purpose appeared before the councils of the city, 'and gave a full explanation and history of their work as done, and stated that the money requested was to be used by the committee, in completing their work in the most perfect and detailed manner,' and the necessity and great utility of such a canal for the people of Pittsburgh. Thereupon the councils of the city unanimously passed an ordinance, July 11, 1895, which was duly approved by the mayor, for the appropriation of \$10,000 out of the rev-

venues of the city for the fiscal year commencing February 1, 1896, 'to be expended solely for the purpose of the provisional committee of the Lake Erie and Ohio River Ship Canal, a public improvement and highway designed to promote the commercial interests of the city. The sum, or so much thereof as shall be required, shall be paid by the controller upon proper vouchers and affidavits presented and made by the chairman of said committee, or the treasurer thereof, and shall be charged to appropriation No. —.' The relators say that, 'relying upon the faith of said ordinance and appropriation, they subsequently entered into contracts, and expended in carrying out the work contemplated, requiring the sum of \$7,500 (\$5,000 yet remaining unpaid, \$2,500 being advanced by the relators), and that, in addition thereto, some \$1,500 will be needed for publishing the reports, etc., making a total of \$9,000, which will be necessary to finish the work'; that, on application to H. I. Gourley, the controller, for the certificate for a warrant for the appropriation, he refused to issue the same, for reasons stated in his letter of June 5, 1896, addressed to the chairman of the committee, in which he says: 'I very reluctantly decline to issue the certificate. . . . The conclusion which I am compelled to reach is based on a provision of the state constitution, which I am advised prevents the use of public money for the purpose designed. I can see no way, at the present time, by which the money can be placed in the possession of your committee.' At the argument on the original petition, answer, and demurrer, it was further urged that the relators had not presented vouchers and affidavits, as required by the ordinance of July, and also that all appropriations, under the general ordinances of the city, must be made at the beginning of the fiscal year, in January or February. It was claimed by the relators that they had or would give the vouchers, etc., and also that in the annual appropriation ordinance of February, 1896, this specific sum of \$10,000 was included. The relators were permitted to amend on these points. The amendment filed March 13, 1897, showed a compliance as to the vouchers and affidavits, and also the general appropriation ordinance of February, 1896, containing this item: '(47) Lake Erie Ship Canal, \$10,000.' The ordinance is headed: 'Appropriations for 1896. The following sums of money are hereby specifically appropriated for the purposes hereinafter set forth.' In the answer of the controller to the amendment, he denies that the \$10,000 in the ordinance of February, 1896, should be paid to the relators, because it is 'an appropriation made to and for a different and distinct body entirely, namely, the Lake Erie Ship Canal.'

"If the answer raised a question of fact, it would have to be referred to a jury. But I do not understand that the controller raises a question of fact, but a legal question, upon the words of the ordinance. In considering

this question, we must take into consideration all the circumstances. It is not alleged that there is any corporation or association by the name of the 'Lake Erie Ship Canal.' If there is none such, then the appropriation could not have been intended for a nonentity. The appropriation in the ordinance of February, 1896, was manifestly intended to refer to the ordinance of July, 1895. That ordinance did not appropriate the money at that time, for it expressly provided it shall be paid out of the revenues of 1896. The ordinance of February, 1896, was intended to carry out the ordinance of July, 1895. It is for the precise sum, and there is no appropriation to the provisional committee. The object is the same in both ordinances. It was suggested in the argument that possibly the city might have to pay the sum twice. Perhaps that was a good reason for raising the question. But certainly the city is in no danger. There is no body now in existence that can claim this money, as the 'Lake Erie Ship Canal.' No doubt, if the money be paid to the relators under the order of court, the city will be fully protected, especially as no body or person representing the 'Lake Erie Ship Canal' has appeared for more than a year to claim this money. When the controller wrote his letter to the committee, June 5, 1896, doubtless he knew of the appropriation in the ordinance of February; but he did not give that as any reason for refusing to certify a warrant, nor does he refer to it in his answer to the original petition, filed January 22, 1897.

"The other, and perhaps the main, question in the case, is the one raised in the controller's letter to the committee: Had the councils power to make the appropriation? The section of the constitution referred to (article 9, § 7) is in these words: 'The general assembly shall not authorize any county, city, borough, township, or incorporated district, to become a stockholder in any company, association or corporation, or to obtain or appropriate money or loan its credit to, any corporation, association, institution or individual.' The principle of this section is not new. It is substantially the same as an amendment to the constitution of 1837, adopted in 1857. It is the same as in the constitution of Ohio. The city of Cincinnati, under an act of the legislature of that state providing that cities of the first class, when a railroad was material to the development of a city, might contract a loan and build a railroad, actually built a railroad entirely outside of the state of Ohio, except the bridge over the Ohio river, which connected it with the city. The supreme court of Ohio gave an interpretation to that section of their constitution. *Walker v. City of Cincinnati*, 21 Ohio St. 52-54. Our supreme court, in *Wheeler v. Philadelphia*, 77 Pa. St. 338, adopted the interpretation of the supreme court of Ohio, as contained in the opinion of Scott, C. J., by this quotation: 'The mischief which this section interdicts is

a business partnership between a municipal or subordinate division of the state and individuals or private corporations or associations. It forbids the union of public or private capital or credit in any enterprise whatever. In no project, originated by individuals, whether associated or otherwise, with a view to gain, are the municipal bodies named permitted to participate in such manner as to incur pecuniary expense or liability. They may neither become stockholders, nor furnish money or credit for the benefit of the parties interested therein. As this alliance between the public and private interests is clearly prohibited in respect to all enterprises of whatever kind, if we hold that these municipal bodies cannot do on their own account what they are forbidden to do on the joint account of themselves and private parties, it follows that they are powerless to make any improvements, however necessary, with their own means, and on their own sole account. We may be very sure that a purpose so unreasonable was never entertained by the framers of the constitution.' In this case the city of Pittsburg does not propose to build a canal, or to loan or appropriate money for that purpose, or to join with any person, association, or corporation for that purpose. It simply appropriates \$10,000—a very small sum for the city in view of the great object aimed at—for surveys, getting information, etc., to ascertain whether a ship canal between Pittsburg and Lake Erie is practicable, and would be a benefit to the city. That such a ship canal is practicable, and would be of very great benefit to the trade and industries of Pittsburg, must be taken as true in this case, for the provisional committee so reported, and it is so stated in the ordinance of July 11, 1895, and is not controverted by the controller in his answers. There can be no doubt, if practicable, it would be of immense importance to Pittsburg to have a ship canal from here to Lake Erie.

"It is objected that the provisional committee was appointed by the chamber of commerce, and not by the city. That is true in one sense. But they are all citizens and business men of the city. It was evidently proper for the chamber of commerce, the incorporated body representing the commerce and business of the city, to take the initiative in the matter. Besides, the committee appeared before councils, giving a history and explanation of the project, what they had done, and what they proposed doing; and, in view of those facts, the councils unanimously passed the ordinance of July, 1895, thus sanctioning the investigation, and endorsing the appointment of the committee.

"The objection that the canal would be outside the boundaries of the city I do not think is entitled to much consideration. There can be no doubt the city could establish gas works or water works beyond the city limits, to supply the citizens with gas

and water; or could purchase and erect a poor house outside of the city limits, which was recently done, and in that case some expense was incurred in ascertaining a good location. The real question is: Was a preliminary investigation as to the feasibility of a ship canal, connecting Pittsburg with Lake Erie, and its advantages to Pittsburg, a proper subject for the councils to inquire into, and appropriate a reasonable sum for that purpose? If so, I have no doubt of the power of the councils to make the appropriation. There is no complaint of the amount appropriated in this case. It is certainly very reasonable, as the relators, by private subscriptions, had raised and expended for that purpose \$29,000 before they asked councils to appropriate the \$10,000.

"There is another and good reason why the relators should have this money. The ordinance of July, 1895, pledged the city for \$10,000. No objection was made to it by the controller or any other citizen until the controller refused to certify a warrant, in June, 1896, nearly one year after the passage of the ordinance. In the meantime, on the faith of that ordinance, the committee contracted debts in carrying out the very object declared in the ordinance, and actually advanced \$2,500. Shall they suffer this loss, or the city pay what it promised to pay them, on the faith of which they incurred the expense? Even if there is a doubt about the power of the city to pass the ordinance of July, 1895, or some legal irregularity in the ordinance of February, 1896, good faith and common honesty would require the city to pay. The relators have incurred debts, for which proper vouchers have been furnished, to the amount of \$7,500. They can only ask for a certificate for that amount at this time. The reports and statistics should undoubtedly be printed for public information. The city would otherwise lose the entire fruits of the investigation. The committee are of opinion it will require \$1,500 more for that purpose. When these are printed, it will be time enough to ask for another certificate. Let counsel draw up a decree in accordance with this opinion."

Clarence Burleigh and J. H. Beal, for appellants. J. W. Kinnear, John C. Slack, and John E. Shaw, for appellees.

PER CURIAM. It is unnecessary to refer in detail to the facts of this case. They sufficiently appear in the pleadings and in the opinion of the court below; and, for reasons given in that opinion, we think the decree should not be disturbed. The case is clearly not within the inhibition of section 7 of article 9 of the constitution. The appropriation was a very reasonable one, for the purpose for which it was made was certainly not foreign to the material interests and general prosperity of the municipality, but quite the contrary. We are therefore of

opinion there was no error in holding that councils had the power to make the appropriation, and that good faith to the relators and others who acted in reliance thereon requires that the sum appropriated should be paid. Decree affirmed, and appeal dismissed, at appellants' costs.

(60 N. J. L. 201)

EAST JERSEY WATER CO. v. BIGELOW
et al.

(Court of Errors and Appeals of New Jersey.
Nov. 9, 1897.)

NUISANCE—LIABILITY OF GRANTOR FOR CONTINUANCE—WATER RIGHTS—DIVERSION AND OBSTRUCTION—DAMAGES—PROFITS.

1. One who erects a structure or construction which creates a nuisance, and then conveys to another his title, and the lands and premises on which the structure or construction exists and is maintained, with a covenant in the deed of conveyance for quiet enjoyment, and right to maintain such structure or construction, is liable for the continuance of the nuisance, upon the ground that he affirms it, and must be regarded in law as continuing it. He is the author of the original wrong, and, thus transferring the premises with the original wrong still existing, he is treated as affirming its continuance.

2. When one turns more water on the land of another than would naturally go in that direction, it is immaterial whether it be productive of injury or benefit as regards a right of action, for no one has a right to compel another to have his property improved in a particular manner. It is as illegal to force him to receive a benefit as to submit to an injury.

3. It is an actionable nuisance for one, by means of a reservoir, to increase, divert, or diminish the volume of water naturally flowing in a stream, to the detriment of and damage to a mill owner thereon; and it is no defense to the action for such an injury that the person complaining is benefited by the increase in the volume of water, for he has the right to the enjoyment of the waters in their natural condition; or, if the plaintiff be injured by the diversion or diminution of the usual flow at certain periods, this injury cannot be compensated, without the consent of the plaintiff, by an increased volume caused by the defendant, in excess of the natural flow, at another time, and no credit could be given, or diminution of actual damage made, because of a benefit received by the plaintiff by reason of such increased volume.

4. Profits are recoverable as damages when they might have been realized, and when they are capable of being estimated with reasonable certainty; and in actions of tort, where the quantum of damages is very much within the discretion of the jury, the evidence of the nature and extent of the plaintiff's business and the general rate of profit he has realized therefrom, which has been interrupted by the defendant's wrongful act, is properly received, not on the ground of its furnishing a measure of damages to be adopted by the jury, but to be taken into consideration to guide them in the exercise of that discretion which to a certain extent is always vested in the jury.

(Syllabus by the Court.)

Error to supreme court.

Action by George W. Bigelow and others against the East Jersey Water Company for damages for a diversion of the waters of a stream. There was a judgment for plaintiffs, and, from a judgment of the supreme court affirming the same, defendants bring error. Affirmed.

Joseph Coult, for plaintiffs in error. John W. Harding, for defendants in error.

LIPPINCOTT, J. The defendants in error are the owners of a tract of land through which a branch of the Pequannock river flows. On this land they maintain a sawmill, which is operated by water power drawn from the river by means of a low dam and a raceway leading to the sawmill. This mill has been uninterruptedly operated by the defendants in error and their father for a period of over 30 years, and their legal right to operate the mill in the manner in which it is operated during this period is not disputed by the plaintiffs in error. This action is for damages for a diversion of the water of the river in such volume, as it has been accustomed to flow, as to interfere with the operation of the mill. This diversion commenced in September, 1891, and it is alleged continued from time to time, covering certain periods, until the commencement of this action, on December 10, 1895. The liability of the plaintiffs in error for injuries arising from the diversion of the water up to May 2, 1892, is conceded, but beyond this date the responsibility is disputed.

The first assignment of error is taken against the admission of evidence to show diversion and injury after this date. The facts, so far as they are involved in the discussion of the question presented, are as follows: The East Jersey Water Company, the plaintiffs in error, on September 24, 1889, entered into a contract with the Newark aqueduct board and the mayor and common council of the city of Newark to furnish a water supply to that city, and to construct such dams, reservoirs, works, and conduits on the Pequannock river and other rivers as might be necessary to render a water supply to the city to the extent of 50,000,000 gallons daily, to be completed by May 1, 1892. A subsequent and further contract was made on August 1, 1892. These contracts provided that, after the contract was fully performed and completed, the city of Newark might, at its option, by a deed or deeds of conveyance, become the owner absolutely, in its own right, of the water, water rights, dams, reservoirs, and works constructed under the contract, subject, however, to a license to the East Jersey Water Company to divert and use for its own purposes a certain portion of the water in excess of 27,500,000 gallons daily up to the year 1900, and deferring the payment of \$2,000,000 of the purchase price until that time, and that, for the purposes of this license and contract, the East Jersey Water Company should, at its own cost and expense, keep and maintain all such dams, reservoirs, and works, and, at the end of the period, deliver the same in good repair to the city of Newark, and that the control of the East Jersey Water Company should then entirely cease and determine. Under these contracts, the plaintiffs in error, in the construction of these dams and reservoirs, interfered with, interrupted, and diverted the usual flow of water

of the river. On the 2d day of May, 1892, the East Jersey Water Company conveyed water, water rights, reservoirs, dams, and works to the city of Newark. This deed of conveyance reserves to the water company the right or license until September 24, 1900, to take out of the pipes or conduits at the city of Newark any excess of water over 27,500,000 gallons daily for its own use; and for such purpose, and in consideration therefor, the water company reserved the right and agreed to keep, maintain, and control the dams, conduits, and works. The contracts and this deed of conveyance were offered in evidence by the plaintiffs below. The plaintiffs below then proceeded to produce evidence to show diversion of water to their injury after the date of the delivery of this deed. This was objected to, on the grounds that the city of Newark, by this conveyance, became the owner of the property and works, and that, from that time on, the maintenance and operation of the works were acts of the owner, and that, if any liability existed for any further diversion, it was upon the city of Newark. The learned trial justice admitted the evidence on the ground that by the deed the water company reserved the right, and were licensed and permitted, to maintain the dams and reservoirs which created the nuisance, and were put in control thereof for the purpose of utilizing the excess of water for its own benefit, and liable to the plaintiffs below for any injury that such maintenance and control caused. In the admission of this evidence it is difficult to perceive any error in the learned trial justice. It may be said as a fact, under this deed of conveyance, that the further control and management of the works in the water company was exclusive; but, even if it were not, still the control being to an extent retained would render the water company liable, at least, for such maintenance and control as it actually exercised.

It cannot be contended either in reason or authority that the company were relieved of liability from and after the date and delivery of the deed; for the deed itself, by its own provisions reserving this control, rendered the defendants liable. Besides, in the deed the grantor covenants the right in the grantee to maintain the erection of the water-works; and the general principle is clear that one who erects a structure or construction which creates a nuisance, and then conveys to another his title, with covenants with the grantee for quiet enjoyment and the right to maintain the erection, is liable for its continuance, upon the ground that, by his relations with the occupier, he affirms the nuisance, and must be regarded in law as continuing it. He is liable for a continuance of the nuisance, if, from the terms of the conveyance, he can fairly be said to affirm or uphold it. The ground upon which the alienor is held liable for a nuisance created by him is that he is the author of the original wrong, and transferring the premises with the orig-

inal wrong still existing is treated as affirming the continuance of it. Wood, Nuis. (2d Ed.) p. 78, § 73; Gould, Waters (2d Ed.) §§ 387-391, and cases cited. Besides, the right to keep, maintain, and control these dams, reservoirs, and other works was expressly reserved to the water company; and, up to the time that this evidence was offered, there was nothing in the case which in the slightest tended to show that the actual maintenance and control had changed. The person primarily liable for a nuisance is he who actually creates it, whether on his own land or not; and the contracts were admissible to show the liability for construction for the city, and the conveyance clearly was evidence to show continuing control, and the evidence clearly admissible. Where the continuance of the nuisance is expressly provided for, no question can arise as to continuing liability. *Blunt v. Aikin*, 15 Wend. 521; *Waggoner v. Jermaine*, 3 Denio, 306; *Hanse v. Cowing*, 1 Lans. 288.

Another exception was to the charge of the court upon the same subject of the liability of the water company for injuries inflicted upon the plaintiffs below after May 2, 1892. The evidence on the part of the defendants tended to establish quite clearly that the plaintiffs in error, through their agents and servants, were in actual control of the dams and reservoirs during the whole period for which the claim for damages is made. Both the answers to the formal interrogatories read as evidence and the evidence of the witnesses on the trial tend to establish this fact. The trial court, after referring to these facts, said: "I therefore charge you, if, after the deed to the city of Newark, this defendant remained in control of the Oak Ridge Reservoir, and used it to confine the waters of this branch of the Pequannock, and, in using it, restrained these waters from flowing in their usual and accustomed mode to the plaintiffs' mill, and thereby deprived the plaintiffs' mill of power, it is liable therefor to the plaintiffs." The fact of control by the deed of conveyance, and the admissions in the answers to interrogatories, and the evidence of witnesses undisputed on this point of control, was so clear and so undisputed that it could have been made a subject of direction in favor of the plaintiffs below; and the defendants cannot complain that the facts were submitted to the jury, to determine whether a basis of liability existed and continued. Upon the principles stated regulating the admission of evidence of injury after May 2, 1892, the court committed no error against the defendants below in this submission to the jury.

There were several requests upon the question of damage, which the trial court refused to charge in the language of the requests, and to which refusals exceptions were taken. The first in order, as contained in the assignment of error, is "that the measure of damages for the injury complained of is the dim-

inution in the rental value of the premises occasioned by that injury." The trial court correctly refused this as an exclusive rule of damage. The damages might not depend upon the amount which could be obtained as rent, but as well upon the diminution in value of the premises arising from the wrongful diversion of the water. The diminution of the value of the use of the premises to the owners might not at all be connected with the mere diminution of the rentals. *Halsey v. Railroad Co.*, 45 N. J. Law, 37; *French v. Lumber Co.*, 145 Mass. 261, 14 N. E. 113; *Luse v. Jones*, 39 N. J. Law, 707; *Post v. Munn*, 4 N. J. Law, 67.

Another exception in order was taken upon the refusal of the court to charge the jury "that the jury could not confine their inquiry and base their verdict alone on damages claimed to have been suffered at particular periods, when the water was shut off, but must consider whether he suffered damages generally, and, if so, what damage during the entire period covered by the suit." The plaintiffs below were entitled to the usual and accustomed flow of the water. *Merritt v. Parker*, 1 N. J. Law, 526, 533; *Wood*, Nuls. (2d Ed.) pp. 499, 500, § 428. The trial justice, in answer to this request, declined to charge as requested, in the language of the request, and charged that "the plaintiffs, if injured by the shutting off of the water during the period proved by them, would not be compensated, without their consent, by water sent down in excess of the natural quantity at another time. They might consent to receive the water, and utilize it, and so set that off against the injury done at a previous time; but, in the absence of such a consent, you, gentlemen, would not be entitled to give the defendant credit for that additional water at another time." This rule accords with reason and that certainty which is required as to compensation for injury done, and it appears to be fully authorized by precedent. *Kinsey, C. J.*, in *Merritt v. Parker*, *supra*, said: "It would be equally unreasonable that one man should have the right to turn more water over the land of his neighbor than would naturally go in that direction; and, so far as regards the right, it is altogether immaterial whether it be productive of injury or benefit; no one has a right to compel another to have his property improved in a particular manner. It is as illegal to force him to receive a benefit as to submit to an injury." In an action for overflowing the plaintiff's land, in which it was suggested that the acts complained of as injurious, instead of being an injury, were really a benefit to the plaintiff's land, the court said that no infringement of the rights of another could be justified on the ground that the act is a benefit to the owner, if it is done against his will. *Tillotson v. Smith*, 32 N. H. 90-96; *Gerrish v. Manufacturing Co.*, 30 N. H. 478. It is the right of every owner of land upon a stream to have the water come to him in its natural flow, undiminished in quantity, and unimpaired in quality, and, it

may be added, with no increase of the volume except from natural causes. Therefore it is an actionable nuisance at common law for a mill owner or other person to turn a new stream into the stream, or, by means of a reservoir, to increase the volume of water naturally flowing in the stream. It is no defense to an action for such an injury that the person complaining is benefited by the increase in the volume of water, for no person can be compelled to have his premises improved, and has a right to their enjoyment in their natural condition, and according to his tastes and inclination. *Wood*, Nuls. § 428, pp. 499, 500. I have noticed, upon an examination, that there was no evidence in the case upon which this request to charge could be founded. It was the opinion of some of the witnesses that, since the reservoir had been constructed, more water at times had flowed than before, but no times were fixed, and there was no evidence, so far as I can perceive, that such increased flow, if it ever did exist, was of any use or benefit to the plaintiffs in this action. For these reasons, this request to charge was properly refused.

The only other two errors assigned pertain to the subject of damages. One arises upon a request to charge upon the subject of the loss of profits as an element of damage, and the other upon what the court said in the charge to the jury on that subject, as a measure or element of damage. Both can be considered together. The request to charge was: "That no damages could be awarded by them for loss on supposed profit on work not done, unless it appear that the plaintiffs were prevented by the acts of the defendant from doing the work, and did not in fact do it." The specific reply of the learned trial justice was as follows: "I do not know that I quite understand that, but I will decline to charge on that subject otherwise than I have charged. The case is left somewhat obscure with reference to whether the work the plaintiffs say they were prevented from doing was afterwards done by them, and whether, if so done, it prevented them from doing other work, that would have been offered to them, which they could otherwise have done. I shall leave the case to the jury on the charge as I have given it, and decline to charge otherwise than I have." In this connection, counsel for the defendants called the attention of the court that the jury had been charged that they should consider the loss on 50 stone boats, and that afterwards all those stone boats had been completed except an order for 20, which was either withdrawn or turned aside. The trial court, after referring to this misapprehension, said: "It is not a question of profit, but a question of what amount has been lost to the plaintiffs by their inability to finish that order; and after that,—counsel calls it to my mind,—if it be true that they filled that order so far as thirty were concerned, and only lost the order with respect to twenty, I restrict

your consideration to those,—the twenty.” The other exception is founded upon what the court said in relation to loss of profits as an element of damage, and upon the assumption that the charge was that the measure of damages to which the plaintiff was entitled was the loss of business profits during the period complained of. The whole charge, including what was said in reply to the requests to charge, must be looked to in order to determine whether these two errors are well founded. The trial court nowhere in its charge placed any such proposition to the jury that the measure of damages was the loss of business profits during the period complained of.

In this state it has been held that profits are recoverable as damages where they might have been realized, and where they are capable of being estimated with a reasonable degree of certainty. *Wolcott v. Mount*, 36 N. J. Law, 269; *Express Co. v. Nichols*, 33 N. J. Law, 435. In this latter case the court said: “In actions of tort, where the quantum of damages is very much within the discretion of the jury, the evidence of the nature and extent of the plaintiff’s business and the general rate of profit he has realized therefrom, which has been interrupted by the defendant’s wrongful act, is properly received, not on the ground of its furnishing a measure of damages to be adopted by the jury, but to be taken into consideration by the jury to guide them in the exercise of that discretion which to a certain extent is always vested in the jury.” In an action for injuries arising from the unlawful raising of a dam below the plaintiff’s cotton mill on the same stream, the operation of which was greatly impeded by back water, whereby the plaintiff’s profits were greatly diminished, evidence of the profits of manufacture was held admissible, as a basis upon which to estimate the damages, if not as an actual measure thereof. In all cases of this character the true measure of damages is the actual compensation which, in view of all the circumstances, the plaintiff ought to have for the injury. *Wood, Nula*. (2d Ed.) p. 1011, §§ 875, 876; *Sedg. Dam*. (3d Ed.) 92, 93, 79, 82; *White v. Moseley*, 8 Pick. 356. These rules are of daily application in the courts of this state, and the charge of the learned trial justice in no instance violates any of them. Upon this subject of damages, the court, in its charge, said: “Therefore, if there is in this case proof of an illegal invasion of right, there must be a verdict for the plaintiffs for nominal damages, and no more, unless the plaintiffs have established by proof actual damages. Damages in a case like this must be compensation. Compensation for the injury done is the measure and the limit of the damages that you should give. These plaintiffs must be compensated in money for

what they have lost in money value. In the case before you it will not be sufficient to sustain a verdict for more than nominal damages to prove that the defendant has at times withheld from the plaintiffs’ mill the natural flow of the water. If that proof stood alone, nothing but nominal damages could be given. To obtain actual damages, the plaintiffs must have proved an actual injury; and on such proof a verdict that will compensate the plaintiffs for the actual loss may be rendered. No greater amount, of course, I need not tell you, than what will compensate them, should be given. To recover actual damages, the plaintiffs must prove, as I have said, not only that the water was irregularly withheld from them, and that the power that they had there could not be used; but at those periods their power was of value, because their business required them to use it, and that it could be used in their business. In this situation of the case, you should first ascertain at what periods, if any, water was improperly withheld, and, secondly, were the plaintiffs then in a business in which the water power was to be used and could be used?” And again, speaking as to the performance after May, 1892: “If you can fix from the evidence the periods, and that in those periods the business of the plaintiffs was interfered with, and the actual loss inflicted upon them, on the same principles as I have stated before, then for those periods you may make them allowances that will compensate and put in their pockets in money what they have lost in money value.” And again, speaking of the interruption of the plaintiffs in the construction of the stone boats, the court said: “You may take in consideration the order for the fifty stone boats which they were unable to fill.” A correction was made to 20 stone boats, to which reference has already been made; and the question whether the performance of any order for stone boats was interrupted is left to the jury, and the court continues, “Now what will compensate them?” and then he goes on to discuss the price obtained in the work of the sawmill, the expenses thereof, and the obligation of the plaintiffs below to judiciously employ their workmen at any work which they might have had to do there during these periods of interruption. It will thus be seen that the verdict of the jury, under the instructions of the trial court, was left to depend upon the proof of actual loss suffered from the acts of the defendants, and that the proof of such loss must be furnished as the basis of the verdict, and that loss of profits, while it was left to the jury as one of the elements of damage for their consideration, was not at all made the measure of damages. No error in the admission or rejection of evidence, or in the submission of the case to the jury, has been discovered; and the judgment of the supreme court must be affirmed, with costs.

(90 N. J. L. 394)

WILSON v. INHABITANTS OF CITY OF TRENTON et al.

(Supreme Court of New Jersey. Sept. 20, 1897.)

STREET IMPROVEMENTS—VALIDITY OF CONTRACT—LOWEST BIDDER—DECISION OF CITY COUNCIL—REVIEW.

1. In a contract with a city to lay a pavement which shall remain in good condition for at least five years, a guaranty by the contractor to restore it at his own expense if it gets out of order during that period, and that, if he fails to do so, the city may make the repairs, and retain the cost out of the contract price, contemplates repairs arising from lack of durability, and does not increase the burden of abutting owners by indirectly making them pay for general repairs, in violation of a charter provision that, after a street has been paved, the city shall keep it in repair at the general expense.

2. Under a charter requiring contracts for municipal work to be let to the lowest bidder "who shall give satisfactory proof of his ability to furnish the requisite materials and perform the work properly," a person seeking a contract with the city must not only underbid his competitors, and be in fact able to perform the contract, but must also satisfy the authorities of his ability to do so.

3. The refusal of the city council to let a contract to the lowest bidder because of his failure to satisfy them of his ability to perform it, is not reviewable by the courts, unless it appears that the council acted in bad faith, or that the proofs furnished by the bidder were of such a character as to satisfy reasonable men of his ability to perform.

Certiorari by Samuel K. Wilson to review a paving contract made by the city of Trenton with Robert A. Montgomery.

Argued February term, 1897, before DEPUE, MAGIE, and GUMMERE, JJ.

John H. Backes, for prosecutor. George W. MacPherson and John Rellstab, for defendants.

GUMMERE, J. The prosecutor, who is a property owner on Hamilton avenue, in the city of Trenton, challenges by these proceedings the validity of a certain contract made by the city of Trenton with Robert A. Montgomery for the paving of said avenue with Trinidad asphaltum. The first ground upon which it is urged that this contract should be declared invalid is that, by its terms, Montgomery is made to guaranty the endurance of the pavement for a period not less than five years from the date of its completion and acceptance by the city, and to maintain the pavement in good condition at the finished grade of the street at his own cost and expense during said period; and that, upon his failure to do so, the city is authorized to make such repairs as may become necessary, and deduct the cost thereof from such moneys as it may have in hand belonging to the contractor. This provision of the contract, it is claimed, imposes upon the abutting owners, who are liable to assessment for the cost of this work in proportion to the benefit received by them therefrom, not only the burden of paying for the improvement, but also the cost of keeping it in repair for a period of five years after its completion. If this be the

effect of the provision, it is clearly illegal, for, by the eighty-seventh section of the charter of the city of Trenton, "after any street shall have once been paved, then the city shall take charge of and keep the same in repair at the general expense." P. L. 1874, p. 376. We are referred to the following cases, which it is said support the prosecutor's contention: *People v. Maher*, 56 Hun, 81, 9 N. Y. Supp. 94; *Verdin v. City of St. Louis*, 131 Mo. 26, 33 S. W. 480, and 36 S. W. 52; *Brown v. Jenks*, 98 Cal. 10, 32 Pac. 701; *Paving Co. v. Leach* (Cal.) 34 Pac. 116; *Fehler v. Gosnell* (Ky.) 35 S. W. 1125; *Boyd v. City of Milwaukee* (Wis.) 66 N. W. 603. The theory upon which these cases are decided is that when, by the terms of the contract, the contractor is required not only to lay the pavement, but also to maintain and keep it in repair for a certain period after its completion, the abutting owners are necessarily required to pay a higher price by reason of the provision to maintain and keep in repair; and that a contract which throws upon abutting owners anything more than the burden of having the pavement well constructed in the outset is invalid, so far as they are concerned. The contract in each of the cases referred to differed, however, in an important particular from that now before us. In those cases the provision for maintaining or repairing was treated as an independent one, while in the one under consideration it is merely an appendant to the guaranty of the durability of the pavement. What the contract, in effect, says, is this: The contractor guaranties to put down a pavement which shall remain in good condition for at least five years. If it gets out of order during that period, the contractor must restore it at his own expense; and, if he fails to do so, the city may make the repairs, and retain the cost thereof out of the contract price. It does not require him to make all repairs which shall become necessary during the period named, but only those which arise from lack of durability of the pavement. Certainly, it cannot, with reason, be contended that a provision in the contract requiring the contractor to guaranty the durability of his work for a reasonable period imposes upon the adjacent property owners the burden of keeping the street in repair. It is merely an added precaution for insuring good workmanship and the use of good material. And if the contractor, notwithstanding the guaranty failed to lay a durable pavement, it cannot be doubted that the city would have a right to recover from him, in a suit for breach of his guaranty, the cost of restoring the same to a good condition.

It seems to me that the provision in the contract relating to the maintenance of the pavement is a mere method of enforcing the guaranty of the contractor by a speedier and less expensive method than by suit, and that it does not have the effect of imposing upon abutting owners any burden other than that

of having the pavement well constructed at the outset. In the case of *City of Schenectady v. Trustees of Union College*, 66 Hun, 179, 21 N. Y. Supp. 147, a similar view was taken by the supreme court of New York to that here expressed, in construing a contract like that now before us; and, although the judgment in that case was afterwards reversed by the court of appeals (144 N. Y. 241, 39 N. E. 67), it was on another ground altogether, nothing being said by the appellate tribunal which casts doubt upon the correctness of the construction put by the lower court on the contract in that case. In my opinion, the first reason assigned for setting aside the contract before us cannot be sustained.

The second ground upon which we are asked to declare this contract invalid is that it was not awarded to the lowest bidder, in violation of section 107 of the city charter (P. L. 1874, p. 385). That section requires "that all contracts for doing work," etc., "shall at all times be given to the lowest bidder or bidders who shall give satisfactory proof of his or their ability to furnish the requisite materials and perform the work properly, and offer sufficient security for the faithful performance of the contract in regard to time, quality of material and work to be done." There were a number of bidders for the contract. Montgomery offered to lay the pavement required by the specifications for \$2.47 per yard, and to repair openings for 20 per cent. above that amount. One William F. McGovern offered to lay the pavement for \$2.23 per yard, and to repair openings for 60 per cent. above that sum. The other bidders were, all of them, admittedly higher than Montgomery. The city disputes the claim made by the prosecutor that McGovern was the lowest bidder, and insists that, taking into consideration the price to be charged for repairing openings, his bid was in reality higher than that of Montgomery. Considerable testimony was taken on this point, but it is not necessary at this time to decide it, for, conceding that McGovern was the lowest bidder, the city was not, therefore, bound to award the contract to him. In order to entitle him to the contract, he was required by the charter, not only to be the lowest bidder, but to give satisfactory proof of his ability to furnish the requisite materials, and perform the work properly. The language of the charter provision is significant. By its terms the burden of procuring and furnishing proof of the bidder's capacity to perform the contract is cast upon the bidder himself. The requirement of the provision is, not that the lowest bidder shall be awarded the contract unless it satisfactorily appears that he lacks the ability to furnish the necessary materials and do the work properly, but that it shall be awarded to him if he furnishes satisfactory proof. By this provision, a person who seeks a contract with the city must not only underbid his competitors, and be, in fact, able to perform it;

he must also satisfy the municipality of his ability to do so. If he fails to do that,—if the proofs which he submits are not of such a character as to satisfy reasonable men of his ability to perform,—he is not entitled to have the contract awarded to him. And this was the situation in the case before us. The proofs furnished by McGovern, when considered by common council in connection with other relevant facts within their knowledge, did not satisfy that body that he was able to furnish the requisite materials, and do the work properly, and they therefore awarded the contract to the next lowest bidder. Their action in that regard was final, and cannot be reviewed by this court, unless it appears that it was taken in bad faith, or that the proofs furnished by McGovern were of such a character as to satisfy reasonable men that he was able to furnish the material required and do the work properly. *Shaw v. Trenton*, 49 N. J. Law, 339, 12 Atl. 902; *McGovern v. Board*, 57 N. J. Law, 580, 31 Atl. 613. There is nothing in the case before us to suggest the idea that the action complained of was the result of bad faith on the part of council; nor can we say that the facts submitted to them by McGovern ought to have satisfied them as reasonable men of his ability to perform the contract. Their action, therefore, in awarding the contract to Montgomery was not a violation of the charter provision which has been invoked, and affords no ground for declaring the contract invalid.

The only other reasons urged upon us for declaring this contract void are based upon alleged uncertainties in the specifications upon which it was founded. They do not require an extended discussion here. It is sufficient to say that an examination of the specifications has satisfied us that the portions thereof which are challenged by the prosecutor are reasonably certain in their requirements, and afford no ground for avoiding the contract. The proceedings brought up by this writ should be affirmed, with costs.

(60 N. J. L. 402)

STATE (McGOVERN, Prosecutor) v. INHABITANTS OF CITY OF TRENTON.

(Supreme Court of New Jersey. Sept. 20, 1897.)

MUNICIPAL CONTRACTS—CERTIORARI TO REVIEW—WHO MAY BRING.

1. One entitled, as the lowest bidder, to have a municipal contract awarded to him, may, by certiorari, question the validity of its award to another.

2. He cannot, in such proceeding, question the legality of the advertisement for bids, or of the provisions of the contract itself, unless he has personal or property interests which have been injuriously affected by the action of the municipal authorities.

Certiorari by William F. McGovern to review a paving contract made by the inhabitants of city of Trenton.

Argued February term, 1897, before DEPUE, MAGIE, and GUMMERE, JJ.

Chauncey H. Beasley, for prosecutor.
George W. Macpherson and John Bellstab,
for defendant.

GUMMERE, J. The writ in this case brings up for review a contract for the paving of Prospect street, in the city of Trenton, with vitrified brick, awarded by the municipal authorities to one Dennis Roe. It is insisted on behalf of the prosecutor that the contract is void, because it was not awarded to the lowest bidder, as required by the 107th section of the city charter; and the right of the prosecutor to challenge the action of the city is based upon the claim that he himself was the lowest bidder, and that, by the award of the contract to another than himself, he was specially and injuriously affected. Assuming his claim that he was entitled to have the contract awarded to him to be well founded, it cannot be denied that he was specially and injuriously affected by the action complained of, and is entitled to question its validity by certiorari. *Jersey City v. Traphagen*, 53 N. J. Law, 434, 22 Atl. 190; *Tallon v. Hoboken*, (N. J. Err. & App.; June term, 1897) 37 Atl. 896. Assuming, then, that the prosecutor was the lowest bidder, was the action of the municipality in awarding the contract to Roe in violation of the charter provision, and therefore void? The 107th section of the charter provides "that all contracts for doing work," etc., "shall at all times be given to the lowest bidder or bidders who shall give satisfactory proof of his or their ability to furnish the requisite materials and perform the work properly." Pamph. Laws 1874, p. 385. This provision of the charter has received consideration at the hands of this court at the present term in the case of *Wilson v. Inhabitants of Trenton*, 38 Atl. 635, and it was there held that, by the requirement of this section, a person, in order to be entitled to the award of a contract with the city, must not only underbid his competitors, and be in fact able to perform the contract, but that he must furnish to the municipality satisfactory proof of such ability. In the present case the common council of the city were not satisfied, from the proofs furnished by the prosecutor, taken in connection with other facts which were before them, of his ability to furnish the requisite material, and do the work properly, and for that reason refused to award the contract to him. We cannot say that the conclusion which they reached was not bona fide, or that the proofs submitted by the prosecutor ought to have satisfied them, as reasonable men, of his ability to perform the contract. This being so, the action of common council is final, and cannot be disturbed by this court. *Wilson v. Inhabitants of Trenton*, supra.

Other reasons are given by the prosecutor why this contract should be annulled, but they are not such as he is entitled to have considered and adjudicated upon in this proceeding. They challenge the legality of the

advertisement for bids, and of certain of the specifications which the contract rests upon. As has already been stated, the prosecutor is here solely because of his claim to have been injuriously affected as a bidder by the action of council in awarding the contract to another than himself. He is not, so far as the case shows, a taxpayer of the city, and has not intervened as such for the purpose of preventing the illegal expenditure of municipal funds. Even if it be true that the advertisement for bids did not conform to the charter requirements, and that certain of the specifications upon which the contract rests are illegal, the prosecutor has no personal or property interest which has been injuriously affected thereby; and it is entirely settled that a certiorari to review the acts of public officials will not lie in favor of prosecutors who have no personal or property interest to be specially and immediately affected by the action complained of. *Jersey City v. Traphagen*, supra; *Tallon v. Hoboken*, supra. The proceedings under review should be affirmed, with costs.

HARRIS v. DE RAISMES et al.

(Court of Chancery of New Jersey. Nov. 4, 1897.)

PARTNERSHIP—FIRM AND INDIVIDUAL PROPERTY—EVIDENCE.

Title to land was taken in the individual names of two partners. One advanced all the cash used in the purchase, and the other's interest was mortgaged to him to secure one-half the sum so advanced. There were no entries regarding the land on the partnership books, nor was any use made of the land in the business, though money was advanced by the firm from time to time to pay for improvements thereon. The husband of one of the partners, who managed all the business for her, had made statements tending to show that the land was partnership property, and that the other partner would recoup losses incurred in the business from the sale of the land. *Held*, the land was not part of the assets of the partnership.

Bill by Elwood C. Harris, receiver, against Emma St. C. De Raismes and another to determine whether certain property be an asset of the estate. Bill dismissed.

The complainant was appointed by this court receiver of a partnership existing between Emma St. C. De Raismes, wife of Hippolyte A. De Raismes, of the one part, and Arthur E. Lebkuecher of the other part. The firm was organized on September 20, 1892, for the purpose of manufacturing jewelry. The capital to be paid in by each partner was \$2,700. By the terms of the partnership agreement, Lebkuecher was to loan to the firm the sum of \$16,000 in addition to his portion of the capital, for the half of which the other party was to secure him. In the conduct of the business the wife acted entirely through her husband as her agent. The business turned out to be unprofitable, and disagreements arose between Mr. Lebkuecher and Mr. De Raismes, the agent, and a bill

was filed by the former on April 29, 1895, for an administration in this court of the firm affairs, which resulted in the appointment of Mr. Harris, the present complainant, as receiver of the partnership assets. The disagreements between the partners was mainly in respect to the ownership of a piece of real estate which Mr. Lebkuecher insisted was partnership assets, but which Mr. De Raismes insisted was not. The present bill by the receiver is filed for the purpose of testing the question whether the property mentioned is firm assets, and should be administered by him in the payment of firm debts. This real estate was purchased on October 13, 1894, the consideration being \$5,200. The title was taken in the name of Arthur E. Lebkuecher and Emma St. Clare De Raismes, no reference being made in the deed to their relations as partners. Of the \$5,200, the consideration mentioned, \$4,200 was raised by mortgage given upon the entire property by the grantees. The remaining \$1,000 was paid by Mr. Lebkuecher. On October 16th—three days after the date of the deed—Mrs. De Raismes and her husband gave a mortgage upon their one-half interest in the property to Mr. Lebkuecher, to secure the payment of \$500, the one-half part of the \$1,000, which he had advanced as a part of the consideration. On March 2, 1896, Emma and her husband made another mortgage upon her alleged undivided one-half interest in the property to her mother-in-law to secure the sum of \$3,348, which sum her mother-in-law had loaned to her to pay in as Emma's share of the capital of \$2,700 at the time of the formation of the partnership. On March 14, 1896, she and her husband made another mortgage upon this other moiety to F. Dorsey Graflin, to secure \$3,000 loaned by him at that time to Mrs. De Raismes personally. The bill attacks these mortgages on the ground that they were made to defraud the firm's creditors.

The primary question is whether this property is firm property, for, if it should be concluded that it is not, then the question in respect to the validity of the mortgages becomes unimportant. The receiver insists that this property was bought with the money of the firm, and was improved with the money of the firm; that Mr. De Raismes admitted it to be firm property, as the acting agent of Emma, in making the purchase, and in improving the land afterwards. The testimony is grouped around the circumstances under which, and the purposes for which, the property was purchased; secondly, the manner in which the property was paid for; third, the manner in which the property was improved, and the improvements were paid for; and, fourth, the admissions of Mr. De Raismes as to the title of the property. Mr. De Raismes' account of the circumstances surrounding the purchase is, in substance, as follows: He says that he was acquainted with this property, and that it occurred to him that at the price for which it could be

purchased it would be valuable to hold for speculative purposes. He at first desired to purchase it himself, and had solicited others to furnish money, and that it was finally at Mr. Lebkuecher's request that the latter was permitted to come into the transaction as a party. He says that Mr. Lebkuecher expressed a desire to take the title in his own name, inasmuch as he was to furnish the money to pay for it, and so should reap the benefit of a rise in value. Mr. De Raismes refused to accede to his request, and finally the title was taken in the joint names of Mrs. De Raismes and Mr. Lebkuecher. Mr. Lebkuecher's account is that losses had occurred in the business, which, by reason of his advancements of money in excess of the capital, had fallen largely upon him, and that this property was bought for the purpose of recouping these losses, and that the property was to be regarded as firm property. In respect to this Mr. De Raismes does not deny that some conversation was had about the purchase of this property being of use to Mr. Lebkuecher to recompense him for the losses which had occurred in the firm, but he does deny that it was ever understood that the title was other than that which appeared on the face of the deed, and insists that whatever benefit Mr. Lebkuecher was to derive was as a tenant in common of the property. In regard to the payment of the property, as already remarked, \$4,200 was raised by a mortgage, \$1,000 was paid by Mr. Lebkuecher, and for one-half of this a mortgage was given on the De Raismes interest, which mortgage was delivered to Mr. Lebkuecher, but never recorded. The reason for the failure to record it, as given by Mr. De Raismes, was that it was concluded to include not only the \$500, but one-half of the sums expended in improving the property; and, according to Mr. Lebkuecher, because it was understood that there should be included in it not only the \$500, but one-half of all the loans he had made to the firm in excess of his portion of the capital. The testimony in regard to the improvement of the property is that in 1895 a street was graded, and some wood cut, by direction of Mr. De Raismes, and with the consent of Mr. Lebkuecher. The expense of such improvement seems to have been \$517. Two checks are in evidence, drawn by Mr. Lebkuecher,—one dated July 20, 1895, for the payment of \$100, and made to bearer; and the other dated July 26, 1895, for \$417, payable to De Raismes & Co. These checks were admittedly drawn for the payment of the amount of the cost of these improvements. Both checks were indorsed by De Raismes & Co. These checks are relied upon as proof that the improvements upon this property were paid out of firm moneys. The explanation of the giving of these checks, made by Mr. De Raismes, is as follows: He was to have the improvements executed. He had no money himself. He paid for the current expenses by taking money

from the cash deposit of the firm from time to time, as he needed it for that purpose. In place of the cash, he says, he deposited slips showing the amount which he had taken, and thus the amount which was due from him to cash deposit. He produced a memorandum of the sum so taken, from which it appears that the moneys were removed for grading on March 25th, June 1st, June 5th, and June 21st, and for wood chopping on June 8th, 15th, 22d, 29th, and July 6th and 20th. He says that the total of these amounts was afterwards paid into the firm as money borrowed from the firm by these two checks of Mr. Lebkuecher of July 20th and 25th. Mr. Lebkuecher, on the contrary, says that these checks were made to the firm for loans, just as previous checks had been made to the firm for different parts of the \$16,000 which he had agreed to advance, and must therefore be regarded as any other assets of the firm. Then, again, it is insisted by the complainant that the expenses of Mr. De Raismes in making two trips to Boston to secure the purchase of this property were paid out of the money of the firm. Mr. De Raismes says that the expenses of two trips were paid out of the money of the firm, but that the trips were made in the course of the firm's business, for business purposes, and that in one of them he incidentally used a portion of his time in inquiring about obtaining a paper pertaining to the title of the property. It is again insisted that Mr. De Raismes has made admissions that the deed of this property was made to the grantees for firm purposes. The important witness to these admissions is Mr. Van Gleson, who says that some time after January or February, 1896, he, as a representative of Mr. Lebkuecher, called on Mr. De Raismes, and in the course of the conversation Mr. De Raismes said to him "that Mr. Arthur Lebkuecher had no occasion or reason for being alarmed; that the firm owned property at Elmora, which had been purchased by the firm for the purpose of covering those losses, and repaying to Arthur Lebkuecher all of the moneys that he had ever advanced." And further he says: "I asked him how the property had been purchased, and he said by the partnership some time before that, when they were in straitened circumstances, and when they had met with losses, that they had purchased this property for the purpose of covering those losses, and that Arthur Lebkuecher had advanced a considerable sum of money to the concern up to that time." At another interview, later, after Mr. Van Gleson had ascertained that the title was not held in the firm, he says: "I said to Mr. De Raismes one day when he came in, that the property was not in the firm's name, and he said it was; and I said it was not; it was held by Arthur Lebkuecher and Mrs. De Raismes as tenants in common; that there was no mention of the partnership. 'Well,' he said, 'these two people were partners, and it is all the same

thing;' and I said, 'It is not,' and Mr. De Raismes said to me, 'I will bet you it is.'" Mr. Frank A. Lebkuecher, a nephew of Arthur E. Lebkuecher, thought of entering the firm in the forepart of 1896, and in relation to such purpose had a conversation with Mr. De Raismes, in which he says Mr. De Raismes told him that: "Arthur has nothing to fear about losses. We have property in Elizabeth, which will more than pay the losses of the concern up to date; and, another thing, when we go on, why, you will not figure in the proceeds of this land at Elizabeth. And I recollect that I said that didn't concern me. My business was from then on with De Raismes & Company." And being asked the question, "Did he give you any reason why you should not figure in the proceeds of this land at Elizabeth?" the witness replied, "Only that I was not in the firm when they made the losses, and that the property was thought to be good property, and would finally bring enough to pay the losses."

Austin Van Gleson and James M. Trimble, for complainant. Skinner & Teneyck, for defendants.

REED, V. C. (after stating the facts). The legal title to the property in question is in the name of Mr. Lebkuecher and Mrs. De Raismes. The effort of the complainant is to fix upon them the character of trustees, and to establish a trust in favor of the firm and its creditors. To make the effort successful, it is essential that the trust be clearly proved. The intention of the purchasers at the time the sale was effected and title taken must be unmistakably shown to have been to acquire the land as firm property. The rights of creditors of the individual partners in whom the legal title is exhibited by the records demand that the title shall not be declared to be equitable elsewhere without convincing proof of the existence of a trust. The most persuasive of the circumstances usually relied on for decreeing the existence of such a trust is the fact that the property was paid for with the money of the firm. From this fact springs a presumption of a resulting trust in favor of the partner of the consideration. While the effect of this circumstance can be rebutted by explanatory facts, it is in itself a strong, often a controlling, factor in establishing a trust. *Harney v. Bank*, 52 N. J. Eq. 697, 29 Atl. 221; *Baldwin v. Johnson*, 1 N. J. Eq. 441; *Deveney v. Mahoney*, 23 N. J. Eq. 247; *Uhler v. Semple*, 20 N. J. Eq. 289.

Another circumstance usually relied upon to show the existence of such a trust is that the property was used in connection with and as ancillary to the firm business. *Steward v. Blakeway*, L. R. 6 Eq. 479; *Waterer v. Waterer*, L. R. 15 Eq. 402; *Richards v. Manson*, 101 Mass. 482, 485; 1 Am. Lead. Cas. (4th Ed.) 431. When these two circumstances concur, namely, when the real estate is purchased

with the assets of the firm to be used for the firm business, it is scarcely possible to imagine a condition of affairs which would rebut the presumption of a trust in favor of the firm. *Bank of England Case*, 3 De Gex, F. & J. 644-659; *Ballantine v. Frelinghuysen*, 38 N. J. Eq. 286. The property purchased by Lebkuecher and Mrs. De Ralsmes was not used in connection with the business of the firm. It was in no way useful for the business in which the firm was engaged. It was bought admittedly as a distinctively speculative enterprise. Now, a firm may buy property for purposes other than the firm business, and yet the property be charged as assets of the partnership. But it may be confidently said that a case can scarcely be imagined where property bought under such circumstances, unless paid for with the assets of the firm, would be declared to be firm property. The important question in this case is whether this property was paid for with the money of the firm. The consideration, as already stated, was \$5,200. Of this, \$4,200 was raised by a mortgage given by the two partners. The remaining \$1,000 was paid in cash by Lebkuecher. De Ralsmes, to secure Lebkuecher for one-half of this \$1,000, had a mortgage executed to Lebkuecher upon the De Ralsmes one-half interest in the property. This mortgage was never recorded. The reason given for its nonrecording by Mr. De Ralsmes is that after the purchase they improved the property, and it was concluded to include in this mortgage not only one-half of the purchase money, but also one-half of the cost of the improvements. The reason given by Mr. Lebkuecher is that it was understood that there should be included in this mortgage not merely one-half of the cost of the improvement, but one-half of the amount which he had loaned to the firm according to the terms of the articles of co-partnership. The transaction seems to show that De Ralsmes thought at the time of the purchase that it was made by his wife and Lebkuecher as individuals. Even if the mortgage was, as Lebkuecher testifies, to be executed to cover one-half of all the loan made to the firm, I do not see how that fact tends to prove that this property was by him regarded as a part of the firm assets. De Ralsmes was to secure Lebkuecher for one-half of the advances made by the latter on account of the \$16,000, which he had agreed to loan. He had attempted to do so for a part of this loan by a conveyance of private property. Now, a mortgage upon the undivided interest in the Elmora property to secure one-half of this sum would not prove that it was firm property, any more than it is proved that the property previously conveyed was firm property.

Now, what has been said of the consideration seems to be true of the money spent for improvements. It is true that in the first instance the money with which De Ralsmes paid the workmen in making those improvements was taken from cash which belonged to the firm; but it seems clearly to have been

taken as a loan from cash deposited. His deposit of slips showing the several amounts of which the cash deposit had been depleted, and the fact that these slips were replaced by checks drawn for the exact aggregate amount of such slips, seem to indicate that the account with this property was an individual, and not a firm, account. The crucial point, however, in my judgment, is whether the amounts paid for the consideration or for improvements figure in the books of the firm as payments made on account of the firm; for, if the money paid by Lebkuecher for the property and for its subsequent improvement had been entered as firm transactions, the matter would present an aspect from which the conclusion would be almost unavoidable that the property was firm assets. *Baldwin v. Johnson*, 1 N. J. Eq. 441; *Harney v. Bank*, 52 N. J. Eq. 697, 29 Atl. 221. But neither of these accounts figure in the books of the firm. Mr. Lebkuecher himself explains that it was not put in the books by saying that they had that as a private investment to recoup themselves for the losses of the business. And it is to be remarked that no part of the consideration paid for the property was included by Lebkuecher in his claim of about \$15,000, filed with the receiver. But there are the admissions made by De Ralsmes to Mr. Van Gleson. De Ralsmes is quite confident that he never told Mr. Van Gleson that the property was firm property. Although he may have forgotten it, nevertheless I think De Ralsmes is mistaken. When Mr. Van Gleson testified that, after he saw that the title to the property was in the two partners as tenants in common, and he had called Mr. De Ralsmes' attention to that fact, the latter offered to bet that this made no difference, and that, notwithstanding this, the property was firm property, I do not see how he can be mistaken. The character of the circumstances is such as to be remembered with reasonable accuracy. But, assuming that this conversation occurred, I do not attribute to it very much force in proving the fact that when the property was bought, in October, 1894, it was purchased as firm, and not as individual, property. This conversation occurred in 1896, when the affairs of the firm had reached a state of embarrassment,—such a stage of embarrassment as rendered it essential that more money should be brought into the business. It was at this stage that Mr. Van Gleson, acting in the interest of Mr. Lebkuecher, approached Mr. De Ralsmes. The object of Mr. Van Gleson, as I understand his testimony, was to form a new partnership, in which, in addition to the two old members, there should be introduced a third, Mr. Frank Lebkuecher, who would bring in some money. Mr. Lebkuecher was obviously dissatisfied with the condition of affairs. Mr. De Ralsmes wished to allay this feeling of dissatisfaction, and so probably made the statement to the attorney of Mr. Lebkuecher substantially as Mr. Van Gleson has sworn. This probability is increased by

the fact that at the time it made no difference to Mr. De Raismes in which way the property should be regarded, for, if it was held by the partners as tenants in common, it was Mr. De Raismes' purpose then, as I have no doubt it was when the land was bought, to apply the money made by the De Raismes in the speculation to the payment of their debt to Mr. Lebkuecher. Mrs. De Raismes owed Mr. Lebkuecher one-half of his advances, and Mr. De Raismes intended that their own one-half of the property should be applied to this debt. This would practically reach the same result as if the whole of the profits was appropriated to the whole of the firm debt. It is manifest, however, that, if the property was originally taken in the name of the two grantees as tenants in common, the admission of Mr. De Raismes, made in 1896, cannot charge the property of his wife with a trust in favor of the firm. In so far as he had sworn of his intention at the time of the purchase, this testimony in regard to his subsequent admissions is important to impeaching his testimony. But in arriving at the intention of the parties at the crucial point of time, the intention of the parties must be gathered, not so much by what they now say it was, but what the circumstances surrounding the transaction show it to have been. Those circumstances have led me to the conclusion that the venture was not a firm, but an individual, affair. Mr. De Raismes admits that he said at the time that they would be able to recoup the losses incurred by them in the firm business by the rise in value of this property. So he could have said of any distinct enterprise in which they might, together or singly, engage. He did hope that by the rise in value of this property Mr. Lebkuecher would, out of his moiety, realize the one-half of what he had loaned the firm, and that Mr. De Raismes, out of his moiety, could repay the other one-half which he had assumed. At that time he obviously had no intention of incumbering his wife's interest with the mortgages subsequently made. This intention sprang out of the final collapse of the business. It may be further remarked that in the testimony of Mr. Frank L. Lebkuecher, a witness sworn by the complainant, it appears that he was the person who desired to enter the firm as a new member. He had a conversation with Mr. De Raismes, in which the latter spoke of this real estate as property bought for himself and Mr. Lebkuecher, and not for the firm. This seems to have been the impression made upon the witness at the time when the conversation occurred, for he says that when Mr. De Raismes told him that if he (Mr. Lebkuecher) entered the firm he would not figure in the proceeds of this land, the latter replied: "That don't concern me. My business from now on is with De Raismes & Co." My conclusion is that the character of the transaction was simply this. De Raismes saw the property; thought it a great bargain; determined to buy himself if he

could borrow the money; if he could not borrow it for himself, then to take the title together with some one who would advance the cash part of the consideration. He had approached others to engage them in the enterprise, and finally Mr. Lebkuecher, learning of the matter, asked to come in. When the deeds were taken, there was nothing said and nothing thought about a trust in favor of the firm. They did think that the money realized by an advance of the property would probably balance their losses in the jewelry business, but the venture was purposely kept entirely distinct from the jewelry business. Under these circumstances, I am of the opinion that the bill of the receiver must be dismissed.

It may be remarked that, had I arrived at the conclusion that this property was firm assets, that result would in no way affect the mortgage of Mr. Graflin. It is demonstrated that he paid the \$3,000 secured by the mortgage at the time when the mortgage was made, and that he had no notice whatever of any circumstance to put him upon inquiry whether the legal title which appeared in the mortgages was affected by a trust.

(56 N. J. E. 286)

KUHNNEN v. PARKER et al.

(Court of Chancery of New Jersey. Nov. 1, 1897.)

PURCHASE-MONEY MORTGAGE—FORECLOSURE—DAMAGES.

If the mortgagee foreclose a purchase-money mortgage against the mortgagor, and the mortgagor shows that the covenant against incumbrances has been broken in such manner as to give him a claim to substantial damages, he may reduce the mortgagee's demand to the extent of those damages.

(Syllabus by the Court.)

Bill by Matie Kuhnén against Lida E. Parker and another to foreclose a mortgage. Motion to strike out part of the answer. Denied.

Craig A. Marsh, for complainant. W. S. Angleman, for defendants.

STEVENS, V. C. The complainant filed his bill to foreclose a mortgage. The defendants answered, averring that they gave it to complainant to secure part of the price of farm land conveyed to them by deed containing covenants of warranty and against incumbrances; that such land was, at the time of the making of the deed, incumbered by rights of way created by recorded instruments which gave the grantee named therein the right to construct a line of iron pipe for the transportation of petroleum, with telegraph and other facilities, over and across the land; and that this pipe line had actually been laid, and that the grantee of the easement was in the full enjoyment thereof, at the time of the conveyance to defendants. It is further averred that the complainant knew of this use of the land at the time of the conveyance, and concealed it from the

defendants, who did not know of it for several weeks afterwards, and would not have purchased had they known of it. An application was made under the rule to strike from the answer all the averments relating to this alleged breach of complainant's covenants. It must be dealt with in the same manner as if there had been exceptions and a reference to a master for impertinence. There are numerous cases to be found in our Reports, but none of them are identical with the case in hand. It may therefore be desirable to refer to and ascertain the principle on which they are based. Where property has been conveyed by deed containing covenants of warranty and against incumbrance, and a mortgage is given by the grantee to the grantor to secure the whole or a part of the purchase money, it has been decided that on a foreclosure the mortgagor is entitled to a deduction for prior mortgages (*Shannon v. Marsells*, 1 N. J. Eq. 413; *Van Riper v. Williams*, 2 N. J. Eq. 408; *Woodruff v. Depue*, 14 N. J. Eq. 169; *Stiger v. Bacon*, 29 N. J. Eq. 443), for prior taxes (*Bank v. Pinner*, 25 N. J. Eq. 495), for prior assessments (*White v. Stretch*, 22 N. J. Eq. 76), and for prior judgments (*Dayton v. Dusenbury*, 25 N. J. Eq. 110). It has also been decided that, where there has been an eviction by title paramount, the court will compel the mortgagee to submit, in some form, to an ascertainment of the damage arising from the existing breach of covenant, and will reduce to that extent the amount of his claim. *Coster v. Manufacturing Co.*, 2 N. J. Eq. 467; *Jaques v. Esler*, 4 N. J. Eq. 461. So it will reduce the amount of his claim if the vendee has been defrauded (*O'Brien v. Hulfish*, 22 N. J. Eq. 471), or has by mistake obtained less land than he bargained for (*Couse v. Boyles*, 4 N. J. Eq. 213). Again, it will arrest the foreclosure pending an action brought to try the title of an adverse claimant, but it will not arrest the foreclosure suit or direct an inquiry on a mere allegation of such title, there being no action pending to enforce it. *Van Waggoner v. McEwen*, 2 N. J. Eq. 412; *Glenn v. Whipple*, 12 N. J. Eq. 50; *Price's Ex'rs v. Lawton*, 27 N. J. Eq. 326, 28 N. J. Eq. 274; *Hile v. Davison*, 20 N. J. Eq. 228. An easement is an incumbrance within the meaning of the covenant against incumbrances. *Rawle, Cov.* (1st Ed.) p. 115. As the easement set up in the answer existed at the time of the conveyance by complainant to defendants, the covenant in defendants' deed was broken as soon as made, and the breach was of such a nature as to give rise to substantial damages. The question in dispute is, therefore, whether, under the principle to be extracted from the above-mentioned decisions, the defendants are entitled in this suit to have their damages ascertained, and deducted from the amount of the mortgage. Now, what is the principle? Complainant's counsel contends

that it is that the court will allow the offset only where the amount of the lien or incumbrance is certain, or, as he says, can be rendered certain, and not where the damages are unliquidated. This cannot be so, for it is opposed to all those cases which, like *Coster v. Manufacturing Co.*, supra, hold that, where there is an eviction by title paramount, the court will compel the mortgagee to submit in some form to an ascertainment of the damages. It is opposed to cases like *Couse v. Boyles*, supra, where there was a mistake in estimating the number of acres, and to cases like *O'Brien v. Hulfish*, supra, where there was a claim of fraud. In this latter case *Beasley, C. J.*, speaking for the court of appeals, says: "I think there is no doubt that where a sale of real property is effected by deceit, and a mortgage given for the whole or a part of the purchase money, relief in equity will be given to the party defrauded in a suit on the mortgage, whenever such course is necessary to reach a just result." These cases seem to me to demonstrate that, where a purchase-money mortgage is being foreclosed, the defendant is not debarred from claiming a reduction merely because his claim is, at the time he makes it, unliquidated. Then counsel suggests a distinction between liens which may be wiped out by tendering a definite sum of money and outstanding titles or incumbrances which in their nature are permanent, and which, he says, it is not in the power of the mortgagee to wipe out by simply tendering the amount due. A rule based on such a distinction is equally irreconcilable with the cases to which I have just referred. Why does the court allow a reduction or offset in foreclosure cases? One reason is, to prevent circuity of action. There can be no good reason assigned, says Chancellor Vroom in *Shannon v. Marsells*, supra, "why there should be this circuity, but a very good one why there should not, which is that the money might be lost to Carrick [the vendee in that case] altogether, he having no security but the covenant." Another reason is that the mortgagee is in these cases equitably entitled to a part only of the amount appearing to be due on the face of his security. I think that the true principle of decision goes at least to this extent: If the mortgagee foreclose a purchase-money mortgage against the mortgagor, and the mortgagor shows that the covenant against incumbrances has been broken in such manner as to give him a claim to substantial damages, he may reduce the mortgagee's demand to the extent of those damages. The case of *Glen v. Whipple*, 12 N. J. Eq. 50, was relied upon by complainant's counsel. In that case the defendant set up an outstanding dower right in the widow of the vendor mortgagee, who had conveyed without his wife joining. Chancellor Williamson put his decision, as I understand it, upon the ground that there

had been no eviction by title paramount, and no action brought by the widow, and that, consequently, there was no breach of the covenant of warranty. It is well known that the covenant against incumbrances, unlike the covenant of warranty, is broken as soon as made. If the existence of an inchoate right of dower, which was all the right the wife had when the conveyance was executed, was a breach of the covenant against incumbrances (and if a breach, it would only have given rise to a claim for nominal damages,—*Rawle*, Cov. pp. 109, 114), she was not, when the foreclosure suit was instituted, alleged to be claiming that right, but the more complete right which vested in her at her husband's death. This right she had not sought to enforce by action. The decision was, therefore, strictly in accordance with the previous cases. *Hamill v. Manufacturing Co.* (N. J. Ch.) 37 Atl. 773, stands upon substantially the same ground as *Baudendistel v. Zabriskie's Ex'rs*, 50 N. J. Eq. 455, 28 Atl. 455. In both of these cases there was a covenant of warranty, but no eviction or action pending. There was no covenant against incumbrances. In the latter case the claim that the deed, in substance, contained such a covenant was denied by the court of appeals. The chief justice, in stating the rule on this subject, there says: "When a grantor has stipulated that there are no incumbrances upon the premises conveyed, such covenant, if infringed at all, is violated by the act of conveyance; and it is the established practice of our courts to compel the mortgagee who seeks to foreclose for the purchase money to submit, in some form, to an ascertainment of the damage that must necessarily arise from the existing breach of his covenant, and to reduce to that extent the claim pressed by him." I think, therefore, that the defendants have set up a defense, and that this defense is the proper subject of answer, and not of cross bill (*White v. Stretch*, 22 N. J. Eq. 81), unless they intend to rely upon fraud. If they do, a cross bill or answer by way of cross bill is necessary. *O'Brien v. Hulfish*, Id. 475. The application is denied, with costs.

(56 N. J. E. 234)

WEIR v. GRANITE STATE PROVIDENT ASS'N et al.

(Court of Chancery of New Jersey. Oct. 27, 1897.)

BUILDING ASSOCIATIONS—INSOLVENCY—LOANS—MATURITY—ADJUSTMENT.

1. When a building and loan association is put into the hands of a receiver because of its insolvency, the mortgages held by the association become due at once, and the receiver can foreclose, and the mortgagor can redeem.

2. In computing the amount then due upon a mortgage, the borrower should receive credit for all his payments of interest or premium, but not of dues.

3. When all the premium was deducted when the loan was made, the borrower should be

charged with the amount of money actually paid to him, with interest thereon, and credited with all interest paid by him, including interest paid upon the premium.

4. When the premium was not deducted when the loan was made, but was paid in subsequent installments, he should be charged with the amount received and interest, and credited with interest and premiums paid, including interest on the installments of premium from time of their payment.

(Syllabus by the Court.)

Bill by Robert A. Weir against the Granite State Provident Association and others.

This bill is filed by a mortgagor to redeem his real estate from the incumbrance of a mortgage. The cause is heard on bills and answers and replication. The mortgage was given to the defendant, a building and loan association of the state of New Hampshire, which has become insolvent, and whose affairs have gone into the hands of a receiver. The mortgagor is the holder of ten shares of stock of the insolvent company, nine of which shares were assigned to the company as collateral security. Those shares were not matured at the time of the company's insolvency. The questions involved are: First, whether the complainant is entitled to redeem; second, if so, what sum is he obliged to pay to effect such redemption. The scope of the business which the corporation transacted, and the method of its transaction, are set out in the pleadings. Subscribers for shares agreed to pay \$1 each month on account of shares, the par value of which was \$200. This \$1 a month is called "dues," and the money so paid was separated into two parts. One part was used to defray operating expenses of the association, and the other part was put into a loan fund for investment among members. If any member wished to borrow money from the association, it was loaned to him on bond and mortgage, and he then agreed to pay, in addition to the regular subscription payments upon his shares and interest on such loan, also an additional premium, which premium and interest went into the loan fund. The loan fund was held in trust for all shareholders. When the accumulation of the loan fund was such an amount that the proportion belonging to any shareholder equaled the par value of his shares less the loan that had been made to him, his shares were canceled. There was also a plan by which the association assumed the payment of any mortgage on the property of the shareholder, and in that case the shareholder, in addition to paying the interest on the loan, also paid to the association the interest on this mortgage, and also premiums in proportion to the amount of the mortgage, and the association agreed to pay the said mortgage out of the share of the loan fund belonging to the shareholder when said share should equal the amount of the said mortgage. The particular transaction is thus stated in the pleadings: On January 11, 1890, one Charles O. Jewell, with his wife, made a mortgage upon their property to Flemming & Lewis, trus-

tees, to secure the sum of \$1,080. Jewell and wife, on January 17, 1890, subscribed for 10 shares of stock in the Granite State Provident Association, and at the same time made a second mortgage to the association, consideration for which second mortgage was stated to be the sum of \$400 (it was in fact \$360), paid by the association to the mortgagor; and, further, that the association agreed to pay off the Flemming and Lewis mortgage. The condition of this mortgage was that, if the mortgagor should pay to the association two dollars per month, and monthly in advance, on each of the nine shares of stock owned by the mortgagor, as provided for by the terms, rules, and by-laws of the association, until the series of which the nine shares are a part shall be worth \$200 per share, when the mortgage and shares are to become canceled, then the instrument to be void. Jewell assigned the nine shares of stock to the association as security for the loan. On May 12, 1891, the Jewells conveyed the mortgaged property to one Peter Abstein, who, on May 12, 1896, conveyed the same to the complainant. On March 14, 1892, David Taggart was appointed assignee of the association in New Hampshire for the benefit of its creditors, and subsequently George R. Gray was appointed receiver in this state. The bill charges that on March 12, 1896, the complainant tendered to the receiver the amount actually loaned on the said mortgage, with all arrears of interest then due, less the premiums paid on the said mortgage, and that the receiver refused to receive less than the full amount of the mortgage, with interest. It appears that the association has paid interest upon the Flemming and Lewis mortgage up to January 11, 1896. From the amended bill and the answer of George R. Gray, receiver, it appears that the amount borrowed by the mortgagor in cash was \$720, which, with the first mortgage of \$1,080, which the company covenanted to pay, made up the matured value of the nine shares assigned to the association as collateral security. The company deducted 20 per cent of the \$1,800 as gross premiums, amounting to \$360. This sum was deducted from the cash loan of \$720, leaving \$360 as the amount of cash actually received by the mortgagor. Of the payment of \$2 a month on each share required by the condition of the mortgage the payment of \$1 a month seems to be referable to the 6 per cent. interest on the whole sum of \$1,800, which sum would amount to \$108, and which sum was the amount paid each year upon the nine shares of stock. The payment actually made by the mortgagor up to the time of insolvency seems to have been all together \$1,433, of which \$657 was paid on account of interest, and \$770 on account of dues, and \$8 on account of a fine. Of the \$770 paid for dues, \$180, under the rules of the company, is applicable to the expense account in running the business, thus leaving \$590 of dues paid in to be applied to the value of the shares. To the bill for redemption, the corporation, Mr. Taggart, the

New Hampshire assignee, and Mr. Gray, the New Jersey receiver, are made parties.

Duffield & Kinney, for complainant. Cortlandt Parker, for Taggart, assignee. Howard W. Hayes, for George R. Gray, receiver.

REED, V. C. (after stating the facts). It seems to be entirely settled that upon the insolvency of a corporation of this class its receiver is at once empowered to collect the amount loaned to any borrower by the association, and that he can, for that purpose, proceed to foreclose a mortgage held by such association, although there had been no default by the mortgagor in the payment of any installment of interest or dues previous to the insolvency of the company. The collapse of the scheme renders it impossible to carry out the object of the association. The debtor cannot pay according to the terms of his contract with the association. The necessity of winding up the affairs of the insolvent company involves the right to immediately collect its assets and distribute the fund to its stockholders and creditors. *End. Bldg. Ass'ns*, par. 523; *Cook v. Kent*, 105 Mass. 246; *Curtis v. Association* (Conn.) 36 Atl. 1023; *Rogers v. Hargo*, 92 Tenn. '35, 20 S. W. 430. If the debts of the borrower become due by the fact of insolvency, it must follow that, if those debts are secured by a mortgage which can be foreclosed, then from the fact of insolvency the right of the mortgagor to redeem his property from the incumbrance of such mortgage must accrue. Until the mortgage debt is due, there can be no redemption. *Brown v. Cole*, 14 Sim. 427; *Kingman v. Pierce*, 17 Mass. 247; *Abbe v. Goodwin*, 7 Conn. 377; *Moore v. Cord*, 14 Wis. 231. But the moment the debt matures, any one interested in the land is entitled to discharge the property from the incumbrance. Indeed, the right to foreclose and the right to redeem may be said to be reciprocal. I am therefore of the opinion that the mortgagor need not await the foreclosure proceedings of the receiver, but can now pay off the amount which could be recovered against him by a sale of his property.

The important question is to determine the theory upon which this amount is to be calculated. As already stated, the condition of the mortgage was not that the mortgagor should pay a single sum, but that he should pay \$18 a month until his shares were worth \$1,800. One thousand eight hundred dollars was an aggregate sum made up of the first mortgage assumed by the association, together with the \$360 in cash loaned, and \$320 of premium charged and retained. One-half of the monthly payments which had been made by the mortgagor, although lumped with the dues, was obviously paid as interest on the sum of \$1,800, which sum was composed of the items just mentioned. The complainant insists upon his right to redeem by calculating his liability upon the follow-

ing theory: He is to be charged with the cash actually received by him, with interest upon it up to the date of the insolvency of the company. He is to be allowed for all payments made by him. To entitle the mortgagor to redeem, he must pay the same amount that could be recovered by the mortgagee by foreclosure. The question, then, is, what sum could be collected from Weir? If there were no condition of insolvency,—if the company was still a going concern,—nothing could now be collected, for the mortgagor would not be in default in any payment required by the condition of his mortgage. And if he had been in default, and the company solvent, the rule for computing the amount recoverable would be this: Calculate the length of time which would be required to mature the series of which the mortgagor's shares are a part, and charge him with all the dues and interest he would still have to pay up to the end of this period. *Association v. Martin*, 13 N. J. Eq. 427-433. But upon the occurrence of insolvency, with its consequential winding up of the affairs of the company, the application of this rule becomes inequitable. The shares can never mature. The object to be attained by future payment of dues can never be accomplished. The mortgagor is discharged from his duty to further pay. Therefore, in arriving at the amount which the insolvent company, or its receiver, can recover, his nonability to make such payment must be assumed. As the scheme under which the loan or advancement was made and the mortgages were given, and the dues and interest were paid, has collapsed, the problem is to establish a rule which will operate equitably between all classes of shareholders under these new conditions.

First, then, with what should he be charged? Inasmuch as he is relieved from paying, according to the terms of his mortgage, and is remitted to the position of an ordinary borrower, whose debt is due, his liability is to be limited to the amount which he actually received, with legal interest thereon. This course seems to be the rational one, and is supported by all the cases. 4 Am. & Eng. Enc. Law (2d Ed.) p. 1081. With what is he to be credited? He paid \$9 a month as dues. He also paid \$9 a month as interest. There was also deducted from the gross amount loaned, namely, \$720, a premium of \$360. As to the interest: If he is charged with interest upon the amount he has received, he should be credited with the interest he has paid, for it is apparent that the interest should be charged on both sides or neither side of the account. Next, in regard to the premiums paid: This is a sum paid for the right to borrow the assets of the association, usually in preference to some other shareholder. Premiums are paid in two ways. In some associations an amount is paid each month as a bonus for the privilege of borrowing, and in other associations

—as in this—a gross sum is deducted from the entire amount bought out, and the remainder only is paid to the borrower. In whatever way the credit is allowed, it is generally admitted that, when an association is prematurely wound up by reason of insolvency, the borrower is entitled to a credit of the premium paid or deducted. Now, it is true that all the shareholders, both borrowers and investors, would share in the increment arising from the payment of bonus and interest thereon by the borrowers, if the scheme was carried out; and it is true that by crediting the premiums paid by each borrower upon his loan the investing members lose all benefits from such premiums. The principle, however, upon which the latter class of shareholders are excluded from those benefits is that the premiums were paid by the borrowers in consideration of the complete execution of their contracts, which would permit the borrower to pay his debt by the application of his matured shares. If the existence of the company is prematurely terminated, and so the borrower is prevented from liquidating his debt by the maturation of his shares, and is prevented as well from receiving their withdrawal value, then the consideration of his payment of premiums fails. The borrower does not receive the benefit for which he has bargained. Under these conditions, the nonborrowers, having paid no premiums, cannot share in those paid by the borrowing class. Not only are the premiums deductible, but, when they are retained at the time of the making of the loan, and the borrower has paid interest upon the gross sum borrowed, including the premiums, then that part of the interest subsequently paid upon the premium—or, in other words, the interest paid in excess of the amount due upon the sum actually loaned—must be deducted. The cases supporting the deduction of both premiums and interest are *Brownlee v. Russell*, 8 App. Cas. 235; *Association v. Goodrich*, 48 Ga. 445; *Association v. Buck*, 64 Md. 338, 1 Atl. 561; *Cook v. Kent*, 105 Mass. 246. While the deduction of all moneys paid as premiums is probably the most equitable that can be adopted, yet it is to be remarked that it may, unless the power to appoint a receiver is employed with caution, work to the injury of the nonborrowing or investing class of shareholders. Instances may occur where the members of this class, by their investment in an association, have acquired the right to have the value of their shares of stock arising from the application of the high rate of interest, which the system of premiums is intended to secure, impaired by the premature winding up of the association. They should not be deprived of their right as shareholders, unless the condition of affairs calls emphatically for the dissolution of the association as an act of justice to all concerned. If, after the value of the shares of all the series has approached par, the company is thrown into bankruptcy,

the one class is stripped of this part of the withdrawal value of his shares, while the other class receives all the benefit, by the application of this value to the payment of its loans. The risk of losses by mismanagement is inherent in the character of the scheme, and, while such losses may protract the life of the series, they do not prove insolvency. A case of such rottenness in the affairs of the association should appear as to render it in the highest degree improbable that the shareholders, in the face of the discouraging condition of affairs, will continue to pay dues, and so bring the series to maturity. In connection with this observation, it may be remarked that there is much to be said in favor of the rule laid down in the case of *Towle v. Society*, 61 Fed. 446, in dealing with premiums in insolvent cases. The rule announced in that case was that the borrowing member had the right to be credited only with the unearned portion of his premium; that is, the proportion which a withdrawing member would be entitled to. I will, however, adopt the rule sustained by the great weight of authority, and by the supreme court of New Hampshire, in advising Mr. Taggart in this matter, viz. that only the sum actually received by the complainant is to be charged against the borrower, which, as already remarked, amounts to actually the same thing as crediting him with the premium paid. He is also to be credited with that part of the interest paid on account of the amount so deducted.

The last question is whether he should be credited with all or any part of the dues paid by him. It has been held by some highly respectable courts that a mortgagor, when an association of this kind is prematurely wound up, is entitled to a credit for all the dues which he has paid. Other courts have held that he is not entitled to credit on the mortgage on account of dues paid, and that he must await the final distribution of the assets of the association, and then take what his shares are proved to be worth. The rule supported by the last class of cases, in my judgment, produces a more equitable—indeed, the only equitable—result. The payment of dues stands upon an entirely different footing from the payment of premiums. The latter are paid by shareholders, it is true, but not as shareholders, but as borrowing shareholders. It is paid as a part of their contract with the association, of which the mortgage is a part; and it can be said that, when the association fails to perform, then the debtor is relieved from paying what he agreed to pay in consideration of performance. But dues are paid by all the members. The fund accumulated by these payments belongs to all members alike. If by maladministration of the affairs of the association the fund is diminished, the losses should fall evenly upon all. The accuracy of this proposition seems to be too obvious for discussion. Now, if a borrowing member is per-

mitted to set off all the money he has paid as dues, it is perceived that he receives the value of his shares, so far as that value is the result of dues; while the nonborrowing members are compelled to bear all the losses. The accuracy of this proposition seems also to be equally manifest. Now, what is equitable is that each member shall receive his proportionate share of the assets, which represents the remainder of dues accumulated. Inasmuch as this amount cannot be determined until the coming in of the final account of the receiver, and inasmuch as the amount due upon the mortgage must be settled at once, there can be no credit upon the mortgage debt on account of this, at present indeterminate, amount. As to it, the mortgagor must await the period of final distribution. The nonapplicability as an offset of the dues paid by the borrower is held in the following cases: *Strohen v. Association*, 115 Pa. St. 273, 8 Atl. 843; *Rogers v. Hargo*, 92 Tenn. 35, 20 S. W. 430; *Curtis v. Association (Conn.)* 36 Atl. 1023; *Bank Com'rs v. Granite State Provident Ass'n (N. H.)*.¹

The last case embodies the instructions given by the supreme court of New Hampshire to Mr. Taggart concerning the affairs of this corporation. The result in detail is therefore this: The complainant is to be charged with \$300, with interest, and to be allowed the interest paid, including the portion of the interest paid on account of the premium as an overpayment. Interest should also be allowed upon the overpayment from the date of each payment.

(55 N. J. E. 553)

GRAY v. BLUM et al.

(Court of Errors and Appeals of New Jersey.
Oct. 30, 1897.)

RECEIVERS—ALLOWANCE OF CLAIMS—ESTOPPEL—DEFECTS IN PROOF.

1. A receiver of a credit-system insurance company stands in the place of the company, as to the allowance or disallowance of the claims against it; and when he acquires knowledge of a loss while the company is solvent, and does some act that implies that he will not insist upon proper and correct proofs of loss being made, he cannot thereafter set up this omission against an allowance of the claims for pro rata distribution.

2. Where the notice and proof of loss are defective, and the insured negotiates as to proper notice and proof, and the proofs are offered, and unobjected to by the receiver, and the insured is led to believe by some act of the receiver that no defect exists, or that an existing defect is immaterial, the defect is waived, and the claim must be allowed.

(Syllabus by the Court.)

Appeal from court of chancery; Reed, Vice Chancellor.

George R. Gray was appointed a receiver of the United States Credit-System Company. From an order disallowing a claim, Alfred Blum and Lucas Toch appeal to the court of chancery, and from a judgment allowing the claim the receiver appeals. Affirmed.

¹ Opinion had not been filed Jan. 24, 1898.

Hayes & Lambert, for appellant. Chas. E. Hill, for respondents.

LIPPINCOTT, J. On the 15th day of June, 1894, the United States Credit-System Company issued a certificate of guaranty to the respondents, by which the credit-system company agreed to pay to them such sum, not exceeding \$5,000, according to the conditions of the certificate, on the total gross sales and shipments of merchandise which they might make between March 15, 1894, and March 14, 1895, to their customers, as they might actually lose on such shipments to legally ascertained insolvent debtors, of whom the United States Credit-System Company had been notified on its notice of failure blanks, with all questions thereon answered, within 10 days after information to them of such insolvency. The other provisions of the certificate need not be referred to, as they are immaterial to the decision of this case. The respondents, during the period of the insurance, had made sales and shipments of merchandise to the Saloon-Fixture Company of the City of Chicago to the amount of \$2,414.46. On this sum there was a credit to the fixture company of the sum of \$198.96, leaving a balance due of \$2,215.50. The saloon-fixture company failed on August 13, 1894, with this balance still due the respondents, and on the same day they received notice of such failure. According to the terms of the certificate, the respondents' own loss would be \$1,000, and therefore the insurance held good only for \$1,215.50, an allowance of which is sought against the receiver in the distribution of the assets of the United States Credit-System Company. The respondents received notice of the insolvency of their debtor, the saloon-fixture company, on August 13, 1894. Mr. Blum testifies that on that day he mailed to the United States Credit-System Company notice of this insolvency, along with statement of the loss sustained. Some time between that date and August 24th, the United States Credit-System Company failed, and on August 23d a temporary receiver of that concern was appointed. The claim was presented to the receiver, and on November 15, 1894, he disallowed the same, on the ground that, according to the conditions of the certificate, notice of loss had not been sent to the company within the 10 days. From that disallowance an appeal was taken to the court of chancery. In that court an order was made that the claim be allowed by the receiver, as duly proved, and entitled to a pro rata payment with the other debts of the United States Credit-System Company, with costs of appeal. The learned vice chancellor founded this order upon the finding of the fact that the notice of insolvency, with statement of loss, was on August 13, 1894, mailed to the company. Whether the notice mailed was a sufficient proof of loss, under the conditions of the certificate, is exceedingly doubtful. The certificate required that the notice should be on the

failure blanks of the company, with the questions thereon answered. This letter and statement were not on such failure blanks, and neither the letter nor statement contained the items of information required. There exists much doubt, also, whether the letter and statement, such as they were, were ever mailed or received by the company.

But the conclusion reached is that the order of the court of chancery should be affirmed, and the claim allowed by the receiver, for a pro rata distribution, upon the ground that the receiver has waived the want of presentation to the company during its solvency of the formal proof of loss, as required by the certificate. The facts, as they appear to be, in the case, are that at the time of the information of the failure of the saloon-fixture company to the respondents, on August 13, 1894, the United States Credit-System Company was on the eve of insolvency itself. The fact, also, may be taken as found by the vice chancellor, that some sort of notice and statement of loss were sent by the respondents to the credit-system company on that day, and at the same time the respondents issued an attachment for their claim, so that it was in a state of litigation. The exact date of actual failure of the credit-system company does not appear. The respondents say that it was about August 13, 1894. The receiver was appointed August 23, 1894, just 10 days after the information of the failure of the saloon-fixture company had been received by the respondents. There is also evidence that the respondents, after notice that their proof of loss was informal, sent, on August 24, 1894, to the company and to the receiver, a formal statement of loss, on the failure blanks, in accordance with the condition of the certificate. The secretary of the credit-system company, who remained in the service of the receiver, claims that no such letter and statement were received; but the fact is that on September 5, 1894, the respondents mailed to the receiver a letter inclosing the account of the respondents against the saloon-fixture company. This was noted by the secretary as having been received on September 7, 1894, and so marked on the notice. They were notified by the receiver that their proof of loss was informal,—apparently, by postal card, from the receiver. Again, on September 26, 1894, they inclosed a certified copy of their statement of loss to the receiver. On September 28, 1894, this statement was returned because it was wrongly made out, and directions were given the respondents by the receiver that they must make out and verify their claim under oath, stating the amount they claimed the saloon-fixture company owed them. In accordance with these directions, the respondents sent to the receiver a statement, under oath, of their claim against the saloon-fixture company. On October 17, 1894, the receiver again informed them that their affidavit was faulty, and directed them to send in the claim against the saloon-fixture company, under oath. On October 18, 1894,

such statement was sent to the receiver. These facts fully appear by the correspondence between the receiver and the respondents. On November 15, 1894, the receiver disallowed the claim, upon the ground that the respondents never filed any notice of loss with the United States Credit-System Company while it was solvent, and that no notice was filed with him until September 7, 1894, and claiming that the condition of the policy which required such notice within 10 days after information of failure of the debtor had not been complied with, and that, therefore, the respondents had no claim for an excess loss against the credit-system company. We think it was entirely too late for the receiver to disallow this claim. Under the facts and circumstances in proof in this matter, and which were before the receiver, there was a clear waiver of this condition of the certificate. It is manifest here that the deficient notices were taken by the receiver, and explicit instructions given by him to the respondents for their correction. Under the circumstances the respondents were led to believe that the receiver had dispensed with this condition of the contract, and upon the faith of that they went on dealing with him. It was very easy, on the 5th or 7th of September, to have said to the respondents that their claim could not be entertained, and that this condition would be insisted upon; but the continued negotiations for the correction of the proofs of loss reveal a state of facts which is only consistent with a waiver of that condition. As was said in *City Bank of Louisiana v. First Nat. Bank*, 6 H. L. C. 360, the law will not allow one to take up the inconsistent position of at once "approbating and reprobating"; and in this view it is quite immaterial what the real intention of the receiver may have been, for he will be estopped from denying the fact of waiver. His conduct raised a belief in the minds of the respondents that he intended to waive one of the terms of the contract, and it would be quite immaterial what his intention may have been. *Roby v. Insurance Co.*, 120 N. Y. 510, 24 N. E. 808; *Armstrong v. Insurance Co.*, 130 N. Y. 560, 29 N. E. 991; *Ronald v. Association*, 132 N. Y. 378, 30 N. E. 739; *Everett v. Insurance Co.*, 142 Pa. St. 332, 21 Atl. 817; *Insurance Co. v. Wolff*, 95 U. S. 326, 333. In this as in kindred cases, the receiver stands in the place of the company, as to the allowance or disallowance of claims of this character under the statute which confers this power and imposes this duty upon him. At least, no question of this character was made in the argument; and therefore it is presented the same as if the act of waiver, if any existed, was that of a duly-authorized agent or officer, having full power to waive this condition of the certificate. The waiver of notice of loss, or defects in proof of loss, or in due time, of their presentation, are common instances of the application of the general doctrine, and instances are so numerous as to make citation of authorities tedious. When

the insurer acquires knowledge of loss, and does some act that implies that he will not insist upon notice being given, he cannot thereafter set up the omission to notify, or at least his conduct is evidence of waiver. *Weed v. Insurance Co.*, 133 N. Y. 894, 31 N. E. 231. Where, on death blanks, forms for proofs are given, and the insured advises and negotiates as to proper proof (*Insurance Co. v. Edwards*, 122 U. S. 457, 7 Sup. Ct. 1249), it has been held that when the proofs offered are unobjectionable, and the insurer leads the insured, by some overt act, to believe no defect exists, or that an existing defect is immaterial, the defect is waived. *Keenan v. Insurance Co.*, 12 Iowa, 126. It has also been held that a waiver may be inferred when the insurer is the cause of the delay of the insured in presenting proofs of loss, as where the proofs are sent back by the insurer for correction, and again sent back after the time has expired. *Insurance Co. v. Grunert*, 112 Ill. 68; *Insurance Co. v. Edwards*, 122 U. S. 457, 7 Sup. Ct. 1249. The insurer's furnishing blanks to the insured, after the time, has been considered evidence of waiver. *Goodwin v. Insurance Co.*, 73 N. Y. 480. Instances of waiver are so numerous that it can well be stated that each case depends upon its own circumstances for a determination of the question. Upon the ground of implied waiver, I vote to affirm the order of the court of chancery directing the allowance of this claim by the receiver.

(56 N. J. E. 126)

DAVIS v. LOWDEN.

(Court of Chancery of New Jersey. Oct. 30, 1897.)

DOWER — QUARANTINE — WHEN RIGHT EXISTS — POSSESSION OF HUSBAND — WAIVER.

1. Revision, p. 320, § 2 (P. L. 1870, p. 22), provides that, until dower be assigned to her, "it shall be lawful for the widow to remain in and to hold and enjoy the mansion house of her husband, and the messuage or plantation thereto belonging, without being liable to pay any rent for the same." Deceased, with his family, occupied part of his building as a dwelling, and rented the remainder as a store to a firm of which he was a member, and as a dwelling for his co-partner. *Held*, that deceased had not been in such possession of the portion of the building so rented as would enable the widow to "remain" in possession thereof under the statute.

2. Where a widow has signed a lease to a third person for premises belonging to deceased's estate, under which the tenant has taken possession, and remains in possession, she is estopped from claiming quarantine in said premises, although the lease was never executed by the executor or by the guardian of the minor heirs, it having been acquiesced in by them.

Bill by Grace E. Davis against John J. Lowden, as guardian of Lester Roscoe Davis. Heard on pleadings and proof. Decree for defendant.

P. H. Gilhooly, for complainant. Joseph Cross and John J. Lowden, for defendant.

PITNEY, V. C. This is a bill by a widow against the heir at law of her husband ask-

ing that dower be set off to her; also asking for rents and profits of premises, in which she claims a quarantine, until dower shall be set off. The facts are as follows: The husband, Lester Davis, died on the 23d of June, 1896, testate of a will in which he gave to the complainant \$2,000 in addition to her right of dower in his real estate. He devised all the rest of his estate, real and personal, to his son Lester Roscoe Davis, an infant under the age of 14 years, the issue of a prior marriage. The testator died seised of several pieces of real estate, none of which, as appears from the evidence and statements of counsel, was of any considerable value, except a lot of land on the corner of Third and Fulton streets, in the city of Elizabeth, upon which stood a large building, 50 feet front by — feet deep, 3 stories high. The main floor, to the full width of 50 feet, was designed and used as a mercantile store and salesroom; the second and third floors were designed and used mainly for dwellings, but one or two rooms on each floor were used for storage of goods in connection with the store below. The dwellings were reached by two routes: one an open stairway from the center of the open storeroom, and another a private stairway leading from Fulton street at the side, furnished with two doorbells,—one for the second, and one for the third, floor. The dwelling rooms on the second floor and two of those on the third floor were occupied by Mr. Davis and his family, and the remaining dwelling rooms on the third floor were occupied by Mr. Jayne (his business partner) and family. Mr. Davis erected this building about the year 1890 or 1891 for his own use, and designed and arranged it as above stated, and about that time he entered into a contract of partnership with Mr. Jayne for the carrying on of a hardware and paint business. The whole building, with stable, etc., in the rear, was rented to the firm of Davis & Co., composed of Mr. Davis and Mr. Jayne, at \$1,000 a year, with the understanding that each partner was to have the privilege of living in the dwelling rooms over the store in the manner above stated. At the death of Mr. Davis, in June, 1896, his partner, as survivor, continued the business, and arranged with the executor to purchase all of Mr. Davis' interest in the business, and by a contract with the executor rented the premises (except the living rooms that had been occupied by Mr. and Mrs. Davis) for five years at \$750 a year. Mr. Lowden was at that time the counsel for the executor, and, under the mistaken notion that the executor had power to execute a lease for the premises, he prepared a lease from the executor and Mrs. Davis, the complainant, as widow, to Mr. Jayne, for the whole premises, "excepting the nine rooms on the second floor and the two rooms on the third floor which are now in the use and occupation of the widow and family of the said deceased," for the term of five years from the 11th of Au-

gust, 1896, at the rent of \$750 a year, in monthly payments of \$62.50 on the 11th day of each and every month. The lease provided that the widow and family of the deceased should have the right and privilege of keeping coal and wood in the cellar for their household use, and a right of way and the use of the stairway. It further provided that the apartments of the widow should be heated as theretofore by the steam-heating apparatus then in the said building, without expense to the widow and family of the deceased. There was a further provision that, in case the widow and family chose to vacate the premises reserved for them, the lessee, Jayne, would take them at the rent of \$250 a year. Then follows this: "It is hereby understood, by and between the parties hereto, that the rents hereby reserved and made payable to the said Mack, executor as aforesaid, shall be divided, after payment of lawful charges against the same, between the parties of the first part, in the proportions to which they may be entitled by law, and that payment to the executor shall operate as a release of all liability on the part of the party of the second part for division of payment." This lease was executed by Mrs. Davis, the complainant, and delivered to Mr. Lowden for the signature of the executor and Mr. Jayne. Then, upon consideration, Mr. Lowden concluded that the executor had no power to make such a lease, and himself afterwards took out from the orphans' court letters of guardianship of the infant; and, without any formal lease being executed, he has, as such guardian, acquiesced in and approved the lease just referred to. One month's rent of the premises (\$83) was paid by the executor to the complainant; and after that various sums were paid to her monthly, up to and including November, 1896, aggregating, with the first payment of \$83, \$318. For this sum the complainant receipted, with this clause added: "I also agree that if my dower interest should not amount to said sum of \$318, or such sum and such other subsequent payments as may be made to me, that the excess over my dower interest thus received shall be paid out of the legacy to me in the last will of said Lester Davis, deceased." The widow now claims by her bill that she is entitled to the whole of the rents of the store and dwelling until dower is actually admeasured and set off to her, basing her claim upon the second section of the dower act, which provides: "That until such dower be assigned to her, it shall be lawful for the widow to remain in, and to hold and enjoy the mansion house of her husband and the message or plantation thereto belonging, without being liable to pay any rent for the same." Revision, p. 320.

Three questions arise upon the case, and were discussed by counsel: First. Did the first floor and the stable and building in the rear, which were occupied by the firm of L. Davis & Co. for mercantile purposes, form a

part of the dwelling? Are they included in the language "mansion house of her husband," or in the language "messuage thereto belonging"? Second. If so, then was the husband in such possession of them that the widow could be said to "remain" in possession thereof, and thereby bring herself within the terms of the act? Third. What effect does her signature of the lease above recited have upon her right under the second section of the dower act above quoted?

The first question is not without difficulty. The word "messuage," as used in *Magna Charta* and all the older authorities, meant simply a mansion house. It has been extended by later use to include other structures; but, so far as I am able to find, the structures which may be properly included within its meaning are such only as are useful in making the occupation of the mansion house itself more comfortable and beneficial. See *Jac. Law Dict.* and *Bouv. Law Dict.* tit "Messuage." In the *Encyclopedia Dictionary* the definition is: "A dwelling house with the adjacent buildings and curtilage appropriated to the use of the household; a manor house." To the same effect is the *Century Dictionary*. The language of our statute is broader than that of *Magna Charta*, in that it gives the right to "remain in, hold and enjoy the mansion house of her husband, and the messuage or plantation thereto belonging." In the older cases it was held that under the term "messuage" a small quantity of land might be included. In our statute the word is used in the alternative, "messuage or plantation," indicating that the legislature had in mind a small piece of land, such as a garden or yard, rather than a building. In *Indiana (Williamson v. Ash, 7 Ind. 495)* it was held, in a case precisely like the one in hand, that the widow was not entitled to quarantine in a storeroom. The report states that Isaac Ash owned a building, erected and used in parts, for two purposes,—one part for a dwelling, and one for a mercantile storeroom. After his death his wife continued to occupy the dwelling house. The heirs took possession of and rented the storeroom. After a year or more the dwelling and storeroom were set off to her as dower. Then she sued *Williamson*, who had been the tenant of the heirs, to recover the rent of the storeroom from the time of her husband's death. The quarantine act in force in *Indiana* at that time was this: "Until such dower shall be assigned, it shall be lawful for her to remain and continue in the mansion house and messuage thereto belonging, without being chargeable to pay the heir any rent for the same." The court held that: "The right to occupy the dwelling did not extend to the storeroom. It was not appropriated to, nor in any way necessary for the use or convenience of, the dwelling house,"—citing *Grimes v. Wilson, 4 Blackf. 331*, where the court used this sensible language: "It is difficult to define with precision the signification of the legal term 'messuage.' Authors have differed in their understanding

of its import. The best writers, however, represent it as synonymous with house, and as embracing within its meaning an orchard, garden, curtilage, adjoining buildings, and other appendages of a dwelling house." By this I understand is meant something which renders the occupation of the dwelling, as such, more comfortable and beneficial. This definition excludes a store and salesroom. The report of *Williamson v. Ash* does not state whether the storeroom in that case was under or adjoining the dwelling rooms, but I am unable to perceive that the relative location of the rooms under the same roof makes any difference, since it is well settled that there may be separate ownership as well as tenancy of different floors of the same building.

But I do not find it necessary to determine this question, as I conclude that the complainant must fall upon the second question, the resolution of which against her is fatal to her claim. The first floor was clearly in the possession of Mr. Davis and his partner, Jayne, as partners, and such possession was held by them, not as ordinary tenants in common, but as joint tenants, with right of survivorship in trust for the purposes of the partnership. So that when Mr. Davis died his partner had an actual right, as his survivor, to the possession of those premises for some considerable period; the only question is for how long. The case shows that there was no written lease between the parties, and the evidence does not disclose that there was any particular term fixed. There were written articles of partnership, which, however, were not produced. The presumption from the facts as shown would be that the term would continue at least during the term of the partnership. In the absence of the element of partnership, the presumption would be that the holding was from year to year, to be terminated on three months' notice. And it seems to me that this presumption is not necessarily overcome by the fact that the partnership was liable to be dissolved by the death of one partner, and, in fact, was so dissolved during the term. Such dissolution was only to the extent of preventing the surviving partner from making new contracts which should bind the firm. He still had the right, as surviving partner, to the possession of the partnership assets for the purpose of winding up the partnership affairs, and among those assets was the right of possession of this store; and it seems to me that, as a matter of necessity, that right of possession must continue long enough at least to enable him to wind up the business, he, of course, continuing to pay the rent. I find it quite impossible to hold that the heir at law had the right to the actual possession of the premises immediately upon the death of his father, since the right on the part of the surviving partner must be held to be exclusive of the right of the heir at law, and also of the widow. I am unable to see how the testator can be said to have had such a possession of the storeroom floor as that his

widow can be said to "remain" in possession. It seems to me that the situation is precisely the same as if the husband had leased the premises to a third person.

That being the situation, it seems to me that there can be no quarantine of the part so leased. The language of the act, "to remain in and hold and enjoy," indicates a continuation of the actual possession and occupation of the husband, and confines the quarantine to houses and lands in his actual use and occupation, and hence, necessarily, excludes those not so in his actual use and occupation, and also excludes the idea of a constructive possession by a reception of the rents of leased premises. Such, I understand, has always been the construction put upon it. The words "remain in," found in our statute, are taken from *Magna Charta*, c. 7,—"*Et maneat in capitali messuagio mariti sui*,"—and are therefore to be accorded the same meaning as has been given to the same words in that instrument. I have examined all the English authorities (1 Co. Litt. 34, b; 2 Co. Inst. 16, 17; Bac. Abr.; Com. Dig.; Vin. Abr. tit. "Dower"), and can find no warrant for the notion that the widow is entitled to quarantine of anything of which her husband was not at his death in the actual possession and occupation, as distinguished from possession by the receipt of rents, or that the right of quarantine could, under any circumstances, include the right to receive the rents of premises held under lease from the husband. Lord Coke (1 Co. Litt. 34, b) says: "This continuance of the widow in the capital messuage is in law called a quarantine. * * * If the heir or other tenant of the land put her out, she may have her writ de quarantina habenda." See 1 Rep. Husb. & W. 386; 1 Bright, Husb. & W. 363; Fitzh. Nat. Brev. 162, 363, where we find this language: "The writ of quarantine habenda lieth where a man dieth seised of any messuage and lands, etc., and, immediately after the death of the husband, the heir or he who ought to have the lands after his death will put the wife out of the messuage, etc.; then the wife shall have this writ, for by the statute of *Magna Charta*, c. 7, the wife shall remain in the capital messuage after the death of her husband by forty days, if it be not a castle." In our own Reports I can find no intimation of any right of the widow to hold, as a part of her quarantine, lands not in the actual use or occupation of her husband at his death, or of any right to demand and receive rents of rented properties. In *Den v. Dodd*, 6 N. J. Law, 367, Kinsey, C. J., at page 369, says: "We are warranted in saying that although the widow, when out of possession, cannot legally enter until her dower is assigned to her, yet, when she came upon the property during the lifetime of her husband, and remained there subsequent to his death, the heir, or one claiming under him, cannot maintain an ejectment against her, and oust her, without assigning to her that proportion of the estate to which

she is legally entitled; and that is the point to which the present defense is limited." In *Den v. Bildérback*, 16 N. J. Law, 497, at page 506, Ford, J., uses this language: "The doctrine stated in the case of *Den v. Dodd*, that a widow, remaining in possession from her husband's death, shall have her quarantine continued until dower is assigned to her, and cannot be dispossessed by ejectment till that is done, either at the suit of the heir or any other person claiming under the husband subsequent to the marriage, was founded on the common law, and two years afterwards the same principle was enacted by statute (Rev. Laws, p. 397, § 2), that, until dower be assigned to the widow, it shall be lawful for her to remain in the mansion house and plantation, without rent. But neither of them compels her to remain. She may give up the possession voluntarily, and go when and where she pleases, it being a personal privilege to herself; and, if once she moves out voluntarily and depart, it is gone forever under the statute, and her dower is reduced to a naked right, only to be recovered by an action at law." In *Craige v. Morris*, 25 N. J. Eq. 467, it was held by Chancellor Runyon that the widow who continues in possession of her husband's mansion house after his death may rent out the same and receive the rents, and that thereby she does not lose her right of quarantine. But this right is based upon a continuation of the husband's possession, and falls short of holding the doctrine contended for by complainant.

I should have supposed the principle above stated to be too clear for argument, but for two cases cited and relied upon by the counsel for the widow, to wit: *Conger v. Atwood*, 26 Ohio St. 134, 22 Am. Rep. 362. The head-note of that case is precisely the same as that of *Craige v. Morris*. The case arose on demurrer to the petition, and one of the allegations of the bill is this: That at the time of the death of the decedent his son-in-law was occupying the mansion house and lot under an agreement between them that the decedent should retain his home there as part of the consideration for the use and occupation of the premises, and should receive from Dressler, the son-in-law, certain rents besides; and, by an understanding between Dressler and the administrator that Dressler should pay him a reasonable rent, said use and occupation was continued for some time afterwards; and it was for the recovery of this rent that the action was brought by the widow. There was also a distinct allegation that at his decease the husband owned and occupied the house. The court, in its opinion, quotes the Ohio quarantine act (Swan & C. p. 516), which provides that the widow "shall remain in the mansion house of her husband free of charge for one year, after his death, if her dower be not sooner assigned to her," and proceeds: "Does the petition show a case entitling her to the benefit of this provision? Some of the averments in the peti-

tion are not entirely clear, but, no motion having been interposed to make them more definite and certain, we must interpret the petition according to its true import and meaning. It is averred that the decedent, at the time of his death, owned and occupied the mansion in question. This averment must be kept in mind in connection with the further averment that the house was also then occupied by another person. The two statements are not necessarily inconsistent, nor does the latter invalidate the former. The more essential inquiry is whether the occupancy of the tenant under the decedent interfered with the right of the widow to the exclusive occupancy of the mansion house after the death of her husband? From the fact that the rent of the tenant was to be paid partly by the occupancy of the decedent, it is fairly inferable that the renting to him was, at most, during the life of the decedent only; and this conclusion becomes incontrovertible, as the case now stands before us, from the fact that, after the death of the husband, the tenant continued in the mansion, so far as appears, only under an arrangement made by him with the administrator. Moreover, his occupancy terminated shortly after the death of the husband, and within the period in controversy. There was then no legal obstacle to the widow's enjoyment of the mansion house of her husband as provided by the statute." This statement shows that the case was put upon the ground that the husband was, in effect, in possession at his death, and that the wife's possession was a mere continuance of his. The decision was by a divided court, and the case had met with varied fortunes in the court below. The conclusion of the court at the end of the opinion (page 369) is as follows: "The right of a widow to remain in the mansion house of her deceased husband, as provided by statute, is not restricted to a personal continuance in the house merely, but she is entitled to a reasonable enjoyment of the possession of the premises, and may, therefore, either personally enjoy them, or she may rent them, as she may deem best promotive of her comfort." I cannot look upon this case, either the decision itself or the reasoning upon which it is based, as sufficient authority to overcome what I consider to be the clear law of this state. The other case relied upon by the complainant is *Orrick v. Robbins*, 34 Mo. 226. Mrs. Orrick, the plaintiff there, had been the widow of one Robbins, who died seised of a tract of land, a dwelling house and grounds, in his actual use and occupation. Adjoining this land, on the same tract, was a field of 66 acres, which at Robbins' death was rented out for a moneyed rent, and in the actual possession of the tenant. After the death of Robbins, his widow, the plaintiff, continued to occupy the part of which he died in the actual occupation, without accounting to the estate for any rent thereof. She also received a prop-

er share, as dowress, of the rent paid by the tenant of the 66 acres up to the expiration of the lease. This rent was received by the administrator under a statute of Missouri. He relet the 66 acres after the expiration of that lease, and the suit was by the widow to recover the whole of the rent of the 66 acres collected by the administrator from the end of the term in existence at her husband's death up to the time that her dower was actually assigned to her. It should be here stated that the widow, under a statute of Missouri, elected to take what is there called a "child's share," in place of her dower; and the principal question discussed in the briefs of counsel (printed in full in the report) was whether or not the right of quarantine was a mere incident to the right of dower, so that when the widow abandoned her right of dower, and took in its place a child's share in the estate, she deliberately abandoned her quarantine. The argument against the widow was that her right of quarantine fell with her right of dower. The question whether or not she was entitled to quarantine in the land of which her husband was not in the actual possession and occupancy at the time of his death was not discussed by counsel. The court, in dealing with it, after holding in the widow's favor on the question discussed, uses this language: "If the owner of a plantation rent out a particular field, or part of it, that is not necessarily a separation of the field or part from the plantation. Whether it be or not is a question of fact for determination in each case. If it be not permanently separated, yet the widow's right being merely possessory, and she being unable to have actual possession during the term created by the husband, she cannot have her quarantine of such rented part until the term shall expire, and then her right would immediately attach. In this case, therefore, we think the widow's right in the rents collected by the administrator to be as follows: For the rents received for the unexpired term created by the husband she was entitled only to a part thereof, in proportion to her general interest as dowress in the real estate; and from the time of the expiration of the term created by the husband, at the time of the assignment of her dower, she was entitled to the whole rent." This reasoning seems to be inconsistent with itself, and not satisfactory. If the widow was entitled to any quarantine in the 66 acres held under a lease from her husband at the time of his death, she was entitled to the whole. It is to be observed that the judgment in this case was a reversal of that appealed from. In the later case of *McClurg v. Turner*, 74 Mo. 45, it was distinctly and directly held that a widow could not have quarantine of a dwelling which was not in her husband's possession or occupation at his decease.

For these reasons I decline to follow those authorities, and hold that the widow is not entitled under a right of quarantine to re-

ceive the rents from the storehouse or that part of the building occupied by the tenant. But, if I am wrong in this, I am unable to see how she is to escape the result of the lease signed by her. That was a distinct letting of the premises in conjunction with the executor, who was supposed at the time to represent the heir at law, to a third party for a term of five years, under which that person has remained in possession ever since; and, although that lease was never executed by the executor or by the guardian of the heir at law, yet it has been acquiesced in by them, and the tenant has been, and still is, holding under it. And I think that it must be held to have the same force and effect against the widow as if the proper party had joined with her therein. And, if so, then she voluntarily joined in a conveyance of the premises in which she recognized the right of the heir therein. Such a conveyance was entirely inconsistent with the existence of her quarantine. I will advise a decree in accordance with these views.

(20 R. I. 376)

STATE v. BAKER.

(Supreme Court of Rhode Island. Nov. 9, 1897.)

ASSAULT WITH A DANGEROUS WEAPON—WHAT CONSTITUTES.

Firing a pistol at another, who is within shooting distance, or in the direction where he is standing, merely with intent to frighten him, is an assault with a dangerous weapon, within Gen. Laws R. I. c. 277, § 19.

Edward Baker was convicted of an assault with a dangerous weapon, and petitions for a new trial. Petition denied.

Willard B. Tanner, Atty. Gen., and Charles F. Stearns, Asst. Atty. Gen., for the State. Page & Page, for defendant.

TILLINGHAST, J. The defendant, who has been found guilty of committing an assault with a dangerous weapon upon Jerry G. Fournier, petitions for a new trial on the grounds: (1) That the presiding justice erred in refusing to give the following instruction to the jury, viz.: "If the jury believe from the testimony that the defendant fired the pistol for the purpose of scaring Mr. Fournier, and for no other purpose, the defendant was not guilty of an assault with a dangerous weapon, as charged in the indictment, but only guilty of a simple assault;" (2) that the verdict was against the evidence, and the weight thereof; (3) that the verdict was against the law; and (4) that the defendant has discovered new evidence material to the issue in said case, since the trial thereof, that he could not have discovered by the exercise of reasonable diligence prior thereto. The witnesses on the part of the state testify substantially that on the 15th day of December, 1906, at East Providence, in this county, at about 12 o'clock in the daytime, while said Fournier was engaged in attending to some

work in his yard, the defendant, who had a grudge against him, came to the fence, drew a loaded revolver from his pocket, and deliberately fired the same into said yard in the direction of the place where said Fournier was standing, which was about 60 feet away, the ball striking a tree in the rear of him, but fortunately doing no harm. Fournier testifies that he heard the whistle or whizz of the ball as it passed him. At the time of the shooting, Fournier's back was towards the defendant, so that he did not see him, or know of his presence until after the shot was fired. There is also evidence on the part of the state that the defendant had had trouble with Fournier, and that he had on several occasions within a day or two previous to the occurrence in question threatened to shoot him, or words to that effect; and there is also evidence that the defendant admitted, after the shooting, that he shot at the said Fournier. Franklin Monroe, the sergeant of police who arrested the defendant, testifies that in a conversation with defendant, after his arrest, he said: "I did shoot at him. I shot at him with lead." To another officer he stated that he shot at Fournier to scare him, and that the next time he would fill him full of lead. The defendant testifies that he fired the pistol in the air, for the purpose of scaring Fournier, and not with any intention of assaulting him; that Fournier had annoyed him considerably, and he thought he would just fire off the pistol, and see what he said. The court, Douglas, J., charged the jury, among other things, that: "Firing such a weapon intentionally in the direction of another person is assaulting him; and therefore the defendant, if he intentionally did this act, is guilty of the offense charged. His defense is that he did not intend to wound the citizen, but only to scare him. * * * Firing a pistol in the direction of another, with the intention of frightening him, or with the intention of wounding him, are equally assaults. If a wound ensues, that would give rise to a civil action for assault and battery. The criminal law looks at the intent of the act, and, if the intent is either to bruise, wound, or frighten, it is the same, so far as the crime is concerned. There must be an intent to commit an assault, or else there can be no assault. Committing an assault need not be wounding. It may consist in frightening as well. Now, the defendant himself tells you that he did not intend to wound, but he did intend to frighten. He tells you that he fired the pistol, and whether he fired it in the direction of this man or not is for you to determine on all the evidence in the case. * * * He himself does not deny that he pointed it in the direction, but says he fired it in the air,—whatever that may mean. But he does say that he intended to scare this man. * * * Have you any reasonable doubt that the defendant fired this pistol in the direction of the man he is charged with firing it at, either to wound or to scare? If the evidence convinces you of this, then the defendant is guilty. * * *

You have simply to ask yourselves this question: Does the evidence convince you that the defendant fired the pistol at, or in the direction of, the person named, with the intention of either wounding him or frightening him? And what the intention was, gentlemen, you have a right to infer from the act. If a man fires a pistol in the direction of another person, it is a fair inference, unexplained, that the act had some reference to the person that the pistol was pointed at, and the natural motive is the motive which you have a right to attribute to the person who commits the act." The court also charged the jury, in compliance with the defendant's request, "that the jury must find from the testimony that this defendant fired the pistol with the intention of committing an assault upon Mr. Fournier, before they can find a verdict of guilty as charged in the indictment." We think the court fairly and substantially stated the law applicable to the case. An assault, as ordinarily defined, is any unlawful attempt or offer with force or violence to do a corporal hurt to another, whether from malice or wantonness. The offense may consist also in putting another in fear of violence. Thus it is said by Mr. Bishop that "an assault is an unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being." 2 Bish. Cr. Law, § 23. And see *State v. Gorham*, 55 N. H. 152. In *Rapalje's Law Dictionary*, under the word "Assault," both definitions are recognized. To constitute an assault with a dangerous weapon, it is necessary that the weapon should be presented at the party intended to be assaulted, within the distance at which it may do execution. 1 *McLain, Cr. Law*, p. 199, § 232, and cases cited in note 4. There is evidence that that was done in this case,—that the defendant stood at the fence, and deliberately fired a pistol at or in the direction of the complainant, who was about 60 feet away, the ball just missing him, as before stated. But the defendant says he did not intend to hit him, but only to scare him. Assuming this to be true, as we must do in order to sustain the refusal to charge complained of, did it constitute an assault with a dangerous weapon under the statute? We think it did. The act of firing the pistol at the complainant, or in the direction where he was standing, with the intent to frighten him, was not only wholly inexcusable, but unlawful and reckless as well. It was an act which was well calculated to inflict serious personal injury, and from such an act the law implies malice. That it was an assault the defendant's counsel did not deny, but he contends it was not an assault with a dangerous weapon. Let us see. There was an assault; this is admitted. It was made with a loaded pistol. A loaded pistol is a dangerous weapon. Without the use of the pistol, there would have been no assault. It logically, as well as necessarily, follows, therefore, that the offense committed was that of an assault with a dan-

gerous weapon. The statute under which the indictment was found (Gen. Laws R. I. C. 277, § 19) reads thus: "Every person who shall make an assault, or battery, or both, with a dangerous weapon, shall be imprisoned not exceeding two years." It will thus be seen that it is not necessary, in order to constitute the offense, that any bodily hurt should be inflicted,—that is, that any battery should follow,—but only that the assault should be made with a dangerous weapon. Among the cases which hold that it is an assault to point a loaded weapon at a person, or to recklessly fire a pistol in the direction of another, see *Morgan v. State*, 33 Ala. 414; *U. S. v. Klerman*, 3 Cranch, C. C. 435, Fed. Cas. No. 15,529; *State v. Shepard*, 10 Iowa, 130; *Crow v. State*, 41 Tex. 471, 472; *Meador v. Stone*, 7 Metc. (Mass.) 151. We think there is sufficient evidence to sustain the verdict. The other grounds upon which a new trial was claimed not having been urged at the bar, there is no occasion for us to consider them. Petition for new trial denied, and case remitted to the common pleas division for sentence.

(20 R. I. 269)

STATE v. STONE.

(Supreme Court of Rhode Island. Nov. 5, 1897.)

GAME—"CLOSED SEASON" DEFINED.

Gen. Laws, c. 112, § 4, making it an offense for any person to have in his possession any ruffed grouse "from the first day of January to the first day of October," will be construed as reading "between the first day of January and the first day of October."

Allen Stone was indicted for a violation of the game law. Heard on demurrer to the indictment. Overruled.

Willard B. Tanner, Atty. Gen., and Charles F. Stearns, Asst. Atty. Gen., for the State. F. P. Owen, for defendant.

MATTESON, C. J. The indictment charges in technical form that the defendant, on the 24th day of September, 1896, at Foster, in the county of Providence, did unlawfully have in his possession 19 partridges, against the form of the statute, etc. The defendant demurs to the indictment, and specifies as grounds of demurrer that the indictment is uncertain, and that it charges no offense known to the law. Gen. Laws R. I. c. 112, § 4, makes it an offense for any person to have in his possession any ruffed grouse or partridge "from the first day of January to the first day of October," and imposes a fine of \$20 for each of such birds. The phrase "from the first day of January to the first day of October" was not happily chosen by the framer of the statute to express what was its evident intent, to wit, the having in possession of the birds mentioned in the section between the dates named. We think, however, that the intent is sufficiently clear for us to construe the words "from" and "to" as equivalent to "between" and

"and"; so that the phrase would read "between the first day of January and the first day of October." The date on which it is charged that the defendant had in his possession the partridges mentioned in the indictment is laid as September 24, 1896, which is within the period covered by the statute. We fail to see that the indictment is lacking in certainty. Demurrer overruled, and case remitted to the common pleas division.

(20 R. I. 286)

STATE v. GALLAGHER.

(Supreme Court of Rhode Island. Nov. 2, 1897.)

BIGAMY—INDICTMENT—NEGATIVE EXCEPTIONS—EVIDENCE.

1. Pub. St. R. I. c. 244, § 1, provides that one convicted of being married to another, etc., having at the same time a former husband or wife living, shall be imprisoned, etc.: provided, that this shall not extend to any person whose husband or wife shall be continually remaining without the state seven years together (the party being married after the expiration of said seven years, not knowing the other to be living within that time), nor to any person divorced, nor to any person by reason of prior marriage made when the man was less than 14 and the woman less than 12 years old. *Held*, that the words contained in such proviso merely constitute grounds of defense, and the exceptions mentioned need not be negated by an indictment for bigamy.

2. There need be no negative averment in an indictment to the matter of an exception or proviso in a statute, unless such matter enter into, and become a part of, the description of the offense, or a qualification of the language defining or creating it.

3. On a prosecution for bigamy the admissions of defendant are competent evidence of his former marriage.

John Gallagher was convicted of bigamy, and petitions for a new trial. Petition denied and dismissed.

Willard B. Tanner, Atty. Gen., and Charles F. Stearns, Asst. Atty. Gen., for the State. John M. Brennan, for defendant.

ROGERS, J. The defendant was indicted for bigamy, under Pub. St. R. I. c. 244, § 1, which reads as follows: "Every person who shall be convicted of being married to another, or of cohabiting with another as husband and wife, having at the time a former husband or wife living, shall be imprisoned not exceeding five years nor less than one year or be fined not exceeding one thousand dollars: provided, that this shall not extend to any person whose husband or wife shall be continually remaining without the limits of this state for the space of seven years together, the party being married after the expiration of said seven years, not knowing the other to be living within that time, nor to any person who shall be divorced at the time of such second marriage, nor to any person by reason of any prior marriage, made when the man was less than fourteen and the woman less than twelve years of age." The material part of the indictment was in these words: "That John

Gallagher * * * did commit the crime of bigamy by then and there marrying one Emily Amella Lawless,—he, the said John Gallagher, being then and there a married man, and then and there having a lawful wife alive other than the said Emily Amella Lawless, the lawful wife being one Emily Gallagher, who was married to said John Gallagher at Providence, in said county, on the 12th day of August, A. D. 1890, under the name of Emily Johnson,—against the form of the statute," etc. On the trial before a jury in the common pleas division, the defendant moved to quash the indictment because it did not negative the exceptions mentioned in said section 1, but the presiding justice overruled the motion, and this is made the first ground of the petition for a new trial. The general rule is that a negative averment to the matter of an exception or proviso in a statute is not requisite in an indictment unless the matter of such exception or proviso enter into, and become a part of, the description of the offense, or a qualification of the language defining or creating it. *Stanglein v. State*, 17 Ohio St. 453, 461; *State v. Rush*, 13 R. I. 198; *State v. Abbey*, 29 Vt. 60. The law is laid down with great clearness in the latter case, as follows: "A prima facie case must be stated; and it is for the other party, for whom matter of excuse exists, to bring it forward in his pleading or defense. * * * The question is whether the exception is so incorporated with, and becomes a part of, the enactment, as to constitute a part of the definition or description of the offense; for it is immaterial whether the exception or proviso be contained in the enacting clause or section, or be introduced in a different manner. 'It is the nature of the exception, and not its location,' which determines the question. Neither does the question depend upon any distinction between the words 'provided' or 'except,' as they may be used in the statute. In either case the only inquiry arises whether the matter excepted, or that which is contained in the proviso, is so incorporated with, as to become, in the manner above stated, a part of the enacting clause. If it is so incorporated, it should be negated; otherwise it is a matter of defense." See, also, cases cited in 1 Benn. & H. Cr. Cas. 255, note; Bish. St. Crimes, § 606, note; 2 Whart. Cr. Law, § 1713, note. The offense of bigamy consists in marrying another while having a former husband or wife living. The words contained in the proviso of chapter 244, § 1, of the Public Statutes of Rhode Island, are not so incorporated with the enacting clause that one cannot be read without the other, but they merely constitute grounds of defense peculiarly within the knowledge, and ability to prove, of a defendant, if existing. See *Com. v. Jennings*, 121 Mass. 47, 52.

The defendant's second ground for asking for a new trial is that his admissions as to

his first marriage were allowed to be given in evidence before the jury against his objection. It has been authoritatively settled in this state, in the well-considered case of *State v. Medbury*, 8 R. I. 543, that admissions of the accused are competent evidence of the fact of marriage. Though there are denials of this doctrine, yet it is sustained by the great body of the cases, English and American. See the numerous cases cited in 1 Bish. Mar., Div. & Sep. § 1058, note.

The defendant alleged in his petition, as a ground for a new trial, that the verdict was against the evidence; but this seems to have been abandoned, as no reference was made to it in the brief submitted in his behalf. An examination of the record, however, satisfies us that the verdict was supported by the evidence. We find no error in the jury trial, and the petition is therefore denied and dismissed, and the case is remitted to the common pleas division for further proceedings.

(20 R. I. 273)

STATE v. PIRLOT.

(Supreme Court of Rhode Island. Nov. 6, 1897.)

CRIMINAL LAW — EXCEPTION TO INSTRUCTIONS — UNLAWFUL PRACTICE OF MEDICINE — COMPENSATION.

1. An exception to a refusal to grant a request for an instruction, made immediately after the jury had retired, was not too late where the judge had directed the jury to take the case as soon as he had concluded his remarks about said request.

2. Though Gen. Laws, c. 165, § 2, makes it unlawful to practice medicine without exhibiting and having registered a certificate, yet, as section 8, providing a penalty, limits the fine to the practice of medicine for reward or compensation, section 2 cannot be violated where a medical practitioner receives no compensation for his services.

Julius A. PirLOT was convicted of unlawfully practicing medicine, and he petitions for a new trial. Granted.

Willard B. Tanner, Atty. Gen., and Charles F. Stearns, Asst. Atty. Gen., for the State. Cassius L. Kneeland, for defendant.

MATTESON, C. J. The indictment charges that the defendant did unlawfully practice medicine for reward and compensation without having first obtained a certificate from the state board of health, and without possessing any of the qualifications set forth in Gen. Laws R. I. c. 165, § 3. At the conclusion of the charge to the jury in the trial in the common pleas division, the defendant requested the justice presiding to charge that, "if the jury find that the defendant received no reward or compensation for his services, they must find for the defendant." The court refused the request, and instructed the jury to the contrary. The record discloses that, as soon as the justice presiding had concluded his remarks concerning the request, he directed the jury to take the case, and they thereupon retired; that, immediately

upon their retirement, the defendant's counsel excepted to the refusal of the court to grant his request, but the court refused to allow the exception, on the ground that, as the jury had gone out, the exception came too late. We think that the exception should have been allowed, particularly as the defendant's counsel had no opportunity to take the exception earlier. 2 Elliott, Gen. Prac. 1048; 2 Thomp. Trials, 2802. The jury, not having returned its verdict, could easily have been called back, if the court, on further consideration, had wished to modify its instruction. Gen. Laws R. I. c. 165, § 2, makes it unlawful for any person to practice medicine or surgery who has not exhibited and registered in the city or town clerk's office of the city or town in which he resides authority for so practicing, as prescribed in section 3 of the chapter, to wit, a certificate from the state board of health. But, while section 2 makes it unlawful to practice medicine or surgery without first exhibiting and having registered a certificate from the state board of health, as provided, section 8, which provides the penalty, limits the fine to the practice of medicine or surgery for reward or compensation. We think, therefore, that the court erred in refusing the defendant's request. Defendant's petition for new trial granted, and case remitted to the common pleas division.

(20 R. I. 270)

STATE v. CONWAY.

(Supreme Court of Rhode Island. Nov. 5, 1897.)

WITNESSES — IMPEACHMENT — INDICTMENT — Nolo Contendere — Nolo Pros. — UNAUTHORIZED COMPROMISE.

1. Under Gen. Laws R. I. c. 244, § 40, providing that a conviction or sentence for any crime or misdemeanor may be shown to affect a witness' credibility, a plea of nolo contendere to an indictment for nuisance, and the payment of costs and \$100 to the state as a condition of the entering of a nolo pros., did not, as touching defendant's credibility, amount to a conviction or a plea of guilty.

2. The indictment having been nolo prossed on the payment of the money and costs, it was not admissible, as affecting defendant's credibility, since it was no longer of any force unless fresh process were awarded on it.

3. A conviction could not be implied from the payment of the money and costs by defendant, since the attorney general had no authority to compromise the case.

Honora Conway was indicted for nuisance, and, having been convicted, petitions for a new trial, on an exception to rulings touching the introduction of certain evidence. Petition granted.

Willard B. Tanner, Atty. Gen., and Charles F. Stearns, Asst. Atty. Gen., for the State. F. P. Owen, for defendant.

PER OURIAM. The petition for new trial in this case is based upon certain alleged errors of the common pleas division in admitting testimony relating to an indictment against the defendant, which had been pre-

viously found, and to which the defendant had entered a plea of *nolo contendere*. At the trial of the case the attorney general was permitted to ask the following questions, against the objection of defendant's counsel, viz.: "This was not your first offense, was it? * * * Are you the Honora Conway who plead *nolo contendere* to an indictment for nuisance on the 16th of October, 1893, and who afterwards paid \$100 and costs?" The court ruled, in effect, that the evidence was competent for the purpose of affecting the credibility of the defendant, and that her plea of *nolo contendere* amounted to a conviction, upon which the court might have imposed sentence. Although this evidence was allowed to go to the jury, the attorney general failed to offer the indictment in question in evidence; and in view of this fact, and for the purpose of having it appear as a part of the record in the case, the defendant afterwards offered the indictment in evidence, saying at the time: "My point is, I want it to appear on the record for this reason: Your honor has allowed that testimony against my objection. This indictment was *nol. prossed*, and I want it to show. That is not evidence against this witness." An exception was taken by the defendant to the rulings aforesaid.

We think the evidence objected to was inadmissible. Gen. Laws R. I. c. 244, § 40, is as follows: "No person shall be deemed an incompetent witness because of his conviction of any crime, or sentence to imprisonment therefor; but shall be admitted to testify like any other witness, except that conviction or sentence for any crime or misdemeanor may be shown to affect his credibility." The evidence shows that the defendant had neither been convicted nor sentenced under the indictment referred to, and therefore the attorney general had no right to attempt to discredit her by any reference thereto. It is true, as said by the court, that a person may be sentenced on a plea of *nolo contendere*, as well as on a conviction (Whart. Cr. Pl. & Prac. § 419); but, while for this purpose it has the same effect as a conviction or a plea of guilty, yet as to the other proceedings it does not have the same effect. As said by Shaw, C. J., in *Com. v. Tilton*, 8 Metc. (Mass.) 233: "This plea, like a demurrer, admits, for the purposes of the case, all the facts which are well stated, but it is not to be used as an admission elsewhere." See, also, *Com. v. Horton*, 9 Pick. 206. Hawkins states the matter thus: "An implied confession is where a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to the king's mercy, and desiring to submit to a small fine, in which case, if the court think fit to accept of such submission, and make an entry that the defendant posuit se in gratiam regis, without putting him to a direct confession or plea (which in such cases seems to be left to discretion), the defendant shall not be estopped to plead not guilty to an action for the same

fact, as he shall be where the entry is *quod cognovit indictamentum*." 2 Hawk. P. O. p. 469. Perhaps the only difference between this plea, where it is received, and the plea of guilty, is that while the latter is a solemn confession, which may bind the defendant in other proceedings, the former is held to be a confession only for the purposes of the particular case. 1 Bish. Cr. Proc. § 469; *Buck v. Com.*, 107 Pa. St. 489.

Another reason why the evidence aforesaid should not have been admitted is that the indictment had been *nol. prossed* by the attorney general upon payment of the sum of \$100 to the state, the effect of which was to put the defendant without day; and therefore said indictment was no longer of any force or validity for any purpose, unless fresh process be awarded thereon. See 6 Mod. 261; 1 Salk. 59; *Com. Dig.* "Indictment," K; 16 Am. & Eng. Enc. Law, 709-714; *Com. v. Town of Northampton*, 2 Mass. 116.

If it be argued that a conviction is to be implied from the payment by the defendant of the sum of \$100 and costs on the indictment as a condition of the entering of a *nolle prosequi* thereon, which the record in that case shows to have been the fact, we reply that, so far as we are aware, there is no authority of law to warrant the attorney general in making such a settlement. If the defendant was guilty of the offense of keeping a nuisance, the only punishment that could legally have been inflicted upon her is that prescribed in Gen. Laws R. I. c. 92. Under section 2 of that chapter the minimum penalty is a fine of \$100 and imprisonment for 30 days. Under section 7 the minimum penalty is 6 months' imprisonment in the state workhouse. As the punishment inflicted, therefore, was by way of compromise, and without statutory authority, it cannot be treated as a conviction of the defendant. We are aware that the custom has obtained to a considerable extent for the attorney general to compromise or settle this class of cases, as well as cases arising under the liquor law, upon the payment of a certain sum of money to the state by the defendant; but the practice is a vicious one, and meets with our entire disapproval. There is no law authorizing a sentence or any legal substitute therefor by consent of parties, without the imposition thereof by the court. Petition for new trial granted.

(55 N. J. E. 800)

CONSOLIDATED COAL CO. et al. v. NATIONAL STATE BANK OF CAMDEN.

(Court of Errors and Appeals of New Jersey. Nov. 18, 1897.)

UNLAWFUL PREFERENCES—INSOLVENT CORPORATION—CONFESSION OF JUDGMENT—RIGHTS OF CREDITORS.

1. Whether or not the holder of a confessed judgment is barred, by the eightieth section of the corporation act, from obtaining a preference over the other creditors of an insolvent corpora-

tion, depends, not upon the intention with which the bond and warrant of attorney were given, but upon the intention with which the judgment itself was confessed. If the object to be attained, in confessing the judgment, was to give the holder thereof a priority over other creditors, the consequences provided by the act necessarily follow, notwithstanding the fact that, at the time of the execution of the bond and warrant of attorney, no intention to prefer existed.

2. Where a creditor who files a bill to obtain a decree of insolvency and the appointment of a receiver against a bankrupt corporation desires to attack the validity of the claim of a co-creditor, he should do so upon proceedings had before the receiver on the question of the distribution of assets. It is improper practice to make such attack by the bill of complaint.

Ludlow, J., dissenting.

(Syllabus by the Court.)

Appeal from court of chancery.

Bill by the Consolidated Coal Company, for itself and others, against the Keystone Chemical Company, to have it declared insolvent, and a receiver appointed. A decree was also sought against the National State Bank of Camden, declaring that a judgment which it held against the chemical company was confessed to give it a preference over other creditors, and only entitled it to share pro rata with them. A decree of insolvency was made, and a receiver appointed, and by a later decree the bank's judgment was found to be a first lien on the assets of the chemical company. Complainant appeals. Reversed.

Norman Grey, for appellant. Israel Roberts and Mark R. Sooy, for respondent.

GUMMERE, J. The bill in this case was filed by the appellant, the Consolidated Coal Company, on behalf of itself and such other creditors of the Keystone Chemical Company as should come in and join in the prosecution of the suit, for the purpose of obtaining a decree of insolvency against the latter company, and the appointment of a receiver. A decree was also sought against the respondent, the National State Bank of Camden, a judgment creditor of the chemical company, declaring that the judgment which it held was confessed for the purpose of giving it a preference over the other creditors of the chemical company, and that it was, for that reason, only entitled to share proportionately with such other creditors in the distribution of the company's assets, by virtue of the provision of the eightieth section of the corporation act (1 Gen. St. p. 923). The provision of the section appealed to is that, in the distribution of the funds of an insolvent corporation, "the creditors shall be paid proportionately to the amount of their respective debts, excepting mortgage and judgment creditors when the judgment has not been by confession for the purpose of preferring creditors." A decree of insolvency was made, and a receiver appointed, pursuant to the prayer of the bill. Subsequently, the respondent, the National Bank of Camden, filed its answer, denying that the judgment held by it was confessed for the purpose of preferring it to the other creditors of

the chemical company; and the court of chancery, on final hearing, sustained this claim, and decreed that the bank's judgment should be first paid out of the chemical company's assets. From that decree this appeal is taken.

The material facts relating to the confession of the bank's judgment are as follows: On the 20th of November, 1893, the chemical company borrowed of the bank the sum of \$25,000, and, as evidence of the loan, made and delivered to it a promissory note for that amount, payable in three months. This note was renewed from time to time as it fell due, the last renewal being made on January 13, 1896, and being for two months. On the 15th of January, 1894, the chemical company obtained a further loan from the bank of \$2,500, and, as evidence thereof, made and delivered to the bank its promissory note for that amount payable on demand. In the month of September, 1895, the president of the chemical company applied to the bank for a further loan of \$10,000. The bank agreed to make the loan provided the company would execute and deliver to it a bond, with a warrant of attorney to confess judgment thereto annexed, as security for the entire indebtedness owing by the company to the bank; that is to say, the \$27,500 previously loaned as well as the \$10,000 about to be advanced. The company consented to this proposition, and on September 27, 1895, executed and delivered to the bank the bond and warrant of attorney upon which the contested judgment was subsequently entered, at the same time receiving from the bank the additional loan of \$10,000, for which it gave to the bank its two promissory notes of \$5,000 each, one dated September 23, 1895, and the other dated the 27th of the same month, and each being payable four months after date. Both of these notes were subsequently renewed, at maturity, for an additional period of four months. On the 26th day of February, 1896, the company being then on the very verge of insolvency, if, indeed, it was not already insolvent, the renewal note of January 13, 1896, for \$25,000, which did not fall due until March 13th of that year, the demand note of \$2,500, made on January 15, 1894, and the two notes of \$5,000 each, which did not mature until May 23, and May 27, 1896, respectively, were canceled by the bank, and surrendered to the company, the latter at the same time giving to the bank a demand note for \$37,500 in their stead. On the same day the company confessed the judgment which is the subject of attack in this suit.

In addition to the proof of these facts, there was evidence produced from which the court below found that, at the time of the making of the \$10,000 loan and the giving of the bond and warrant of attorney, neither the chemical company nor the bank supposed that the former would be compelled to cease business on account of financial embarrassment, but, rather, that this additional loan would tide it over its troubles, and enable it to continue its business; and it was because of the existence of

this belief, both on the part of the debtor and the creditor, that the court of chancery considered that the judgment was not confessed for the purpose of giving a preference. The conclusion thus reached would seem to be based upon the idea that the execution of a bond and warrant of attorney to confess judgment, and the actual confession of a judgment thereon, are one and the same thing, for on no other theory can the intention with which the former were executed be held to be conclusive of the purpose with which the judgment was confessed. But this idea is palpably erroneous. The execution and delivery of a bond and warrant of attorney by a debtor to his creditor merely puts the latter in a position where he may, if he desires, obtain a judgment against the former,—a position which the creditor not infrequently fails to take advantage of. Nor is the intention with which the bond and warrant are given necessarily the intention with which the judgment is confessed. When a creditor takes a bond and warrant of attorney as security for a debt due from an entirely solvent debtor, but refrains from having a judgment confessed thereon, it can readily be conceived that he has not taken his security for the purpose of obtaining a preference over other creditors; but if his debtor subsequently becomes insolvent, and, as soon as that fact comes to his knowledge, he procures an attorney to represent his debtor and confess a judgment on the bond, no one would doubt for a moment that his object in doing so was entirely different from that which originally caused him to take the bond and warrant, and that he procured the judgment to be confessed solely for the purpose of obtaining a priority over other creditors. And this was the situation of the respondent in this case. Conceding that the proofs justify the conclusion that, at the time of the making of the bond and warrant, neither of the parties thereto had any thought of preferring the respondent, it is manifest that the purpose both of the bank and the chemical company, at the time the judgment was confessed, was thereby to give the former a preference over the other creditors of the latter. No other reasonable explanation can be found of the surrender, on the very day the judgment was entered, of the unmatured notes of the company, and the substitution of the demand note in their place. The object sought to be accomplished by making the whole amount of the company's indebtedness immediately due and payable was, indubitably, to put the bank in a position where it could safely enter up its judgment forthwith. The statute deals with the intention with which the judgment is confessed, not with the purpose for which the bond and warrant are given; and, if it appears that the object sought to be accomplished by the confession of the judgment was to enable the plaintiff therein to thereby obtain a preference over other creditors, proof that such intent did not exist at the time of the making of the bond and warrant will not operate to relieve from

the consequences imposed by the statute. Whether the same result would follow if the creditor alone, or the debtor alone, should seek by the confession of a judgment to create a preference, it is not necessary now to decide. In the present case both the creditor and the debtor united in the purpose to give the former a preference over the other creditors of the latter by the confession of the judgment, and their joint action clearly brings the case within the statute. The judgment of the respondent should therefore be paid proportionally with the other debts of the chemical company.

Before leaving the case, we deem it proper to state that, in our opinion, the question of the position which the respondent's judgment is entitled to occupy in the distribution of the assets of the chemical company has been brought before the court in an entirely irregular way. An attack by one of the creditors of a corporation on the validity of a claim held by another has no place in a bill filed, in behalf of all the creditors, for a decree of insolvency and the appointment of a receiver. All such questions should be raised after the decree of insolvency is pronounced, in proceedings had before the receiver on the question of the distribution of assets. But as the party whose judgment has been attacked has been heard in defense of its claim to have it declared a preferred debt, and as the conclusion reached by us is in the interest of those creditors who have not been afforded a hearing in the matter, no rights can be injuriously affected by the irregularity of the proceeding. We have therefore considered and decided the question presented, without regard to the course of procedure which has been adopted by the complainant. The decree appealed from should be reversed, with costs.

LUDLOW, J., dissents.

(80 N. J. L. 565)

SUPREME COUNCIL OF GOLDEN STAR
FRATERNITY v. CONKLIN.

Court of Errors and Appeals of New Jersey.
Nov. 17, 1897.)

BENEFIT INSURANCE—DECLARATION AS TO AGE—
EVIDENCE—FAMILY BIBLE.

1. The declaration of his age, made by an applicant in his petition for membership in a beneficial society, which has been accepted, and a beneficiary certificate issued, and the required payments made and received for a series of years, will be presumed to be correct, until the presumption is overcome by competent proof.

2. A Bible, in which the names and dates of birth of several members of the same family are recorded, without proof of when or by whom written, or of the knowledge the writer had of the facts recorded, or that the persons whose names and dates of birth are written therein ever acknowledged it to be an authentic family record, and when the entries in the book are not shown to have been contemporaneous with the facts stated, is not competent proof of the age of any person whose name may be recorded therein.

(Syllabus by the Court.)

Error to circuit court, Essex county; Childs, Judge.

Action by Margaret Conklin against the Supreme Council of the Golden Star Fraternity. Judgment for plaintiff. Defendant brings error. Affirmed.

Joseph A. Beecher, for plaintiff in error. J. Franklin Fort, for defendant in error.

NIXON, J. The plaintiff in error is a corporation organized pursuant to the act of the legislature of New Jersey entitled "An act to incorporate benevolent and charitable associations," approved March 9, 1853 (1 Gen. St. p. 149). One of the objects of this fraternity, as declared in its constitution, is to establish a beneficiary fund, from which, on satisfactory evidence of the death of a member in good standing, a sum not exceeding \$2,000 shall be paid as directed in the benefit certificate issued. Daniel F. Conklin, the husband of the defendant in error, became a beneficiary member of this association, having previously complied with all the constitutional rules and requirements, and received from it a benefit certificate for the sum of \$1,000, dated March 11, 1884, and payable, in case of his decease, to Margaret Conklin, his wife. He died on the 9th day of October, 1895, and proof of his death was furnished to the supreme council of the fraternity. Payment of the said sum stipulated in the certificate having been refused, the beneficiary, Margaret Conklin, brought suit, and recovered judgment for that amount, with interest and costs. This writ brings here for review the record, proceedings, and judgment in that trial, which took place before the circuit judge without a jury. The record shows that only two exceptions were taken at the trial, and sealed by the trial judge. The first is to the refusal of the court to nonsuit the plaintiff, and the second to the general finding of the judge against the defendant, which is in the following words: "I find, under the evidence in this case, that the plaintiff has established a right of recovery against the defendant for the amount of this certificate, one thousand dollars, and I direct judgment to be entered accordingly." Other errors are specified in the assignment, but, as no exceptions other than the two above mentioned were taken at the trial, they cannot be considered by this court. If, however, there is sufficient evidence to support the finding of the judge, the other errors alleged are in no way material to the disposition of the case.

At the trial below, the plaintiff in error relied entirely on the defense, set up in its special plea, that Daniel F. Conklin, in his application for membership in the fraternity, made a false statement as to his age, no one being entitled to beneficiary membership whose age exceeds 55 years at the time of his application. In the application his age was given as 54 years, and the date of his birth, December 13, 1829, which would make him 54 years and about 2 months old; thus bringing him

within the eligible period. If this statement was in fact false, and the defendant corporation was thereby led to enter into a contract it otherwise would not have made, it would undoubtedly be a sufficient bar to any recovery upon a certificate such as Conklin held at the time of his death. The proof of false representation, however, rests upon the party alleging it, when the object is to overthrow a contract mutually made and accepted. The suit in this case was based upon the certificate issued to Conklin by the defendant order. The validity of the contract therein expressed will be presumed until overcome by proof, and therefore the issuance of the certificate by the plaintiff in error, duly authenticated, and the good standing of the member at the time of his death, and due notice to the supreme council of the fraternity of the death of the member, if established by the plaintiff, are sufficient to throw the burden of proving misrepresentation upon the defendant. The above facts were either proved or admitted in the evidence for the plaintiff. But in the proofs of death submitted by the defendant in error the date of Daniel F. Conklin's birth was stated to be December 13, 1828, whereas in the application for membership it was given by him as December 13, 1829. The former date, if correct, would have made him ineligible to beneficiary membership at the date of his application on February 12, 1884. In the case of *Holland v. Chosen Friends*, 54 N. J. Law, 490, 25 Atl. 367, it was held that: "The contract of the association with its beneficiary members is made up of the application for such membership, the certificate issued, which is an acceptance of the application for such membership, and the charter, constitution, and by-laws of the society." In his application, as appears by the record before us, Conklin said, among other things: "I agree that any untrue statements, evasion, or fraudulent allegation, or concealment of facts by me, shall forfeit my right to membership in the fraternity, and all the benefits arising therefrom." The applicant, therefore, consented beforehand, as he had a right to do, that any untrue statements made by him should invalidate any claim to benefits. The controlling question is whether the statement made by Conklin as to his age was true or false; and it is not necessary, in this case, to go into a discussion as to whether it was a representation or a guaranty. The evidence relied upon by the plaintiff in error to prove the falsity of Conklin's declaration as to his age was, first, the said notice of his death given to the supreme council of the fraternity. The printed form of notice was furnished by the supreme secretary to a son-in-law of the beneficiary. The blanks were filled by the son of the decedent, and signed by the defendant in error with her mark, she being unable to write her name; and it does not clearly appear that the certificate, when signed, was read to her, or that she knew anything about its contents, except that it was notice of her husband's death.

band's death about to be sent to the fraternity. Section 4 of article 7 of the constitution of the order provides that "on the death of a member the secretary of the council shall immediately forward to the supreme secretary an official notice of such death, in accordance with a form furnished by the supreme council." Nothing is said as to what it shall contain further than the notice of death, and no reference is made in the original application for membership, or in the beneficiary certificate, to any special form of notice. The contents of the notice in this case were not in any way an element of the original contract between the fraternity and Conklin. It is only a matter of detail, provided by the constitution to be observed after the death of the beneficiary member. The statement as to age in the notice was written by a stranger to the contract, and the beneficiary only signed it with her mark when presented to her for that purpose. Of itself, therefore, it could have but little probative effect upon the question of Conklin's age, and only serve to stimulate investigation on that subject. George W. Conklin, the son, being asked where he got the date and place of birth which he put in the notice, said: "I got that information from an old Bible that was in the house. I have got it here now." He further said "he did not know in whose handwriting the entry was made, and that he had never seen it before it was brought to him by his sister, when the notice was made out." The Bible was offered in evidence, and the plaintiff rested, and the motion to nonsuit was then made. There was no error in the refusal of the trial judge to grant the motion. There had been no evidence presented to show that the Bible in question was a Family Bible, or that Daniel F. Conklin had ever seen it, nor when or by whom the family record it purported to contain was written. The evidence of the defense throws but little light upon this subject. Margaret Conklin, being recalled by the defendant, and asked about this Bible, said the stepmother of her husband, who was soon to remove to Connecticut, brought it to her house about 10 years ago, and asked if she did not want it as a keepsake, and she took it, and tied it up, and laid it in the bedroom upstairs; and that she did not think her husband ever looked into it; if he did, it was done privately. A family group of pictures was offered in evidence, and the date of Daniel F. Conklin's birth, written thereon, as December 13, 1828. This was prepared about 15 years before, by a daughter since deceased, and it does not appear that Conklin ever authorized his birth to be so written, or that his attention was ever called to it in any way. A letter to the supreme secretary from the defendant in error, in reply to one

from him, stating that the date of birth in the notice of the death of her husband had been obtained from the Family Bible, was also offered. The evidence for the defense also brought out the additional fact that at the time of the marriage of Margaret Conklin, the beneficiary, with Daniel F. Conklin, in June, 1848, she was not 18 years old, and her husband was not 19, to the best of her knowledge. If she is correct in her knowledge of the age of her husband at the time of their marriage,—and it is only reasonable to suppose that a wife would be informed on that point,—then Conklin's age was correctly stated by him in his application. This evidence was elicited by the defense. No further proofs were offered on either side.

It will be perceived that the only evidence to impeach the correctness of the statement as to age made by Conklin in his application had its origin from the record made in the Bible. This book, judging by the proofs alone, does not possess the necessary characteristics to warrant its acceptance as an authentic family record. It falls far short of what is required to give it such a character. But the learned trial judge in the court below had the opportunity to personally inspect the book itself when offered, and, in the reasoning which led up to the ultimate finding to which the second exception under consideration applies, he uses the following language: "The Bible bears the appearance of age. Perhaps that is hardly correct. It is mutilated, and shows evidence of use for a long time; but the binding is not of a character one would expect to find in a very ancient volume. The title page being lost, it is impossible to ascertain the date of printing. The entries are certainly not contemporaneous with the facts stated. The names are written in one handwriting, and apparently at one time; the same pen and ink, apparently, having been used. It is also apparent that the dates of the birth of the children were written at the same time, but in a different handwriting from the names, and with a different pen and ink. From the appearance of the ink and the writing, I think that the dates were appended long after the names were written. A correction has been made in one of the dates. * * * The question is, can this book, under the evidence, be regarded as a family record? I do not think there is proof in the case warranting me to so regard it. There is no evidence showing when the dates were placed in the book, or by whose authority, or what information the person making the entries had. That they were not made contemporaneous with the births of the children named is apparent." We find no error in the record, and the judgment should be affirmed.

(9 N. J. L. 422)

**AMERICAN SAW CO. OF NEW YORK v.
FIRST NAT. BANK OF TRENTON.**

**AMERICAN SAW CO. OF NEW JERSEY v.
SAME.**

(Court of Errors and Appeals of New Jersey.
Nov. 17, 1897.)

DIRECTING VERDICT.

Where the facts are clear and undisputed, and conclusively show lack of authority in an agent, question as to his authority in a given particular being the matter in issue, it is the duty of the court to determine the issue by peremptory instruction to the jury; but the contrary is the rule if the evidence be doubtful or conflicting as to a material fact, or if the established facts admit of conflicting inferences determinative of the issue.

(Syllabus by the Court.)

Error to supreme court.

Action by the American Saw Company of New York and the American Saw Company of New Jersey against the First National Bank of Trenton. The actions were consolidated. Judgment rendered for defendant, and plaintiffs bring error. Reversed.

Charles L. Corbin, for plaintiffs in error.
William M. Lanning and Chauncey H. Beasley,
for defendant in error.

McGILL, Ch. The American Saw Company of New York was organized as a body corporate in virtue of the laws of the state of New York in January, 1866, and from thence until 1893 carried on its business at Trenton, in this state. In January, 1893, the American Saw Company of New Jersey was organized as a body corporate under the laws of this state, and thereupon acquired the property and succeeded to the business of the American Saw Company of New York. For convenience the companies named will be called, respectively, the New York Company and the New Jersey Company. Two suits, which were tried together, are here involved, in both of which the First National Bank of Trenton is the defendant. One is brought by the New York Company to recover the aggregate amount of 40 drafts and checks that belonged to it and were collected and paid by the defendant to one Isaac F. Bissell between March, 1891, and the 31st of January, 1893, and the other is brought by the New Jersey Company against the defendant to recover the aggregate amount of 49 similar instruments that were its property, and were collected and paid by the defendant to Bissell between the 31st of January, 1893, and November of the same year. The main contention at the trial was upon the question whether Bissell had authority to receive from the bank for the companies the amounts of the checks and drafts paid by the defendant to him. That question was left to the jury by the trial judge, who refused to instruct that body to find for the plaintiffs. Error has been assigned upon such refusal, to which exception was duly taken. It is contended that at the conclusion of the trial it

was clear, from the undisputed facts established, that such authority could not be held to exist either in express terms or by implication or by way of estoppel, and that, therefore, the desired instruction should have been given. Admitting the assumption of fact in this proposition to be correct, the proposition is sound. Where the facts are clear and undisputed, and conclusively show lack of authority in an agent, question as to his authority in a given particular being the matter in issue, it is the duty of the court to determine the issue by peremptory instruction to the jury; but the contrary is the rule if the evidence be doubtful or conflicting as to a material fact, or if the established facts admit of conflicting inferences determinative of the issue. *Railway Co. v. Block*, 55 N. J. Law, 605, 27 Atl. 1067; *Bahr v. Lombard*, 53 N. J. Law, 233, 21 Atl. 190, and 23 Atl. 167; *Thread Co. v. Bennett*, 58 N. J. Law, 404, 33 Atl. 404; *Montclair v. Dana*, 107 U. S. 162, 2 Sup. Ct. 403. The test is whether the evidence is such that the court would set aside any number of verdicts rendered against it. *Crue v. Caldwell*, 52 N. J. Law, 215, 19 Atl. 188.

The proofs before us establish that the New York Company kept its bank account with the defendant for upwards of 20 years, and the New Jersey Company, succeeding to the account, continued it beyond the time to which this controversy relates. Isaac F. Bissell was secretary of the New York company for many years prior and up to the time of the organization of the New Jersey Company, and thereafter was secretary of the New Jersey Company until November, 1893. During the entire time Bissell held the secretaryship Samuel W. Putnam was the treasurer of the companies. In that time Mr. Putnam was also a director of both companies, and for several years was vice president of the New York company and the actual manager of its business. During the years 1891, 1892, and 1893 Mr. Putnam lived at Elizabeth and Mr. Bissell lived at Trenton. The by-laws of the New York company provided that the treasurer of that company should have charge of all the funds of the corporation, and should deposit all moneys received in a bank to be designated by the trustees of the company or their executive committee, and that all checks or drafts upon those moneys, exceeding \$200, should be drawn by the treasurer, and be countersigned by the president or a member of the executive committee of the trustees. They also authorized the treasurer to indorse checks, drafts, etc., payable to the company, for deposit to its credit. In February, 1887, to relieve Mr. Putnam of a portion of the work he was doing for the company, the trustees adopted a resolution, known in the litigation as the "Loomis Resolution," which is in this language: "Whereas, that inasmuch as circumstances prevent the continuous attendance at the works of the company of Mr. Samuel W. Putnam, vice president, who has hitherto acted as manager, resolved, that Isaac F. Bissell be ap-

pointed manager of the business of the works, with full power to act in all matters in the absence of Mr. Putnam." The practical construction given to this resolution in prosecution of the business of the company was that Bissell became manager of the business at the manufactory only; for thereafter, as theretofore, drafts upon the bank account of the corporation continued, without exception, to be made by checks signed by Mr. Putnam as treasurer, and until 1890 indorsements for deposit were all made in his name as treasurer. The by-laws of the New York company permitted their amendment by a vote of a majority of the trustees at one of their regular meetings, provided the proposed amendment should have been considered at a previous regular meeting of the trustees. In June, 1889, an amendment to the by-laws was proposed at a regular meeting of the trustees, which contemplated that the secretary as well as the treasurer might "make and indorse all checks, drafts, or orders for the payment of money for deposit" in the company's bank account, and that all drafts upon that bank account should be drawn by the treasurer or president and countersigned by the secretary, and that either the secretary or treasurer could sign drafts in course of business upon the debtors of the company. This proposed amendment was not adopted, but some months after its proposal, in 1890, the secretary did commence to indorse for deposit and to countersign checks which drew moneys from the bank, and to sign drafts upon debtors in ordinary course of business. The cashier of the defendant bank testified that at a time he could not fix exactly, but which he thought was "probably" eight or ten years prior to May, 1896, when his testimony was given, Messrs. Putnam and Bissell came to his office in the bank, and there, in conversation, Mr. Putnam in effect stated, using the language of the witness: "That on account of impaired health he was about to be relieved of some of the duties of the office, and that Mr. Bissell would attend to those duties,—to the duties of the Trenton office. He would have charge and management of the office and of its financial affairs, and perform such duties as he had been performing while here. He would not be able to come over so often." The witness added that he did not understand that Mr. Putnam would give up his office as treasurer. William S. Middleton, the paying teller of the defendant, testified that at one time, while he was at the receiving teller's window, Messrs. Putnam and Bissell came out of the cashier's room, and stopped at the window where he was, and Mr. Putnam, in substance, said that he was about to leave the city for a time, and that Mr. Bissell would take charge of and attend to the financial part of the business of the American Saw Company. The business of the company was done largely with customers at a distance from Trenton through correspondence by mail. From 1890, in regular course of the business of the company, the secretary would open the mail mat-

ter. That matter related mainly to orders from customers for products of the manufactory, and to remittances by them in liquidation of indebtedness, by checks, drafts, or postal orders, and to remittances by banks to which drafts upon customers had been sent for collection. Upon the orders of customers the secretary would act by either refusing to fill them, or by directing them to be filled by the proper employes of the factory, or by referring them, when of magnitude, to the executive committee of the trustees. He would pass the drafts, checks, and postal orders received to the bookkeeper, who, after crediting the customer in each case, would enter the checks and drafts in the margin of the company's check book, and make out a deposit slip to be sent with the checks and drafts to the defendant bank, and then return them to the secretary, who would print upon the back of each draft and check with a rubber stamp the words, "For deposit to the credit of the American Saw Co.," and immediately thereunder sign, "I. F. Bissell, Secty.," and thereupon the checks and drafts would be taken to the defendant bank either by a clerk, the bookkeeper, or Mr. Bissell. The companies usually had more than 2,000 open accounts with customers. It was the course of business, when an order was filled, for the shipping clerk to make out a bill of the particulars of the order, and submit it to the secretary, who, upon being satisfied as to its correctness, would pass it to the bookkeeper, who, in turn, would charge the amount of the bill against the customer in his account with the company, and then, after having a letterpress copy of the bill taken, would send the original bill to the customer. On the first of each month the bookkeeper would furnish the secretary with a list of the balances of customers' accounts which were due and remained unpaid, and the secretary, exercising his discretion in the case, would either write to the customer, draw a draft upon him, or allow the account to stand without action. When he would draw upon the customer, which was a matter of frequent occurrence, he would have the bookkeeper prepare the draft, and would then print upon it, where it should be signed by the drawer, with a rubber stamp, "American Saw Co.," and directly thereunder sign, "I. F. Bissell, Secty." The drafts thus signed would be sent to whatever bank might be deemed a suitable collecting agent. Many of them were sent to the defendant bank, and by it to its correspondents, and its collections were invariably credited to the companies in their account with it. When the New Jersey Company was organized, its by-laws adopted the course of the business which was then understood to be pursued by the officers, epitomized in the provisions that the treasurer should have charge of all funds of the corporation, under the direction of the board of directors or its executive committee; that the treasurer or secretary, or either of them, might indorse for deposit in bank; that all checks or drafts upon the bank should be

signed by the president or treasurer, and countersigned by the secretary or a member of the executive committee; that the treasurer, under prescribed restrictions, should pay the obligations of the company; and that the secretary or treasurer should sign drafts upon debtors to the company.

It is observed that in its course of financial dealing whatever laxity in safeguard there may have been was in the practice of putting money into the bank, necessitated by daily receipts of funds in a variety of forms. It is at the same time noticed that the drafts which were to take money out of the bank were invariably made by checks drawn by the treasurer, and countersigned by another officer of the company, except, perhaps, during the time of the New York Company, when they were occasionally for less than \$200, and then they were signed by the treasurer. The bank had need to be but little concerned in the practice of making deposits, because in that case it was to collect the money, and would have it to answer the exigencies of any irregularity; but it was very seriously interested in the authority for any practice which called for the payment out of money, because, if there should be lack of authority in the drawer, loss might fall upon it beyond repair. It was in the latter line—drawing out money—that Bissell operated in the perpetration of his fraud. In March, 1891, he received a check drawn upon a trust company of Philadelphia for \$189.20, and, without apprising the bookkeeper of its receipt, printed upon it, with one of the rubber stamps alluded to, "American Saw Co.," and signed thereunder, "I. F. Bissell, Secty.," and took it to the bank and requested the bank to give him the cash for it. This was in 1891, the second year after the proposed amendment to the by-laws of the New York Company, four years after the passage of the "Loomis Resolution," and four or six years or some other considerable time after Mr. Putnam's conversation with the cashier and paying teller of the bank, during the lapse of all which time no money had been drawn from the bank for any purpose except by the treasurer's check duly countersigned, and no check or draft received from another had been indorsed to be cashed over the counter. Nor before then had any such payment over the counter ever been made. The demand offered an entirely new course of business, conspicuously at variance with, and utterly destructive of, the safeguard of the doubly-signed check, and ignorant or regardless of the treasurer's prerogatives, which had theretofore been most carefully maintained. That check was paid, and, at irregular intervals thereafter, within a period of two and a half years, without notice to the companies, the 88 other checks in question here were likewise paid. During the same time several thousand checks were, in the usual course, deposited to the credit of the companies, and the carefully countersigned drafts of the treasurer, for the uses of

the companies, continued. When it is considered that the aggregate amount of the moneys thus had by Bissell in two years and a half was nearly \$17,000, and that during that time the treasurer continued to draw his checks weekly for each pay roll and all other demands upon the company, it is surprising that the defendant did not stop to inquire to what use this large amount of money was being devoted. The proceeds of every check or draft indorsed by Bissell and cashed to him by the bank were retained by him for his own purposes. He operated with the checks of a few customers of the companies whose financial standing admitted of excuses for their apparent failure to liquidate their indebtedness, and by using his control of the course of business in the office of the companies to withhold from those customers drafts and dunning letters which would probably have led to an earlier disclosure of his methods. The proofs make it perfectly clear that Bissell's indorsement for other purposes than deposit to the credit of the companies of which he was secretary was without express authority. The by-laws expressly circumscribed and limited his powers so as to exclude such authority, and make plain the financial policy that all moneys should in the first instance be deposited in a bank to the credit of the companies, respectively, and thereafter be from thence drawn for use in a prescribed manner, and that no moneys should, immediately upon receipt without deposit, be applied by any officer to the uses of the companies. The trustees or directors were unrestricted in their general management of the affairs of the companies, but it is not perceived that they sanctioned indorsement by Bissell for purposes other than deposit. It is true that they adopted the "Loomis Resolution" in 1887, but that resolution plainly was intended to give Bissell, in Mr. Putnam's absence, only the authority which he (Putnam) had theretofore, as vice president and acting manager, exercised at the manufactory. The clause of the resolution reading, "with full power to act in all matters in the absence of Mr. Putnam," is controlled by the antecedent matter, and refers only to duties about the manufactory. "Language," says Mr. Justice Depue, in *Gulick v. Holmes*, 33 N. J. Law, 470, "however general in its form, where used in connection with a particular subject-matter, will be presumed to be used in subordination to that matter, and therefore is to be construed and limited accordingly." The resolution is silent as to Mr. Putnam's powers and duties as treasurer, leaving him in sole control of them. The resolution does not admit of any other interpretation than this, and this interpretation accords with the conduct of the affairs of the corporation subsequent to the passage of the resolution. It is remembered that for three years after the resolution was adopted all indorsements were in the name of the treasurer, and that it was not until some months

after the proposition of 1889, to amend the by-laws so that they would authorize the secretary to indorse for deposit, countersign checks, and draw drafts upon debtors, that he commenced to perform those acts. In passing it should be added that the construction of this resolution, and the question whether it supported the defendant's contention, were matters to be determined by the court, which should not have been left, as they were, to the jury.

It is equally clear that Bissell was not impliedly given authority to indorse otherwise than for deposit. Authority by implication could arise only from a course of dealings sanctioned by the directors. The only course of dealing in financial affairs, unrecognized by the by-laws, which appears to have been known to and to have had the sanction of the directors, was an exercise by the secretary of the powers which the proposed amendment to the by-laws sought to confer upon him; that is, indorsing for deposit, countersigning checks, and drawing drafts upon debtors. It is impossible to distort such sanction into the implied bestowal of power to indorse for the purpose of immediately obtaining possession of money. Such a practice was never known to the directors or sanctioned by them. On the contrary, as has already been stated, such indorsing was in direct conflict with the practice of drawing money which was the policy of the by-laws, and alone had the sanction of the directors. Nor can there be found in the proofs any fact which shows that the company suffered false appearance of authority in Bissell, which could have misled the defendant. The conversation between the defendant's cashier and paying teller and Mr. Putnam did not create such appearance. It related merely to the shifting of some of the duties of Putnam to Bissell. Putnam had never indorsed otherwise than for deposit, and after those conversations Bissell did not attempt to do so for years. Besides, it nowhere appears that Putnam's conversation was by authority of the trustees of the corporation or was even known to them. In January, 1893, when Bissell's course of fraud was half completed, some 21 promissory notes, held by the New York Company, were discounted by the defendant, upon an unauthorized indorsement of them by Bissell. This circumstance is much relied upon as the creation of a deceptive appearance of general financial powers in Bissell, but it is not perceived that it could possibly create such appearance. The proceeds of the discount went to the credit of the New York Company, and were drawn from it by the countersigned checks of the treasurer. The transaction put money in the bank, and stands as of kin to other indorsements for deposit. It is not claimed that there was a ratification of Bissell's conduct by silence during the time he drew the checks. It could not be so claimed, for the companies knew nothing of his procedure in that respect. *Gulick v. Holmes*, su-

pra. It is deemed that the proofs make it clear that Bissell was not authorized by the plaintiffs to receive the payments made to him by the bank, which are here sued for, and hence that the request that the jury should be instructed to find for the plaintiffs should have been acceded to. It is unnecessary to pass upon the remaining assignments of error, and therefore no opinion is expressed with reference to them. The judgments will be reversed, to the end that in each case a *venire de novo* may issue.

(56 N. J. E. 792)

QUINZEL v. SCHMIDT et ux.

(Court of Errors and Appeals of New Jersey.
Nov. 15, 1897.)

AUCTIONEERS—REVOCATION OF AUTHORITY—MEMORANDUM OF SALE—ALTERATION.

1. An auctioneer employed to sell land cannot bind the vendors by a memorandum signed by him some time after the sale, and after his authority has been revoked by the vendors to the knowledge of the vendee.

2. An alteration made by a vendee in a memorandum of sale after it has been signed, by which, if valid, its scope, as evidence against the vendors, would be enlarged, is a material alteration, and annuls the instrument as a contract and as evidence, in favor of the vendee.

(Syllabus by the Court.)

Appeal from court of chancery.

Action by Charles Quinzel against Christopher A. Schmidt and wife. Decree for complainant, and defendants appeal. Reversed.

Mr. Bradner, for appellants. Mr. Lyon, for respondent.

DIXON, J. The following circumstances may be assumed in this case: That Christopher August Schmidt and Elizabeth, his wife, were the owners of premises No. 191 Magazine street, in the city of Newark; that Mr. Schmidt, with his wife's assent, authorized Hildebrandt, an auctioneer, to sell the premises at auction, and that on July 24, 1895, the auctioneer accordingly sold the same to Charles Quinzel; that on July 25, 1895, the auctioneer and Quinzel met in a lawyer's office, and signed a writing, of which the following is a copy: "Received at Newark, N. J., July 25, 1895, from Charles Quinzel, one hundred dollars, as the first payment for purchase of premises known as 'No. 191 Magazine Street,' in the city of Newark, N. J., purchased by him from — Schmidt upon the following terms: [Terms stated.] M. Hildebrandt, Auctioneer & Agt. [L. S.] Charles Quinzel. [L. S.]" It is also proved that when this writing was signed the auctioneer believed Mr. Schmidt to be the sole owner of the property, regarded himself as the agent of Mr. Schmidt alone, and signed the writing solely on his behalf. Shortly afterwards Mr. and Mrs. Schmidt, in presence of Mr. Quinzel, declared that the auctioneer had violated his instructions as to the price at which he was to sell, and had not made a fair sale; and,

on being asked by Quinzel to execute a conveyance, they repudiated the transaction. Thereupon, in August, 1895, Quinzel filed a bill for specific performance against Mr. Schmidt alone; but subsequently, on his counsel learning that the title was in both husband and wife, that suit was discontinued. In November, 1895, Quinzel and the auctioneer met in the office of Quinzel's attorney, and then the attorney wrote in the blank which had been left in the body of the instrument, before the word "Schmidt," the words "Christopher and Elizabeth"; and the auctioneer, at the instance of the attorney, wrote at the foot of the instrument, immediately above his own signature, the words "Christopher August & Elizabeth Schmidt." That being done, the present bill was filed against Mr. and Mrs. Schmidt for specific performance.

The defendants' answer having denied the existence of a contract, it devolves upon the complainant to establish its existence by some memorandum or note thereof, in writing, signed by the defendants, or some other person by them thereunto lawfully authorized, as required by section 5 of our statute of frauds. 2 Gen. St. p. 1602. Conceding that the auctioneer was at one time the agent of the defendants to sign such a memorandum or note, and that his authority to sign for them (the vendors) was not confined to the time of sale, yet it is indisputable, on the facts stated, that before the making of this present writing, in November, his authority had been actually revoked by the defendants, and the fact of revocation had been made known to the complainant. The agency had therefore wholly ceased. Browne, St. Frauds, § 353; 3 Am. & Eng. Enc. Law (2d Ed.) 491; Williams v. Evans, L. R. 1 Q. B. 352. We must therefore recur to the instrument as originally signed, to consider whether that is legitimate evidence of a contract such as the complainant seeks to have enforced. When that writing was signed the auctioneer intended to act as the agent of Mr. Schmidt alone, and to bind only him. Whether, in view of this fact, parol evidence would have been competent to show that Mrs. Schmidt also had concurred in authorizing him to act as auctioneer, and so to charge her in a transaction by which the agent had not intended to bind her, and had intended to bind, and had had authority to bind, a different principal, is a question which admits of some doubt. But, supposing such proof might have been received to supplement the writing, the alteration made in the instrument by the complainant's agent, and at his request, in November, was certainly a material one. When signed, the writing did not indicate that Mrs. Schmidt was to be bound by it as a vendor, nor did the auctioneer then intend that the blank left in it should be so filled as to afford such an indication. But when the names of both defendants had been inserted in the blank, and affixed at the foot, the writing became, if valid, the complete memorandum, under the statute

of frauds, to establish the fact that they both were vendors. The alteration considerably enlarged the scope of the instrument as a means of evidence, and therefore was a material one. Having been made by the other party, the complainant, it annulled the instrument as a contract, or as evidence of a contract, in his favor. Hunt v. Gray, 35 N. J. Law, 227; Jones v. Crowley, 57 N. J. Law, 222, 30 Atl. 871. Our conclusion is that neither the writing made in July, nor that made in November, furnishes such evidence of the agreement as the statute of frauds requires. In the foregoing it may seem to have been assumed that, if the contract had been duly proved, it would have been enforced against the estate of the married woman. But it is not the design of the court even to suggest any opinion on the question whether, when the obligation of a married woman to convey her lands arises merely out of her contract, a court of equity will compel her to perform it. The decree in favor of the complainant should be reversed, and his bill dismissed.

(60 N. J. L. 449)

DELAFIELD CONST. CO. v. SAYRE et al.
(Court of Errors and Appeals of New Jersey.
Nov. 15, 1897.)

EQUITY—ENFORCEMENT OF LIENS—PUBLIC IMPROVEMENTS.

Suits to ascertain and enforce the liens given by the act of March 30, 1892 (2 Gen. St. p. 2078), must be brought in the court of chancery. (Syllabus by the Court.)

Error to circuit court, Essex county; Childs, Judge.

Suit by James R. Sayre against the Delafield Construction Company and others. Decree for plaintiff, and defendant Delafield Construction Company brings error. Reversed.

Cortlandt Parker, for plaintiff in error. Edward M. Colle, for defendants in error.

DIXON, J. This suit is one of several brought in the Essex circuit court against the plaintiff in error, the city of Orange, and numerous persons having claims similar to that of the plaintiff below, to enforce liens upon a debt due from the city of Orange to the plaintiff in error, under the "Act to secure the payment of laborers, mechanics, merchants, traders and persons employed upon or furnishing materials toward the performing of any work in public improvements in cities, towns, townships and other municipalities in this state," approved March 30, 1892 (2 Gen. St. p. 2078). The chief assignment of error questions the jurisdiction of the circuit court, the contention being that the act confers the jurisdiction on the court of chancery alone. On examining the statute, it is perceived that, while it provides for a civil action, it does not in explicit terms declare where that action shall be brought. Nor do the names used in relation to the pro-

cedure indicate the appropriate tribunal; for, while some of them—e. g. "summons," "judgment"—point to courts of law, others—e. g. "answer," "appeal"—point to the court of chancery. The enactment that, when separate actions are commenced, the court in which the first action is brought may consolidate them, is more significant, because it suggests the possibility of suits being instituted in several courts, and in this state there is but one court of chancery. But, since there is in our law no mode provided for consolidating actions pending in different tribunals, this enactment is futile, and should not be deemed of controlling force, as an indication of the legislative purpose with regard to the court whose jurisdiction was to be invoked. It is only a circumstance to be considered in the inquiry. It loses some of the force to which it might otherwise be entitled when we discover that our act is copied almost verbatim from a statute of New York (Laws N. Y. 1878, c. 315), where there is no court of chancery, and where legal and equitable remedies are administered by the same tribunals. In that state this provision may have had a sensible meaning, even though the actions to be brought were purely equitable; and it appears in our statute merely because the copyist lacked either the knowledge or the forethought needed to suggest terms adapted to our judicial system.

The safest guide for ascertaining the tribunal in which the legislature designed that the right given by this statute should be enforced is to be found by considering the nature of the right and the main features of the remedy proposed. The right is one granted to those who perform labor or furnish materials in the making of a public improvement in any of the municipalities of this state, and it consists of a lien upon the money in the control of the municipality due or to grow due for such improvement to the contractor who owes for such labor or materials. After the claimant has perfected his lien by filing due notice of his claim with the proper officers of the municipality, he is to enforce it by a civil action, in which the municipality, the contractor, and all persons who may have in like manner secured liens on the same fund are to be made defendants; and in that action the court is to determine the validity of each lien claim, the amount due upon it, and the amount due to the contractor from the municipality, and is to render judgment directing the municipality to pay over to the several lienors the sums found to be due to them respectively, so far as the fund will go, and according to the priority prescribed by the act. The statute also authorizes the contractor or the municipality to institute a similar action for the determination of the claims, bringing before the court all persons interested in the disposition of the fund. There is no provision for a personal judgment against the contractor as a debtor, but the right of the claimants to obtain such

judgments against him in other actions is expressly preserved. Such suits as this statute contemplates are unknown in courts of the common law. There is a slight resemblance between them and proceedings by attachment, and to enforce the statutory lien of mechanics and material men against real estate, but these proceedings are much simpler, and are brought in the legal tribunals by express direction of the legislature. On the other hand, the remedy now under consideration comes completely within the ordinary remedial functions of the court of chancery. One class of cases over which its jurisdiction extends is thus described by Professor Pomeroy: "Those cases in which the relief is not a general pecuniary judgment, but is a decree for money to be obtained and paid out of some particular fund or funds. * * * They assume that the creditor has, either by operation of law, or from contract, or from some acts or omissions of the debtor, a lien, charge, or incumbrance upon some fund or funds belonging to the latter, either land, chattels, things in action, or even money; and the form of the remedy requires that this lien or charge should be established and then enforced, and the amount due obtained by a sale, total or partial, of the fund, or by a sequestration of its rents, profits, and proceeds. * * * There is also another species of pecuniary remedies, closely analogous to the last, and differing from it only in the additional element of a distribution of the final pecuniary awards among two or more parties having claims either upon one common fund or upon several funds. The final relief in all these cases is simply pecuniary. The amounts to which the different parties are entitled are ascertained, and are obtained by a distribution of the fund or funds upon which they are chargeable." 1 Pom. Eq. Jur. 95. The aptness of this description to the case in hand is clear, and we are thereupon led to the conclusion that it was the purpose of the legislature to have the actions which this statute authorized brought within that tribunal where such jurisdiction was normally exercised, viz. the court of chancery. This conclusion is strengthened when we notice that suits under the New York prototype are called "actions to foreclose liens," and are tried at special term,—the session of the New York courts in which equitable remedies are administered. *Powers v. City of Yonkers*, 114 N. Y. 145, 21 N. E. 132. The judgment of the circuit court should be reversed.

CAMDEN FIRE INS. CO. v. REED et al.
(Court of Chancery of New Jersey. Nov. 8, 1897.)

MORTGAGES—USURIOUS LOAN—DEFENSE BY PURCHASER—PLEADING—IRREGULAR FILING.

1. A mortgage was tainted with usury, where the officer of the corporation to whom it was

given, who consummated the loan, deducted a certain sum from the sum for which such mortgage was given, as such act of the officer must be imputed to the corporation whom he represented in such transaction.

2. A subsequent purchaser of mortgaged property was not estopped from interposing the defense of usury on the theory that the full amount of the mortgage was deducted from the consideration paid for such property, where it did not appear that the conveyance was made subject to the incumbrance of such mortgage.

3. An objection that the answer was not filed in time was unavailable where no motion was made to strike it out as irregularly filed.

Bill by the Camden Fire Insurance Company against Joseph D. Reed and others to foreclose a mortgage, to which the defense of usury was interposed. Decree eliminating the alleged usury.

John Harned, for complainant. Norman Grey, for defendants.

REED, V. O. The mortgage in question was executed March 12, 1875. It is proved that \$120 was deducted from the sum of \$2,000, for which the mortgage was given, by the officer of the complainant who consummated the loan. His act must be imputed to the corporation whom he represented in the transaction. The mortgage was, therefore, tainted with usury. Nor are the present holders of the mortgaged property estopped from interposing the defense of usury. It is true that on November 12, 1884, the mortgagor conveyed the mortgaged property to Washington D. Reed, and he, on July 6, 1888, conveyed the said property to Mary A. Reed, the wife of the mortgagor. There is nothing in the case, however, to show that such conveyances were made subject to the incumbrance of this mortgage. It is upon the theory that the full amount of the mortgage has been deducted from the consideration paid for the property, and therefore the purchaser should not be permitted to deduct any part of the mortgage again, that he is estopped from setting up usury. I am constrained to hold that the defense of usury is available to the defendants, and that it has been proved. There should be a decree for \$1,880, the amount actually reserved. From this should be deducted interest on the \$120 at 7 per cent. from March, 1875, to March, 1895,—i. e. 20 years,—which amounts to \$168. To it should be added interest on \$1,880 at 1 per cent. from 1879 to 1895,—i. e. 16 years,—\$300.80.

In respect to the point that the answer was filed out of time, if a motion had been made to strike out the answer as irregularly filed I could have controlled the character of the answer which the defendants would have been permitted to file out of time, and could so have compelled the defendants, as a condition to the granting of such leave, to tender full interest upon the amount actually reserved up to date of the decree. No such motion was made, and I must regard the answer as regular.

MORAN v. GRAY.

(Court of Chancery of New Jersey. Nov. 1, 1897.)

LOAN ASSOCIATIONS—INSOLVENCY—BORROWING MEMBER—RELATION—MORTGAGED PROPERTY—BASIS FOR REDEMPTION.

1. Where the insolvency of a loan association makes it impossible for a borrowing member to continue the payments of interest and premium till value of the stock equals the loan, the parties are remitted to the position of ordinary lender and borrower.

2. As the basis on which a borrowing member will be allowed to redeem mortgaged premises from an insolvent loan association, he will be charged with the money actually received, with interest thereon to the time of the insolvency, and be credited with the interest paid on the amount received and the premium, and with interest calculated on the installments of interest paid on account of the premium from the time of each payment.

Bill by Thomas Moran against George R. Gray, receiver of the Granite State Provident Association, to redeem mortgaged property. Decree for complainant.

Shafer & Miller, for complainant. Howard W. Hayes, for defendant.

REED, V. O. This bill is filed by a mortgagor, who gave a mortgage to the Granite State Provident Association, which association has become insolvent, to redeem the mortgaged property from the incumbrance of said mortgage, by the paying to the receiver of the insolvent company of the sum of \$300. It appears from the pleadings that the complainant, on April 15, 1890, gave a mortgage to one Monk, to secure the payment of \$500 on the 15th day of April, 1896. It appears that upon the same day he gave another mortgage upon the same property to the Granite State Provident Association. The last instrument recited that the mortgage was given in consideration of the sum of \$150, agreed to be paid by the said association. The condition of the mortgage was that the complainant should pay \$2 a month, monthly in advance, on the 15th day of each month, on each of four shares of the stock in said association, until said stock should be worth \$200 per share, when a satisfaction piece of said mortgage should be delivered to the complainant. The association, also as a further consideration for the mortgage made to it, covenanted to pay the Monk mortgage and have the same canceled. The association, before the maturity of the Monk mortgage, paid to Monk the amount due upon his mortgage, and took an assignment of the same in February, 1895. It appears that the mortgagor continued to pay his \$2 per month upon his shares until the occurrence of the insolvency of the company. The method pursued by the association in conducting its business and in making loans upon mortgages was set out in the opinion delivered in the recent case of *Weir v. Association* (N. J. Ch.) 33 Atl. 643. That case was one also in which the bill was filed by the mortgagor to redeem his mortgage. It was then held that he could

redeem upon paying a sum to be calculated upon the following basis: He was to charge himself with the amount actually received, together with interest upon said sum, and he was to credit himself with all the interest paid by him, on account of the money so received, as well as upon the premium deducted, and also with interest upon the installment of interest paid from time to time, on account of the premium from the times of the respective payments. In that case, the mortgage which the company agreed to pay off was one already existing when the second mortgage was made to the association. In that case the principal of the former mortgage remained unpaid at the date of the insolvency of the association. In this case the first mortgage was made to Monk simultaneously with the mortgage to the association, and it was paid for by the association previous to the date of the insolvency of the association. Now, it was held in the former case that the occurrence of insolvency prevented the execution of the contract entered into between the mortgagor and the association, according to the terms of the agreement, and that therefore the association and the mortgagor were remitted to the position of ordinary lender and borrower. The borrower was relieved from his obligation to further pay \$2 a month until each of his shares should reach the value of \$200; and the association was relieved from its covenant to pay off the outstanding mortgage. The rule thus announced applies to the present case. The mortgagor, by reason of the insolvency of the association, cannot perform his covenant to make payments upon the four shares for the requisite period; and, as it was in consideration of this that the association covenanted to pay off the Monk mortgage, it follows that the obligation of the company became dissolved by the failure of the performance of the counter covenant of the mortgagor, in consideration of the performance of which the association entered into its covenant. The parties therefore must be remitted to the position of lender and borrower. The mortgagor must be charged with the money actually received. He actually received \$140. He should be charged with interest upon this amount up to the time of insolvency. He has paid interest upon \$800. A part of this is referable to the Monk mortgage of \$500; a part to interest upon the sum actually received, and a part to the premium of \$160, deducted at the time of the loan. He is entitled to a credit for all this interest, and also with a credit for interest calculated upon the installments of interest paid on account of the premium from the time of each payment. Upon the payment of the balance remaining as the result of a calculation made upon this basis, the mortgagor will be entitled to redeem from the mortgage held by the association; the Monk mortgage still remaining outstanding. That mortgage, now held by the association, stands in exactly the same posture as if held by Monk, and must be paid in full. If the

amount of money paid by the association to Monk when it took an assignment of the Monk mortgage should be charged to the mortgagor as money paid upon his account, and the liability of the mortgagor calculated upon the basis of charging him with money actually received and interest thereon, the result would be exactly the same.

(60 N. J. L. 571.)

NEW JERSEY TRACTION CO. v.
GARDNER.

(Court of Errors and Appeals of New Jersey.
Nov. 17, 1897.)

INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

1. It is not contributory negligence per se to alight from a slowly-moving horse car, and, when personal injury and a suit for damages result from so doing, it should be left to the jury to determine, from all the evidence, whether the proximate cause of the accident was the plaintiff's own negligence, or a want of proper care in the control and management of the car.

2. It is not error to refuse to charge that, if the jury find certain facts set forth in the request to be true, the verdict should be for the defendant, when the facts formulated in the request are substantially the very matters in dispute. To so charge would be a trespass upon the rights of the jury.

(Syllabus by the Court.)

Error to supreme court.

Action by John Gardner against the New Jersey Traction Company for personal injuries. There was judgment for plaintiff in the circuit court, which was affirmed in the supreme court. Defendant brings error. Affirmed.

Depue & Parker, for plaintiff in error. Robert H. McCarter and Samuel Kallisch, for defendant in error.

NIXON, J. The defendant in error, in alighting from a street car owned and operated in the city of Newark by the plaintiff in error, was severely injured, and recovered damages in a suit in the Essex circuit court. The judgment was affirmed in the supreme court, and is now brought here for review.

The first alleged error is the refusal of the trial judge to nonsuit the plaintiff. The declaration in the case alleged, among other things, that the cause of the plaintiff's injury was the sudden and violent movement of the car from a slow to a rapid rate of speed, while he was in the act of alighting, by which he was thrown from the platform, and under the wheels of the moving car; while the plea of the defense charged that the plaintiff was guilty of contributory negligence, by the careless manner in which he alighted from the car, and that no previous notice had been given to the driver of his intention to leave the car. While it has been generally held that to step from a steam-railroad car going at any rate of speed is an act of contributory negligence, sufficient to defeat a suit for damages, it is as well settled that to step from a slowly-moving street car, drawn by horses, is

not negligence *per se*, but that the act must be considered in connection with all the attendant facts and circumstances. From the voluminous testimony in this case, these facts appear: The defendant in error and two companions were riding along Warren street, in Newark, on the front platform of a street horse car. They all desired to leave the car at First street, and two of them did so safely, although the car was in motion, while the defendant in error met with the accident before stated. He insists that he notified the driver that he wished to get off, and the driver applied the brake, and "slackened up." One of his companions, Gilroy, also testified that the brake was applied by the driver, and the car "almost stopped," as he got off. The other companion, Keegan, who alighted at the same place, says, "The car slackened up, and then gave a big jolt ahead." The defendant in error, in numerous repetitions, both in his examination and cross-examination, testified that, when he saw the car slackening its speed and almost coming to a stop, he got down upon the step of the front platform, and was in the act of getting off when "the car shot right ahead, and struck him on the left shoulder," causing the accident. It was insisted that, from the plaintiff's own evidence, he had not exercised sufficient care, having admitted that he stepped from the platform with his face to the side of the street, instead of the direction in which the car was moving, and that he made conflicting statements as to his manner of alighting, and that there was other contributory negligence. Such was the situation of the case when the plaintiff rested, and the evidence at this point clearly raised a disputed question of negligence for the jury. There was no error in refusing to grant the motion to nonsuit.

The second error assigned is the refusal of the trial judge, at the conclusion of the evidence on both sides, to direct a verdict for the defendant. We fail to find from an inspection of the testimony for the defense any ground for such a motion. There is no new proof as to the manner of alighting from the car, nor is there anything which tends to give any new light as to whether the sudden propulsion of the car or the plaintiff's own negligence was the proximate cause of the accident. There were witnesses called to testify that the defendant in error admitted soon after his admission to the hospital that the accident was the result of his own carelessness. This he denied, and there were others who testified that his condition at that time was such as to make him incapable of making a responsible statement. We therefore find nothing which would have warranted the trial judge in taking the case from the jury.

The third assignment of error is based upon a refusal to charge that "if the jury from the evidence found that, while the car was in motion, the plaintiff attempted to alight with his left foot, from the left-hand side of the car, as the car was proceeding, and with his

body placed at right angles to the direction in which the car was moving, the plaintiff is guilty of contributory negligence, and cannot recover." There was no error in refusing to so charge, on two grounds: First, it was, in effect, requesting the judge to indicate what conclusion the jury should draw if they found certain facts contained in the request to exist, which were substantially the very matters in dispute, and concerning which the evidence was very conflicting; and, second, because the correct legal principle which they should apply to all the evidence in the case on the subject of negligence had been given to the jury. The learned judge said: "As I have stated to you already, the act of leaving a slowly-moving car is not *per se* a negligent act, but it is a question of fact for the jury to determine, in view of the evidence in the case, whether the act of the plaintiff in leaving the car in the way he did was a negligent act." And, again: "If it was a negligent act, then it was an act contributing to his injury, and would disentitle the plaintiff from a recovery."

The fourth and fifth assignments of error are open to precisely the same objections we have noted in respect to the third, and that part of the charge of the judge quoted above covers all the ground which the court could take without an invasion of the province of the jury. There is nothing prejudicial to the plaintiff in error in the refusal of the judge to adopt the language of these requests. It was merely remanding the whole evidence to the jury to be dealt with by them, after declaring the legal principles which should guide them in their deliberations. It was no implication to them that they should not find the facts as postulated in the requests, but merely a refusal to indicate what their inference and conclusion must be from such facts. It is not error in any case to refuse to adopt the exact language of a request to charge which contains no legal principle applicable to the case.

The sixth and last assignment of error is a refusal of the judge to charge that "if the jury believe from the evidence that the plaintiff, standing on the front platform, intending to leave the car, and requested the driver to stop the car, in order to enable him to alight, and that the driver, in compliance with such request, applied the brakes for the purpose of bringing the car to a stop, and was bringing the same to a stop, that it was the duty of the plaintiff to remain upon the car until it came to a stop; and if he step from the platform to the street before it came to a stop, and while it was in motion, he cannot recover." This is practically a request to charge that to step from a slowly-moving horse car is contributory negligence *per se*. If acceded to, it would have been equivalent to directing a verdict for the defendant, which had already been refused. In that part of the charge above quoted, the judge had said that the act of leaving a slowly-moving car is not *per se* negligence, thus submitting to the jury wheth-

er there was negligence in this particular case. The facts formulated in the request are a very accurate summary of the evidence given by the plaintiff below, and on which this case rested, lacking only the additional allegation that the suddenly increased speed of the car while alighting caused the fall. There was no error in refusing this request. This court has held that it is not contributory negligence per se to step from a slowly-moving car, and that all the attending circumstances should be left to the jury. It is also the law as held in other states. *Linch v. Traction Co.* (Pa.) 25 Atl. 621; *Railway Co. v. Mumford*, 97 Ill. 560. We find no error in the record, and the judgment should be affirmed.

(60 N. J. L. 198)

MAGOWAN v. METROPOLITAN LIFE INS. CO.

(Court of Errors and Appeals of New Jersey.
Nov. 15, 1897.)

STATUTES—CONSTRUCTION—APPEAL FROM DISTRICT COURT.

1. When the words of a statute are clear, and their meaning and application plain, there is no room for judicial construction.

2. "An act concerning appeals from district courts in this state" (P. L. 1892, p. 257) authorizes an appeal from a judgment rendered by the First district court of the city of Newark for a sum in excess of \$200.

(Syllabus by the Court.)

Error to supreme court.

Action by Mary Magowan against the Metropolitan Life Insurance Company. From a judgment of the supreme court affirming a judgment of the court of common pleas, plaintiff brings error. Affirmed.

James M. Trimble, for plaintiff in error.
Thos. N. McCarter, Jr., for defendant in error.

GARRISON, J. The question to be decided is thus stated in the brief of the plaintiff in error:

"Judgment was entered October 31, 1893, in the First district court of the city of Newark, in favor of the plaintiff in error, Mary Magowan, for the sum of two hundred and eleven dollars and seventy-two cents damages, and costs of suit, taxed at thirty-nine dollars and fourteen cents. From that judgment the defendant appealed to the Essex common pleas. The plaintiff, claiming that the appeal to the court of common pleas was null and void, because no appeal to the common pleas would lie from the judgment of a district court of over two hundred dollars in amount, applied to the supreme court for a mandamus to compel the district court to issue execution on her judgment against the defendant, but the supreme court refused. *McGowan v. Insurance Co.*, 57 N. J. Law, 390, 30 Atl. 433.

"The appeal being tried in the Essex common pleas de novo, upon new pleadings, with new proofs, judgment below was reversed, and judgment given for defendant. This

judgment of the common pleas was removed into the supreme court on a writ of certiorari, and the supreme court affirmed the judgment of the court of common pleas; and from this judgment of the supreme court, affirming the judgment of common pleas, the plaintiff now appeals to this court."

The contention of the plaintiff in error is that the court of common pleas was without jurisdiction to entertain this appeal, notwithstanding the provisions of "An act concerning appeals from district courts in this state." P. L. 1892, p. 257. The pertinent language of this statute is "that from any judgment obtained in any district court established by law in any city of this state, whether by general or special statute, where the debt, demand or matter in dispute exclusive of costs be for a sum not less than twenty-five dollars, except judgments given by confession, either party may appeal, both as to matter of law and fact, to the court of common pleas of the county."

With respect to this act, counsel for the plaintiff in error pointed to the confusion of previous practice introduced by the sweeping nature of its provisions, and indicated some contingencies in which the results were deemed to be so absurd that, had they been foreseen by the legislature, the law would not have been enacted in its present form; and from this basis it was argued that the judicial department should nullify the legislative action, or at least prune it into symmetry with the body of law on this subject.

The same contention was pressed in an earlier outbranch of the case in the supreme court. The language of the opinion in that case was: "It may be true, as argued, that this act works confusion; that it produces absurd results; that it never would have been enacted if its consequences had been foreseen. But whence arises any authority in the judicial department to nullify legislative action because of these or similar reasons? Admitting, without examination, the force of all these criticisms of the act, it still remains as a perfectly plain and explicit legislative mandate, to be obeyed accordingly until it is repealed by the authority that brought it into existence." *McGowan v. Insurance Co.*, 57 N. J. Law, 390, 30 Atl. 433.

The reasons urged in this court against the views thus expressed have not prevailed, or created any doubt as to the jurisdiction of the pleas in the premises, which was the only question argued here.

Upon the argument, reference was made to the fact that this cause was tried without a jury, and, as one of the assignments of error ascribed this result to the statute under consideration, it may be well to say that upon this record, which shows no demand for a jury, no such question could have been considered, had it been argued. *Joy & Seliger v. Blum*, 55 N. J. Law, 521, 26 Atl. 861.

The judgment of the supreme court is affirmed.

(80 N. J. L. 533)

RYAN v. STATE.(Court of Errors and Appeals of New Jersey.
Nov. 15, 1897.)**CRIMINAL LAW—APPEAL—RECORD—EVIDENCE—
SIMILAR CRIMES.**

1. In order to bring a review, on writ of error in a criminal cause, within the statute authorizing the return with the writ of "the entire record of the proceedings had upon the trial," such entire record must be certified by the trial court.

2. Illegal evidence will work a reversal except where it is clear that it cannot have harmed the expectant.

3. Competency of proof in a criminal cause of the commission by the defendant of offenses similar to that charged considered.

(Syllabus by the Court.)

Error to supreme court.

Michael Ryan was convicted of dealing in counterfeit money. The conviction was affirmed in the supreme court (38 Atl. 706), and he brings error. Reversed.

E. H. Koester and A. Q. Garretson, for plaintiff in error. P. W. Stagg, Prosecutor of the Pleas, for the State.

COLLINS, J. Michael Ryan was convicted in the court of general quarter sessions of the peace, of the county of Bergen, upon an indictment based on the act of March 30, 1888 (1 Gen. St. p. 1097, pl. 254), which indictment reads as follows: "Bergen County, to wit: The grand inquest of the state of New Jersey, in and for the county of Bergen, upon their respective oaths, present that Michael Ryan, Edward Lyons, and Charles Adams, late of the township of Union, in the said county of Bergen, on the seventh day of March, in the year of our Lord one thousand eight hundred and ninety-five, and on divers other days and times between that day and the twenty-fourth day of May, in the year one thousand eight hundred and ninety-five, with force and arms, at the township aforesaid, in the county aforesaid, and within the jurisdiction of this court, did keep and maintain a certain house, and in the said house, on the said day, and on the said other days and times, were then and there unlawfully, feloniously, willfully, corruptly, and with evil intent engaged in a certain illegal and unlawful scheme and device, and, in furtherance of the said illegal and unlawful scheme and device, the said Michael Ryan, Edward Lyons, and Charles Adams were then and there unlawfully, willfully, feloniously, corruptly, and with evil intent engaged in, and aiding, assisting, and abetting in, offering and purporting to offer for sale, exchange, and distribution to one Hugh Mullins and divers other persons, whose names are unknown to this grand inquest, certain counterfeit coin, paper money, and other token of value, commonly called green articles, green coin, paper goods, bills, green paper goods, green goods, business that is not legitimate, cigars, and green

cigars, contrary to the form of the statute in such case made and provided, and against the peace of this state, the government and dignity of the same." Upon writ of error the supreme court affirmed such conviction, and the judgment of affirmance is now before this court.

The sufficiency of the indictment is challenged, but we find no assignment of error permitting us to consider that question. It is, indeed, assigned for error that the sessions denied a motion to quash for insufficiency; but quashing an indictment is discretionary.

We are asked to review the trial under the act of May 9, 1894 (1 Gen. St. p. 1154, pl. 170), which enacts that "the entire record of the proceedings had upon the trial of any criminal cause may be returned by the plaintiff in error therein with the writ of error, and when so returned shall form a part thereof, and on the argument such entire record shall be considered and adjudged by the appellate court." The language of this statute is not technical. The record intended is a written history of the proceedings at the trial, including the evidence adduced. No provision is made for authentication of this record, unless one is implied by the direction that it shall be "returned." A fair construction of the statute is that the plaintiff may cause this record to be returned by the trial court. It certainly must in some way be authenticated, and we see no other satisfactory way than by that court's certificate. Proper practice would seem to be for the plaintiff in error to require in his writ this so-called "record," which will naturally then be embraced in the court's return. In the present case there was furnished merely a written stipulation by the attorneys that the printed book contains a correct report of the evidence taken at the trial and copies of the exhibits. We regard this as insufficient to bring the statute into operation.

The decision of the cause, therefore, must turn on the bills of exception. The supreme court refused to consider exceptions to testimony declared in that court to be "reprehensible." The reason given for such refusal was that the inference to be drawn from the several bills of exceptions must be that the defendant's objections were made to the questions and answers; i. e. to answers that were responsive to illegal questions, to which no objection was made at the time of asking. If such must be the inference, the conclusion of the court was correct; but we think that too narrow a view was taken of the bills of exception. A transcript of the evidence had been prepared in advance of signing the exceptions. In it appeared, in each case of admission of alleged illegal evidence, the question or offer, an objection seasonably taken, the ruling of the court, a brief note of exception, and then the answer. In some cases there was not sufficient space to write and sign the formal

exceptions, and, in order to have them certified, separate slips were prepared, reciting in each case that the defendant had prayed exception to the admission of the question and answer or other evidence stated; which slip was pasted in the margin of the transcript at the proper place, and signed and sealed by the judge. In the supreme court these slips were considered as something apart from the transcript to which they were affixed, and as the sole evidence of the exceptions. As explanatory of the court's ruling that the objections came after the answers, it was said: "Our conclusion in this respect is necessarily based upon the bills of exception signed by the court below. Where such bills state the course of the trial differently from the printed copy of the stenographer's notes (as is the case in this paper book), the appellate court relies exclusively upon the certificate of the judicial officer." We think that the bills of exception drew to themselves all appropriate matter to which they were affixed, and that their recitals were only intended as condensation. We have therefore considered the evidence forming the subject of the exceptions. We agree with the view expressed in the supreme court, that it was illegal, and we hold that its admission must work a reversal. It was said, obiter, in the supreme court, that the legitimate proofs established a case upon which the judgment could safely rest, and that it was difficult to believe that the "irrelevant and inconsequential narrations" wrongly admitted in evidence could have harmed the defendant; but, on error, reversal is required if it appear that the illegal evidence may have been harmful. *Ruckman v. Bergholz*, 37 N. J. Law, 437, 441.

We cannot be sure that the jury would have found the legitimate proof sufficient. It was quite meager, consisting mainly of testimony that the defendant had hired the premises where the unlawful practices were pursued, and had been seen there on a few occasions. This was supplemented by the narrations of a United States post-office inspector of the methods of different gangs, as he called them, engaged in schemes like those charged in the indictment in this case, and particularly those of the "Ryan gang," of which the defendant was assumed to be the head. He produced letters and circulars received through the mails, and these were admitted in evidence. His testimony on these subjects was altogether hearsay. He was also permitted to testify to a particular offense of the character charged in the indictment, committed at South Bethlehem, Pa., in which he identified the defendant as participating. The general rule is that the state may not, for the purpose of showing that a defendant would be likely to commit the crime charged against him, prove that he had committed other crimes, although of like nature. *Clark v. State*, 47 N. J. Law,

556, 558, 4 Atl. 327. Upon the trial of a person for one crime, evidence that he has been guilty of other crimes is irrelevant. There are exceptions to this rule, most of which are well summarized by Mr. Justice Dixon in the case of *State v. Raymond*, 53 N. J. Law, 260, 264, 21 Atl. 328. The testimony now being considered comes within none of them, nor within any other that I have been able to find. The judgment of the Bergen sessions and that of the supreme court affirming it must be reversed.

(60 N. J. L. 576)

ROHR v. STATE.

(Court of Errors and Appeals of New Jersey.
Nov. 15, 1897.)

FORGERY—WHAT CONSTITUTES—INTENT—INDI-
CUMENT—ALTERATION OF INSTRUMENT.

1. Where two joint executors have money of their testator's estate on deposit in bank, which it is agreed shall not be drawn except upon the check of both of the executors, and one of them procures his co-executor to sign checks upon the bank drawn to the order of certain creditors to pay claims against the estate, and after receiving them for the purpose of attaching his own signature, and delivering the same to the creditors, adds his own signature thereto as executor, and erases from the body of the checks the names of the payees, and writes therein his own name individually, and draws the money from the bank, and then settles with the several payees at a less sum than their actual demands, and applies the difference to his own use, the executor profiting by such acts, if done with intent to defraud, is guilty of the crime of forgery.

2. It can make no difference to the legal character of the offense whether, in point of time, such executor makes the forged alterations upon the checks before or after he thus appends his signature thereto as a joint drawer, provided these several acts were but parts of one transaction, done with the common intent to defraud.

3. Since the enactment of section 50 of the "Criminal Procedure Act (1 Gen. St. p. 1130), it is no longer necessary, in cases of forgery, to allege in the indictment or prove on the trial an intent to defraud any particular person; it is sufficient to allege and prove that the forgery was committed with an intent to defraud.

4. It is no defense to a forgery committed by alterations in an instrument that there was no special attempt to conceal such alterations, and that they were plain to be seen; the rule being that if a signed writing, which is forged, be intended to be taken as true, and might be so taken by ordinary persons, it is sufficient.

(Syllabus by the Court.)

Error to supreme court.

Joseph A. Rohr was convicted of forgery. The conviction was affirmed in the supreme court, and he brings error. Affirmed.

Samuel Kallsch, for plaintiff in error. Louis Hood, for the State.

HENDRICKSON, J. The plaintiff in error was convicted of the crime of forgery in the Essex quarter sessions on February 14, 1894. A writ of error was taken by him, removing the conviction to the supreme court, where the judgment below was affirmed, and from the latter judgment the plaintiff took a writ of error to this court. The errors assigned arise upon an exception taken in the court of quarter

sessions upon the court's refusal to quash the indictment, and upon exceptions to the charge of the court and its refusal to charge as requested. But the controversy, as presented by counsel of the plaintiff in error, is narrowed down to a single point, and that is whether the acts alleged to have been committed by the plaintiff in error constitute the crime of forgery.

To understand the merits of this controversy, a brief recital of the facts is necessary. The plaintiff in error and one Charles F. Herr were the executors of the estate of Anna Wichman, deceased. They had deposited moneys belonging to the estate in their joint names, as such executors, in a banking institution known as the Fidelity Title & Deposit Company, at Newark, N. J.; and it was agreed that no check drawn upon such account should be valid without the signatures of both of the executors. The proofs show that the estate was indebted in the following amounts to the following persons, who had filed claims, to wit: To Dr. Glatzmeyer, \$54; to Daniel Neldinger, \$5.78; and to J. H. Mersfelder, \$11.05. The plaintiff in error drew checks dated June 30, 1892, to the order of these several parties, upon the bank, for the above amounts, respectively, due them, and procured the signature thereto of his co-executor. With these checks in his possession, the plaintiff in error, on the same day, without the consent or knowledge of his co-executor, erased therefrom the names of the several payees, and wrote his own name as payee in each of the three checks, and before or after such alteration (whether before or after does not clearly appear) he wrote his own name to the checks, as one of said executors, above the signature of the co-executor, and, having indorsed said checks, presented them, so signed and altered, to the bank, and drew therefrom the several amounts named therein. With the moneys thus in hand, the plaintiff in error afterwards made a settlement with the original payees of the checks, at amounts less than the face of the original claims. The case also shows that the plaintiff in error filed an account, as executor of said estate, with the surrogate of Essex county, on December 14, 1892, in which he craved allowance for the full amount of these several claims, without giving any credit whatever to the estate for the amounts deducted by the claimants on settlement. It will thus be seen that the plaintiff in error profited by these transactions to the extent of the difference between the amount of the checks as originally drawn and the amount of the payments actually made to the claimants in effecting a settlement with them. Each of these transactions was made the basis of an indictment, and the three indictments were tried together.

The point in controversy comes up for review under an exception to that part of the charge where the trial judge says: "For the purposes of this case, I charge the jury that the alteration of the checks made by the de-

fendant, in the manner which has been admitted and proven before this jury in these several cases, amounts to a forgery, provided the jurors find, as a matter of fact, the alterations were made with an intent to defraud the payee of the check or the estate of which he was an executor." And it is further raised on exceptions to the court's refusal to charge the proposition, which was, in substance, that the state had failed to establish that the defendant had committed any of the offenses charged against him in the indictments. In support of these allegations of error, counsel has insisted that the admitted facts and proofs fail to establish the crime of forgery; that the essential element of fraud of a character such as to amount to a cheat at common law is lacking; and, consequently, that there could be no legal conviction. His argument in support of this contention was, in brief, that the estate had paid on these checks no more than the original indebtedness; that the funds upon which the checks were drawn were the joint and separate funds of the executors; each owned the whole at law; that, in erasing the names of the payees and substituting in their places the name of the plaintiff in error, there was no attempt made to conceal the erasure; it was plain to any one who took the trouble to look; that there was no claim that false representations had been made or any deception practiced to induce the payees to take a less sum than was due them; that the estate was not liable to pay any more, and did not pay more, than was honestly and justly due to the payees of the checks; that it was a matter wholly within the volition of the payees whether to accept a less sum than was due them or not; that it was clear that the plaintiff profited by the transactions, and was guilty of a breach of trust in not giving the estate the benefit of the transaction, but that it was impossible to see how any fraud could be inferred from the change of the names of the payees; that the bank could not be defrauded by the transactions; the estate owed the money justly, and it was no fraud on it; and the creditors received the amounts they did in full satisfaction of their claims.

In examining the question thus raised, reference should be had to a familiar precept of criminal law, which is that "It is forgery to fraudulently alter any part of an instrument when the alteration is capable of working injury to another. Thus, it is forgery to alter the dates, names, or any other material parts of an instrument when the alteration gives it a new operation." 1 Whart. Cr. Law, 677. Our own statute (section 235 of the "Crimes Act"; 1 Gen. St. p. 1092) makes it a high misdemeanor to falsely make, alter, forge, or counterfeit, etc., among the other instruments named, a check, with intent to prejudice, injure, damage, or defraud any person or persons, body politic and corporate. That the checks in question were altered in a material part will not be disputed. Nor will it be contended but that the alterations were false-

ly made, since the word "falsely," used in such connection, implies that the paper or writing so altered is false, not genuine, fictitious, not a true writing, or writing which is the counterfeit of something which is or has been a genuine writing, or one which purports to be a genuine writing when it is not. *State v. Young*, 46 N. H. 270, cited in 9 Enc. Pl. & Prac. 557. But the material inquiry is, were the alterations made with intent to defraud, as charged in the indictments? It may be observed here that the settled doctrine of the common law is that, though the intention to defraud is an essential to the completion of the offense, yet it is not necessary to show that the prosecutor was actually defrauded. If the jury can infer from the circumstances that it was the defendant's intention to defraud the party averred, known or unknown, there being an apparent possibility of fraud, it is sufficient to satisfy such allegation in the indictment. 1 Whart. Cr. Law, 713. And, under section 50 of our "Criminal Procedure Act" (1 Gen. St. p. 1130), it is no longer necessary, in cases of forgery, etc., to allege in the indictment the name of the person intended to be defrauded, nor on the trial to prove an intent on the part of the defendant to defraud any particular person; it is sufficient to allege and prove that the defendant did the act charged with an intent to defraud.

Applying these principles to the case in hand, was there evidence of acts and circumstances from which the jury could infer that the false and forged alterations of the checks in question were made with intent to defraud some person or persons, and that there was at the time an apparent possibility of fraud as a consequence of the acts complained of. The evident effect of these forged alterations was to give an entirely new operation to the checks in question, making them a means of transfer of the funds of the estate, not to its creditors, as intended, but to the pocket of the accused. That such diversion of these funds created an apparent possibility of fraud that did not exist before, I think, must be admitted. The effort of counsel to avert such a conclusion by his suggestion that the funds upon which the checks were drawn were in fact the joint and separate funds of the executors, and that each owned the whole in law, falls because the principle of joint and several control by executors over the estate of a decedent does not apply after the estate has been converted into money, and jointly deposited, as was the case here. The doctrine is that there may be a contract between joint executors concerning the funds of the estate and their management; and that they may keep the funds so that both or all the executors exercise control and supervision thereof together; and that, when this is the case, any person dealing with them is bound to recognize their joint title. Thus, if they open a joint account with a banker, both must unite in a

receipt or check in order to discharge him. *Schouler, Ex'rs*, 401. *De Haven v. Williams*, 80 Pa. St. 480. Here was the joint deposit, and the contract as well, to the effect that no check should be valid without the signatures of both executors. It follows, therefore, that the accused had parted with all right or claim to the exclusive use or control of the funds so deposited, and that he had no more right than a stranger to thus transfer a part of these funds to himself by forged alterations of the checks with which he was intrusted. With the money thus unlawfully diverted into the hands of the accused, there was nothing but his own volition to prevent an embezzlement or devastavit of the whole. That he chose to settle with the original payees of the checks at a less sum than their real claims, and to convert to his own use only a portion of the funds, does not alter the principle involved. It being in proof that the accused himself drew the checks to the order of these creditors of the estate, and then, having obtained the signature of his co-executor thereto, on the same day made the forged alterations, and drew the money thereon from the bank, and that he filed his sworn account as executor a few months later, in which he craved allowance for the full amounts of the checks as if paid to the creditors, there was certainly evidence from which the jury might reasonably find that the accused made the forged alterations in the checks with intent to defraud.

The suggestion that there was no attempt to conceal the erasure—that it was plain to any one—is no defense in this case. The alteration was, at least, successful in its object; and the rule of law in that particular is that it is sufficient to constitute the crime if a signed writing which is forged be intended to be taken as true, and might be so taken by ordinary persons. 3 Greenl. Ev. 105; 2 Russ. Crimes, 348-350, and cases cited. Or, as Justice Ford expressed it in *State v. Robinson*, 16 N. J. Law, 510, in speaking of an alteration: "Nice observers might detect the falsification by holding it up to the light, but that does not justify the forgery. The law is to protect the mass of society, and it matters not if a few knowing men are safe."

It was further insisted for the plaintiff in error that, when the checks came to his hands, they bore the signature of his co-executor alone, and were of no validity until signed by the other executor; that the alterations occurred when the checks were in this invalid condition, and could not, therefore, constitute the crime of forgery. Not admitting that such an instrument could not be the subject of forgery, it is plain that such invalidity, if it existed, could be no defense in this case; for, as a part of the same transaction, the plaintiff in error did, in fact, attach his signature to these checks; and, even if this act were done after the alterations, the plaintiff in error thereby sanctioned and adopted the forged alterations he had made,

and gave them their fraudulent operation and effect. The checks thereby undoubtedly became forged. The second counts in the indictments, charging the uttering of these forged instruments, were sustained by the act of the accused in drawing the money upon them at the bank. I mean to say that these acts constitute forgeries and the uttering of forged paper, provided they were done with intent to defraud; and the question of intent having been properly submitted to the jury, as before stated, the result is that there is no error in this part of the record. My conclusion is, after a careful consideration of the whole case, that the judgment below should be affirmed.

(60 N. J. L. 404)

STATE (FERGUSON, Prosecutor) v. BOARD OF CHOSEN FREEHOLDERS OF PASSAIC COUNTY.

(Supreme Court of New Jersey. Nov. 8, 1897.)
COUNTIES—LOCATION OF BRIDGES—INTERFERENCE BY COURT.

The location of a bridge, the character of its construction, and the awarding of the contract for building the same, are matters which are committed to the discretion of the board of freeholders; and courts have no right to interfere with their action in these matters, so long as they act honestly, and within the limits of their power.

(Syllabus by the Court.)

Action by the state, on the prosecution of John W. Ferguson, against the board of chosen freeholders of the county of Passaic, to set aside a contract to build a bridge. Proceedings affirmed.

Argued February term, 1897, before GARRISON and GUMMERE, JJ.

William Nelson, for prosecutor. De Witt C. Bolton and John W. Harding, for defendant.

GUMMERE, J. An examination of the return to the writ, and of the testimony submitted therewith, has satisfied us that the prosecutor's case is without merit. He seeks to have declared illegal a contract entered into by the board of freeholders of Passaic county with the firm of Keepers & Thatcher, bridge builders, for the construction of a concrete and steel arch bridge over the Passaic river, at Wert street, in the city of Paterson. The propriety of building a bridge, of its location, of the materials of which it shall be built, and to whom the contract for its construction shall be awarded, are all matters which, by the statute, are left to the board. *State v. Freeholders of Essex*, 23 N. J. Law, 214; *McKinley v. Freeholders*, 29 N. J. Eq. 164. And whether the location selected by the board is an inferior one, whether the plan of construction might be improved upon, whether parties other than those to whom the contract for constructing the bridge has been awarded would build it for less money, are matters which do not at all affect the

validity of the contract, unless they are of such a character as to indicate fraud or an abuse of discretion, and do not justify judicial interference. As was said by Vice Chancellor Van Fleet in *McKinley v. Freeholders*, supra, "The courts have no right to interfere with the action of any of the agencies of government intrusted with power to be exercised according to their discretion, so long as they act within the limits of their power." The grounds mentioned are the principal ones upon which the contract before us is attacked. There is nothing in the case, as presented, to suggest fraud on the part of the board in their action, or an abuse of the discretion reposed in them which would justify a court in declaring the contract invalid. The proceedings brought up by the writ in this case are affirmed, with costs.

(60 N. J. L. 410)

FOUNTAIN et al. v. CITY OF PERTH AMBOY.

(Supreme Court of New Jersey. Nov. 8, 1897.)
WATER RIGHT—CONSTRUCTION—EXTENT OF EASEMENT.

1. Under a grant of lands and water privileges, the easement being of so much water as will operate a mill which is upon the lands conveyed, the grantee is entitled to the use of the water for any purpose he sees fit, provided the quantity used is not increased, and the change in the use does not prejudice the rights of others.

2. Where a conveyance of a "mill seat" contains a grant of a right to flow other lands of the grantor for the purposes of a mill pond, such grant carries with it, as an incident, the right to enter and cleanse the pond.

(Syllabus by the Court.)

Case certified from court of common pleas, Middlesex county; Woodbridge, Judge.

Action by Asbury Fountain and others against the city of Perth Amboy. Case certified under Act May 16, 1894. Plaintiffs held to have no ground of action.

Argued February term, 1897, before MAGIE, C. J., and DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Willard P. Voorhees, for plaintiffs. John W. Beekman, for defendant.

GUMMERE, J. This is an action for trespass, brought by the plaintiffs against the city of Perth Amboy, for wrongfully entering upon the plaintiffs' lands, and subverting and carrying away the soil thereof. The plaintiff's and defendant are owners of adjoining tracts of land, each of which, in the year 1850, belonged to one Clarkson Brown. In the year mentioned, Brown sold the tract now owned by the defendant to one Hensel, through whom the defendant claims. The deed to Hensel conveyed "all that certain mill seat, and farm, situate," etc.; "and also all the milling privileges belonging to said property, and the right to attach a dam to the lands on the south side of Tennant creek" (being the lands now owned by the plaintiffs); "and also the right

and title to flow all the lands heretofore flowed by the party of the first part, with the further privilege to flow so much of the land of the party of the first part as the party of the second part, his heirs and assigns, may hereafter require for milling purposes; and also the right of the party of the second part, his heirs and assigns, to use all the earth that may be required for constructing and repairing the dam, from the south side of Tennant creek." The tract now owned by the plaintiffs came to them by descent from Clarkson Brown, and is that portion of his lands which is referred to in the Hensel deed as "the lands on the south side of Tennant creek." The defendant acquired its title to the Hensel tract, with its appurtenances, in 1891. At the time of its purchase, however, the mill had fallen into disuse, the dam had broken out, and the water of the mill pond had run off. The defendant, a short time after taking possession of its property, proceeded to clean out the mill pond, and to restore the dam with the earth which was taken from the bottom of that part of the pond which was on the south side of Tennant creek, and, consequently, on the lands of the plaintiffs. This it did, not with the intention of putting its property again in use as a mill seat, but for the purpose of utilizing the mill pond as a reservoir from which to supply the inhabitants of Perth Amboy with water.

These acts of the defendant constitute certain of the trespasses laid in the plaintiffs' declaration; and the advisory opinion of this court is asked on the question whether, under the grant by Clarkson Brown to Hensel (to all the rights and privileges contained in which the defendant has succeeded), the defendant had a legal right to clean out that portion of the mill pond which is upon the lands of the plaintiffs, and use the soil taken therefrom for the purpose of restoring the dam, notwithstanding the fact that it proposes to use its property, including the mill pond and dam, exclusively for other than milling purposes. We think that this question must be answered in the affirmative. The deed conveys a "mill seat," and authorizes the maintenance of a mill dam, partly upon other lands of the grantor (now of the plaintiffs), and also the flowing of a portion of said lands for the purposes of a mill pond. Such a grant carries with it, as an incident, the right to enter and cleanse the pond. *Ang. Water Courses*, § 158; *Fralley v. Waters*, 7 Pa. St. 221. So far as the right to use the soil taken from the plaintiffs' lands for the repair of the dam is concerned, it is given by the very words of the grant. It is manifest, therefore, that the acts of the defendant which are complained of do not constitute a trespass unless its right to maintain the dam and cleanse the mill pond has ceased by reason of its abandonment of the use of the property for milling purposes. But no such result flows from that action of the defendant. By the conveyance to Hensel, he and his assigns acquired not only the mill seat, but also

the right to so much water as was at that time used to operate the mill; and it has been considered as settled law ever since the decision of *Luttrell's Case*, 4 Coke, *86a (where the question first came up for solution), that, when the easement is of a certain quantity of water, the grantee is not restricted to use it in a particular manner, though the purpose for which it is used be specified in the grant. He may use the water in a different manner, or at a different place, if he sees fit, provided the quantity used is not increased, and the change does not prejudice the rights of others. *Carlisle v. Cooper*, 21 N. J. Eq. 595; *Johnston v. Hyde*, 33 N. J. Eq. 632. In our opinion, the facts contained in the question certified to us do not, under the circumstances mentioned therein, constitute a trespass, and afford the plaintiffs no ground of action; and the court of common pleas should be so advised.

We have not considered the other questions sent up, for the reason that in each of them disputed questions of fact are involved, which we have no power to settle. All such questions must be settled by the trial court before it certifies the case to this court for its advisory opinion. *Destefano v. Calandriello*, 57 N. J. Law, 483, 81 Atl. 385.

(60 N. J. L. 557)

McLAUGHLIN v. CAMDEN IRON WORKS.

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1897.)

INJURY TO EMPLOYEE—ASSUMPTION OF RISK—NEG- LIGENCE OF FELLOW SERVANT.

A laborer was called from his special work, and, with others, directed by their foreman to raise by hand a large frame. Through lack of bracing or fastening, the frame fell, and injured him. *Held*: (1) That he could not establish a right of recovery against his employer by proving that it is usual to have work of that sort done by a rigger with a derrick and appliances; (2) that the foreman was a fellow servant with the laborers in the same common employment, and that his negligent use of, or failure to use, proper appliances provided by the master, did not entail liability on the master.

(Syllabus by the Court.)

Error to circuit court, Camden county; Miller, Judge.

Action by John McLaughlin against the Camden Iron Works. From a judgment of nonsuit, plaintiff brings error. Affirmed.

G. M. Bacon and J. W. Wescott, for plaintiff in error. D. J. Pancoast, for defendant in error.

COLLINS, J. The plaintiff sought recovery for personal injuries alleged to be due to the defendant's negligence. The declaration averred that, while in the employment of the defendant as a riveter, the plaintiff was ordered by the defendant to leave his employment, and assist in raising a large frame of great weight, and that by reason of the defendant's careless omission to supply and use in raising the frame the means necessary to

raise the same, and hold it in place while being raised, it fell, and injured the plaintiff. At the trial the plaintiff was nonsuited at the close of his case, on the ground that his injury was the result of the negligence of a fellow servant in the same common employment. Upon the consequent judgment the writ in this case was brought, and the nonsuit is assigned for error.

The proof was as follows: The defendant (a corporation) was engaged in building a large iron gas holder. Its roof was to be supported by a wooden structure formed by four timbered frames. One of these lay flat on the ground, and about 25 men of the general laboring force were called by the foreman to raise it by hand. The plaintiff, whose ordinary work was riveting, was one of the number. A block and fall were used, not for additional power, but as a guy, and to hold the weight of the frame as it rose. The frame was not braced or fastened, and one end of it slewed around, the rope slackened, and the frame fell, striking and badly injuring the plaintiff. Afterwards the frame was raised by a rigger, using a derrick and appliances. On the subject forming the gravamen of the plaintiff's complaint the only testimony was that of two witnesses,—one a laborer, named Corbett, who said that raising the frame was a rigger's work; and the other a carpenter, named Tice, who said that he "supposed it would take a rigger to handle that sort of a frame," and, again, that he "believed it was generally a rigger's work to handle a frame of that weight and size." When asked his opinion of the method of raising in use at the time of the accident, he said that he did not think such a method safe; but on cross-examination he said that, with both ends of the frame securely fastened, the men could have raised it in that way. A witness named Barker, who ran a hoisting engine at the works, and saw the accident, was called to testify that he warned the foreman that he was doing an unsafe thing. On cross-examination he said that the danger apparent to him could have been removed by bracing or fastening the end of the frame that afterwards slid. He said that all that was needed was a rope and a stake. Another witness, named Davis, testified, on the plaintiff's own call, that the frame slewed around because it had no fastening at the bottom.

Of course, the defendant was not obliged to hire a rigger, or use a derrick. The plaintiff knew that the frame was being raised by hand under the direction of the foreman, and he assumed such resultant risk of that method of doing the work as was obvious to him. There was on the ground an abundance of ropes, pulleys, and timbers, and there was a hoisting engine there. Where appliances for work are needed, the duty is on the master to use reasonable care in their selection, and he cannot escape it by delegation; but carelessness in their use, or failure to use them, on the part of his servant, whereby injury

is received by a fellow servant in the same common employment, is not chargeable to the master, no matter what may be the grade or authority of the servant. *O'Brien v. Dredging Co.*, 53 N. J. Law, 291, 21 Atl. 324; *Gillmore v. Nail Co.*, 55 N. J. Law, 39, 25 Atl. 707; *Steamship Co. v. Ingebreghsten*, 57 N. J. Law, 400, 31 Atl. 619; *Maher v. Thropp*, 59 N. J. Law, 186, 35 Atl. 1057. The nonsuit, therefore, was proper unless legal evidence was excluded or illegal evidence was considered. Error is assigned upon bills of exceptions taken on both of these grounds. They remain to be considered. A witness was asked on cross-examination, "Q. What caused the accident?" and replied, "A. Well, I suppose, if there had been a man there that knew his business, it wouldn't have occurred,—if there had been a rigger there." The court, on defendant's motion, struck out the answer as not responsive. After being instructed by the court to state only what took place, the witness persisted thus: "Well, that is all I know that caused it. Mr. Flanagan [the foreman] didn't know his business when he rigged that thing up, or the carpenters, or whoever did it." This answer also was struck out. The testimony may have been responsive; it certainly was not material. I find no error here. Counsel for the plaintiff then asked the witness this question: "Q. If there had been a rigger there to raise this frame, would this accident have happened?" The court properly overruled the question. It was irrelevant. Failing to secure an answer, counsel moved to strike out, because elicited from nonexperts, the testimony above stated, to the effect that, if the frame had been braced or fastened, the accident would not have happened. The court rightly denied the motion. The testimony was given without objection, and, moreover, was directed to a fact within the range of ordinary observation. Perhaps, in form, it was objectionable, but in substance it was only a statement that the frame could not have slewed around if both ends had been braced or fastened,—a fact almost self-evident. No other question is raised by any bill of exceptions or assignment of error. I shall vote to affirm this judgment.

(60 N. J. L. 548)

DECKER et al. v. HARTSHORN.

(Court of Errors and Appeals of New Jersey.
Nov. 15, 1897.)

LEASE—SURRENDER OF TERM—ASSENT TO ABANDONMENT.

1. A surrender of a term in demised premises, by act and operation of law, will not be implied upon proof that the lessee has put a third person in possession thereof, and that the lessor has received rent from such third person, and nothing more. *Quære*: Will such surrender be implied, if it also appears that the lessor, with the lessee's assent, has accepted such third person as his tenant?

2. The mere receipt of rent by a landlord from an underlessee does not evidence his assent to the abandonment of the demised premises by the

original lessee, and is no proof of his acceptance of such underlessee as tenant.

(Syllabus by the Court.)

Error to supreme court.

Action by Parmelia Decker and another against Henry L. Hartshorn to recover rent of leased premises. From a judgment for defendant, plaintiffs bring error. Reversed.

Norman Grey, for plaintiffs in error. Henry M. Snyder, Jr., for defendant in error.

GUMMERE, J. This was an action brought by the plaintiffs in error, who were the plaintiffs below, to recover from the defendant (trading as Louis Pelouze & Co.) rent for certain premises in the city of Philadelphia which had been leased to him by them. The rent sought to be recovered was claimed to have accrued from February 4, 1893, to April 3, 1894. The defense was that the defendant had ceased to be a tenant before the first-mentioned date. The only assignment of error which requires consideration in the disposition of the case is that which challenges the correctness of the ruling of the trial judge in refusing to direct a verdict for the plaintiffs. The situation at the close of the testimony was this: The plaintiffs having proved the existence of a tenancy, the defendant sought to show that there had been a surrender of his estate in the demised premises by act and operation of law, prior to February 4, 1893. The evidence produced by him in support of this defense was as follows: On November 1, 1892, the defendant delivered up the possession of the premises to the American Type-Founders' Company, who thereafter carried on business there as Louis Pelouze & Co., the same name as that used by the defendant in conducting his business there. On November 28th he notified the agent of the plaintiffs of that fact, in a letter sent to their agent, which reads as follows: "Mr. Galley—Dear Sir: Inclosed we hand you check for one hundred and twenty-three dollars and fifty-two cents, rent in full to November 1st, 1892. As this foundry became possessed by the American Type-Founders' Company on November 1st, 1892, we square up our account to that date, which we trust is satisfactory. Kindly acknowledge receipt in full to November 1st, 1892. Respectfully, Louis Pelouze & Co." To this letter Mr. Galley sent the following reply to the defendant, November 29, 1892: "Mess. L. Pelouze & Co.—Gentlemen: Your favor of yesterday, with check for \$123.52, in settlement of rent to November 1st, duly received. Please accept thanks for same, and inclosed find receipt. If you wish the rent hereafter to fall due on the first day of each month, it will necessitate a new lease, which I will prepare and take to you for execution, unless you advise me that you wish the rent to become due as heretofore, on the 4th. Yours, truly, S. M. Galley." On the 13th of January, 1893, a check of the American Type-Founders' Company, for the rent due January 1st, was sent to the plain-

tiffs' agent in a letter signed "Louis Pelouze & Co." This letter was in the handwriting of the defendant, but he testifies that when he wrote it he was in the employ of the American Type-Founders' Company, and was acting for them. The check was accepted by plaintiffs' agent, in payment of the rent for which it was sent, and the money drawn thereon by him. This is the whole of the evidence from which it is insisted, on behalf of the defendant, that a surrender of his estate in the demised premises can be implied. Are these facts sufficient to warrant the implication? The case most favorable to the contention of the defendant, so far as my examination of the books has disclosed, is *Thomas v. Cooke*, 2 Barn. & Ald. 119, in which it was held that a surrender in law could be implied where a lessee had put a third person in possession of the demised premises, and the lessor had, with the lessee's assent, accepted such third person as his tenant. This case has been followed to some extent, both in England and in this country, but has, notwithstanding, been frequently doubted. Baron Parke, in *Lyon v. Reed*, 13 Mees. & W. 284, 308, 310, in discussing that decision, says: "It is a matter of great regret that a case involving so much importance should have been decided by refusing a motion for a new trial. Had the case been put into a train for more solemn argument, we cannot but think that many considerations might have been suggested which would have led the court to pause before they came to the decision at which they arrived. * * * We feel fully warranted in not extending the doctrine of that case, which is open to so much doubt, especially as such a course might be attended with very mischievous consequences to the security of titles." In our own state, also, Chief Justice Beasley, commenting on the same case, in *Hunt v. Gardner*, 39 N. J. Law, 533, says: "I think it may be safely said that to hold that a surrender in law will be implied or raised up from the facts that a tenant has put a third person in possession of the demised premises, and that such third person has been accepted as tenant with the assent of the original tenant, is carrying the principle to the verge of mischief to titles by leasehold." Whether, in view of the injurious criticism to which the case has been subjected by such eminent jurists, the doctrine established by *Thomas v. Cooke* should be followed in this state, is a question which, it seems to me, ought not to be determined except after very careful consideration; and the case before us, as I view it, does not call for a determination of that question. In *Thomas v. Cooke* the person who was put in possession of the demised premises by the lessee was afterwards accepted as tenant by the lessor; in the present case that element is wanting. There is nothing in the letter written by the agent of the plaintiffs on November 29th which can be construed into an acceptance of the type-founders' company as tenant. On the contrary, it clearly appears from it that the agent

still considered the defendant to be the tenant of his principals, notwithstanding the change in the possession of the demised premises. So, too, although it appears from the proofs that, after possession of the premises had been delivered by the defendant to the type-founders' company, the latter paid rent to the plaintiffs, yet such payment was made by the company in the name of Louis Pelouze & Co., the name previously used by the defendant; and there is no evidence to warrant the conclusion that, when this payment was made to and accepted by the plaintiffs, they had any knowledge that Louis Pelouze & Co. was no longer Henry L. Hartshorn, the defendant, but had become the American Type-Founders' Company. But, even if the facts had been otherwise,—if the plaintiffs had known that the rent was paid by the type-founders' company, and had accepted it with that knowledge,—the result would have been the same, so far as this case is concerned. The mere receipt of rent by the landlord from an underlessee, does not evidence his assent to the abandonment of the premises by the original lessee and is no proof of his acceptance of such underlessee as tenant. *Bacon v. Brown*, 9 Conn. 334; *Tayl. Landl. & Ten.* § 512; *Copeland v. Watts*, 1 Starkie, 95. In my opinion, taking the most favorable view of the facts proved in this case, and of the law applicable to those facts, they will not support a finding that there was a surrender of the estate of the defendant in the demised premises, by act and operation of law, prior to the commencement of the period for which rent is claimed by the plaintiffs. The request of the plaintiffs, therefore, that the jury should be directed to render a verdict in their favor, was improperly refused, and for this reason the judgment below should be reversed.

(56 N. J. E. 244)

IRWIN v. GRANITE STATE PROVIDENT ASS'N.

(Court of Chancery of New Jersey. Nov. 5, 1897.)

RECEIVER OF FOREIGN CORPORATION—AUTHORITY OF DOMICILIARY RECEIVER—RE-TENTION OF ASSETS.

1. Whether, after a foreign corporation doing business in this state has passed into the hands of a receiver in the state of its domicile, a receiver will be appointed in this state, and, if so, whether the domiciliary receiver will be appointed here, will depend upon the volume and kind of business done in this state, and whether any special interest of the creditors or citizens in this state is likely to be involved in the settlement of the insolvent affairs.

2. The receiver in this state is amenable alone to the direction of this court, and not to the direction of the domiciliary receiver.

3. The securities deposited by a foreign building and loan association with the secretary of state as a condition upon which it is permitted to do business in this state will be controlled by this court, so as to secure the payment of the amounts awarded to shareholders in this state upon final distribution of the assets of such insolvent corporation.

(Syllabus by the Court.)

Bill by Henry E. Irwin to have a receiver appointed for the Granite State Provident Association. On answer and cross bill of David A. Taggart, assignee in insolvency of the company in New Hampshire, praying to be substituted as receiver in place of George R. Gray, appointed by the court. Prayer denied.

The Granite State Provident Association is a corporation chartered under the laws of New Hampshire, with power, *inter alia*, to carry on the business of a building and loan association, which consisted in selling shares of stock upon which the purchaser agreed to pay one dollar a month until the value of the shares reached the sum of \$200; also in loaning the money so collected to shareholders, upon which loans interest and premiums were to be paid by the borrower. These loans or advancements, the amount of which to any one shareholder was limited to the natural value of all the shares he held and deposited with the company as collateral security, were to be paid and canceled whenever his share of stock matured,—i. e. reached the value of \$200 each,—so that the sum total equalled the amount advanced. The loans or advances were also to be secured by real-estate mortgages given by the borrower to the association, which mortgages were, of course, to be canceled at the maturity of the stock. The scheme was substantially that of all building and loan associations. The association sold its shares and made loans, not only in New Hampshire, but in several other states, including New Jersey. Among those who, in this state, bought shares and procured loans, was the complainant, Irwin. He bought seven shares, and borrowed \$1,400, and deposited his shares as collateral security, and gave to the association two real-estate mortgages; one for \$200, and the other for \$1,200. On these shares he paid certain dues and interest. Afterwards, on March 18, 1896, the company became insolvent. The bank commissioners of New Hampshire caused it to be enjoined from transacting further business, and David A. Taggart was appointed assignee. On March 25, 1896, Irwin, the present complainant, filed his bill in this court, setting up the fact of the company's insolvency, and the appointment of an assignee in New Hampshire, and further setting up that he (the complainant) was a stockholder and creditor of the company. Upon this bill, George R. Gray was appointed receiver in this state. In this suit the association was made a party defendant. On December 21, 1896, Mr. Taggart, upon his petition, was made a party defendant, with leave to file an answer and cross bill, which he did on March 27, 1897. The answer and cross bill set up the right of the New Hampshire assignee to all the assets in New Jersey, and that the duty of the New Jersey receiver is only to preserve and deliver those assets to the former officer; that Mr. Taggart, the assignee, should be substituted for Mr. Gray as receiver; that Mr. Gray should be instructed to collect and pay over the proceeds of col-

lection to Mr. Taggart, and that Mr. Gray should be ordered to conform to the directions given by Mr. Taggart, and approved by the court in New Hampshire. The defendant also asks that it may be decreed that mortgagees are not creditors of the association.

Cortlandt Parker, for Taggart, assignee.
Howard W. Hayes, for Gray, receiver.

REED, V. C. (after stating the facts). Assuming that Mr. Taggart, at this stage of the suit, is in a position to question the appointment of the New Jersey receiver, I am of the opinion that there is no substance in the objections raised. The insistence made on this behalf is that all right in the assets of the insolvent corporation passed to him by force of his appointment as assignee in the state of New Hampshire. This proposition undoubtedly states the general rule. The right to collect personal assets everywhere passed to the receiver; but the exercise of that right beyond the limits of the state of his appointment is by virtue of the comity which may be extended to him by the court of the state in which the right is asserted. This comity will not be extended where the rights of the citizens of the state are likely to be prejudiced, or where it would be in contravention of the policy of the state. *Hurd v. City of Elizabeth*, 41 N. J. Law, 1; *Trust Co. v. Miller*, 33 N. J. Eq. 155; *Sobernheimer v. Wheeler*, 45 N. J. Eq. 614, 18 Atl. 234.

In view of this admitted rule, it follows, I think, that whenever application is here made for an appointment of a receiver for a foreign corporation which is already in the hands of a receiver at the place of its domicile, the court in which the application is made can do one of three things: First, it can refuse to appoint a receiver here, and let the domiciliary receiver bring suits in this state to collect all the debts of the insolvent corporation within its limits; second, it can appoint the domiciliary receiver as ancillary receiver; third, it can appoint some one other than the domiciliary receiver. In this instance, the latter course was adopted. The receivership in this state is, however, but ancillary to the receivership in New Hampshire, and constitutes a mere agency to collect assets here, and forward them to the original receiver, unless it appears that creditors or stockholders in this state are asserting a special right in the local assets, which rights should be settled by the courts here. Whether a receiver at all should be appointed in this state depends upon the volume of business and the kind of business which the foreign corporation was here transacting; and whether, if a receiver is appointed here, the appointee should be Mr. Taggart or another, depends upon several considerations, the main one being whether the interest of New Jersey parties would be likely to antagonize in any respect the interest of the general shareholders and creditors. One prayer only

in the cross bill need be referred to to justify the appointment, not only of a receiver in this state, but a receiver other than the domiciliary officer. This prayer is that the New Jersey receiver be directed to pay over the proceeds of the money collected by him to the New Hampshire assignee, to be distributed by him according to the laws of New Hampshire. Now, a part of the money to be collected is the sum of \$30,000, deposited by the association with the secretary of state for the benefit of the creditors in this state. This condition of affairs therefore raised a question of importance, namely, whether this part of the assets, at least, should not be retained in this state to answer the purpose for which it was deposited. The existence of this question, however it may be decided, is sufficient to show the propriety of a separate receiver in this state. The remaining part of the cross bill seems to be foreign to the subject-matter of the suit. The bill is filed to have a receiver appointed to administer the New Jersey business of the insolvent corporation. So far as the answer and the cross bill are directed to matters pertaining to the right to have such an appointment made, it is entirely proper; but the other matters contained in the pleadings which are designed to obtain the order of this court in respect to the conduct of the New Jersey receiver are not germane to the purpose sought to be accomplished by the bill. Mr. Taggart undoubtedly, as the representative of the general body of stockholders, has a right to the aid of this court in compelling the receiver here to promptly and properly perform his duty. But this object can be accomplished by a petition presented to the court. However, the receiver here, for the purpose of a speedy deliverance of this court upon the question presented by the cross bill, is willing to regard the bill as a petition, and has therefore fully answered it. I will therefore proceed to consider the points involved.

One of the prayers of the cross bill is that the New Jersey receiver shall be directed to sue in the name of the New Hampshire assignee. It is apparent that the granting of this prayer would establish a condition entirely novel in the administration of affairs by an ancillary receiver. The fact that a receiver has been appointed in this jurisdiction is the best evidence that in the judgment of the court the presence of a local officer is expedient to gather in the assets here, so that those assets will be under the control of the court, whose officer this receiver is. A suit in the name of the foreign receiver would be exactly the same as a suit by that receiver himself. The receiver here would be no more than the attorney in fact of that officer, not even subject to the direction of this court either in the collection or the distribution of the money collected. Mr. Gray would be merely a receiver in name. The same condition of affairs would result if another prayer of the cross bill should be granted,

namely, that the New Jersey receiver should be ordered to conform to the directions of the assignee regarding the collection or compromise of claim. Such an order would make the New Jersey receiver the instrument for executing the will of the New Hampshire assignee, rather than an officer of this court, amenable to its directions, and liable to it for the manner in which he should discharge his duties. Mr. Gray is an officer of this court; and if any person interested in the administration of the corporate affairs confided to him thinks that he, through delay, or mismanagement, or otherwise, is jeopardizing any such interest, he can, by application to this court, have the matter rectified, if there appears to be a grievance. As already observed, Mr. Taggart, as the representative of all the creditors, can thus, through this court, secure a prompt and equitable administration of the affairs of the insolvent association within this state. The important question discussed upon the hearing is raised by another prayer, and the facts upon which it is based, namely, that Mr. Gray be directed to collect all debts, and pay over all proceeds to Mr. Taggart, to be distributed according to the laws of New Hampshire. That, as a rule, the prayer states correctly the duty of the ancillary receiver, is not controverted by the counsel of the New Jersey officer. It is now admitted, and has never been denied, that the general assets of the association should be distributed by the home assignee. But there is a part of the assets in this state regarding which it is doubtful whether this general rule applies. This portion consists of the mortgages deposited with the secretary of the state as a condition precedent to the association obtaining a certificate of authority to do business in this state. This deposit is of securities amounting to \$30,000, and is made under the provisions of section 3, p. 427, Act 1890 (3 Gen. St. p. 3258). The language of the statute is that the securities shall be held by the secretary of state in trust for the benefit of the creditors of such corporation within this state. The insistence on behalf of Mr. Taggart is that there are no creditors in this state. It is argued that the only parties here who have claims against the assets of the estate are shareholders, and that they are not creditors, but part owners with all the shareholders in those assets. I think that a shareholder is not a creditor. Mr. Smith observes that these associations have been not inaptly termed "corporate partnerships," for the reason that the stockholders are in fact co-partners in their business relations. Smith, Rec. § 322. Judge Hallett, in delivering the opinion in the case of *Patterson v. Trust Co.*, in the circuit court of the United States, said: "The shareholders who have petitioned for those assets [in Colorado] are not upon the footing of creditors of the corporation. They cannot, under any circumstances, be creditors, until their shares should mature, and \$200, which would be

payable to them upon the completion of the term of eight years, become due. * * * The business of the corporation was not of a character to create indebtedness, so as to give people in general the standing of creditors of the corporation. There could not be creditors unless some or all of the officers should have claims against it for services rendered it." To the same purport are the cases of *Towle v. Association* and *Maynard v. Association*.

But the question is, what is meant in the New Jersey statute when it uses the word "creditors." This must be ascertained by the purpose sought to be attained by the legislature. The title of the act includes loan and building associations, and it certainly could not have been the legislative intent to confine the benefits of its provisions to officers or agents who have claims against the company for services rendered, or to dealers who have furnished stationery or coal or light for the company's office. It is admitted that while the association is a going concern no shareholder becomes a creditor until the maturity of his shares. But when insolvency occurs the rights and liabilities of the shareholders and borrowers are radically changed. The borrower becomes liable to pay his debt at once, and upon the confirmation of the final account of the receiver the shareholder becomes entitled to his distributive share. Now, it seems to me that the right of the shareholder to this ascertained portion of such fund then becomes as secure as the right of a holder of matured shares. The dividend declared in his favor is as much a debt as would have been the par value of his shares had they matured. In both instances the shareholder becomes a creditor within the meaning of the New Jersey statute. The deposit of the fund in this state does not, in my judgment, change in the least the proportion to which New Jersey shareholders will be entitled. All the assets here are to be taken into account as a part of the fund to be distributed; but the right to control the fund deposited in this state, for the purpose of securing the payment to shareholders in this state of their proportion of the assets to be distributed, resides in this court. Whether such fund is to be turned over to the domiciliary receiver, or is to be retained here, or whether a part is to be so turned over, and the remainder retained, will depend upon circumstances. All this court can reasonably exact is that its citizens shall not be driven into the court of another state to obtain their distributive shares, and that the payment of such shares shall be secured, so far as the amount received from the securities deposited will furnish security. The securities deposited with the secretary of state were mortgages upon New Jersey property, and those mortgages are in the hands of the New Jersey receiver for collection. The theory for the calculation of the amount due upon each of those mortgages has just been de-

clared in the case of *Weir v. Association*, 88 Atl. 643. The New Jersey officer will at once proceed to collect the amount of those securities. When they are all, or substantially all, collected, the New Hampshire assignee may file a petition, showing the amount of assets as nearly as possible, the amount and character of his bond, and then this court will make an order, either that the assets in this state be paid over to Mr. Taggart upon his giving bond in this state to pay the New Jersey shareholders their distributive shares, or possibly upon the security of his original bond taken together with the assumption that the court of New Hampshire will see that the shareholders everywhere are paid; or the order may be that sufficient assets may be retained here to be distributed through the hands of the receiver in this state, but according to the proportion fixed by the decree of the court of New Hampshire. The receipts of any collections by Mr. Gray, other than those thus deposited, will, after deducting expenses, be paid over at once.

(80 N. J. L. 452)

LAMBERTSON v. CONSOLIDATED TRACTION CO.

(Court of Errors and Appeals of New Jersey.
Nov. 15, 1897.)

**PERSONAL INJURIES—DECLARATIONS AS EVIDENCE
—OPINION OF PHYSICIAN.**

1. The declarations of a person as to his symptoms, made to a physician or surgeon, not for the purpose of treatment, but for the purpose of leading the physician or surgeon to form an opinion to which he may testify as a witness for the declarant, in a suit brought by him for personal injuries, are not admissible in evidence at the instance of the declarant.

2. It is not error for the court to refuse to charge the jury to disregard the opinion of a physician formed wholly or in part on such declarations as are above mentioned, in a case where there is legitimate evidence of the truth of the declarations.

(Syllabus by the Court.)

Error to supreme court.

Action by Charles Lambertson against the Consolidated Traction Company. From a judgment of the supreme court (36 Atl. 100) affirming a judgment for plaintiff, defendant brings error. Affirmed.

Depue & Parker, for plaintiff in error. Samuel Kalisch, for defendant in error.

DIXON, J. In an action for personal injuries, brought in the Essex circuit, the plaintiff recovered a judgment, which, having been affirmed in the supreme court (36 Atl. 100), is now before us on writ of error. Of the matters involved, we think none requires consideration other than that received in the supreme court, except the assignments of error based upon the judge's refusal to charge as requested concerning the opinions of the medical experts. The following requests will show the precise points for consideration: "The testimony of a physician called

to examine the plaintiff at a recent period, with a view solely to giving testimony at the trial, as to the extent of an injury and its probable duration and effect, cannot be regarded by the jury in any case in which the opinion of the witness is founded, in whole or in part, upon statements made by the plaintiff of circumstances not proved to be true or to exist, and upon symptoms or conditions which existed at a former period, and of which the physician has no knowledge, except from what the plaintiff told him." "The opinion of a physician who has no knowledge of the case, except that derived from an examination made in anticipation and with a view of testifying on the trial of a cause where the physical condition of the person examined is a material fact, cannot be regarded if that opinion is founded, in whole or in part, on statements of previous physical condition and suffering and pain, of which proof was not made at the trial." It appears that, about a week before the trial, a physician was called in by the plaintiff to examine his bodily condition, in order that the physician might form an opinion to which he could testify at the trial as an expert witness on the plaintiff's behalf; and, in so testifying, the physician, having stated that "there was not anything to discover by the examination except the symptoms as he [the plaintiff] expressed them," was allowed to tell what symptoms the plaintiff had narrated. Although this testimony was objected to, no exception seems to have been sealed, and there is no assignment of error upon its admission. Its only bearing now, therefore, is upon the requests to charge.

The testimony itself, we think, was illegal. It is well settled that the declarations of a patient as to his symptoms, made to his physician or surgeon for the purpose of treatment, are admissible in evidence. *Fay v. Harlan*, 128 Mass. 244; *State v. Geddicke*, 43 N. J. Law, 86. While such declarations partake of the nature of hearsay, they derive some credibility, beyond that of hearsay, from the fact that the patient expects his physician or surgeon to be guided by them in administering remedies, and so the patient has an incentive, beyond the ordinary obligation, to tell the truth. But when such declarations are made, not for the purpose of treatment, but for the purpose of leading the physician or surgeon to form an opinion to which he may testify as a witness for the declarant, not only is this reason for credibility absent, but, instead, self-interest becomes a motive for distortion, exaggeration, and falsehood. Hence it is the better conclusion that declarations made under such circumstances are not competent evidence on behalf of the declarant. *Railroad Co. v. Huntley*, 38 Mich. 537; *Jones v. President, etc., Village of Portland*, 88 Mich. 598, 50 N. W. 731; *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573; *Railroad Co. v. Roalefs*, 16 C. C. A. 601, 70 Fed. 21. Of course, this does not ap-

ply to utterances which are the natural expressions of present pain, even though they are brought out by an examination made for the purpose above mentioned. Such utterances are themselves symptoms, and, while they may be feigned, are nevertheless competent testimony of the honesty and weight of which the jury must judge. The exclusion of a party's declarations made for the purpose of qualifying an expert to testify on his behalf will not unduly interfere with the evidence of expert witnesses. These witnesses may state to the jury the grounds of their opinion so far as their expertness has discovered them; but, outside of that, the grounds must be disclosed by other evidence; and, upon the grounds thus laid, hypothetical questions may be framed on which the opinions of experts can be received. But, although we consider this testimony illegal, yet the court did not err in refusing to charge as requested. The requests were, in substance, that the jury should be instructed to disregard the opinions of the physician if they were based wholly or in part on the statements of the plaintiff as to his previous physical condition. But it is plain that, if the evidence in the cause would warrant the jury in believing that the statements of the plaintiff were true, the opinions of the physician were competent testimony for the consideration of the jury. While the physician might not lawfully, at the plaintiff's instance, repeat to the jury the statements so made, yet his opinion, based on what the jury should believe to be facts, was not rendered valueless because those facts had been communicated to him by the plaintiff himself. We find, in the record, testimony, uncontradicted, that the statements made by the plaintiff to the physician were true; and hence even the last assignment, directed against the consideration of an opinion based on statements of previous physical condition, of which proof was not made at the trial, is inapplicable to the case, since no such statements appear. There is no error requiring the reversal of the judgment, and therefore it is affirmed.

(60 N. J. L. 456)

HOIMARK v. CONSOLIDATED TRACTION CO.

(Court of Errors and Appeals of New Jersey.
Nov. 19, 1897.)

NEGLIGENCE—PROVINCE OF JURY.

Where plaintiff was injured in a collision while riding in a wagon driven by another, and the sole ground on which plaintiff could be charged with the driver's negligence was that at the time of the collision the driver was a partner of plaintiff, and engaged in partnership business, and the evidence was not clear that the driver was so engaged, it was not error to refuse to charge absolutely that the driver's negligence was imputable to plaintiff.

Error to supreme court.

Action by Peter Hoimark against the Consolidated Traction Company for damages for

personal injuries. From a verdict and judgment in favor of plaintiff, affirmed by the supreme court (38 Atl. 100), defendant brings error. Affirmed.

Depue & Parker, for plaintiff in error.
Samuel Kalisch, for defendant in error.

PER OURIAM. This suit, like that of *Lambertson v. Traction Co.* (just decided) 38 Atl. 683, was brought for personal injuries received in a collision between a car of the defendant and a horse and wagon driven by Charles Lambertson, and in which the plaintiff was riding. Aside from the matters discussed in the case of *Charles Lambertson*, the only point calling for mention is the alleged refusal to charge that the contributory negligence of the driver was imputable to the plaintiff. The sole ground on which the plaintiff could be charged with the driver's negligence was that, at the time of the collision, the driver was a partner of the plaintiff, and engaged in partnership business. The testimony by no means makes it clear that the driver was then so engaged, and the judge charged the jury as follows: "They were partners, and, so far as partnership business is concerned, each partner is an agent of the other members of the firm. Whether they were engaged at that time in any partnership matters, or whether the journey through Broad street to Centre Market was for the benefit solely of Lambertson, is a question of fact for you to determine. If you find that, at the time the accident occurred, the relation between Lambertson and the plaintiff was that of principal and agent, then I charge you that the negligence of Lambertson may be imputed to the plaintiff, and so become his negligence." Under the circumstances of the case, we think this charge fairly presented to the jury the matter for their consideration; and the assignment of error directed against the refusal to charge absolutely that the driver's negligence was imputable to the plaintiff cannot be sustained. The judgment is affirmed.

(60 N. J. L. 457)

LAMBERTSON v. CONSOLIDATED TRACTION CO.

(Court of Errors and Appeals of New Jersey.
Nov. 15, 1897.)

PERSONAL INJURIES—DAMAGES—MENTAL DISORDER.

When an actionable wrong, consisting of or accompanied by personal injury, is committed, the jury, in fixing the damages therefor, are generally entitled to consider the mental agitation and disorder of the plaintiff naturally and proximately resulting from the wrongful conduct of the defendant.

(Syllabus by the Court.)

Error to supreme court.

Action by Julius Lambertson against the Consolidated Traction Company. Judgment for plaintiff was affirmed by supreme court

(36 Atl. 100), and defendant brings error. Affirmed.

Depue & Parker, for plaintiff in error. Samuel Kalisch, for defendant in error.

DIXON, J. This suit grows out of the collision which gave rise to the suits brought by Charles Lambertson (38 Atl. 693), and Peter Holmark (Id: 684), just decided, and presents no questions which have not been already disposed of, save the request to charge that no damages could be given for fear, fright, or any physical or mental disorder resulting from fear or fright. The trial judge charged that the only compensation the plaintiff was entitled to was compensation for injuries which resulted from the physical injury caused to the plaintiff by the collision between the wagon in which he was riding and the defendant's car; and we think that, in so doing, he went as far as the defendant had any right to ask. While there are decisions holding that mere fright cannot form the legal basis of an action for damages (*Mitchell v. Railway Co.* [N. Y. App.] 45 N. E. 354), it is a well-established rule that when an actionable wrong, consisting of or accompanied by personal injury, is committed, the jury, in fixing the damages, are entitled to consider the mental agitation and disorder of the plaintiff naturally and proximately resulting from the wrongful conduct of the defendant. This principle was applied in *Ogden v. Gibbons*, 5 N. J. Law, 596, an action of trespass *quare clausum fregit*, and is constantly applied in suits for seduction, slander, libel, assault, breach of promise of marriage, and the like. In two reported cases this court has expressly sanctioned the principle. *Allen v. Ferry Co.*, 46 N. J. Law, 198; *Railroad Co. v. Walsh*, 47 N. J. Law, 548, 4 Atl. 323. Although in these instances the mental disturbance was only temporary, it certainly cannot the less deserve consideration because it appears to be permanent. The judgment should be affirmed.

(61 N. J. L. 107)

INHABITANTS OF ORVIL TP. v. MAYOR, ETC., OF BOROUGH OF WOODCLIFF.

(Supreme Court of New Jersey. Nov. 3, 1897.)

BOROUGH—FORMATION—LIABILITIES AND ASSETS—STATUTES—CONSTRUCTION.

1. A statute which imposes upon a borough a proportionate part of the liabilities of a township from which it has been set off, and assigns to it a proportionate part of the assets of such township, is valid, although not passed until after the formation of the borough.

2. In construing statutes it is an invariable rule that words should never be supplied or altered unless to effect a meaning clearly shown by the other parts of the act.

(Syllabus by the Court.)

Case certified from circuit court, Bergen county, for advisory opinion.

Action by the inhabitants of the township of Orvil, in the county of Bergen, against the mayor and council of the borough of Woodcliff. Case certified, and judgment advised for plaintiff.

Argued June term, 1897, before **MAGIE, C. J.**, and **DEPUÉ, VAN SYCKEL**, and **GUMMERE, JJ.**

J. W. De Yoe, for plaintiff. **Miller & Meyers** and **Luther Shafer**, for defendant.

GUMMERE, J. The borough of Woodcliff became incorporated about the 28th day of August, 1894, under the act for the formation of borough governments, approved April 5, 1873, and the several supplements thereto. It includes within its boundaries a portion of the township of Orvil, in the county of Bergen, and a portion of the township of Washington, in the same county. Prior to the time of the incorporation of the borough, the township of Orvil had become indebted in the sum of \$30,000 for moneys expended in macadamizing a portion of the roads within its territory, and had issued bonds to secure the same. None of these roads, however, were in that part of the township which is now within the limits of the borough. At the time of the formation of the borough no legislation existed for apportioning to it its share of the assets and liabilities of the township. On April 16, 1896, however, a statute was passed, entitled "An act to provide for the division of the assets and liabilities of townships between such townships and any borough or boroughs set off from the same," the first section of which provided that, "where any borough has been heretofore or shall be hereafter set off from any township in this state, the township committee of such township, and the mayor and council of such borough shall have the power, and it shall be their duty, by agreement to make division between such borough and such township of all the property of such township, including moneys and assets on hand, and due or to become due to said township, and to make an equitable apportionment of the indebtedness and liabilities of such township." P. L. 1896, p. 270. Under the provisions of this act, proceedings were taken to make division of the assets and liabilities of the township of Orvil between it and the borough of Woodcliff, with the result that there was apportioned to the borough, as its share of the above-mentioned indebtedness, the sum of \$509.85; and, upon the refusal of the borough authorities to pay to the township the first installment of said amount when it fell due, this suit was brought for its collection. The first ground upon which the borough resists the collection of the moneys claimed to be due from it to the township is that, as no legal liability rested upon it, when first it became incorporated, to pay any portion of the indebtedness which had previously been incurred by the township, no such liability

could be subsequently imposed upon it by the legislature, and that the act of April 16, 1896, so far as it attempted to do so, was unconstitutional. Although this contention has the support of a number of adjudicated cases, of which *Inhabitants of Hampshire v. Inhabitants of Franklin*, 16 Mass. 76, and *Bowdoinham v. Richmond*, 6 Greenl. 112, are examples, it seems to me that it cannot be supported on principle, as "It is inconsistent with the necessary supremacy of the legislature over all its corporate and unincorporated bodies, divisions, and parts." 1 Dill. Mun. Corp. (4th Ed.) § 189. We are told that the constitutional provision which legislation of this kind violates is that which prohibits the passage of any law impairing the obligation of contracts, but it seems quite plain that this law is not objectionable for that reason. As was said by Mr. Justice Clifford in *Laramie Co. Com'rs v. Albany Co. Com'rs*, 92 U. S. 307, a case where the question under consideration was somewhat similar to that in the case now before us, "institutions of this kind [municipal corporations] are the auxiliaries of the state in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the legislature of the state, because there is not, and cannot be, any reciprocity of stipulation, and their objects and duties are utterly incompatible with everything in the nature of a compact." Moreover, the power of the legislature to pass laws of this character, retroactive in their operation, has already been affirmed by this court. In the case of *Rader v. Township of Union*, 30 N. J. Law, 509, the legislature had incorporated a road district out of a portion of the township, and authorized it to lay out and to improve streets within its limits. After it had incurred a large indebtedness in carrying out the purposes for which it had been created, the legislature repealed the act which brought it into being, but provided, in the repealer, that its debts should be charged upon and paid by the township at large. It was held that this was a valid exercise of legislative power. It is argued that the case before us differs from that cited, in that in *Rader v. Township of Union* it was considered that there existed a moral obligation on the part of the township to pay the debts of the road district, arising out of the benefit received by the township at large from the work done and improvements made by the road district, and that this moral obligation was merely turned into a legal one by the action of the legislature; while in the present case (as we are told) no moral obligation rested upon the defendant, prior to the passage of the act of 1896, to pay any portion of the indebtedness which had been incurred by the plaintiff in the macadamizing of its roads. I cannot agree to this view. When the township made these improve-

ments to certain of its roads, it did so not only for the benefit of those of its inhabitants who rented or owned property in the immediate neighborhood of such roads, but for the benefit of the township as a whole; and all the taxable property therein, as well that which is now included within the limits of the borough of Woodcliff as that which remains in the township of Orvil, was subjected to liability for the payment of the liability incurred. The separation of the borough of Woodcliff from the township did not operate in any degree to deprive those of the inhabitants of the borough who were formerly citizens of the township of the benefits of these improvements; nor did it deprive that portion of the territory of the township which is now included in the borough of those benefits. Consequently, although that separation relieved the borough from any legal liability to pay for its share of those benefits, its moral obligation to do so still remained. That being so, the right of the legislature to subsequently impose upon it the burden of paying its proportionate part of this indebtedness would seem to be manifest.

The second ground upon which the defendant bases its refusal to pay the plaintiff's demand is more unyielding. The act of April 16, 1896, after providing the method by which a division and apportionment of the assets and liabilities of the township shall be made, declares that "no such division and apportionment shall be valid unless the same shall be approved by a majority either of the said township or of the said mayor and council" (of the borough). P. L. 1896, p. 270. It appears that in the present case the division and apportionment of assets and liabilities were approved, not by a majority either of the township or of the mayor and council of the borough, but by a majority of the township committee of the township of Orvil. This, it is insisted on behalf of the defendant, was not a compliance with the statutory requirement, and consequently did not validate the division and apportionment. On the other hand, it is argued for the plaintiff that from a reading of the context it is clear that the legislature intended, by the provisions recited, that a majority of the township committee, and not of the inhabitants of the township, should approve the division and apportionment; and we are asked to insert the word "committee" after "township" in construing the law, in order to give effect to that intent. The invariable rule in the construction of statutes is that words should never be supplied or changed unless to effect a meaning clearly shown by the other parts of the statute. *Lane v. Schomp*, 20 N. J. Eq. 82. Although it seems probable from an examination of the other parts of this act that the legislature intended to confer the power of approval upon the governing body of the township rather than on the township itself, we can-

not say that such intent appears beyond doubt. Not to be able to do this is fatal to the claim of the plaintiff, for the injection of the word "committee" into the statute, under such circumstances, would be an act of legislation rather than of construction. The division and apportionment of the assets and liabilities of the township between the plaintiff and the defendant, not having been approved in the manner provided by the statute, are invalid; and, being so, the plaintiff cannot successfully maintain an action against the defendant for the recovery of so much of the township's liabilities as was apportioned to it. The circuit court of Bergen county should be advised accordingly.

FRENCHÉ v. McCONNELL et al.

(Court of Errors and Appeals of New Jersey.
Nov. 15, 1897.)

MORTGAGE FORECLOSURE—DEFENSES—BREACH OF COVENANT OF DEED.

1. A breach of covenants in a deed against incumbrances or for good title is no defense against proceedings to foreclose a mortgage given on the land, for part of the consideration money, except in cases where there has been an eviction by title paramount or an action is pending to try the title to the mortgaged premises. A further exception exists where actual fraud in the transaction is alleged and proven.

2. The same equity that will be invoked to refuse a decree of specific performance requiring the vendee to accept a deed and pay the purchase money, when the vendor is unable to make a title free from some defect or incumbrance which cannot then be removed, will not be available to a vendee under like circumstances in resisting the payment of a mortgage for consideration money. The reason is that specific performance is not a matter of absolute right, but of sound discretion, and when it is refused the court leaves the party to his remedy at law; but, if it refuses to administer equities founded upon a deed executed, the party applying would be left without a remedy.

(Syllabus by the Court.)

Appeal from court of chancery.

Bill for foreclosure of a mortgage by Eliza J. McConnell and Mary E. Struble, wife of Hugh McD. Struble, against James Frenché. From a decree for complainants, defendant appeals. Affirmed.

Charles M. Woodruff, for appellant. Martin Rosenkrans, for respondents.

HENDRICKSON, J. This appeal brings to this court for review a decree of the court of chancery for the sale of mortgaged premises on proceedings to foreclose. The mortgaged premises consist of a farm situate in Byram township, Sussex county, N. J., which was purchased by the appellant of the appellees on May 17, 1892; the mortgage, which was for \$1,500, having been given by the former to secure part of the consideration money. The bill to foreclose is in the usual form, and the answer as amended sets up as a defense against the payment of the mortgage a breach of covenants in the deed against in-

cumbrances and for good title, alleging that appellant had discovered upon the record since the purchase two several mineral leases executed upon said premises by prior owners of the property, one by Alexander McKane and wife to Michael R. Kemble, dated April 7, 1853, and the other by Almira Hendershot and James Hendershot to Daniel D. Chapin and Vall Hilbin, dated April 29, 1881; that the leases invested the lessees and their heirs and assigns with the ores and minerals in and upon said lands, which constituted a considerable and material part of the value of the property; and that owing to the existence of these incumbrances, notice of which had been duly given at the earliest time to the solicitors of the appellees, the appellant had been unable to enjoy or to dispose of said premises as fully and beneficially as he might otherwise have done; and that inasmuch as the proper and lawful consideration of said mortgage, and the bond it secured, had failed, the answer prayed and insisted that the appellees should not be permitted to recover in said suit or to prosecute the same until after said incumbrances should have been wholly removed, and the appellant sufficiently indemnified for his loss and deprivation in the premises; and that the bill might be dismissed, with costs. The case was heard on bill, answer, and proofs, and at the close of the hearing, after argument, the vice chancellor expressed the opinion that the defense had failed entirely, and that complainant might have his decree.

The grounds of appeal set forth in the petition of the appellant are, in substance, that the decree adjudging the principal and interest of the mortgage to be due the appellees, with costs, and directing a sale of the mortgaged premises to raise and satisfy the same, is erroneous, because made in disregard of the defenses set up in the answer of the appellant, and because in fact no money whatever was due from the appellant, because of the utter failure of consideration of the said mortgage, and the failure and inadequacy of the title to the mortgaged premises conveyed to the appellant by the respondents, by reason of the incumbrance of two mineral leases above named subsisting thereon before and at the time of said conveyance, and because said mortgage was obtained by misrepresentation. The leases or the record of them were offered and admitted in evidence at the hearing. The McKane-Kemble lease conveyed to the party of the second part, his heirs and assigns, forever, all the zinc ores, franklenite, and iron ores upon a tract of 200 acres, of which the mortgaged premises form a part. The excavations were to be confined to the hedges, rocks, and ledges of the premises, unless the ores and minerals should run in or upon the cultivated fields, and then the excavation might be extended to those parts, upon paying a reasonable price for the grain there growing. The annual rent reserved was a

stipulated sum for each ton of the ore raised and carried away, payable half yearly, and, in case the rent reserved should remain unpaid for 15 days after demand made in writing, the lease should become null and void forever; and there was a further condition to the lease that, in case the party of the second part should not discover any of the before-described ores and mineral substances in or upon said premises within one year of the date thereof, then the same should be null and void forever. The Hendershot-Chapin lease was similar to the McKane-Kemble lease, except that the grant was for 20 years, and that the rental was to be paid every 3 months after removal of the ores; and the parties of the second part were required to commence to explore for said mines and minerals within 6 months of the date of the lease, or the same should be null and void. Evidently two such leases could not co-exist upon said premises and both be valid. It may be further observed that, by the proofs admitted, it appeared that up to the time of the hearing, November 19, 1896, the appellant was in the possession of the property; he had not been evicted nor disturbed in his possession; and no claim had been made to it by any one since its purchase by the appellant. It was further proved by appellant himself that no shaft had been opened upon the farm, and the only excavation that had been made was an open cut in the rock, not in the cultivated part of the farm. As to when this cut in the rock was made the appellant was the only witness, and he only knew by hearsay that some work was done on it about seven years before. This is not legal evidence, and hence there was no proof of such allegation. There was some evidence offered in behalf of the appellees tending to show that before the deed was delivered to the appellant the existence of the McKane-Kemble lease was made known to him by the appellees, with a statement that the deed would not be delivered unless the appellant would waive objections on account of the existence of the lease; and that the appellant made the waiver and accepted the deed with that understanding. This evidence was denied by the appellant so far as it applied to the McKane-Kemble lease, but the appellant admitted that mention was made of the Chapin lease and an old Smith lease which he regarded as no incumbrance. The testimony leaves it in some doubt whether even the McKane-Kemble lease remained as a valid incumbrance upon the premises at the time of the conveyance to the appellant. No evidence was given tending to show that the existence of either of these supposed leases had been an actual detriment to the appellant in hindering a sale of the premises by him or by causing a depreciation in its value. But it must perhaps be admitted that the lease just named having had its existence recognized in several deeds constituting the

chain of title, as late as 1876, is a sufficient cloud upon the title or incumbrance upon the premises to raise the question of the validity of the defense set up by the answer and proofs. Counsel for the appellant insists that the existence of these mineral grants upon record and in full force, as he claims, is a clear breach of the covenants of warranty contained in the deed made to his client, and that the latter would not have paid and secured to be paid the consideration price of \$2,000 for the same had he known of these incumbrances, and that the respondents are not entitled to a decree for their mortgage money until these incumbrances are removed. He bases his insistence mainly upon the ground that a court of equity will not enforce specific performance of a contract by the vendee to accept a deed for land and pay the purchase money, when the vendor is unable to make a title as described in the agreement without some defect or incumbrance, which cannot then be removed, and that the same equity should be applied to protect a purchaser, under like circumstances. But in principle this cannot be done. And the reason is plain. The specific execution of a contract in equity is a matter not of absolute right in the party, but of sound discretion in the court, and, when the court simply refuses to enforce the specific performance of a contract, it leaves the party to his remedy at law. In this respect it differs greatly from the case of an executed contract; for, if a court of equity should refuse to administer equities founded upon a deed executed, it would leave the party applying without a remedy. 1 Story, Eq. Jur. 768, and note 1, citing *Vigers v. Pike*, 8 Clark & F. 562, 645. That this rule has no application to the case in hand is settled by a long line of decisions in this and other states. In *Hulfish v. O'Brien*, 20 N. J. Eq. 230, a bill was filed to foreclose a mortgage. The answer stated that the mortgage was given for part of the consideration money of a conveyance of land by deed with full covenants, and that the title conveyed was defective; that the grantors only owned and conveyed three-fifths of the premises. Chancellor Zabriskie in the opinion says: "It has been decided in this court repeatedly by three of my predecessors that a defect of title to mortgaged premises conveyed by the mortgagee is no defense in a suit for the foreclosure of a mortgage for part of the consideration,"—citing *Shannon v. Marsells*, 1 N. J. Eq. 426; *Van Waggoner v. McEwen*, 2 N. J. Eq. 412; and *Glenn's Adm'r v. Whipple*, 12 N. J. Eq. 50. The chancellor adds: "Such has been the uniform doctrine of this court, and it is in accord with the decisions of other states." The same doctrine is laid down in *Price's Ex'rs v. Lawton*, 27 N. J. Eq. 325, afterwards affirmed in this court in 28 N. J. Eq. 274; the only exception being that if there has been eviction by title paramount, or an action is pending to try

the title to the mortgaged premises, the court will interfere. Neither of these conditions exists in the present case. Among other cases fully supporting this doctrine are *Long's Adm'rs v. Long*, 14 N. J. Eq. 462; *Coster v. Manufacturing Co.*, 2 N. J. Eq. 467; *Miller v. Avery*, 2 Barb. Ch. 582; *Bumpus v. Platner*, 1 Johns. Ch. 218; *Withers v. Monell*, 3 Edw. Ch. 560; *Tallmadge v. Wallis*, 25 Wend. 107; *Edwards v. Bodine*, 26 Wend. 109. Counsel has argued that there is a recognized exception to the above rule in cases of fraud or misrepresentation. Such an exception is recognized by the authorities, but only in cases of actual fraud. Since such fraud is not alleged in the pleadings nor proved on the trial, it is unnecessary to discuss the nature and limitations of the exception referred to. My conclusion is that the decree should be affirmed.

(61 N. J. L. 80)

PATERSON, N. & N. Y. R. CO. et al. v.
MAYOR, ETC., OF CITY OF
NEWARK.

(Supreme Court of New Jersey. Nov. 8, 1897.)

EMINENT DOMAIN—TAKING PROPERTY FOR PUBLIC
USE—COMPENSATION—MEASURE OF DAMAGES.

1. The laying out of a highway across a railroad is a taking of the company's property for public use, and entitles it to compensation therefor; and compensation for such taking includes the making good to the company the moneys expended by it in erecting, maintaining, and operating gates at the crossing, provided such gates are necessary for the proper protection of the public, and for the safe operation of the company's railroad.

2. Where a city, which is engaged in acquiring by condemnation the right to lay out and open a street across the tracks of a railroad company, fails to define the manner of crossing, but seeks to condemn the privilege of crossing generally, the damages will be assessed for that manner of crossing which will be most injurious to the company's interests.

(Syllabus by the Court.)

Condemnation proceedings by the mayor and common council of the city of Newark for the purpose of acquiring the right to cross the railroad of the Paterson, Newark & New York Railroad Company with a street, in which the railroad company appealed from the award of commissioners to the circuit court, where damages were awarded such company. Heard on rule obtained by the railroad company to show cause why a new trial of the appeal should not be directed. Rule made absolute, and new trial ordered.

Argued June term, 1897, before MAGIE, C. J., and DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Cortlandt Parker and Cortlandt Parker, Jr., for appellants. Frederick T. Johnson, for respondents.

GUMMERE, J. The city of Newark instituted condemnation proceedings for the purpose of acquiring the right to cross the railroad of the Paterson & Newark Railroad

Company with a newly laid out street, called "Herbert Place." The railroad company, being dissatisfied with the award of the commissioners rendered in those proceedings, appealed therefrom to the circuit court of the county of Essex. On the trial of that appeal the court refused to permit evidence to be given by the company of the cost of constructing, maintaining, and operating safety gates at the proposed crossing, and limited the damages of the company to the cost of construction and maintenance of the crossing, planking, and cattle guards. The appellants contend that there was error in this judicial action, and that on account thereof a new trial of the appeal should be directed. The contention of the appellants is well founded. Our constitution declares that private property shall not be taken for public use without just compensation, and nothing is just compensation that does not make good to the owner all the pecuniary outlay which he is compelled to make by reason of the appropriation of his property. If the construction of a highway across its road makes it necessary for a railroad company, on account of the populousness of the neighborhood, or for any other reason, to erect, maintain, and operate safety gates for the proper protection of the public, and the safe operation of its road, the outlay for this purpose is just as much a damage caused by the taking of the company's land as is the cost of planking between the tracks, or of constructing cattle guards, and the company is equally entitled to compensation therefor. Whether or not the company is entitled to compensation for such outlay depends upon whether it is rendered necessary by the laying out of the street across the company's railroad, and this is a question for the jury to decide; and, if the jury is satisfied from the evidence that such outlay is necessary for the proper protection of the company and the public, it should be included in their verdict. It is said, in opposition to this view, that the appellants ought not to be allowed to recover for the cost of constructing, maintaining, and operating safety gates, because its obligation to do so results from an ordinance of the city of Newark which requires all railroad crossings to be so protected; that this ordinance is a police regulation, pure and simple, which may be abolished to-morrow; and that it is entirely settled that no person can recover damages on account of being compelled to comply with the police regulations of a municipality, which are designed to promote the common welfare. But this argument, as it seems to me, is based upon a misapprehension of fact. The necessity for gates at a highway crossing over a railroad does not at all depend upon the existence or nonexistence of an ordinance requiring their erection; for, unless the proper protection of the public makes them necessary, such an ordinance would be unreasonable, and therefore void, and, on the other hand, if the safety of the

public and the safe operation of its road required the presence of gates at such crossing, it would be necessary for the company, for its own protection, to erect them, even if no ordinance to that effect existed. And in this case the question which should have been left to the jury is, not whether a compliance with the city ordinance required the appellants to construct, maintain, and operate gates, but whether the proper protection of the public, and the safe operation of their road, made it necessary for them to do so. The existence of an ordinance requiring it to be done is only important, in the determination of that question, as being an admission on the part of the city that such gates are necessary to the public safety.

It is further argued, on the part of the respondents, that the ruling of the trial court in excluding evidence of the cost of constructing and operating gates was justified by reason of the fact that the grade of the proposed street had not yet been fixed, and that until that was done there was no presumption that the crossing would be at grade, rather than overhead or undergrade, and that, therefore, there was nothing to warrant the conclusion that safety gates would be required. But this contention overlooks the well-settled rule that where the condemning party fails to define how it will cross the right of way of a railroad company, but seeks to condemn the privilege of crossing generally, the damages will be assessed for that manner of crossing which will be most injurious to the company's interests. *National Docks & N. J. J. C. Ry. Co. v. United Cos.*, 53 N. J. Law, 217, 21 Atl. 570. The rule to show cause should be made absolute, and a new trial ordered.

(61 N. J. L. 83)

MEYER v. HARRIS et al.

(Supreme Court of New Jersey. Nov. 8, 1897.)

NUISANCE — LIABILITY OF TENANT — LEASE FOR TERM — ACTION AGAINST FEDERAL RECEIVER.

1. A tenant for years is not responsible in damages to a third person for maintaining and keeping in repair, upon the demised premises, a structure, erected thereon by his landlord prior to the commencement of his term, which operates to the nuisance of such third person. The remedy of the injured party is against the landlord alone.

2. The owner of premises upon which a nuisance has been erected by his predecessor in title is responsible for injuries occasioned thereby, if he continues the nuisance.

3. A party having possession of premises under a lease for 999 years is, for all practical purposes, the owner thereof; and his responsibility for maintaining and keeping in repair a structure upon the premises so held by him, which operates to the nuisance of a third person, is that of an owner, and not that of a tenant for years.

4. Since the passage of the act of congress of March 3, 1887 (24 Stat. 552, c. 373, § 8), it is not necessary to obtain from a federal court, which has appointed a receiver of a railroad company, remission to sue such receiver for injuries caused by his maintaining and keeping

in repair a structure upon the lands of the company which operates to the nuisance of the party who sues.

(Syllabus by the Court.)

Case certified from circuit court, Somerset county, for advisory opinion.

Action by Bernhard Meyer against Joseph S. Harris and others, receivers of the Philadelphia & Reading Railroad Company. On demurrer to pleas, and case certified. The court advised to enter judgment on demurrer.

Argued June term, 1897, before MAGIE, C. J., and DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Henry M. T. Beekman, for demurrant. James J. Bergen, for defendants.

GUMMERE, J. The declaration in the cause alleges that about the year 1874 the Delaware & Bound Brook Railroad Company, a corporation of this state, constructed a railroad embankment and bridge in, over, and across the Raritan river, in the county of Somerset; that in the year 1879 it leased its road, including the said embankment and bridge, to the Philadelphia & Reading Railroad Company; and that the latter company and its receivers, the defendants in this cause, have ever since been in the possession of said embankment and bridge, and have used, rebuilt, and maintained the same. The declaration then charges that, by reason of the construction of said embankment and bridge, the waters of the said river are penned up and forced back upon the lands of the plaintiff, thereby rendering them boggy and valueless. The defendants have filed several pleas to this declaration, and to two of them the plaintiff has demurred. The first of these pleas sets out that the Philadelphia & Reading Railroad Company came into the possession of said embankment and bridge by virtue of a certain lease made to it by the Delaware & Bound Brook Railroad Company, whereby the latter company leased to the former, for a term of 999 years, its railroad and appurtenances, of which the said embankment and bridge are a part. The defendants then aver that neither the said Philadelphia & Reading Railroad Company nor they (its receivers) have ever built up, constructed, or maintained said embankment and bridge in such manner as to obstruct the flow of said river in any other or different manner, or to any greater extent, than the same was obstructed by said embankment and bridge when the same came into the possession of said company and its receivers under said lease, and that the only use which said company or its receivers have made of said embankment and bridge has been the running of its and their railroad trains over them. It will be observed that by this plea the defendants do not deny that they and the company of which they are receivers have built up, constructed, and maintained said embankment and bridge. They merely deny that they have done so in such

a manner as to obstruct the flow of the river in any other manner, or to any greater extent, than the same was obstructed by the said embankment and bridge when those structures came into their possession. The question, therefore, which is presented for decision, is whether a tenant under a lease for a term of 999 years becomes responsible for damages caused by the existence of a structure upon the demised premises which is a nuisance, when such structure was put there by his lessor prior to the making of the lease, and when the tenant simply maintains it in the condition in which it came to him, and rebuilds it when it falls out of repair. The answer to this question must depend, it seems to me, upon the estate which the tenant has by virtue of his lease. The law imposes upon an ordinary tenant for years the duty of keeping the demised premises in repair, and of returning them to his landlord at the end of his term in approximately the same condition in which he received them. If he fails to do this, and suffers the estate to go to decay for want of necessary repairs, the law makes him liable to his landlord as for a permissive waste. So, too, if he does any act which injures the inheritance, his lessor may recover against him as for a voluntary waste. *Moore v. Townshend*, 33 N. J. Law, 284; *Newbold v. Brown*, 44 N. J. Law, 266. This being so, it follows, as a necessary result, that a lessee is under no obligation, to a third person, either to tear down, or to suffer to fall into decay, a structure upon the demised premises, which, in the state in which it was at the commencement of the term, was a nuisance to such person. The law does not impose upon any one the duty of performing an act for the benefit of one person which will necessarily subject him to liability at the hands of another. In those cases in which the nuisance exists at the time of the creation of the estate for years, and the lessee does nothing except to maintain the demised premises in the condition in which he received them, the person who suffers from the nuisance must look to the landlord, and not to the tenant, for redress. It is urged that this view is opposed to that taken by this court in the case of *Banking Co. v. Ryerson*, 27 N. J. Law, 457; but this contention is based upon a misapprehension of what was really decided by that case. The situation was this: the Morris Canal & Banking Company had purchased a tract of land, upon which there was a dam which caused the waters of the Pompton river to flow back upon and submerge the lands of Ryerson, and the latter brought his suit to recover for the damages caused by the backwater. The matter to be determined was whether the owner of lands, upon which there was a structure which had been erected, to the nuisance of another, prior to his acquiring title, was liable for the damages caused thereby, unless he had been first requested to remove it; and this court held that if the owner of

lands upon which such a structure has been erected continues the nuisance, and uses the structure, the party injured has a remedy against him, without first requesting an abatement thereof, but that if such owner simply suffers the structure to remain, without using it, such action on his part is not a continuance of the nuisance, unless there be a request to remove it. Clearly, this decision affords no ground for the contention that a tenant for years becomes responsible in damages for maintaining and using a structure upon the demised premises, which has been erected thereon, to the nuisance of a third person, prior to the beginning of his term. But do the defendants in this case, and the company of which they are receivers, occupy the position of tenants for years under their lease? By its provisions they become the possessors of the railroad and appurtenances of the lessor company (including the embankment and bridge referred to in the pleadings) for a period of 999 years,—a term which is, for all practical purposes, perpetual. Such a lease, as was said by Mr. Justice Van Syckel, speaking for the court of errors and appeals, in *Black v. Canal Co.*, 24 N. J. Eq. 465, is substantially a conveyance in fee; and for this reason the lessees, in determining the measure of their responsibility in maintaining a nuisance upon the premises conveyed to them by such an instrument, should be considered as owners, rather than as tenants for years. Now, as owners, they are responsible to a third person for damages sustained by him by reason of the existence upon their lands of a structure erected by their predecessor in title, to his nuisance, provided they continue the same. *Banking Co. v. Ryerson*, supra. That these defendants have actively continued the nuisance complained of, they themselves admit in their plea. The declaration charges them with having done so, by building up, constructing, and maintaining the embankment and bridge which constitute the nuisance; and they, in their plea, merely deny that they have done so in such manner as to obstruct the flow of water in any different manner, or to any greater extent, than the same was obstructed by the said embankment and bridge when the same came into their possession. The result is that the matters set up in this plea constitute no defense to the plaintiff's action.

The second plea demurred to sets up as a defense that the defendants were appointed receivers of the Philadelphia & Reading Railroad Company by the United States circuit court for the district of New Jersey, and that the plaintiff brought his suit against them as receivers without first obtaining leave of said court for that purpose. It was held by the United States supreme court in *Barton v. Barbour*, 104 U. S. 126, that no suit can be maintained against the receiver of a railroad company, who is, by order of court, conducting the business of a common carrier, without leave of the court by which he was ap-

pointed, and that the failure to acquire such leave might be set up, by plea, as a bar to the maintenance of an action so brought. Mr. Justice Miller, however, dissented from the view of the majority of the court; being of opinion that the failure to obtain leave to bring a suit could not be pleaded as a bar to its maintenance; and that the remedy of the defendant receiver was to apply to the court which appointed him for an injunction to restrain its prosecution. But, in passing upon the validity of this plea, it is not necessary for us either to approve or disapprove the doctrine established by *Barton v. Barbour*, that failure to obtain leave to sue can be pleaded as a defense; for, since the decision of that case, congress, by an act passed March 3, 1887 (24 Stat. 552, c. 373, § 3), has provided that "every receiver or manager of any property, appointed by any court of the United States, may be sued in respect of any act or transaction of his, in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed." This statute has been construed by the supreme court of the United States in *McNulta v. Lochridge*, 141 U. S. 327, 12 Sup. Ct. 11; and it is there held that it was not intended, by the words, "any act or transaction of his," to limit the right to sue to cases where the cause of action arose from the conduct of the receiver himself, or his agents, but that, with respect to the question of liability, he stands in the place of the corporation. It is manifest, therefore, that by virtue of the provision of the statute referred to, as construed in *McNulta v. Lochridge*, a party may sue a receiver without permission first obtained, not only for an injury caused by his own act, but for those which result from acts of the corporation done before his appointment. In addition to this, the declaration in this case alleges that the nuisance which the plaintiff complains of has been continued by the defendants, since their appointment as receivers, by the rebuilding, maintaining, and using of the embankment mentioned therein; and the plaintiff was therefore, by the very words of the act of congress, entitled to institute this suit without first obtaining leave of the United States circuit court. The plaintiff is entitled to judgment on his demurrer, and the circuit court is so advised.

(61 N. J. L. 112)

KLEMM v. MAYOR, ETC., OF CITY OF NEWARK.

(Supreme Court of New Jersey. Nov. 8, 1897.)

MUNICIPAL CORPORATIONS—SERVICES OUTSIDE OF OFFICIAL EMPLOYMENT—COMPENSATION.

An ordinance prohibiting a municipal officer from being interested in any city contract, or from receiving any compensation, except his salary, for services rendered to the city, will not prevent such officer from maintaining an action against the city to recover for services rendered altogether outside the line of his official

employment, when such services were rendered in pursuance of a contract made between such officer and the city itself, and for a compensation fixed therein.

(Syllabus by the Court.)

Action by Henry C. Klemm against the mayor and common council of the city of Newark to recover for services. Heard on demurrer to plea. Demurrer sustained.

Argued June term, 1897, before MAGIE, C. J., and DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Henry Young, for plaintiff. Herbert Baggs, for defendant.

GUMMERE, J. The declaration in the case contains only the common counts, but by the bill of particulars which is annexed to it it appears that the plaintiff sues to recover for services rendered by him as an architect to the city of Newark, at its request, in the erection of two of its engine houses. The plea demurred to sets up as a defense to the plaintiff's claim that at the time of his rendering the services for which he seeks to recover he was one of the officers of the city, to wit, a commissioner of public schools, and that, by virtue of a certain ordinance of the city then existing, he was, as such officer, prohibited from being interested in any contract of the city, or in any compensation for any work done for it, or from receiving any compensation, commission, or other reward from the city for his services except the salary and fees paid to him as such commissioner. Do these facts, the truth of which is conceded by the demurrer, constitute a bar to the plaintiff's suit? It seems clear to me that they do not. The ordinance was made by the city, and for its own protection. Assuming that it is given, by its charter, power to pass such an ordinance (which is denied by the plaintiff, and which it is not necessary to decide in disposing of this demurrer), it also had power to repeal it, or to suspend its operation; and when the city itself, the creator of the ordinance, notwithstanding its existence, makes a contract with one of its officers to do work which is entirely outside the line of his official duty for a fixed compensation, it is to be considered as suspending by that action the operation of its prohibitory ordinance so far as that transaction is concerned; or, rather, to state it more accurately, the city is estopped by its conduct from setting up such ordinance for the purpose of avoiding performance on its part. The rules of fair dealing forbid that a municipality shall take advantage of its by-laws to escape performing a contract when, notwithstanding the existence of those by-laws, it not only has made the contract, but has permitted the other party thereto fully to perform it, and has itself received the benefit thereof. It is not intended to intimate, by this decision, that a municipality would be barred from taking advantage of ordinances, such as that set out in the plea, in a suit brought against it by one

of its officers on a contract made by him with one of its boards or committees. That question is not presented by the record in this case. All that we decide is that such an ordinance is not a bar when the contract sued upon is made by the city itself, and it has received the fruits of its bargain. The plaintiff is entitled to judgment on his demurrer.

(61 N. J. L. 154)

STATE (KEER, Prosecutor) v. OLIVER.

(Supreme Court of New Jersey. Nov. 8, 1897.)

ACTION EX DELICTO—MISJOINDER—EFFECT.

In a declaration charging willful and malicious injury to a chattel, allegations of bailment, and implied contract to use care and return the chattel in good condition, are recitals by way of inducement only. The action is *ex delicto*, and misjoinder of defendants will not defeat it.

(Syllabus by the Court.)

Certiorari to court of common pleas, Middlesex county; Strong, Judge.

Certiorari by the state of New Jersey (Arthur J. Keer, prosecutor) against Charles A. Oliver, to review a judgment against the prosecutor in an action of tort on appeal from a court for the trial of small causes to the court of common pleas. Affirmed.

Argued June term, 1897, before DIXON, LUDLOW, and COLLINS, JJ.

Freeman Woodbridge, for prosecutor. George S. Silzer, for defendant.

COLLINS, J. The writ in this case removes a judgment against the prosecutor, in an action of tort, on appeal from a court for the trial of small causes. The suit was brought against the prosecutor and two other defendants. The state of demand was, in substance, as follows: "The plaintiff complains of the defendants for this: That, heretofore, to wit, on," etc., "at," etc., "the plaintiff loaned to the defendant a wagon," etc., "for the purpose of being used by the defendants," etc., "which said wagon was to be used by the defendants with ordinary care, and was to be returned to the plaintiff in good condition, ordinary wear and tear excepted; and for that the defendants, instead of using the said wagon with ordinary care, willfully and maliciously injured the same [stating the particulars] whereby the said wagon is injured, and has been rendered useless to the said plaintiff, two hundred dollars." The proof was that the other defendants were the bailees of the wagon, and that the prosecutor, who was riding with them, willfully, and despite their protest, defaced and otherwise injured it. At the trial before the justice the prosecutor moved for a nonsuit, and afterwards for judgment in his favor, because of variance of the proof from the demand, and because of the misjoinder with him of his co-defendants. No amendment was prayed or ordered. The motions were

denied, and judgment was rendered against all three defendants. The prosecutor appealed, caused a severance of the other defendants, and relied, in the common pleas, as here, upon the objections above recited. They have no force. The action was strictly *ex delicto*. The bailment of the wagon was stated in the demand by way of inducement only. No amendment was necessary. There was a clear misjoinder, and the justice should have ordered a nonsuit or affirmative judgment in favor of the two defendants wrongfully joined, but the prosecutor cannot complain of the error. In actions of tort a misjoinder of defendants does not defeat recovery against any or either proved to be guilty. A *nolle prosequi* as to any defendant may be entered at a plaintiff's will. Allen v. Craig, 13 N. J. Law, 294. On the trial of the appeal, as the prosecutor alone was in court, the judgment rendered was the only one possible, and it should be affirmed, with costs.

(80 N. J. L. 429)

ROXBURY LODGE, NO. 184, I. O. O. F., v. HOCKING.

(Court of Errors and Appeals of New Jersey. Nov. 16, 1897.)

BENEVOLENT SOCIETIES—ENFORCEMENT OF RIGHTS—INTERPRETATION OF BY-LAWS.

1. The general rule is that, to secure property rights or enforce money demands against a social or beneficial organization, the member may, in the first place, prosecute his claim in the civil courts. The exception is where the constitution of the defendant body contains an express agreement binding its members first to seek their rights in the tribunals of the order before bringing an action at law. In this case there was no such agreement or provision which entered into the contractual relation between the parties, and therefore a suit at law will lie.

2. The established rule that "words in a statute ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them," should be applied in the interpretation of by-laws of social and beneficial organizations in controversies with members in the civil courts (Syllabus by the Court.)

Error to circuit court, Morris county; before Chief Justice Magie.

Action by William Hocking against Roxbury Lodge, No. 184, I. O. O. F. Decree for plaintiff, and defendant brings error. Affirmed.

William A. Stryker, for plaintiff in error. Mahlon Pitney, for defendant in error.

VAN SYCKEL, J. The defendant in error, who was the plaintiff below, brought this suit against Roxbury Lodge, of which he is a member, to recover "sick benefits" from April 20, 1893, to February 9, 1895. The plaintiff's action is founded upon article 9, § 1, of the by-laws of the lodge, which reads as follows: "Section 1. Every brother who has been a member of this lodge for six months, who is not disqualified by article X

of these laws, shall, in case of being rendered incapable by sickness or disability of following his usual occupation, make known his case within one week to the lodge, or to one of the visiting committee, and he shall be entitled to and shall receive out of the funds of the lodge, provided he hath attained the third degree, three dollars (\$3) per week, and all others two dollars and fifty cents (\$2.50) per week, during his sickness or disability, commencing not more than one week anterior to his notice: provided such sickness or disability does not proceed from immoral conduct on his part: and provided, also, that no benefit shall be allowed for sickness or disability for less than one week, then pro rata according to the time so sick or disabled,—each week to consist of seven days." On the 14th day of September, 1893, which was five months after Hocking's disability and right to benefits commenced, the by-laws of the lodge were changed, reducing the amount of benefits to which disabled members are entitled. Two questions are involved in the controversy: First, whether, before instituting this suit, Hocking was bound to appeal to the sovereign grand lodge of the order for the redress which was denied to him by Roxbury Lodge; second, whether Hocking is bound by the by-laws reducing his benefits. Both these questions were decided by the trial court in favor of Hocking.

Where the question is a social one, involving discipline or the conduct or standing of a member of the lodge, he must exhaust his remedy in the tribunals of the lodge before he can invoke the aid of the civil courts. *Zelliff v. Grand Lodge*, 53 N. J. Law, 536, 22 Atl. 63. In that case the court observed that there is a distinction between cases in which the association subjects its members to discipline for violation of its rules, and those instances in which the member seeks to enforce money demands against the social organization. In the latter case a contractual relation exists between the society and its member, as was recognized in *Holland v. Chosen Friends*, 54 N. J. Law, 490, 25 Atl. 367, and that draws to it a legal rule not applicable to the subject of discipline. The general rule is that, to secure property rights or enforce money demands, the member may, in the first place, prosecute his claim in the civil courts. The exception is where the constitution of the defendant organization contains an express agreement binding its members first to seek their rights in the tribunals of the order, before bringing an action at law. That was the posture of affairs in *Knights of Golden Eagle v. Smith*, 58 N. J. Law, 545, 33 Atl. 849; and our supreme court distinctly ruled that these lodges may provide methods for hearing the controversies of their own members, and that the members may bind themselves to have recourse thereto in the first instance, and before invoking the civil courts. The agreement to exhaust the remedy provided by the lodge enters into, and be-

comes an inseparable part of, the contractual relation, and the member cannot enforce the contract on the part of his lodge without executing it on his own part. The same view was taken by this court in affirming the case of *Knights of Golden Eagle v. Smith*, 35 Atl. 917. In the principal case the constitution of the lodge provides with much detail the mode of procedure before the lodge, and for appeal where charges are preferred against a member, but no provision is made for the trial and enforcement of a claim to benefits. The only reference to a prosecution in the tribunals of the lodge for a money demand is in the proviso of rule 13, which reads as follows: "That, in all cases of appeals to the grand lodge of New Jersey, the fact of such an appeal shall act as a stay of proceedings; and in all cases appealed to the sovereign grand lodge the fact of such an appeal shall act as a stay of proceedings, and the decision of the subordinate shall be final until reversed by the sovereign grand lodge: provided, when an appeal refers to benefits, the amount in dispute shall be paid by the subordinate lodge to the grand secretary, to await the final determination of the case." The express provision for procedure in the lodge, being restricted to matters of discipline, by implication excludes the idea that money demands are to be taken cognizance of by the tribunals of the defendant order. It also necessarily limits the application of rule 13, as to appeals, to cases in which the constitution and by-laws give an appeal. As in this case there is no provision made for a trial within the lodge, there can be no appeal to which rule 13 is applicable. It is true that the proviso in rule 13 says, "when an appeal refers to benefits," etc. The function of a proviso is to restrain the enacting clause, and to except something which would otherwise have been within it, or in some measure to modify the enacting clause. *Wayman v. Southard*, 10 Wheat. 30; *Voorhees v. Bank*, 10 Pet. 449; *Lanning v. Lanning's Adm'r*, 17 N. J. Eq. 228; *Minis v. U. S.*, 15 Pet. 423; *Potter, Dwar. St.* 118; *Sedgw. St. Const.* 49; *Endl. St.* §§ 184-186. Article 9, § 1, of the by-laws, imposes an absolute liability to pay sick benefits in cases within its terms, without in that or in any other provision requiring the member to submit his claim to the adjudication of any body within the lodge. No prior adjudication by the lodge being provided for, the proviso in rule 13 cannot impose upon the member the duty to take an appeal. The trial court, in maintaining the right of the member to prosecute this suit, committed no error.

The constitution of the lodge (article 5, § 6) provides that a sick member shall be entitled to such weekly benefits as shall be fixed by the by-laws. The by-laws adopted by the lodge, and in force at the time Hocking became sick, provided the weekly allowance he recovered in this suit. Whether the lodge had power to reduce the allowance to the plaintiff below by changing the by-laws after

he became sick, need not be decided in this case. The by-law of September 14, 1893, relied upon by the lodge, does not, on its face, purport to apply to any member whose sickness or disability antedates its passage. The language is that "every brother who has been a member for six months shall, in case of being rendered incapable by sickness or disability," be entitled to receive the reduced allowance therein specified. This refers to future disability,—to members who become disabled after its passage. This construction is in accordance with the rule adopted in many adjudged cases. *Cohen v. Supreme Sitting*, 105 Mich. 283, 63 N. W. 304; *Wheeler v. Supreme Sitting* (Mich.) 68 N. W. 229. In this state the leaning of the courts has always been against giving to statutes any retroactive effect, and as a general rule, unless the retrospective intention clearly appears, a statute will be construed to be prospective only. *Town of Belvidere v. Warren R. Co.*, 34 N. J. Law, 193; *Baldwin v. City of Newark*, 38 N. J. Law, 158; *City of Elizabeth v. Hill*, 39 N. J. Law, 555; *Williamson v. Railroad Co.*, 29 N. J. Eq. 311. In the case last cited this court declared that "words in a statute ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot otherwise be satisfied." No reason appears why this by-law, which declares what shall be the law as between these parties, shall not be subject to the rule of interpretation which pertains to the construction of statutes. In my opinion, there was no error of law in the trial court, and the judgment below should therefore be affirmed.

(60 N. J. L. 447)

LANCE et al. v. APGAR.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1897.)

TRESPASS—NONSUIT—PROOF OF DAMAGES.

The committing of a trespass upon the rights of another is per se a legal injury, from which some damage to the plaintiff will be inferred. In the absence of proof showing the amount of such damage, it is error to nonsuit the plaintiff. Nominal damages, at least, can be recovered.

(Syllabus by the Court.)

Error to circuit court, Hunterdon county; before Justice Gummere.

Action by Peter Lance and others against Nathan L. Apgar. From a judgment of nonsuit, plaintiffs bring error. Reversed.

H. B. Herr, for plaintiffs in error. Richard S. Kuhl, for defendant in error.

VAN SYCKEL, J. This suit was brought to recover damages for cutting timber upon the lands of the plaintiffs. The evidence produced on the trial below on the part of the plaintiffs showed that the cutting of the timber in question was done partly before suit brought, and

partly after the commencement of the suit. The testimony also showed the damage done by all the cutting, but did not show what portion of the damage was to be attributed to so much of the cutting as was done before the institution of the suit. On motion of the defendant's counsel, the trial court thereupon nonsuited the plaintiffs, for the reason that the jury could not, under the evidence, measure the extent of the injury, and ascertain the amount of damages recoverable in the suit. At common law the breach of a contract or the committing of a trespass upon the rights of another was per se a legal injury, from which some damage to the plaintiff would be inferred. If the extent of the injury is not proven, nominal damages only can be recovered. Chief Justice Beasley in *Golden v. Knapp*, 41 N. J. Law, 215, states the rule accurately as follows: "Where actionable misconduct is shown on the part of the defendant on the breach of a covenant, the law implies nominal damages, at the least. This accepted rule was enforced by this court in *New Jersey School & Church Furniture Co. v. Board of Education*, 58 N. J. Law, 646, 35 Atl. 397. The nonsuit was improperly ordered, and the judgment below should therefore be reversed.

(55 N. J. E. 798)

JENKINS et al. v. GUARANTEE TRUST & SAFE-DEPOSIT CO. et al.

(Court of Errors and Appeals of New Jersey.
Nov. 15, 1897.)

SECOND APPEAL—RES JUDICATA.

An appeal will not be entertained from a decree of the court of chancery made in accordance with instructions contained in a remittitur from this court. If such decree is erroneous, the party injured thereby suffers by reason of the mistaken conclusion reached by this court, and his remedy is by petition for a rehearing of the original appeal.

(Syllabus by the Court.)

Appeal from court of chancery.

Bill by the Guarantee Trust & Safe-Deposit Company and others against Seth L. Jenkins and others. From a decree for complainants, defendants appeal. Dismissed.

Edward Dudley, Wm. H. Burnett, and John Sparhawk, Jr., for appellants. Samuel H. Grey, for respondents.

GUMMERE, J. This is an appeal from a decree of the court of chancery upon a remittitur from this court. 32 Atl. 208. The bill was filed by the Guarantee Trust & Safe-Deposit Company, executors of, and trustees under, the will of Margaret K. Maxwell (who at the time of her death was a resident of, and domiciled in, the state of Pennsylvania), for the purpose of ascertaining by judicial decision whether or not a legacy of \$5,000 given by the will to the Presbyterian Hospital of Philadelphia, and directed thereby to be paid out of the proceeds of the sale of certain lands in New Jersey, was a valid bequest. The court of chancery having determined by its de-

ree that the bequest was valid, an appeal was taken from that decree. This court, on the hearing of the appeal, reached the conclusion that the validity of the bequest was to be determined by the laws of Pennsylvania, and that, as the testatrix had died less than 30 days after the execution of her will, the bequest was void, by virtue of the provision of the Pennsylvania statute of mortmain, and that it must consequently fall into the residuary estate of the testatrix, and be distributed therewith. *Jenkins v. Safe-Deposit Co.*, 53 N. J. Eq. 194, 32 Atl. 208. The record in the case was thereupon remitted to the court of chancery, with an order that a decree be there entered in accordance with the conclusions reached by this court. In pursuance of the mandate of the remittitur the court of chancery made the following decree: "And it is further ordered, adjudged, and decreed that the legacy of \$5,000 to the Presbyterian Hospital, contained in the will of Margaret K. Maxwell, declared to be void by the court of errors and appeals in this cause, be for nothing holden, and shall fall into the residuary estate of the said Margaret K. Maxwell, and be distributed therewith." From this decree the present appeal is taken. It will be perceived that the decree now appealed from was entered in exact compliance with the instruction of this court, and that, in order to sustain the appeal, we must declare that it was error in the court below not to have disregarded that instruction. Such a proposition carries with it its own refutation. If the decree now before us wrongly determines the rights of the parties, it is because of the erroneous conclusion reached by this court, and our instruction to the court of chancery based thereon. For such an error this court alone is responsible, and alone can correct it. And the only method by which relief from such an error can be obtained is by petition to this court for a rehearing. To say that a decree of the court of chancery, entered in conformity to the mandate of this court, can be reversed on appeal, is tantamount to saying that that court is at liberty to set at naught our instructions, and to make a decree in accordance with its own views, whenever it is convinced that the conclusions reached by us are erroneous. The appeal should be dismissed, with costs.

(60 N. J. L. 459)

OTTAWA TRIBE, NO. 15, IMPROVED ORDER OF RED MEN, v. MUNTER.

(Court of Errors and Appeals of New Jersey.
Nov. 15, 1897.)

APPEAL—REFUSAL TO DIRECT VERDICT—EXCEPTIONS—REFUSAL TO NONSUIT—ACTION ON CONTRACT—DEFENSE—NONPERFORMANCE.

1. An exception to a refusal to direct a verdict, which does not disclose the grounds of the motion, is not entitled to consideration on error.
2. On exception to a refusal to nonsuit, only those grounds for the motion which are disclosed in the bill of exceptions will be considered on error.

3. When the plaintiff's declaration avers generally performance by him of all the conditions of the contract, the defendant cannot set up in defense the nonperformance of any condition which he has not specified in his plea.

(Syllabus by the Court.)

Error to circuit court, Camden county; Miller, Judge.

Suit by Margaret Munter against Ottawa Tribe, No. 15, Improved Order of Red Men. Decree for plaintiff, and defendant brings error. Affirmed.

Howard Carrow and William J. Kraft, for plaintiff in error. H. S. Scovel and Thomas B. Hall, for defendant in error.

DIXON, J. This suit was brought to recover the sum of \$100, upon an agreement made between the defendant and one of its members (Edward H. Munter, the plaintiff's husband) that upon his death the defendant would pay \$100 to such person as should be at the expense of his burial, or his nearest competent relative. Mr. Munter having died, the plaintiff bore the expense of his burial, and was his nearest competent relative. At the trial in the Camden circuit, two exceptions were taken by the defendant,—one, to the refusal of the judge to nonsuit the plaintiff; the other, to his refusal to direct a verdict for the defendant,—and on these exceptions the judgment in favor of the plaintiff is now assailed.

If we should confine our attention to that portion of the bills of exception in which the exceptions are noted, we would be required, by a well-settled rule of practice, to refrain from considering the propriety of the judge's ruling, because no specific reason is there stated for taking any other course than that which he pursued; and hence we could not be legally informed that the reasons urged before us had been brought to the attention of the lower tribunal. Without that, exceptions to such rulings are futile. *Insurance Co. v. Barracloiff*, 45 N. J. Law, 543; *Traction Co. v. Behr* (N. J. Err. & App.) 37 Atl. 142. But, on perusing the whole bills of exception, we find a statement by the trial judge that the motion to nonsuit was based upon a claim that the defendant's constitution required the plaintiff to take appeals within the order before resorting to the courts of the state for redress upon the contract. This statement may fairly be considered as if incorporated in the exception. This alleged ground of defense is, however, precluded by the pleadings. The declaration avers compliance by the plaintiff and by Edward H. Munter with all the conditions and requirements of the contract; and to this the defendant pleaded only the general issue, and (by leave granted during the trial) the nonpayment of dues by Munter. Under our statute (Prac. Act, § 126; Revision, p. 868), which requires the party to specify in his pleading the condition, the nonperformance of which he intends to contest, the de-

defendant's pleas could not support the suggested defense. Nor should an additional plea to introduce this defense be now allowed. The defense is purely technical, and, if permitted, would be interposed against a person not a member of the order, and in fact not conversant with its rules. The judgment should be affirmed.

(61 N. J. L. 156)

LIVERIGHT et al. v. GREENHOUSE.

(Supreme Court of New Jersey. Nov. 8, 1897.)

FRAUD—ATTACHMENT—INTENT—SUFFICIENCY OF EVIDENCE.

1. It is necessary to the validity of an adjudication of fraud in contracting a debt by misrepresentation of the collectibility of assets, where the proof is the alleged admission of the debtor, that enough details of time, circumstances, and substance of language of the admission should be proved to establish that there was intentional falsehood in the representation.

2. A purpose of a debtor to remove or dispose of his property with intent to defraud his creditors is not established by proving his statement that the holder of a judgment against him will not execute his judgment except at his desire, and except to protect him from his other creditors.

(Syllabus by the Court.)

Certiorari to circuit court, Camden county; Miller, Judge.

Action in attachment by Max Liveright and others against Martin E. Greenhouse. There was a judgment quashing the attachment, and plaintiffs bring certiorari. Affirmed.

Argued June term, 1897, before DIXON, LUDLOW, and COLLINS, JJ.

Thomas E. French, for plaintiffs. Henry I. Budd, Jr., for defendant.

COLLINS, J. By virtue of an order made by a commissioner of this court, an attachment was issued out of the circuit court of Camden county against Martin E. Greenhouse. The order was based on the statute that authorizes an attachment in cases where a capias ad respondendum may issue in actions on contracts. It was therein adjudged that the defendant had fraudulently incurred an obligation to the plaintiffs, and also that he was about to remove or dispose of his property with intent to defraud his creditors. After notice and hearing, a judge of said circuit court quashed this attachment because the proof on which was rested the order for the writ was insufficient to sustain it. This court is now called on to review his action, the sole question argued being as to the sufficiency of such proof. On the subject of fraud in the contract the only proof before the commissioner was contained in an affidavit of one of the plaintiffs that on February 28, 1896, Greenhouse, for the purpose of securing credit, gave the plaintiffs a statement of his financial condition, in which, among other things, he wrote that he had "good book accounts, * * * \$20,000," and

added: "The outstanding accts. I have got more than I stated above, but I can safely say that the above stated may be all collected;" and that upon the faith of this statement the plaintiffs, between August 31 and December 8, 1896, sold and delivered to Greenhouse merchandise for which he was still indebted in the sum of \$1,846.55. The affidavit proceeds as follows: "Deponent further avers that in said statement the said Martin E. Greenhouse represented to deponent's firm that he had \$20,000 of good book accounts, which deponent avers to be false and untrue, and that said Martin E. Greenhouse has since admitted to deponent that the said book accounts are and were not good book accounts, and are and were not collectible." This was not sufficient. The affiant should have narrated enough of details of time, circumstance, and language of the later statement of the defendant to afford an opportunity for judicial consideration of its effect as an admission of an intentional falsehood in his former statement. Proof of facts from which a jury might infer fraud on an issue involving it was essential to the validity of the commissioner's adjudication. The conclusions and belief of the affiant were not competent evidence. *Kipp v. Chamberlin*, 20 N. J. Law, 656; *Bowne v. Titus*, 30 N. J. Law, 341. Not only did the affidavit fail to prove the alleged admission of the defendant, but the admission itself is stated too indefinitely to establish fraud in the contract. When was it made? When did the book accounts cease to be good and collectible? When did the defendant learn that they were not so? The affidavit is silent on these vital points. On the subject of intended fraudulent disposition of property there was nothing before the commissioner except the following statement in said affidavit, and a condensed corroboration thereof in the affidavit of another person: "Deponent further avers: That the said Martin E. Greenhouse is about to assign, remove, and dispose of his property with intent to defraud his creditors, in that the said Martin E. Greenhouse has suffered to be recovered against him the aforesaid judgment by one Jacob Oartun, for the sum of \$5,000 or more, which said judgment is collusive, and, as deponent is informed, is to be used for the purpose of hindering, delaying, and defrauding the other creditors of him, the said Martin E. Greenhouse, and cheating and defrauding them. That on December 23d deponent, with Philip Arnold, met said Martin E. Greenhouse, by the appointment of said Martin E. Greenhouse, at the office of Martin V. Bergen, in the city of Camden, who was the attorney of said Jacob Oartun, and apparently also of said Martin E. Greenhouse. That, while there, conversation took place between deponent and said Arnold, Greenhouse, and Bergen, in relation to an indebtedness due from said Greenhouse to deponent's firm, and from Greenhouse to the firm of which said Arnold is a member, and in relation to the judgment

then and there stated to have been recovered by said Jacob Cartun against said Greenhouse; and that in the conversation said Greenhouse stated that in this matter he had confidence in Mr. Bergen, and would do as he said, and said Martin E. Greenhouse also stated that the judgment of Cartun had been recovered, and that execution papers were prepared, which would be used by the said Jacob Cartun, or not, according to the desires of him, the said Martin E. Greenhouse; and that, if it were not necessary to use said judgment to protect him, the said Martin E. Greenhouse, from other creditors, the said Jacob Cartun would not use said judgment at all, nor issue execution thereon. That the statements were made in the presence and hearing of said Martin V. Bergen, and not denied by him. Deponent further avers that he is unable to say how much is due by the said Martin E. Greenhouse to said Jacob Cartun, but he believes that some portion of said judgment is not bona fide, and that the whole of said judgment, whether due or not, is being used as aforesaid, for the said purpose of hindering, delaying, and cheating, and defrauding the other creditors of him, the said Martin E. Greenhouse. And deponent further says that said Greenhouse stated to deponent that he had several suits for collection pending against him; that he could not meet his obligations, and wanted to get a settlement with his creditors for from twenty to twenty-five cents on the dollar; that, when the creditors saw the situation, they would be glad to accept it." This part of the proof has the same vice as the other,—of stating conclusions, information, and belief, instead of facts. As to so much of it as is competent, I can only say that to my mind it is not evident that, because a debtor says that a judgment against him will not be executed, except at his desire, it may be thereby inferred that he is about to dispose of his property with intent to defraud his creditors. The order of the circuit court quashing the writ of attachment must be affirmed, with costs.

(61 N. J. L. 4)

NIXON v. FITHIAN.

(Supreme Court of New Jersey. Nov. 8, 1897.)
SERGEANT AT ARMS—FAILURE TO RETURN EXECUTION—LIABILITY.

A sergeant at arms of a district court is not made subject to the statutory liability for failure to perform the duties prescribed by the district court act respecting executions out of said court delivered to him which is imposed upon constables for such failure by section 73 of said act (1 Gen. St. p. 1227).

(Syllabus by the Court.)

The declaration states that the defendant (William Fithian) was, on June 1, 1896, duly appointed a sergeant at arms of the Camden district court, and became duly qualified and entered upon the duties of the office; that plaintiff (Japhet R. Nixon) obtained two judgments in said court against one Seybold, one for \$43.71, and the other for \$114.60; that executions, issued upon said judgments, were placed in the hands of defendant as sergeant at arms to be executed; and that defendant did not make return of the executions in 30 days from the time he received them. In the conclusion it is charged that thereby an action had accrued to plaintiff to recover of defendant \$158.31. The second plea sets up as an excuse for failing to return the executions that defendant was prevented from doing so without any fault on his part, by restraining orders out of the court of chancery, and the advice of the attorney of the plaintiff. There was a demurrer to this plea. Judgment for defendant.

Argued June term, 1897, before MAGIE, C. J., and DEPUE, VAN SYCKEL, and GUMMERE, JJ.

John J. Crandall, for plaintiff. Henry S. Scovel and William T. Boyle, for defendant.

John J. Crandall, for plaintiff. Henry S. Scovel and William T. Boyle, for defendant.

MAGIE, C. J. A demurrer to a pleading reaches back in its effect through all previous pleadings, and judgment thereon must be given against the party in whose pleadings the first substantial defect is found. The declaration in this case is in the form of a declaration in debt, and founds plaintiff's right of recovery solely upon defendant's failure to make return of the executions in his hands within 30 days. By that failure its claim is that he had become liable to plaintiff for the whole amount named in the executions. The office of sergeant at arms of district courts was first created by a supplement to the district court act approved February 16, 1892 (1 Gen. St. p. 1257). That supplement has been superseded and repealed by another supplement approved March 26, 1896 (Laws 1896, p. 164). By section 1 of this supplement, any district court judge may appoint a suitable person as sergeant at arms, and it is therein provided that "any person, not a constable, when so appointed, shall during his continuance in office, be invested with and possess all the rights, privileges, powers and duties appertaining to the office of constable and all papers, warrants and process either civil or criminal, issued out of any district court of this state, shall be as binding and effectual and have the same legal effect when served or executed by said sergeant at arms as if served or executed by a constable." When this supplement is compared with the original district court act, it is obvious that a sergeant at arms, if a constable, derives his power to serve and execute the process of that court wholly from the provisions of the original act, contained in section 51 and the following sections, while a sergeant at arms who is not a constable derives his power to serve and execute such process wholly from the provisions of the supplement of 1896. By section 63 of the district court act, a constable who had levied upon any goods and chattels by

virtue of an execution issued out of such court was required to give a certain notice of the time and place when he would expose said goods and chattels to sale, and it was added that he "shall at the time and place so appointed expose them to sale by public vendue and strike them off to the highest bidder and pay the money thence arising to the plaintiff, or, in case of his absence, to the clerk, and, within thirty days from the time he shall receive the execution, make return to the clerk who issued the same of the proceedings had thereon and the said clerk shall make a record thereof." Whether the clause of section 63 above quoted, which requires the peremptory sale of goods and chattels levied on and the return of the execution within 30 days, remains in force admits of doubt; for by section 5 of a supplement approved April 5, 1878, the first part of section 63 was re-enacted with slight and immaterial variations, but the last clause was wholly omitted. The supplement contained a general repealer. But assuming that, by the scope of this legislation, constables, to whom have been delivered executions issued out of district courts, must make return thereof within 30 days, it follows that, by the express provisions of section 73 of the original act, a failure to perform that duty will make them liable to pay to the plaintiff in execution the debt or damages and costs, and the amounts thereof may be recovered by action, without reference to the question whether plaintiff in execution was in fact injured by the failure to make return. The language of that section may perhaps be susceptible of another construction, but the provisions of the justice's court act, now contained in section 68 of that act (2 Gen. St. p. 1878), and which are identical with those of section 73 of the district court act, have been construed in this court as subjecting the constable to the statutory liability upon a mere failure to return the execution in his hands. *McLaren v. McVicar*, 41 N. J. Law, 271. The declaration avers that the executions which defendant failed to return were delivered to him as sergeant at arms. From its averments it is obvious that defendant did not hold the office of constable, and that whatever powers he had over the process were derived from the provisions of the supplement of 1896, *ubi supra*. There can be no doubt that he was thereby fully empowered to execute the process as any constable might do. But the question is whether, upon his failure to perform any duty that devolved upon him in respect to such process, the law has imposed upon him, as it has upon constables, a liability to answer for the whole sum to be raised by the execution, without reference to the question whether the failure in fact injured the plaintiff in execution. Such legislation has been held to be penal in its character. *McLaren v. McVicar*, *ubi supra*. The provisions of section 73 apply in terms only to constables. The supplement of 1896 gives rights, privileges, and powers, and

imposes duties, upon sergeants at arms, but it nowhere contains any express provisions subjecting them to a penalty for failure to perform such duties. In my judgment there is nothing to justify an implication of a legislative intent to subject them to such a penalty. The result is that the declaration discloses that plaintiff has no cause of action against defendant. Whether plaintiff may not have relief for any injury actually suffered by him because of defendant's dereliction of duty, by an action on the bond, which defendant was required to give by the supplement of 1896, or upon a declaration in case charging injury from neglect to perform official duties, need not be discussed. Judgment on the demurrer must be given for defendant.

(20 R. I. 107)

LANGLEY v. HONEY et al.

(Supreme Court of Rhode Island. Oct. 8, 1897.)

DEED—DESCRIPTION OF PROPERTY.

A deed, by a granddaughter of J., of "all the right, title, and interest * * * which I have or may have to any portion of the estate * * * which I inherit or hereafter may be entitled to from my father, * * * and which he derived or inherited from his father, the said J.," will convey all the interest she has in the estate of her grandfather; the clause describing it as inherited from her father being rejected as false description, he having died shortly before her grandfather, whose will made provision for him.

Bill by John S. Langley against Samuel R. Honey and others for partition of the estate of John S. Langley, Sr., deceased. After decree for partition, and the appointment of a commissioner to make a sale and divide the proceeds, a petition was filed by certain of the parties asking for a share of the proceeds on the ground that no part of the estate passed by the deed of Sarah B. Thayer. Denied.

John S. Langley, Sr., died in 1860, leaving seven children, and the children of one son, Nathaniel H. Langley, who died shortly before his father. This son Nathaniel left five children, who took the share of the estate of John S. Langley, Sr., devised and bequeathed to their father, Nathaniel. Among these five children of Nathaniel are John S. Langley, the complainant herein, and Sarah B. Thayer. In 1872 she conveyed to the complainant, John S. Langley, "all the right, title, and interest, present or prospective, which I have or may have to any portion of the estate, real or personal, which I inherit or hereafter may be entitled to from my father, the said Nathaniel S. Langley, and which he devised or inherited from his father, the said John S. Langley, by virtue of his said will and codicil."

Wm. P. Sheffield, Jr., for complainant. Saml. R. Honey, for respondents.

PER CURIAM. The court is of the opinion that the intention of the grantor in the

deed from Sarah B. Thayer to John S. Langley, dated February 27, 1872, as appears both from the deed itself and the conduct of the parties in interest, was to convey all of her interest in the estate of her grandfather, John S. Langley, to the respondent in the present petition, John S. Langley. The clause in the deed which describes this property as inherited from her father is simply a matter of false description. Rejecting this, according to well-settled rules of construction, there is still left a good conveyance. *Waterman v. Andrews*, 14 K. I. 589; 2 Ping. Real Prop. § 1378; 2 Devl. Deeds, §§ 835, 836. The court is therefore of the opinion that the respondent, John S. Langley, took the title of Sarah B. Thayer under said deed, and that the petitioners have no valid claim to the proceeds of the land in the hands of the commissioner. Petition denied and dismissed with costs.

(20 R. I. 261)

LAPORTE v. COOK, City Treasurer.
(Supreme Court of Rhode Island. Oct. 28, 1897.)

MASTER AND SERVANT—NEGLIGENCE—FELLOW SERVANTS—PLEADING—DUPLICITY—LEGAL DUTY OF EMPLOYER.

1. In an action by an employé against a city for personal injuries through negligence on the part of defendant, a count alleging that defendant, having entire charge and control of the work on which plaintiff was employed, so carelessly and negligently managed the same as to cause the injuries complained of, set up, in effect, the negligence of a fellow servant, for which defendant *prima facie* was not liable, and was therefore bad on demurrer.

2. Such count was also bad in that it did not state in what defendant's alleged negligence consisted.

3. A count alleging injury to an employé through negligence on the part of his employer, and setting up (1) neglect to furnish plaintiff proper safeguards for his protection; (2) neglect to give him suitable instructions; and (3) neglect to provide proper persons to take charge of the work,—was bad for duplicity, as each of such several alleged breaches of duty should be made the subject of a separate count.

4. A count in which it was alleged that plaintiff was injured while working for defendant in a trench, the sides of which, through neglect on the part of defendant, were not properly shored and supported, and, by reason thereof, caved in on him, sufficiently stated a cause of action, as it charged defendant with the neglect of a legal duty to plaintiff, resulting in the injuries alleged.

Action by Joseph Laporte against Samuel P. Cook, city treasurer of the city of Woonsocket, for damages for personal injuries alleged to have been received, through negligence on the part of said city, while he was engaged as a laborer in digging a trench or ditch, and laying water pipes therein, in Diamond Hill road, in said city. The declaration was in three counts, in the first of which plaintiff alleged that said city, having entire charge and control of the work on which he was employed, so carelessly and negligently managed the same that the sides

of said ditch or trench caved in, and thereby injured him; in the second, that the employment in which plaintiff was engaged exposed him to danger of which he was ignorant, but which the agents and servants of said city in charge thereof well knew, and neglected to inform him of such danger, or to furnish suitable safeguards for his protection, or to give him suitable instructions, or to provide suitable persons to take charge of said work, by reason of which default and neglect he received the injuries complained of; and, in the third, that the character of the soil and earth in which said trench or ditch was dug was such as to require, for the safety of the workmen employed therein, that the sides and banks thereof should be properly shored and supported, to prevent them from caving in, in consequence of the neglect of which duty the injuries complained of were received by plaintiff. On demurrer to the declaration. Sustained in part.

William G. Rich, for plaintiff. Walter I. Ballou, for defendant.

PER CURIAM. The first count in the plaintiff's declaration is bad in that the allegation, in effect, is that the negligence complained of was that of a fellow servant, for which the defendant, *prima facie*, is not liable. *Di Marcho v. Iron Foundry*, 18 R. I. 516, 27 Atl. 328, and 28 Atl. 661. Said count is also bad in that it does not state in what particular respect the defendant was negligent; that is to say, wherein the negligence consisted.

The second count is bad for duplicity, in that it sets up several distinct and independent breaches of duty, viz.: (1) Neglect to furnish proper safeguards for the protection of the plaintiff; (2) neglect to give him suitable instructions; and (3) neglect to provide proper persons to take charge of the work. These allegations should each be made the subject of a separate count, if the plaintiff desires to rely thereon. See *Steph. Pl.* (Heard's Ed.) 251; Gould, *Pl.* (3d Ed.) p. 219, § 99; *Id.* p. 419, § 1.

The third count sufficiently states a cause of action. It is different from the count in the case of *Di Marcho v. Iron Foundry*, *supra*, which case is relied upon by defendant's counsel in support of his demurrer, in that there the allegation was that the defendant corporation threw, or caused to be thrown, a box, etc., thus showing the doing of some positive act, while in the count now under consideration the defendant is charged with the neglect of a legal duty. See 7 Am. & Eng. Enc. Law, 828.

The demurrer to the first and second counts is sustained, and the demurrer to the third count is overruled, and the case is remitted to the common pleas division for further proceedings.

(69 Conn. 702)

Appeal of ALLEN et al.

(Supreme Court of Errors of Connecticut. Nov. 3, 1897.)

WILLS—CONSTRUCTION—POWERS—REASONS FOR DECREE—EVIDENCE.

1. The court of probate, and not the individual who for the time should be occupying the office of judge thereof, is meant by a will appointing five executors and trustees, and providing that if, on account of vacancies, there should at any time be only two, "the judge of probate of this district" should appoint a third,—regard being had in making such appointment to the wishes of the existing trustees,—and further providing that testator did not desire "the judge of probate," in fixing the bonds of his executors and trustees, to be governed by the law with regard to the amount of personal property.

2. The provision of a will, that if, by reason of vacancies, there should be left only two of testator's executors and trustees, the probate court should appoint a third to act with them, and in so doing should regard the wishes of the existing trustees, or the persons interested in the estate,—if valid,—confers on the cestuis que trustent, at most, a power to control the judgment of the court, which must be exercised, if at all, by their unanimous concurrence.

3. Letters and declarations of a judge out of court are inadmissible to show why he made a decree, and thus to show error in it, they being mere hearsay.

4. Whenever it is permissible to show the reasons leading the judge to render a judgment, and the findings do not show it, the facts must be proved by direct testimony, and the judge put on the stand.

Appeal from superior court, Hartford county; William T. Elmer, Judge.

Julia Allen and others, beneficiaries under a trust created by the will of William S. Pierson, deceased, applied to the probate court for the district of Windsor for the appointment of various persons to fill a vacancy in the office of trustee. From a decree appointing as trustee one other than any of those asked for, Julia Allen and another, cestuis que trustent, appealed to the superior court, which reversed the decree. From the judgment of the superior court, Annie P. Allen, another of the beneficiaries, appeals. Reversed.

The will created a trust of residuary estate for the benefit of four sisters of the testator during their lives, and of the children of two of them during the lives of such children, with remainder thereafter to the grandchildren of said two sisters, or their issue or legal representatives. This estate was vested in five executors and the survivors or survivor of them, and their successors, as trustees, in trust for the use of the parties beneficially interested. Of the five persons named as executors, two were the husbands of two of the sisters, and three were of the immediate family of another of them; one being her husband, and two her sons-in-law. The fourth sister was unmarried. All the executors qualified and accepted the trust in 1879. In 1896 the death of one left only two survivors,—Samuel H. Allen, then 78 years old, the husband of Julia P. Allen, one of the four sisters of the testator, and Herbert

R. Coffin, a son-in-law of another sister, who died after the testator. The will contained the following provisions: "While the labor and detail of the care of my property and estate may be very properly done by some one of the executors and trustees, I urge that all important matters shall be done on consultation of all, so far as practicable, especially in the investments of money received from sales, collections, or any source, and that frequent and periodical examinations be made by all the executors and trustees, so far as practicable, unless prevented by absence, sickness, or unavoidable cause; and books should be kept, with correct lists and schedules of all property and estate, and all changes recorded, and also of all receipts and disbursements, so that the condition of the estate and every part thereof can be thoroughly understood by such examinations, and at all times by all the executors and trustees. In case of vacancy in my executors and trustees or their successors, so that there shall not at any time be only two, the judge of probate of this district shall appoint a third to act with them; and in making this appointment the judge of probate shall regard the wishes of the existing trustees, or the persons interested in the estate, as far as he believes he can with safety to the estate, but no further. While I do not desire the judge of probate to be governed, in fixing the amount of bonds for my executors and trustees, by the law with regard to the amount of personal property, so as to, perhaps, make it impracticable for them to find bondsmen, I desire that such bonds shall be given, which, together with their personal responsibility, shall, as far as practicable, secure the execution of the trusts, and the estate from loss." Two of the sisters were living in 1896. One had died without issue; and one, leaving issue. Mrs. Samuel H. Allen filed in the court of probate for the district of Windsor a request for the appointment, to fill the vacancy, of her son, Julian S. Allen. An unmarried sister joined in this request. Of the descendants of the sister who had died leaving issue, one daughter and one granddaughter filed a similar petition for the appointment of the latter's husband, and one daughter petitioned for the appointment of her brother-in-law. No wishes were expressed by the surviving trustees. The court of probate, after hearing the parties, appointed John H. White, who had no connection with any of the testator's family or relations, and whose appointment was not asked for by any of them.

Upon the trial of the case the appellant offered the following letter from the judge of probate, addressed to Samuel H. Allen: "Windsor, Conn., October 29th, 1896. Mr. Samuel H. Allen, Trustee of Estate of William S. Pierson, Hartford, Conn.—Dear Sir: After full consideration of the matter of appointing a trustee upon said estate, I feel that it will be necessary that the appointment should be of one from outside the family. Should be pleased to hear from you, if you have any one

to suggest for the position. Very truly yours, D. Ellsworth Phelps." To the admission of this letter as evidence the appellee (appellant here) objected, but the court admitted the same. The appellants offered the testimony of Eustace L. Allen as to two conversations which he had had with the judge of probate,—one on the 29th day of October, 1896, and the other November 11th,—to both of which conversations the appellee objected, but the court admitted the same. This testimony was that on the 29th day of October, 1896, he had had a conversation with Judge Phelps, in the probate office in Windsor, in relation to the reason why he had refused to appoint Julian Allen as a trustee to fill said vacancy. Judge Phelps, in his presence, then wrote the letter to his father above referred to, for the witness to take to his father, and the judge stated that he had decided to appoint one outside the family, because of the disagreement in the family; that he could not appoint Mr. J. S. Allen, whose name had been mentioned, and much less Mr. Spalding, whose name had been mentioned; that the objection of one of the trustees alone to the appointment of Mr. Allen would not have been sufficient to justify him to refuse to appoint at the request of the beneficiaries; that he did not refuse on the ground that he considered him an unsuitable or an improper person, but only on account of the disagreement in the family; that subsequently, on the 11th day of November, the same witness (Eustace L. Allen) met Judge Phelps in the highway, and asked him whether he refused to appoint his brother, Julian S. Allen, and the judge replied that it was because some of the beneficiaries objected. The witness then asked the judge if he would have appointed him if they had not objected, and he said, "Yes;" if they had all agreed he would have appointed him. Upon the above evidence, to the admission of which the appellee duly objected, the court found that the said judge of probate did not refuse to appoint Julian S. Allen because he was not a suitable person, nor did he pass upon the question whether he could appoint him with safety to the estate, but that he declined to make said appointment on the sole ground that only a part of the beneficiaries asked for his appointment, and the other beneficiaries objected to such appointment. The appellee, upon the hearing, claimed, among other things, as matter of law, that the provisions of the will did not divest the judge of probate of his power and discretion in appointing a trustee to fill a vacancy in the absence of a nomination by the existing trustees, or by the persons interested in the estate; that the letter of Judge Phelps was immaterial and irrelevant; that the conversations between Mr. Eustace L. Allen and the judge of probate were immaterial, irrelevant, and inadmissible, and were hearsay evidence; that the court of probate is a court of record, and its action can only be shown in and by its decrees; and that the decree appealed from shows, presumptively,

ly, that sufficient reasons were given by those interested in the estate against the appointment of Julian S. Allen, aside from the question of safety to the estate. The court did not sustain any of said claims, but rendered judgment for the appellants.

Charles E. Gross, for appellant Annie P. Allen. Charles E. Perkins, for appellants Julia Allen and others.

BALDWIN, J. In 1872, when the will, upon the construction of which this case turns, was executed, it was part of our statute law, as it still is, that every testamentary trustee should, unless otherwise provided in the will, be required by the court of probate having jurisdiction over the estate of the testator to give a sufficient bond, with surety, and also that, if the will did not provide for the contingency of his death, the same court should, upon that event, appoint some suitable person as his successor. Gen. St. 1866, p. 407, §§ 26, 27; Gen. St. 1888, §§ 490, 491. In the will of William S. Pierson, certain provisions on these subjects were made. The five executors and trustees whom he named were to hold in joint tenancy; but, whenever their number should be reduced to two, he directed that the judge of probate of the district to which he belonged should appoint a third, and in so doing should "regard the wishes of the existing trustees, or the persons interested in the estate, as far as he believes he can with safety to the estate, but no further." Then follows a clause stating that while he did not desire the judge of probate to be governed, in fixing the amount of bonds for the executors and trustees, by the law with regard to the value of the personal property belonging to the trust, he wished such bonds to be given as, together with their own personal responsibility, should, as far as practicable, secure the estate from loss. This latter provision assumes that the judge of probate has certain duties, under the law, as to requiring bonds from executors and trustees, which may be affected by testamentary directions. Such is the case in respect to courts of probate, and to judges of probate while acting officially as such a court, and it is obvious that by the term "judge of probate" the testator here meant to describe the court of probate for the district of Windsor. The rule of construction, that words occurring more than once in a will shall be presumed to be used always in the same sense, unless a contrary intention appear by the context, or they be applied to a different subject, applies with double force where the word in question is found in two sentences in immediate succession. It was therefore the court of probate which the testator must be deemed to have had in mind, in directing as to the exercise of the power of appointment, although his reference to the "judge of probate of this district," had it stood alone, might have been taken to apply to the individual who for the time being should be occupying that office.

Bishop v. Bishop, 54 Conn. 232, 6 Atl. 426. This clause of the will seeks to impose a certain limitation on the action of the court in making an appointment. The imperative phrase, "shall regard the wishes," if taken in its natural import, is equivalent to, "shall be governed by the wishes." We find it unnecessary to determine whether, assuming this to be its proper construction, the manner in which the testator sought to direct and control the action of the court of probate is such as, under Gen. St. § 491, the law permits. If the provision be given full effect, it would amount to no more than the grant of a power to certain individuals, by the expression of their wishes, to control within certain limits the judgment of the court in the choice of a trustee. It would, as to them, concern a matter of mere private confidence; and every power of that description conferred upon several persons must be exercised by their unanimous concurrence, or not at all. The testator undertook to create an alternative power. If the two surviving trustees had agreed on any nomination, and had all the beneficiaries under the trust, then in being (including, in the case of minors, their guardians), agreed on another, the court of probate would have been left free to choose between them. As it was, the trustees expressed no wish, and the beneficiaries agreed on none, each of those who appeared objecting to the nominations made by any of the others. Under these circumstances, the court of probate properly proceeded to fill the vacancy without regard to wishes expressed by any number of the cestui que trust less than the whole, even if the provision made by the testator be regarded as supported by the statute in its full extent. On the other hand, if it can be regarded as an unauthorized attempt to confer jurisdiction upon a court of justice, and dictate its course of proceeding, then it was so far void, and the decree of the court of probate was a valid exercise of its ordinary statutory powers. This would be true, notwithstanding the general rule of equity jurisprudence, that in appointing a trustee the court should always pay regard to the wishes of the person who may have constituted the trust, or of those whom he has empowered to speak in his behalf, for in this case no such wishes were ever expressed.

The evidence received to show the reasons which led the judge of probate to pass the decree in question was, in any view of the case, totally incompetent and inadmissible. His letters and declarations out of court were mere hearsay. Judicial decrees speak for themselves, and whenever, in the rare instances when it may be permissible to inquire into the process of reasoning leading to a judgment, no finding on that subject has been made, the facts must be proved, as in other cases, by direct testimony, and the judge put upon the stand. There is error, and the judgment of the superior court is reversed. The other judges concurred.

(59 Conn. 668)

NOLAN v. CITY OF NEW BRITAIN.

(Supreme Court of Errors of Connecticut. Nov. 8, 1897.)

WATER COURSES—POLLUTION—NUISANCE—RIGHTS OF CITIES—CONSTRUCTION OF STATUTES—PLEADING—ANSWER.

1. The pollution of a stream through the use of the same by a city for sewerage purposes, rendering the water unfit for domestic purposes and the watering of cattle, and causing the emission of noxious odors, is a public nuisance.

2. Act 1872 (7 Sp. Laws, p. 836) empowers the common council of the city of New Britain, whenever public health or sewerage requires it, "to take, occupy, and appropriate, in such manner as they shall, from time to time, deem expedient, any stream, or part of a stream, natural or artificial, running in or through said city, and to straighten, deepen, or lower the same, or lower or remove * * * obstructions to the free and healthy flow of such stream." The act does not authorize the taking or affecting of lands out of its territorial limits. The only taxing district suggested is the city itself, and the tax officers are the city officers. *Held*, that said act was for local improvements, and did not authorize a pollution of the stream as against the owners of riparian lands without the city.

3. Where plaintiff complains of the pollution of a stream by defendant, an answer alleging a use of the stream other than the one complained of, and asserting such use to be a proper one, is bad.

4. A defense stating that the use made of a stream, and complained of by plaintiff, is proper, and not inconsistent with the rights of plaintiff, amounts to a general denial, and is insufficient as a special defense.

5. A defense that defendant had acquired a use to a stream substantially the same as the use of which plaintiff complains is not a complete defense, since plaintiff is entitled to recover for damages done him by the difference between the use acquired and the use actually practiced.

6. A complaint charged that defendant caused to flow into the waters of a stream, to the use of which plaintiff had a right, "large quantities of acids, impure matter, sewage, and other noxious and impure substances, so as to render the waters of said brook filthy." A special defense thereto alleged that defendant had, by prescription, acquired a right of "causing to flow into the waters * * * factory and house sewage, drainage, and storm and surface waters from the city's streets." *Held*, that the defense does not include the whole use complained of, and plaintiff can recover for uses alleged in the complaint, and not included in the defense.

Appeal from superior court, Hartford county; Frederick B. Hall, Judge.

Bill in equity by Patrick Nolan against the city of New Britain for an injunction to restrain the defendant from polluting a certain stream of water by sewage, and for damages. After several special defenses had been pro forma adjudged insufficient upon demurrer, the case was tried to a jury, and there were verdict and judgment for the plaintiff for \$2,000 damages, and appeal by the defendant for alleged errors of the court in sustaining the demurrers of the plaintiff. No error.

The complaint was as follows: "(1) The plaintiff is now, and for many years last past has been, the owner of a farm in said Newington, with dwelling houses and other build-

ings thereon, through which there has during all said time flowed a brook or stream of water known as 'Piper's Brook,' the use of which has been very valuable to the plaintiff, and the plaintiff is entitled to the natural flow of said stream in a pure condition, and uncontaminated by any injurious substances. (2) The said city of New Britain has since the 1st day of October, A. D. 1887, and during all the time to the present, caused to flow into the waters of said brook, above the said property of the plaintiff, large quantities of acids, impure matter, sewage, and other noxious and impure substances, so as to render the waters of said brook filthy, noxious, and unclean, and still continues daily so to do, and threatens and intends to continue so to do. (3) By said action of the defendant, the plaintiff has been deprived of all use of the waters of said brook for watering his stock, and for all domestic purposes, and has been put to large expense thereby, has been injured in the use of said lands for agricultural and pasturing purposes, has been injuriously affected in his business of selling milk, has been exposed to noxious and unhealthy odors arising from said impure condition of said brook, has been deprived of the use of the waters of said brook for ice. (4) The plaintiff has often, and especially on the — day of —, 189—, notified the defendant of this injury, and requested it to desist from such defilement of said stream, but the defendant has, notwithstanding, continued said nuisance to the present time."

The answer consisted of several defenses.

The first was the general issue.

The second was as follows: "(1) In 1872 it became necessary for the city of New Britain to provide a system of public sewerage for the inhabitants thereof, and, in addition to the powers conferred upon it by its original charter, the legislature of this state, in said year, authorized the common council of said city, whenever in its opinion the public health or sewerage should require such action, to take, occupy, and appropriate, in such manner as it should from time to time deem expedient, any stream or part of a stream, natural or artificial, running in or through said city, and to straighten, deepen, or lower the same, or remove or lower any or all walls, dams, or other obstructions to the free and healthy flow of such stream, or part of a stream, and, having complied with the provisions of said act, to go on to complete said public improvement, and to do all acts necessary or convenient for that purpose, without further liability in the premises, all of which more fully appears by the provisions of said act. [The said act of 1872 is set out at length in the case of *Kellogg v. New Britain*, 62 Conn. 236, 24 Atl. 996, or it may be found in 7 Sp. Laws, p. 336.] (2) In 1874 the common council of said city decided that the public health and sewerage of said city required that said stream, called in the complaint 'Piper's Brook,' should be taken, occupied, and appropriated by said city for sewer purposes,

and, pursuant to the provision of said act, said city, through its common council, took proceedings in 1874 and 1875 to occupy, straighten, and appropriate said stream for said purposes, and to remove and lower dams and other obstructions therein; that is to say, said common council, on the — day of 1874, appointed a committee to prepare a descriptive survey of the improvement contemplated, to wit, the taking, occupying, and appropriating said stream for sewer purposes, with a careful estimate of the cost of completing the same, and to agree with parties interested as to damages and special benefits on account of such improvement; and said committee made a report to said council of such survey, and of the estimated cost of completing said improvement, which was accepted and recorded. And, inasmuch as said common council was unable to agree (though it undertook so to do through its said committee) with the parties interested as to the damages or benefits to be assessed on account of such improvement, Dwight W. Pardee, one of the judges of the supreme court of errors, on the application of said city, after causing such notice of the pendency of such application as he deemed just and reasonable, appointed three judicious and disinterested freeholders of the county of Hartford, to wit, Nathaniel Shipman, Charles J. Cole, and Charles Bosworth, to estimate the damages and benefits resulting from said improvement; and said committee having been duly sworn, and having given notice of the time and place of their meeting for the purpose, by publishing the same not less than twice in a newspaper published in said city, met at the time and place designated, to wit, on the 11th day of January, 1875, and on succeeding days by adjournment, in the city court room, in said city, and, having heard all the parties in interest who appeared before them, determined what parties were damaged by said improvement in excess of special benefits, and the amount thereof, also what parties owning or interested in lands, easements, or franchises, within a reasonable distance of said improvement, received special benefits over all damages, and the amount thereof, and also what parties received an equal amount of damage and benefit. And thereafter said committee reported in writing to said Dwight W. Pardee, the judge who appointed them, and he confirmed their report. [Here are set out the notices of the pendency of said application before Judge Pardee, the orders of notice issued by said judge, and the notice of the committee of the time and place, when and where, they would attend to the duties of their appointment. The said notice was directed to nearly 100 persons by name, and to all persons interested in the appropriation of said stream.' The name of the plaintiff was not included in either of said notices.] At said hearing, before said committee, who appraised the damages and assessed the bene-

fits from the taking and appropriation of said stream, the plaintiff in this case, although he was duly notified of all said proceedings, made no claim for damages, and said committee appraised no damages to him; and this defendant avers that, by reason of the proceedings aforesaid, said stream was lawfully taken and appropriated by said city under the authority aforesaid, and this plaintiff is barred from making any claim for damages for such taking and appropriation. (3) The defendant has not otherwise defiled, polluted, or injured said stream, except by taking, occupying, and appropriating the same, as aforesaid. (4) Said action on the part of said city was taken in the utmost good faith, in a proper manner, and in the exercise of proper and reasonable care, under the lawful authority of this state, for a public purpose, and under the necessities of the public health and sewerage of said city, doing no unnecessary damage to the plaintiff, and without protest or objection from him, and at the cost to said city of upward of one hundred thousand dollars."

Third defense: "(1) Piper's brook has its source just outside the city of New Britain, and has always flowed through the central portion thereof. The city of New Britain is a manufacturing center, and for more than fifty years the manufactories thereof have used said brook for manufacturing purposes. Said brook was so located that it naturally received the drainage of said city; and, long before said city did any of the acts complained of in the complaint, said stream, as the population and manufacturing industries of said city had increased, had become the natural receptacle of the drainage and wash of the streets, and the wash, drainage, and sewerage of numerous factories, public buildings, and private residences. By reason of said use, the waters of said stream, long prior to 1874, had become foul, corrupt, and unfit for any domestic use whatever. In 1874 the condition of said stream as it flowed through the city of New Britain, by reason of the said uses which for a period of years had been made thereof, and by reason of the fact that certain dams and obstructions on said stream set back and obstructed the flow of its waters, was a menace to the public health; and to remove said stream from its old channel, and to promote the more rapid flow of its waters, and to promote better sewer facilities for said city and the inhabitants thereof, said city, in the year 1875, constructed a large brick sewer from Main street, in said city, near the railroad crossing, down to what was then known as 'Shepard Dam,' and into said sewer it diverted and directed said stream. Said city also removed dams and other obstructions to the healthy flow of said stream. Since the construction of said main sewer, which contains said stream, the city has built and connected therewith lateral sewers from the northern and west-

ern sections of said city, whose drainage would naturally flow into said stream, and said lateral sewers find their outlet through said main sewer into said stream. Said city was using said stream in the manner above described when this suit was brought. Said stream flows through a sparsely settled portion of country, from New Britain to its junction with Park river, in the city of Hartford; and the lands through which it flows are not specially valuable, but are, in the main, low pasture lands. Long prior to the acts complained of, there was not a mill or manufacturing establishment of any kind on said stream below New Britain, and, as a source of water power, said stream was not sufficient or reliable, either at New Britain or at any point below it. The use of which the city of New Britain has made of said stream, as above set forth, is a natural, reasonable, and proper one, and is not inconsistent with the rights of the plaintiff."

Fourth defense: "The defendant, at the time of the alleged grievances, and for more than fifteen years prior to the bringing of this suit, had enjoyed as of right, without interruption, the right of diverting and using said stream for drainage and sewerage purposes for its benefit, in substantially the same manner as it now uses the same, and the alleged grievances were uses by the defendant of the said right."

Fifth defense: "(1) The defendant, at the time of the alleged grievances, and for more than fifteen years prior to the bringing of this suit, had enjoyed as of right, without interruption, and with knowledge of the owner of the fee of the plaintiff's land, the right of diverting and using said stream for drainage and sewerage purposes for its benefit, in the same manner as it used the same fifteen years before this action was brought, to wit, on September 20, 1878, and the alleged grievances were uses by the defendant of the said right. (2) Said use to which the defendant had the said right on said date consisted of causing to flow into the waters of said Piper's brook, as heretofore alleged in the second and third defenses of this answer, factory and house sewage, drainage, and storm and surface water from the city's streets. (3) The action of the city, as described in paragraph two, has not been appreciably or sensibly enlarged to the prejudice of the plaintiff during said period of fifteen years next prior to the bringing of this action."

Sixth defense: "(1) The defendant, at the time of the alleged grievances, and for more than fifteen years prior to the bringing of this suit, had enjoyed as of right, without interruption, and with knowledge of the owner of the fee of plaintiff's land, the right of diverting and using said stream for drainage and sewerage purposes for its benefit, in the same manner as it used the same fifteen years before this action was brought, to wit, on September 20, 1878, and the al-

leged grievances were for the most part uses by the defendant of the said right."

Seventh defense: "(1-3) Paragraphs 1, 2, and 3 of the fifth defense are made paragraphs 1, 2, and 3 of this defense. (4) Said stream of water, in the year 1878, and long prior thereto, was unfit for drinking or domestic purposes, and had been abandoned and given over by the riparian owners to secondary or inferior uses; and the use of said stream as made by the defendant was a proper, reasonable, and natural use, as more particularly set forth in the third defense hereof, so much of which is referred to and made a part of this defense, and the defendant was guilty of no fault or negligence in the said use of said stream."

From the judgment of the superior court sustaining demurrers to each of these defenses, the defendant has appealed to this court.

Frank L. Hungerford and John H. Kirkham, for appellant. Charles E. Perkins and Arthur Perkins, for appellee.

ANDREWS, C. J. The use of Piper's brook which the complaint charges that the defendant has made, unless there is a lawful warrant therefor, causes a public nuisance. Anything not warranted by law, which annoys and disturbs one in the use of his property, rendering its ordinary use or occupation physically uncomfortable to him, is a nuisance. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719. If the annoyance is such as to materially interfere with the ordinary comfort of human existence, it is a nuisance (Lord Romilly, in *Crump v. Lambert*, L. R. 3 Eq. 409-413); and, if the annoyance is one that is common to the public generally, then it is a public nuisance (Steph. Dig. Cr. Law, 120). The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights. A public nuisance is one that injures the citizens generally who may be so circumstanced as to come within its influence. *Westcott v. Middleton*, 43 N. J. Eq. 478, 11 Atl. 490; *Wood, Nuis.* § 76. That it would be a public nuisance to render the water of a stream so impure that it could not be used for domestic purposes or for the watering of cattle, and so that it gave off noxious and unhealthy odors, is hardly open to question (*Chapman v. City of Rochester*, 110 N. Y. 273, 18 N. E. 88), for the reason that these causes would injuriously affect every riparian owner along the whole length of the stream, and every person who lived near it. If a municipal corporation, in the absence of a legal right so to do, causes sewage to pollute a water course, to the use of which a lower owner, through whose premises the water course flows, is entitled, it is guilty of a nuisance, for which damages may be recovered. *Inman v. Tripp*, 11 R. I. 520; *New York Cent. & H. R. R. Co. v. City of Rochester*, 127 N.

Y. 591, 28 N. E. 416; *Attorney General v. Leeds Corp.*, 5 Ch. App. 588; *Gould, Waters*, § 545; *Dill. Mun. Corp.* (4th Ed.) 1047; *Byrnes v. City of Cohoes*, 67 N. Y. 204; *Selfert v. City of Brooklyn*, 101 N. Y. 136, 4 N. E. 321; *Franklin Wharf Co. v. City of Portland*, 67 Me. 48; *Morse v. City of Worcester*, 139 Mass. 389, 2 N. E. 694.

The ground of the plaintiff's claim is that he has received a special injury from a public nuisance which the defendant has caused. A private action is maintainable for a public nuisance by one who suffers therefrom some particular loss or damage beyond that suffered by him in common with all others affected by the nuisance. *Atwood v. Partree*, 56 Conn. 80, 14 Atl. 85; *Wheeler v. Bedford*, 54 Conn. 244, 7 Atl. 22; 16 Am. & Eng. Enc. Law, 971.

This appeal brings up the six defenses (2 to 7, inclusive) pleaded by the defendant. Each of these admits—by not denying—the use of the stream as charged in the complaint; and each purports to be an answer to the whole complaint, by setting forth a lawful warrant for using the stream as is charged. To each of these defenses a demurrer was interposed, and the demurrer to each was sustained. The second defense depends on the act of the legislature of 1872, mentioned in the statement of the case. It counts on that act, and then sets forth with some particularity the proceedings of the common council of the city of New Britain taken in pursuance of its provisions, and then "avers that, by reason of the proceedings aforesaid, said stream was lawfully taken and appropriated by said city, under the authority aforesaid, and this plaintiff is barred from making any claim for damages for such taking and appropriation." In considering this defense in its application to the complaint, it should be kept in mind that the plaintiff is not an inhabitant of New Britain, and that his farm, through which he alleges the polluted stream flows, is not within the territorial limits of that municipality. The said act authorizes and points out the steps to be taken in order to complete within said city a valuable public improvement, to be paid for by that species of taxation known as the "assessment of damages and benefits." It empowers the common council, "whenever in their opinion the public health or sewerage shall require such action, to take, occupy, and appropriate, in such manner as they shall, from time to time, deem expedient, any stream, or part of a stream, natural or artificial, running in or through said city, and to straighten, deepen, or lower the same, or lower or remove any or all walls, dams, or other obstructions to the free and healthy flow of such stream or part of a stream, or enlarge or cause to be enlarged or lowered, any or all culverts, which at any season of the year cause the accumulation of stagnant water, or interrupt in any manner the free and healthy flow of any part of such stream." This is all of the act which

grants power to the defendant to interfere with Piper's brook; and, if this language does not give the defendant a lawful warrant to do the things charged in the complaint, then the defendant has no such lawful warrant. The other parts of the act are conversant with the procedure which the common council of the city is to follow whenever they "take action under the foregoing power"; that is to say, "they shall appoint a committee to prepare a descriptive survey of the improvement contemplated, with a careful estimate of the cost of completing the same, and to agree with the parties interested as to damages and special benefits on account of such improvement; and the report of such survey and estimate having been accepted and recorded, and such agreement having been ratified, and the sums agreed upon as damages having been paid to the parties entitled thereto or deposited to their credit in the city treasury, said city may go on to the completion of said improvement," etc. Then the act mentions the steps the city is to pursue in respect to persons with whom the common council was unable to agree as to damages and benefits, to the end that the damages accruing to such persons should be ascertained; "and, said damages being paid or deposited as before provided, said city may go on to complete said public improvement, and do all acts necessary or convenient for that purpose, without further liability in the premises." This defense states that the common council did appoint a committee to make such descriptive survey, etc., as is provided in said act; that said committee made a report; and that it failed to agree with the parties interested in the damages and benefits; and that, therefore, an application was made to a judge of the supreme court for the appointment of a committee "to estimate the damages and benefits resulting from said improvement." And the defense details with elaborate fullness the notice given by said judge and the said committee; but it nowhere sets forth the "descriptive survey," nor the "careful estimate" made by the committee appointed by the common council, nor is the report of the committee given, so that it may be known whether or not said committee attempted to agree with the plaintiff. We are therefore compelled to believe that said descriptive survey and careful estimate did not include any reference to the plaintiff or to the plaintiff's property, and that there was no attempt to agree with him as to the damages he might suffer by reason of the fouling of the water in said brook. The notices made a part of the defense show that they were not directed to or served on the plaintiff. These omissions point unerringly to one conclusion: The common council of New Britain, in 1874, understood the said act of 1872 to be—what it in fact was—an authority to them to make a local improvement. That act of the legislature gave the council no authority to do anything or to affect any prop-

erty outside the city limits, or to affect any person not an inhabitant or property owner within those limits. The common council was a local board. It had no power or jurisdiction outside the city unless such was specially given it by the legislature. The legislature had given the council no such power, and so it did not attempt any such jurisdiction. It did not attempt to affect the plaintiff's right in Piper's brook.

If it had been the intent of the legislature, by the act of 1872, to authorize the common council of the city of New Britain to take or to affect any lands outside of the city limits, it is certain there would have been in the act some provision for the ascertainment of damages to be paid to the landowner. The right of the plaintiff to have the water of Piper's brook flow through his land as it has been accustomed to flow (i. e. pure and uncontaminated) "is not an easement or appurtenance; but it is inseparably annexed to the soil." *Wadsworth v. Tillotson*, 15 Conn. 366, 373. To deprive the plaintiff of that part of his soil for the purposes named in that act would be the taking of private property for public use, and the plaintiff would be entitled to have just compensation. A "taking" under the right of eminent domain means the exclusion of the owner from use and possession of the property taken, and the actual assumption of the possession by the party authorized to take. And there would naturally be some proceeding, in its nature judicial, for the finding of the damages thereby occasioned. *Woodruff v. Catlin*, 54 Conn. 277, 297, 6 Atl. 849. Such proceeding is essential to ascertain the just compensation which must be made in order to complete the taking. *Railroad Co. v. Long*, 69 Conn. 424, 37 Atl. 1070; *Cooley, Const. Lim.* (6th Ed.) 695. So far as concerns damages for taking or injuring lands outside the city limits, it can hardly be said that there is anything in the act of 1872 providing for any such process as this. The general assembly had in view a local improvement to be carried out by local authorities, and paid for in large part, if not altogether, by the local assessments on the lands specially benefited. Obligations and liens created by assessments of this kind do not proceed from the right of eminent domain, but from the power of taxation. It is not to be presumed, in the absence of plain provision to that effect, that the act of 1872 was intended to authorize any proceedings conducted by the city of New Britain for its own benefit, which should include a tax laid in its behalf, and payable to its treasurer, upon lands outside of its territorial limits. But there is nothing in the act to indicate that the area over which the right to appropriate land before payment of just compensation extends was wider than that within which benefits might be assessed to raise the funds with which to pay for the lands taken. The only taxing district suggested by the act is the city of New Britain. The only taxing officers are the officers of that city. For these reasons we

think a person resident outside the city, as was the plaintiff, and not a property owner therein, whether he had notice or did not have notice, could not be bound by any action taken by the common council of New Britain under the act of 1872. That act applied only to New Britain. Its language indicates that it was not intended to be operative on persons or property anywhere except within the territory of that municipality. *Edmondson v. City of Moberly*, 98 Mo. 523, 11 S. W. 990.

The third defense states a certain use of Piper's brook which the defendant has made, and then avers that "the use which the city of New Britain has made of said stream, as above set forth, is a natural, reasonable, and proper one, and is not inconsistent with the rights of the plaintiff." It is not averred that the use of said stream so set forth is the same use of which the plaintiff complains. We suppose it is intended to be a different one. If we are right in the supposition, then the demurrer was properly sustained. It is no answer to the plaintiff's complaint to aver that a use of the stream other than the one of which he complains is a natural, reasonable, and proper one, and not inconsistent with the plaintiff's rights. Whether such other use is or is not a natural, reasonable, and proper one is entirely irrelevant. If, on the other hand, the use set forth in this defense is intended to be the very same use complained of by the plaintiff, then the defense is insufficient, because it amounts to nothing else than a general denial.

The fourth, fifth, and sixth defenses, while differing as to the forms of expression, all rest on one ground,—that the defendant has acquired the right to use the said stream in the manner it does by prescription. The fourth is insufficient because it is not a complete answer to the complaint. If the defendant had acquired by prescription the right to a use of the waters of Piper's brook which was no more than substantially the same as the use of that stream of which the plaintiff complained, then it had not acquired the right to a use which barred the plaintiff's recovery in this action. He was still entitled to recover for the damage done him by the difference between the use acquired and the use actually practiced. The fifth defense is insufficient for the same reason. It does not answer the whole complaint. The prescription alleged includes, not the whole use complained of, but only the most part of it. The plaintiff is entitled to recover for the remaining part. The sixth defense presents the question of prescription. We have already indicated our opinion that the use of Piper's brook of which the plaintiff complains is a public nuisance. We suppose the law to be so that a public nuisance cannot be prescribed for. No length of time can legitimate or enable a party to prescribe for a public nuisance. *People v. Cunningham*, 1 Denio, 524; *Mills v. Hall*, 9 Wend. 315; *Veazle v. Dwinel*, 50 Me. 479, 490; *Com. v. Upton*, 6 Gray, 476; *Wood, Nuis. 722*; 19 Am. & Eng. Enc. Law, 30. When an action

is brought by a party who has suffered a special injury in consequence of a public nuisance, a prescriptive right to do the acts complained of cannot be maintained against him. *Bowen v. Wendt*, 103 Cal. 236, 37 Pac. 149; *People v. Gold Run Ditch & Min. Co.*, 66 Cal. 138, 4 Pac. 1152; *Boston Rolling Mills v. City of Cambridge*, 117 Mass. 396; *O'Brien v. City of St. Paul*, 18 Minn. 176 (Gil. 163); *Cooley, Torts*, 614. There is no occasion to discuss this defense further, because the defendant's counsel, in their brief, expressly disclaim that any right can be obtained by prescription to commit such a nuisance.

The seventh defense is precisely like the third, and is defective for the same reason. There is no error. The other judges concurred.

(66 Conn. 576)

Appeal of NORWALK ST. RY. CO.

(Supreme Court of Errors of Connecticut. Nov. 5, 1897.)

APPEAL—EFFECT OF REVERSAL—DISMISSAL OF APPEAL.

On an appeal taken under the provision of the act of 1895 (Pub. Acts 1895, c. 283) authorizing an appeal whenever the municipal authorities shall fail to notify the railway company of their decision respecting any proposed plan presented by such company, and transferring, in such event, to the court "the same powers with reference to said plan and the acceptance and modification thereof that said municipal authorities would have had," judgment of reversal (which simply directs the dismissal of such application) is not a bar to another presentation of a plan to the municipal authorities, and a proper appeal, if occasion shall arise, under the provision of such act authorizing an appeal from any "decision, denial, order, or direction" within the jurisdiction of such authorities.

Motion for rehearing. Denied.

For former report, see 37 Atl. 1080.

John W. Alling, George D. Watrous, J. Belden Hurlbutt, and Winthrop H. Perry, for the motion. Goodwin Stoddard and Edward M. Lockwood, opposed.

PER CURIAM. The motion is denied. The appeal to Judge Hall was taken under the provision of the act of 1895 authorizing an appeal whenever the municipal authorities shall fail to notify the railroad company of their decision as prescribed, and transferring, in such event, to the court "the same powers with reference to said plan and the acceptance or modification thereof that said municipal authorities would have had under the provisions of said act" of 1893. This appeal should have been dismissed, because the court had no jurisdiction to entertain such an application; and for this reason we reversed the judgment. Counsel now claim that the appeal to Judge Hall was also an appeal under the preceding provision of the act of 1895, authorizing an appeal from any "decision, denial, order, or direction," and requiring such appeal to be by petition, stating specifically the portion of such decision,

etc., appealed from, and the reasons of such appeal, and urge their failure to argue this claim upon the original argument as a ground for granting the present motion. The considerations now suggested in support of their claim, as well as those in further support of the appellant's main contention, were carefully weighed before our decision was announced. We held that the appeal to Judge Hall was not taken from any decision, etc., under the first provision of the act of 1895, but was taken solely under the later provision, which we held to be invalid. The judgment of reversal simply directs the dismissal of the application to Judge Hall, for want of jurisdiction. It is not a bar to the new presentation of a plan to the city council, and a proper appeal, if occasion shall arise, under the first provision of the act of 1895.

(183 Pa. St. 174)

ALLAM v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

CARRIERS—DELIVERY OF FREIGHT—CONTRACT—NEGLIGENCE.

1. A carrier may contract that goods destined for a station at which the business does not warrant any building or agent, and at which there is none, shall be left on the platform, without any further responsibility on its part.

2. For a carrier which has contracted to deliver the goods on the platform at a station where it has no building or agent, without further responsibility therefor, to deliver them during a rain, is not negligence.

Appeal from court of common pleas, Philadelphia county.

Action by J. S. Allam against the Pennsylvania Railroad Company. From a judgment of the superior court affirming a judgment of the common pleas for plaintiff, defendant appeals. Reversed.

John Hampton Barnes, and Geo. Tucker Bingham, for appellant. Alfred J. Wilkinson and E. Hunn Hanson, for appellee.

WILLIAMS, J. The judgment appealed from in this case was rendered by the superior court. Four of the learned judges of that court concurred in the judgment. Three of them dissented from it. The questions that came under consideration are of public importance, and that they are by no means free from difficulty is shown by the wide differences of opinion entertained as to them by the members of the superior court. They may be stated thus: First. Is it an invariable rule in this state that a common carrier must give to the consignee of goods notice of their arrival at the point of destination? Second. May not special circumstances, a general custom or usage of business, or a special contract, modify or relieve against this duty? Third. If the second question be answered in the affirmative, is not this case, upon the evidence, one in which such modification should be held

to exist? The evidence shows, substantially, that along the lines of the defendant's railroad there are small stations, known as "prepaid stations," at which no depot building has been erected, and no freight agent located. The business at such stations will not ordinarily justify the expense which such conveniences would involve, but the railroad company will accommodate people near such stations by delivering goods consigned to them on a platform, or on the ground, as the case may be. Among such prepaid stations was one called "Strafford." The only convenience at Strafford for the receipt and delivery of goods was a platform by the side of the road. There was no shelter, and no employé of the company to give notice of the arrival of goods at this station, up to the 7th day of October, 1893. It is alleged, and evidence was given upon the trial to show, that a custom exists among the railroads of the country for consignees of goods at such stations to look out for the arrival of their parcels, and take charge of them when they are set down from the train. It is not difficult to see how such a custom should grow out of the necessities of the situation in which both shippers and the carrier find themselves at such stations. Shippers know—for they are bound to know—that at a prepaid station they cannot expect notice from the carrier, nor attention or shelter for their goods, yet their wants are such that they may prefer to accept the risks rather than be compelled to go to some more remote station, where shelter exists and employés are abundant, to receive their goods. When persons so situated elect to have goods shipped to them at a prepaid station, there is no hardship in holding that they thereby assume to do for themselves what they know the railroad company cannot do for them. If we hold that a carrier is bound to give notice to the consignee of the arrival of goods at such stations, and keep them safely for a reasonable time, until they can be taken away, we simply compel the railroad company to abandon all such stations, and deprive the neighborhood of the accommodation which they afford. As there is no shelter there, the company cannot keep the goods for the owner. As there is no employé at the station, notice cannot be given. The carrier must transport the goods in the only way he can, or refuse to transport them to a prepaid station. If, therefore, the general rule as to notice be as contended for by the plaintiff where the ordinary facilities exist, we must nevertheless admit the existence of some exceptions, growing out of the special circumstances under which the carriage is undertaken, and out of the customs that have grown up for the mutual advantage of both shipper and carrier. But in this case we have an express contract, entered into because of the character of the station, and the refusal of the carrier to assume risks against which he cannot protect himself at the place for the delivery of the goods. In the bill of lading of February 22, 1894, there is the following pro-

vision: "When merchandise is destined to or from any way stations and platforms where station buildings have not been established by the carrier, or where there are no regularly appointed freight agents, it shall be at the risk of the owner until loaded into the cars, and when unloaded therefrom; and, when received from or delivered on private turnouts, it shall be at the owner's risk until cars are attached to, and after they are detached from, the train." The goods were received and transported under the terms of this agreement, by which the consignors undertook to receive the goods when they were put upon the platform at Strafford, and care for them at their own risk. If this was not done, it was not the fault of the carrier. He was to carry only, and all responsibility for protecting the goods, whether from thieves or from the weather, after reaching their destination, was assumed by the consignor, the owner. This contract the superior court held to be void, because against public policy, and cited as authority for such holding, among other cases, *Willock v. Railroad Co.*, 166 Pa. St. 184, 30 Atl. 948. But the cases cited are not exactly in point. In *Willock's Case* the question was whether the carrier could protect himself by a contract against the consequences of his own negligence or fraud. The headnote of the reporter is in these words: "A common carrier cannot stipulate for a release from the consequences of his own negligence or fraud." The case does not hold that he may not by contract so modify his common-law liability as to enable him to serve small communities, where no station house has been built, and no employé located. Such stipulations have been upheld in many cases where no effort was made to shield the carrier from his own negligence, and they have been held not to violate any rule of public policy. *Atwood v. Transportation Co.*, 9 Watts, 87; *Bingham v. Rogers*, 6 Watts & S. 495; *Laing v. Colder*, 8 Pa. St. 479; *Express Co. v. Sands*, 55 Pa. St. 140; *Farnham v. Railroad Co.*, Id. 53; *Clyde v. Hubbard*, 88 Pa. St. 358; *Railroad Co. v. Ralston*, 119 Pa. St. 577, 13 Atl. 324. The special contract relied on in this case does not stipulate for relief from the consequences of the negligence or fraud of the carrier. It recognizes the existence of circumstances that make it practically impossible for the carrier to discharge all the common-law duties of a carrier at Strafford, and that induce him to refuse freight to that station, except upon special terms. It agrees, in view of these circumstances, to accept such service as the carrier can render, viz. the simple transportation of the goods, and to supply what the carrier is not prepared to supply,—the care and protection of the goods when they reach the platform. The contract limits the liability of the company to what it undertakes to do, and relieves it of responsibility for all that lies beyond the mere transportation and setting down of the goods.

It is asserted that the goods were unloaded

during a storm, and were not protected by the carrier from the weather. By the contract, the consignor was to look after the goods on their arrival. It was his business to provide the shelter. He knew the company had none. He had agreed to take the risk of caring for them. When the accommodation train came that morning, at the usual hour for its arrival, the consignee was not at the platform. His foreman was not there, although he was expecting the goods, and had notice from the consignor of their shipment. What should be done? The contract of the carrier had been performed, and he had the right to unload the goods. He could not carry them to some station where he had a safe place for storage, and leave them there, for Strafford was the point of destination; and the carrier can neither deliver goods at a wrong place, or to a wrong person, without liability to the owner. If the goods had filled the car, the car might have been left with the goods in it, but the goods did not fill the car. It contained other goods, to be delivered to other persons, and at other places. The only other way of preserving the goods from the weather would have been to hold the train until the rain was over before unloading the goods, but this was clearly impracticable. The alternative was to unload the goods, and leave the consignee to attend to them, as the shipper had agreed should be done. This the carrier did, and we see no negligence in his so doing. He did all he agreed to do, all he was employed to do, all he had the power to do. The complaint really is that he delivered the goods at the proper point of destination, in exact compliance with his undertaking. If, after they were put off at the station, they were damaged by being left in the rain, the consignee and his agent, who came a half an hour too late to the platform, must take the consequences of the risk assumed when the carriage of the goods was contracted for. We sustain the assignments of error, and reverse the judgment appealed from. A venire facias de novo is awarded, as there is another item in the plaintiff's claim, as to which negligence in the manner of unloading is alleged.

(123 Pa. St. 74)

MORRISON v. SEAMANS et al.
(Supreme Court of Pennsylvania. Oct. 25, 1897.)

BOUNDARIES—LOCATION OF SURVEYS.

1. Where only the exterior lines of a batch of surveys made in the name of the same warrantee are located, the interior lines separating the individual tracts are to be ascertained according to the rules applicable to the "block system" by reference to monuments made or adopted in the exterior lines; but, where there are marks of the original survey made or adopted for each of the tracts, sufficient to fix the position of their lines on the ground, each tract must be located by following the footsteps of the surveyor, as nearly as the marks he has left behind him will permit.

2. Though many of the tracts inclosed by exterior lines are without marks on their own lines

made for them, yet, if one or more of such tracts has original marks on its lines, of an earlier date, which were adopted by the surveyor for the location of the tract, such adopted marks will control in the same manner as if the marks had been made by the surveyor.

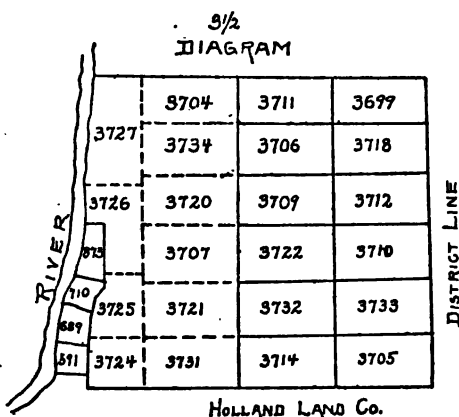
Appeal from court of common pleas, McKean county.

Ejectment by Phoebe T. Morrison against Charles D. Seamans and others. Judgment for defendants, and plaintiff appeals. Reversed.

W. J. Knupp, El. R. Mayo, and D. I. Ball, for appellant. J. W. Bouton, F. D. Gallop, W. M. Lindsey, J. O. Parmlee, and Edward Lindsey, for appellees.

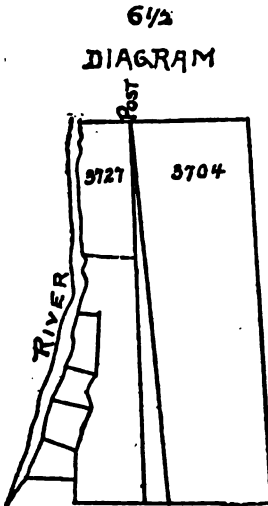
WILLIAMS, J. The plaintiff's right to recover in this case depends on the location of the boundary line between warrants Nos. 3725 and 3721, in the name of Robert Morris, warrantee. These warrants are part of a considerable number of surveys made in the name of the same warrantee, returned as made on consecutive days, and as located in a compact body. The deputy surveyor adopted a well-marked district as the eastern boundary of the Morris lands. The Allegheny river and four small river surveys were adopted as the western boundary; and on the south the lands of the Holland Land Company were called for as an adjoiner all the way from the district line to the river. The north line of these surveys is the only continuous east and west line that is shown by the evidence to have been run upon the ground by the deputy surveyor in the location of the Robert Morris tracts. The space inclosed by the exterior lines just spoken of was subdivided into 22 separate tracts, arranged in tiers. The first, second, and third of these tiers going west from the district line contain six warrants each. The fourth tier reached to the river and to the old surveys, and contained four warrants, of which 3725 was the second in order going north from the line of the Holland Land Company. An original line was run along the west boundary of the first and second tiers west from the district line, and corners marked for the several tracts upon both lines. The result of this work is that each of the twelve tracts in these two tiers has four original corners made for it on the ground, while the warrants in the third tier have an original east line and northeast and southeast corners, the location of which is apparently free from difficulty. The warrants in the fourth tier rest upon the river and the four old river surveys as their western boundary. Their location is fixed, therefore, by reference to original marks and corners in their west lines as solidly as the place of warrants in the third tier is fixed by their east lines and corners. The situation of the 22 tracts, so far as the work of the surveyor is concerned, is shown by the accompanying diagram, in which the dark lines indicate the lines run

or adopted by the surveyor, the dotted lines those that are admitted to be chamber work.



It will be noticed that 3721 has an original east line with northeast and southeast corners, and 3725 has an original west line with northwest and southwest corners. The open line, about which this controversy arises, is the line which is at once the east line of 3725 and the west line of 3721. The plaintiff's theory for locating this line is to treat the whole body of the miner's surveys as a block, and run a line from the quaking aspen, the southwest corner of 3731 and the southeast corner of 3724, in the north line of the Holland Land Company, northerly between six and seven miles to the post, the northwest corner of 3704 and the northeast corner of 3727. This would locate the division line about 60 rods east of where the courses and distances of the survey of this individual warrant would place it, and throw a large excess of land over the official quantity into the plaintiff's warrant 3725. The defendants assert that the original work on the ground is sufficient to locate each tract in the entire body of Morris surveys, and that the conditions do not exist which authorize the application of the rules relating to block surveys. Nevertheless, the defendants locate this division line by the same methods adopted by the plaintiff, with the difference that they would start from the place of the post at the north, and run southerly to a point some 60 rods further west at the line of the Holland Land Company than the plaintiff's location of the quaking aspen; thus fixing the course and position of the line, not by the surveys of these two warrants, but by marks made or adopted in the lines of exterior surveys. The learned judge of the court below adopted the defendants' position that these surveys did not constitute a block, and that the interior lines were not to be located by the rules applicable to a block. At the same time he adopted also the defendants' method of running the division line by starting at the post on the north and running southerly across the Robert Morris lands to an assumed common corner for Nos. 3724 and 3731 in the north

line of the Holland Land Company. This would put the large excess of land within the lines of 3725 and 3721, or most of it, into the defendants' warrant 3721. The small diagram below will show the relative position of the two lines thus contended for, having a common starting point on the north and diverging from each other until at the Holland Land Company's north line they are over 60 rods from each other. Neither line rests on any assured original work at its south end, made for or adopted as the common corner of Nos. 3724 and 3731. The only agreed point on either line is the common terminus at the north.



It is apparent from what has now been said that the controlling question in this case is whether either of these lines, and, if either, then which of them, is entitled to consideration. In popular use, the phrase "a block of surveys" means any considerable body of contiguous tracts surveyed in the same warrantee's name, without regard to the manner in which they were originally located. In legal use, the same phrase is employed to describe a body of contiguous tracts located by exterior lines, but not separated from each other by interior lines. The Robert Morris tracts would have constituted "a block" in the legal sense if only their external line had been on the ground. The interior or division lines separating the body of land in the block into separate tracts would, in that case, have been ascertained by reference to monuments originally made or adopted in the exterior or inclosing lines, or by laying off the tracts by courses and distances in accordance with the returns of survey. But the interior lines of the Robert Morris warrant are not left to be ascertained in this manner. Two tiers of tracts directly west of the district line, containing six tracts each, had all their corners marked upon the ground by the surveyor, which fixed absolutely the position of all their lines. The lines of these tracts must now be run in

accordance with the marks made in 1793, as they afford the best evidence of how and where the surveyor placed them. In the absence of monuments of the original surveys, calls for adjoiners, courses, and distances, and the legal presumption that the surveys were made as they were returned into the land office, are to be resorted to in order to locate the line of any given survey. *Ferguson v. Bloom*, 144 Pa. St. 549, 23 Atl. 49. In the case of interior members of a block, the rule is that marks made by the surveyor for any tract in the block are evidence for the purpose of fixing the lines of any other tract in the same block. *Fisher v. Kauffman*, 170 Pa. St. 444, 33 Atl. 137. But where lines are run and marks made by the surveyor for a particular tract sufficient to fix its place on the ground, the general rule is that its place must be found by tracing the footsteps of the surveyor. The rules applicable to the location of individual warrants are to be followed in such a case, and those applicable to the interior tracts of a block have no application. If many of the tracts inclosed by exterior lines are without marks upon their own lines made for them, still, if one or more of such tracts has original marks on its lines of an earlier date, which were adopted by the surveyor for the location of the tract in question, such adopted work will control the location of the tract in the same manner as if the marks had been made by the surveyor, instead of being adopted by him. *Bloom v. Ferguson*, 128 Pa. St. 362, 18 Atl. 488.

We come now to inquire how the division line shall be run between 3725 and 3721. The Robert Morris surveys do not constitute a block, in the legal sense of that word. There are, on the other hand, definite and ascertainable monuments of the original survey made or adopted for each of the 22 tracts, including 3725 and 3721. Such being the case, we should retrace the footsteps of the surveyor as nearly as the marks he has left behind him will permit. Turning, then, to the returns of survey, we find that the location of the 22 tracts upon the ground was the work of five different days by the deputy surveyor. The four warrants in the south-east corner of the body, viz. Nos. 3705, 3733, 3732, and 3714, were returned as having been surveyed on the 30th July, 1793. On the next day—the 31st July—the three warrants north of 3733 and the three warrants north of 3732 were surveyed. The two tiers of warrants directly west of the district line were thus put upon the ground with four original corners made or adopted for each of them. The survey was suspended at this point until the 6th day of August. The surveyor then seems to have resumed work at the ironwood, the northwest corner of No. 3711, and to have run thence to the Allegheny river, and down the river far enough to inclose No. 3727. He then plotted in the interior lines, and so located 3704, 3734, 3720 of the third tier, and 3727 of the fourth tier.

several surveys made on the 6th and 7th days of August are ascertained by following the surveyor's work southerly from the place of the post, the northwest corner of 3704, to the post and stones, the southwest corner of 3721, the lines of the surveys made on the 8th of August, so far as they call for the lines of 3721, must follow them, and the southwest corner of 3721 is a common corner for 3725, 3724, and 3731. The division line between 3724 and 3731 must be run from this common corner to the place of the aspen. Any deflection in the division line which this may cause must be attributed to the fact that 3731 has three original corners, and that the original work must control both calls and courses and distances that are not in harmony with it. The deflection, if any, being due to the work on the lines of this survey (No. 3731), will not extend to or affect the lines of any warrant north of it. For this there are, as have been pointed out, two good reasons: First, the warrants north of it were first located, and have seniority; next, if this was not so, the disturbing monument is peculiar to this warrant and No. 3714 on the east side of it, and its influence cannot extend beyond the lines of the tracts to which it belongs, since all the other tracts in the entire body of the Morris surveys must be located by the original work made or adopted for them respectively. The line from the aspen north to the common corner of 3731, 3725, and 3724 is not before us. What is said of it here is by way of showing that it has no relation to the line now in controversy, but must be adjusted on principles peculiar to it whenever it may come in controversy. As it does not appear where the disputed line would be if located in accordance with this opinion, it becomes necessary to reverse the judgment in this case, and direct a *venire facias de novo* to issue, that its position may be fixed in the manner indicated herein. The judgment is accordingly reversed, and a *venire facias de novo* awarded.

(182 Pa. St. 574)

POUNDSTONE v. JONES.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

HUSBAND AND WIFE—FRAUDULENT CONVEYANCES—EVIDENCE—DECLARATIONS—INSTRUCTIONS.

1. Where J., an insolvent, deeded a house to S., his wife's brother, taking his note in payment, but with an understanding that S. did not want the house, and was neither to pay for nor use it, but to hold the title for benefit of J., and thereafter J. surrendered the note, and had the house deed to his wife by S., the declarations of J. as to the extent of his interest in the property, and his purpose in making the deed to S., or directing the deed to be made to his wife, would be admissible against his wife, in a contest for the property between her and his creditors, the same as though there had been no deed to S.

2. The insolvency of J. when he sold a house to S.; the fact that the sale was without consideration; the fact that the house was not put in J.'s deed of assignment for the benefit of his creditors, though S. was merely holding title for

his benefit; that after the proceedings in insolvency J. surrendered to S. his purchase-money note, and directed the conveyance of the house to his wife; that J. negotiated with B. the purchase of a farm, which B. conveyed to J.'s wife, and that J. used the house for the first payment on the purchase; that he made the second payment; and that his wife was without any separate estate, unless J. gave it to her just before her marriage,—are all admissible in a contest for the farm between J.'s creditors and his wife, she claiming that the house used in the trade had been deeded her in payment of a loan she had made her husband.

3. Refusal of an instruction that the evidence in the case is not "of that full, clear, and rigid character necessary to sustain the defendant's claim, and that the verdict should be for the plaintiff," with the statement, "The question is a question of fact, to be determined by you," is error, as submitting to the jury a question of law, or, if intended as a denial of the point, and a submission of the question of fact to the jury, then as calculated to mislead the jury as to their duties.

Appeal from court of common pleas, Fayette county.

Action by Mary A. Poundstone against Eliza Jones. Judgment for defendant. Plaintiff appeals. Reversed.

The first, second, seventh, and eighth assignments of error are as follows: "First. The court erred in admitting the deed of George Swearer and wife to Eliza Jones, as offered by defendant, which offer was as follows, viz.: 'Defendant offers in evidence record of deed from George Swearer and wife to Eliza Jones, dated February 27, 1879, acknowledged same day, and recorded in Deed Book No. 47, p. 72, for the purpose of showing title in Eliza J. Jones to a lot of land that was conveyed to Ephraim H. Barr as part of the consideration in this article of agreement, and showing thereby that that part of the consideration was paid by her separate property; the deed having been recorded February 22, 1882. Mr. Campbell: We object to that, unless it is followed by testimony that that property was purchased by her own money, or obtained from sources outside of the husband. The Court: Well, it is admitted as one link in the evidence.' Second. The court erred in admitting the evidence of Robert McKinley, one of defendant's witnesses, as to any declarations of George W. Jones in contradiction of the written article of agreement then in evidence (Exhibit No. 1), which evidence was admitted under the following ruling of the court: 'Mr. Campbell: I ask the counsel now to state the purpose of the evidence of this witness [Robert McKinley]. Mr. Hertzog: An article of agreement having been offered in evidence, in which it appears that the parties thereto are Eliza J. Jones and Ephraim H. Barr, but the agreement being signed by George W. Jones also, I offer to show by this witness that at the time it was signed George W. Jones refused to sign the paper, stating that he was no party to the agreement, but that the justice requested that he sign it, in order to make it valid, as it was his opinion that Mrs. Jones,

being a married woman, couldn't sign the agreement alone. This for the purpose of showing that George W. Jones was not a party to the agreement, in any respect. Mr. Campbell: I object that the offer, your honor, is incompetent and irrelevant. In the first place, they couldn't prove any declarations of George W. Jones in contradiction of that agreement. Neither can Eliza Jones, the wife of George W. Jones, dispute that title. It puts her in opposition to his title. The Court: I don't think this contradicts it in any way. It is competent. The objection is overruled, and bill sealed.' "Seventh. The court erred in refusing to permit plaintiff to show by her witness Barr who made the bargain with him for the premises in dispute prior to the signing of any article for the same, which offer was as follows, viz.: 'Mr. Campbell: Ques. Mr. Barr, state to the court and jury who made the bargaining,—who did the bargaining with you,—prior to the signing of the contract at Squire McKinley's office, for this house and lot in dispute. Mr. Hertzog: I don't see how he could prove a fact of that kind without proving the declarations. The Court: Not the declarations, but who did the bargaining. Mr. Hertzog: Well, we object to it, for the reason that it amounts to declarations. The Court: Yes; I think it comes to that. The objection is sustained, and bill sealed.' Eighth. The court erred in refusing to permit plaintiff to show that Eliza J. Jones' health was not such as to preclude her attendance at the trial of this case, but that she was in her usual health, and could have attended said trial, had she so wished, which offer was as follows, viz.: 'Mr. Campbell: I now offer to prove that the defendant, instead of having been sick for two weeks, as testified here, has been on the streets in Bridgeport, at her home, as usual, and that she was seen out and going about on the streets as usual during this last week just past,—I think, as late as Monday,—to show that she is able to attend court. Mr. Hertzog: I object to that testimony. The Court: This would only be applicable to the admission of the notes of her testimony, and, that matter having been passed upon, it is irrelevant, and the testimony is irrelevant. Objection sustained, and bill sealed.' "

Edward Campbell, for appellant. D. M. Hertzog, for appellee.

WILLIAMS, J. This action involves an inquiry into the title to real estate in Bridgeport, Fayette county. The plaintiff in the court below, who is also the appellant in this court, claims to own the property by virtue of a purchase at sheriff's sale made upon a judgment against George W. Jones. The defendant, who was the wife of Jones, and living with him on the property, at the time the judgment against him was entered, denies that he had at any time any title whatever

to the land, and asserts that she was the owner of it in her own right, holding it as her separate property. At the trial the plaintiff showed possession and cultivation by Jones, the recovery of the judgment against him, and the sheriff's sale made thereunder, together with the sheriff's deed under which she claimed. This made a case upon which she was entitled, prima facie, to a judgment against Jones and all persons in possession under him. It then became the duty of the defendant to overcome the prima facies of this showing by establishing a right to the possession not derived from her husband, nor bound by the judgment against him. This she sought to do by making proof of purchase by herself of the property in controversy from Ephraim H. Barr for \$5,500, and the payment of the purchase money by her out of her separate estate. The plaintiff replied that Mrs. Jones never had any separate estate; that the purchase was negotiated by Jones, and the payments made by him, while he lived; and that the title was put in Mrs. Jones to keep the property out of the reach of his creditors. The controversy thus settled down over the bona fides of the purchase by the defendant. Was she the real purchaser, buying with her own separate estate, or was her husband the real purchaser, and the use of her name a device to keep the property away from her husband's creditors? The evidence showed clearly that the wife was without any separate estate at the time of her engagement to Jones. She testified, however, that a few months before the marriage he gave her \$2,350 in paper money as a present, and subsequently supplied her with \$100 more for the purchase of her wedding outfit. The larger sum she says she counted and put in a trunk in her room, where it remained till after the wedding. She then loaned it to her husband, without note or other evidence of the debt, and for 11 years afterwards, and until the purchase of the property now in controversy, it does not seem to have been mentioned by either of them. The marriage was in 1868. In 1876 Jones became insolvent. He owned at that time a house and lot, in which, as the evidence indicates, he was living. He made a sale of this house and lot to a brother of his wife for \$2,000, taking the note of the purchaser, Thomas J. Swearer, for the purchase money. The understanding was that Swearer did not want the house, and was neither to pay for nor use it, but to hold the title for the benefit of Jones. Soon after this deed to his brother-in-law, Jones made a general assignment for the benefit of his creditors, in which this house did not appear. Three years later Jones surrendered the note to Swearer, and had him make a deed for the property to Eliza Jones, his wife. He was evidently in no position to hold the title himself, although he had been the actual owner of it all the time. This house and lot were turned over to Barr for \$2,000, in payment of hand money due on the property sold by him

to Mrs. Jones. Her contention is that the conveyance to her by Swearer in 1879 was a payment of \$2,000 by her husband to her upon the alleged loan made by her to him in 1868, and that the transfer of this house to Barr as part payment for the property bought of him was a payment by her out of her separate estate so acquired from Jones before the marriage. It is true that if Mrs. Jones was in good faith the purchaser of the Barr property, and made the advance payment of \$2,000 out of her separate estate, she acquired such a title as would enable her to defend her possession in this action of ejectment. On the other hand, if this was a purchase by Jones, who used his wife's name for the purpose of putting the property beyond the reach of his creditors, she has no title. The sale or pretended sale by Jones and wife to Swearer was clearly a fraud. The ostensible purchaser never paid a farthing of the purchase money, nor was he desired or expected to do so. The house continued the property of Jones as fully after the fraudulent conveyance to Swearer as it had been before. Its conveyance to Mrs. Jones was at the request of her husband, and was in no sense in pursuance of a purchase by her from her brother. It was in effect a gift by Jones to his wife, made at the date of the deed to her, and at a time when he was insolvent, unless he was honestly indebted to her, as she alleges, for borrowed money. In that event it may be regarded as a sale by him to her in consideration of a debt that does not seem to have been recognized as such by him at the time of his assignment, or to have been asserted by her as a claim upon the assigned estate, so far as we can learn from the evidence. The legal effect of the transaction is precisely the same as if Jones had made the deed for the house and lot directly to his wife. Her title is neither better nor worse for the intervention of her brother between her husband and herself, because he had no interest at any time in the property. That remained the property of her husband until the deed was made at his direction to her by his fraudulent grantee. His declarations, made at any time during his ownership, as to the extent of his interest therein, and his purpose in making the deed to Swearer, or directing the deed to be made by him to his wife, were certainly competent on the trial of this action. The position of the plaintiff was that the whole transaction relied on by the defendant was fraudulent, having been devised and executed for the purpose of hindering and defeating creditors; that Mrs. Jones had been used by her husband as an instrument for transferring the title to one who might be a purchaser for value, and without notice; that the contract with Barr had been negotiated by Jones as a purchaser; and that the deed from Mrs. Jones to him was made in pursuance of this contract, and as the payment of hand money called for by it. There was evidence before the jury from which the

truth of this reply to the title of Mrs. Jones might well have been found. The evident insolvency of Jones when the sale to Swearer was made; the fact that the sale was without consideration; the fact that the house and lot, though belonging to Jones, were not put in the deed of assignment for the benefit of his creditors; that after the proceeding in insolvency Jones surrendered the unpaid note to his brother-in-law, and directed the conveyance of the house and lot to his wife; that he negotiated the bargain with Barr, and used the house and lot for the first payment therein; that he made the second payment of \$1,000; and that Mrs. Jones was without any separate estate whatever, unless she acquired it from Jones just before her marriage,—were all of them relevant and significant circumstances bearing upon the bona fides of her title. The jury was entitled to them all.

The ninth assignment of error also requires some consideration. The learned judge was asked to instruct the jury that the evidence in this case on the part of the defendant was not "of that full, clear, and rigid character necessary to sustain the defendant's claim, and the verdict should be for the plaintiff." The answer made to this request was: "This is refused. The question is a question of fact to be determined by you." It was the duty of the learned judge to deny or affirm the legal proposition embodied in the point. The jury had a right to a definite instruction upon the sufficiency of the evidence to justify its submission to them. The answer under consideration refused the instruction asked for because "the question [raised by the point] is a question of fact to be determined by you [the jury]." This could hardly have been intended. The question whether the evidence was so clear, full, and satisfactory as to justify its submission to the jury was a question of law for the decision of the court. If it did not meet the test, the jury had nothing whatever to do with it. It was not before them. If it did, then the court would submit it to them for consideration, with suitable instructions; and they would pass upon it, as upon the other evidence in the case, determining both its credibility and its weight. If the answer was intended as a denial of the point, and a submission of the question of fact to the jury, it was unfortunate in the language employed, and calculated to mislead the jury as to their own duties in the case. It was, in effect, an intimation that the evidence in support of Mrs. Jones' title to the land was as "full, clear, and rigid" as was necessary, not merely to submit to the jury, but "to sustain the defendant's claim," and that while this was so, in the judgment of the court, the question was one wholly for the decision of the jury. This left to the jury the standard of proof required by law, and the conformity of the evidence in this case to that standard. This was error. Whether the evidence in support of Mrs. Jones' title,

which was her own story uncorroborated in any important particular, is so clear, full, and satisfactory as to be entitled to submission to the jury, it will be the duty of the court to declare. If submitted, it should be with careful instructions, calling attention to the circumstances that bear upon her credibility, and tend to impeach the good faith of her title.

The first, second, and eighth assignments are not sustained. The seventh is sustained. The ninth has been sufficiently commented upon. The judgment is now reversed, and a *venire facias de novo* awarded.

(183 Pa. St. 390)

COPE et al. v. HASTINGS et al.

(Supreme Court of Pennsylvania. Nov. 9, 1897.)

CAPITOL COMMISSION—SELECTION OF ARCHITECT—INJUNCTION.

1. A bill reciting that commissioners to erect a capitol solicited submission of plans with the assurance that a board of experts would select one whose author would be chosen architect of the building, and two others whose authors would receive medals, and praying that the commissioners be compelled to award the prizes to three of the eight plans selected by the experts, fails to show that complainants have any interest in the subject-matter; it not being alleged that their plan was one of the eight selected.

2. Selection of an architect to make a design independent of that submitted by him in competition is not contemplated by the programme of the state capitol commissioners, though entitled "Programme of a Competition for the Selection of an Architect for a New Capitol Building," and stating that "the object of * * * this competition is to select and appoint an architect to design and supervise" the building, and that "the prize of this competition is the award of a commission to design and supervise the erection" of the building; there being in it an invitation to all architects "to submit drawings in competition," with statement that "all drawings with accompanying description * * * will have full consideration"; that the advice of the board of experts is to be "on the relative merits of the designs submitted"; that the experts are to select "those eight designs which in their judgment are best"; that the "selection of designs will be governed by the merit of each design as a whole"; that, "the designs so selected" being reported to the commissioners, they shall select "one of the said designs as being in their opinion most satisfactory"; that "if by reason of youth or inexperience, or for any other reason, the architect chosen as above provided shall, in the judgment of the commissioners, be an unsuitable person to be placed in charge of this work, he shall, at the request of the commissioners, associate with himself in the performance of his duties an architect who shall be acceptable to the commissioners"; and that "the architect so appointed shall revise his competitive drawings to meet the future requirements of the commissioners, and, upon the basis of these revised preliminary drawings, shall prepare fully detailed working drawings and specifications of the building, and shall during the construction supervise the work."

3. Architects are not entitled to consideration in the selection of a plan for a state capitol where, notwithstanding a statement in the programme for competition of the amount appropriated for the building, and that the provision limiting the cost is "mandatory, and will be strictly and fully observed in judging the designs," they submit plans for a building, the cost of

which would exceed the appropriation, unless the materials used and the character of the workmanship were to be unworthy of the capitol.

4. Commissioners appointed by the legislature to erect a state capitol that shall, "in their judgment, be adapted to the * * * use of the general assembly," cannot bind themselves so as to delegate their discretion or limit their final judgment, in the selection of an architect, by provision that they will select one out of eight which experts may select on consideration of plans submitted.

5. A suit to compel commissioners, appointed by the legislature to erect a state capitol, to select in a certain way an architect therefor, and to award prizes to others, being virtually against the state, cannot be maintained; it not being charged that they are acting against the law, but against private rights growing out of their own previous action.

Appeal from court of common pleas, Dauphin county.

Suit by Walter Cope and others against Daniel H. Hastings and others for mandatory injunction. Bill dismissed, and complainants appeal. Affirmed.

Gowen, Hood & Ingersoll, C. L. Bailey, Jr., and John G. Johnson, for appellants. Brown & Hensel, Lyman D. Gilbert, John H. Weiss, and Robt. Snodgrass, for appellees.

MITCHELL, J. By the act of April 4, 1897 (P. L. 19), the respondents were appointed commissioners to erect a new state capitol at Harrisburg. The location, upon or near the site of the old capitol, the Colonial style of architecture, and the cost, not to exceed \$550,000, were fixed by the act, and were mandatory upon the commissioners and every one dealing with them. So, to a lesser extent, was the fireproof character of the building; but everything else was left to the discretion of the commissioners, under the general direction that the building should, "in their judgment, be adapted to the present and future use of the general assembly, its officers, committees, and employés." The commissioners were further directed, "with the least possible delay, to advise with and employ an architect and adopt plans," etc. Under this act the commissioners engaged an architect to assist them as "professional adviser," and issued what has been known as the "Programme," under which this suit arises. Its provisions will be examined more in detail hereafter. For the present it is enough to say that three disinterested architects were selected as a board of experts, to whom all plans were submitted anonymously, with the assurance to those competing that all the plans submitted would have full consideration, that the board would recommend eight designs, out of which the commissioners agreed to select one whose author should be appointed architect "to design and supervise the erection" of the building, and two others whose authors should receive first and second medals, respectively. The programme further contained elaborate provisions for the competition, the selection, and technical details of the requirements of the building, etc., not necessary for us to dwell upon. Thirty designs

were submitted, out of which the board of experts selected eight, which they reported to the commissioners with a recommendation as to their relative excellence. The board also reported that, "In the matter of cost, all the designs submitted * * * would exceed the appropriation," unless the materials used and the character of the workmanship were to be unworthy of the capitol of the commonwealth. The board further reported that two of the designs submitted had been excluded from the competition for violation of the directions of the programme,—one because trees were shown in one of the drawings, and the other because all the elevations in the drawing were not rendered in monotone. The commissioners, upon the receipt of this report, and also of complaint as to the exclusion of the two designs as above noted, disapproved the action of the board of experts, and, by resolution reciting the facts, canceled and set aside the competition under the programme, ordered all the designs to be returned to the authors, and invited the submission to the commissioners of new plans by all the competing architects. On this action of the commissioners the complainants filed the present bill, averring that they had entered the competition by preparing and submitting plans in accordance with the programme, and "that the action of the commissioners in thus disregarding the obligations of said programme, and in annulling the provisions of the same, is a violation of the obligations assumed thereunder by the commissioners to your orators, and will result in depriving your orators of the opportunity of securing one of the prizes therein provided for." This is the cause of action, and the averment of damage, in the complainants' own language; and it will be seen at once that it is radically defective, in setting out, at most, nothing further than a mere contingent right, without the averment of the happening of the contingency on which the right will arise. It asks the court to compel the commissioners to award the prizes to three of the eight preferred designs, but does not say that complainants' designs were among the eight. If the relief asked were granted, there is nothing to show that complainants would be in any way benefited by it. Courts of equity are not set in motion upon speculative contingencies. In strict practice, therefore, the bill should be dismissed, on this ground alone. But, as there are questions of public interest involved, we prefer to consider the case further, and, if the bill is otherwise sustainable, to allow an amendment on this point, especially in view of the pendency of another bill by a different complainant, in which this defect does not occur. The bill and complainants' case are based on the view that the programme contemplates only the selection of an architect, and not a plan. It is admitted that the selection of a plan must rest in the discretion of the commissioners, but it is argued that the choice of an architect was, by the action of the commissioners in issuing the programme,

made a preliminary step, as to which they bound themselves to abide by the report of the experts, and that such action was not a delegation of discretion as to a plan, but a mere means of informing themselves as to a class of architects from whom the selection could best be made.

This brings us to the examination of the programme, and it must be conceded that some of the expressions look towards the complainants' view. Thus, it is entitled "Programme of a Competition for the Selection of an Architect for a New Capitol Building." Section 5 of part 1 states that "the object of the commissioners in instituting this competition is to select and appoint an architect to design and supervise" the building. Section 7 provides that "the prize of this competition is the award of a commission to design and supervise the erection" of the building; and some other expressions tend the same way, though less strongly. On the other hand, by section 1 of part 1, all American architects are invited "to submit drawings in competition"; by section 4, "all drawings with accompanying description * * * will have full consideration"; by section 10, the advice of the board of experts was to be "upon the relative merits of the designs submitted"; by various sections of part 2, the board of experts are to select "those eight designs which in their judgment are best"; the "selection of the designs will be governed by the merit of each design as a whole"; it is "the designs so selected" which are to be reported to the commissioners, who are then to select "one of the said designs as being in their opinion the most satisfactory"; and other sections bearing in the same direction. The view of the appellants would require us to hold that these reiterated provisions as to the drawings and plans had no reference to the merits of the plans themselves, as means of obtaining the best building, but only intended them as evidence from which to judge of the ability of the authors as architects, and left the subject of plans for the actual building entirely open for future and separate consideration. That the elaborate scheme, so advertised as to bring in 30 competitors from all parts of the United States, each preparing 24 large and laborious drawings, should be intended only as a preliminary skirmish for the appointment of an architect, to be followed by another and separate contest for a plan, the thing with which the real interest of the state is concerned, is not only unusual and startling, but in the highest degree unbusinesslike. Under it the author of the best plan might be a youth, just through his professional studies, of great artistic ability, but without the practical experience of ever having built a single house. Indeed, the programme itself foresees and provides for this very contingency. By section 24 of part 2: "If by reason of youth or inexperience, or for any other reason, the architect chosen as

above provided shall, in the judgment of the commissioners, be an unsuitable person to be placed in charge of this work, he shall, at the request of the commissioners, associate with himself in the performance of his duties an architect who shall be acceptable to the commissioners, and such associated architect shall be paid a portion of the fees," etc. A construction which would thus seem to provide a method for the selection of an architect only, and then at the same time provide in express terms for the contingency that the method might lead to the selection of an unsuitable person, so obviously stultifies the whole programme that it should not be adopted unless the language used admits of no more sensible construction. There is no compulsion to adopt such a view. On the contrary, it is opposed not only by the clauses already cited, but also by the whole scope and object of the programme. What the state wants and the act of assembly commanded was a building. That was the sole object in view. The architect and the plans are only means to that end, and the selection of the architect is not the first step in importance, nor necessarily in order of time. This is already shown by the provision for an associated architect. But the adoption of a plan as well as the selection of an architect is demonstrated in the next section (25): "The architect so appointed shall then revise his competitive drawings to meet the further requirements of the commissioners, and, upon the basis of these revised preliminary drawings, shall prepare fully detailed working drawings and specifications of the legislative building, and shall during its construction supervise the work," etc. What possible purpose can be attributed to the command to prepare "fully detailed working drawings and specifications" according to his plan, and to proceed with the construction, if his plan has not been adopted? Much stress was laid, in the arguments by appellants, upon the expressions in the programme, already quoted, that the object of the competition was to select an architect "to design and supervise," etc.; that the prize was a commission "to design and supervise," etc.; and other like uses of the word "design." But this section shows that the designing meant was that which was done for the competition, and not afterwards. All difficulty is avoided by this construction. The prize is truly stated as a "commission to design and supervise" the construction of the building, for that is the appointment which carries with it the very considerable sum of 5 per cent. upon the cost of the building,—much more, probably, than would be paid for the design alone. The best design having been selected, its author was to be the architect, not to make a new design, which might not be equal to his first, and not to supervise the building on another's plan, but on his own; and if, notwithstanding the merits of his plan, he was likely to fall short in practical ability, he was to have an

associate. This view does away with the self-condemning features of the programme and makes it sensible and consistent throughout. The plan of the successful architect was to be revised, and this was the real object of all the provisions sought to be construed as looking to a separate selection of architect and plan. The best plan was to be selected and adopted, and treated as evidence of the capacity of the architect for doing the work, but the adoption was not to be absolute in either aspect. The architect might be required to take an associate of more experience, and his plan was to be open to revision upon suggestions by the commissioners. The incorporation of ideas from other plans was provided for in section 35, with the consent of the authors, and upon compensation. But, with an associate or without one, the author of the plan selected as best was to be the architect of the building; and, with revision or without it, his plan was the one to be put into working drawings and constructed. Considered as a whole, and with regard to its purpose and the circumstances of its issue, the programme does not admit of any other rational construction.

We come now to the action of the board of experts and of the commissioners. As already said, the experts reported that all the plans would exceed the limit of the appropriation, and would require modification or the use of inferior materials and workmanship. They also reported that they had felt constrained to exclude two designs from the competition, "for serious violation of clauses well defined in the programme," to wit, No. 15, because of "trees being shown on the elevation at one sixty-fourth scale," and No. 21, because of "all the elevations and sections not being rendered in monotone, at least three colors being used." This action by a board of professional gentlemen of such high character and intelligence can only be accounted for by their erroneous view of the scope of the programme as limiting their duties to the selection of an architect. The two plans excluded, it is true, violated the plain conditions of the competition, and the authors have no ground of complaint, for they were bound to know the risk of departures from the programme. But the violation was of requirements that affected only the drawings, and did not touch the merits of the designs, but only the work of the experts in estimating them relatively to the others. When, therefore, the experts enforced the conditions so relentlessly against two minor offenders, it was not to be expected that they would overlook violations that went to the very substance of the plans themselves. Yet each of the eight recommended exceeded in cost the amount of the appropriation, and this was the most important and mandatory requirement, not only of the programme, but of the statute itself. It is no answer to say that the designs could be modified to bring them within the necessary limit. Distinct notice was given in section 1 of the programme of the amount of

the appropriation available, and, "in order to permit uniformity in estimating the probable actual cost of the building," the preliminary expenses of the competition, to be deducted from the gross appropriation, were assumed to be \$10,000. And in the supplement to the programme it was again explicitly reiterated that "the provisions limiting the cost and specifying the areas required are mandatory, and will be strictly and fully observed in judging the designs." The nature and extent of modification necessary to produce the required reduction of cost are peculiarly matters of technical knowledge, on which, however, the experts gave the commissioners no assistance. And if modifications were permissible at all, prior to the selection of a design, it would seem that mere corrections of the drawings should more readily be allowed than modification of the substance of the plans. The commissioners therefore had a right to be dissatisfied with the action of the board of experts; and in setting aside all the competitive designs, and reopening the whole competition, they were not only within their powers, but were doing merely what the board of experts, as a matter of strict right, should have advised.

It is much to be regretted that a scheme so carefully prepared and so well intended should result in failure. But the responsibility does not rest upon the commissioners. Primarily it is the fault of the competing architects, who disregarded the most important and mandatory requirement of the whole scheme, which even the commissioners themselves were not at liberty to depart from; and secondarily, in a lesser degree, of the board of experts, who neither enforced the conditions strictly against all competitors, nor gave the commissioners the necessary information to enable them to judge how far the departures from the programme could safely be excused and remedied. These views necessarily put an end to all claims for relief under this bill, but, as some other points of importance have been argued, we proceed to notice them, although briefly.

The commissioners are invested by the statute with a discretion on the subject-matter, which cannot be controlled or reviewed by the courts or parted with by the commissioners themselves. The law is not disputed that delegated authority, requiring the exercise of the personal discretion and judgment of the agent, cannot be delegated by him. We think it quite clear that if the appellants' construction of the programme should be adopted, and the commissioners be held to have bound themselves to limit their choice of an architect to one of the authors of the eight plans recommended by the board of experts, it would be an illegal delegation of their discretion. It is urged that, so long as the commissioners retained the ultimate right and power of selection, they might take any steps they thought proper to secure a class of competent persons from whom to select. The argument is entirely sound so long as it is applied

to the voluntary action of the commissioners. If they had selected one of the class, no other outside of the class could object that their action was illegal by reason of delegation of authority to select the class. They might voluntarily or in the exercise of their discretion limit their choice to one of eight, chosen by others as most competent, but they could not bind themselves to do so. The discretion which was free at first must remain free to the last, or up to the time of final judgment and action.

A further objection to the bill is that it is virtually against the state. The defendants have no personal interests in the matter. They are clothed with authority as agents of the state, and their acts which are made the basis of the bill are done by virtue of their office only. Three of them, a majority, are named in the act by their office only. The building is upon ground of the state, and is to be built and paid for by the state. An injunction concerning it in any way would not affect the commissioners in their personal capacities, but only as the officers of the state, and through them the state itself. It is not charged that they are acting against the law, but against private rights growing out of their own previous action. The state cannot be interfered with on such grounds.

On the whole case our conclusions may be summed up as follows: First. Complainants have shown no interest in the subject-matter entitling them to relief. Second. By the bill and the attached report of the board of experts it appears that complainants violated the terms of the competition, and were therefore not entitled to be considered in the selection. Third. That the action of the commissioners complained of was not illegal, but was justified under the terms of the programme. Fourth. That, even if the action of the commissioners had been in disregard of the programme, they could not bind themselves so as to delegate their discretion or limit their final judgment. Fifth. That, the state being the real party in interest as defendant, and its officers not being alleged to be acting in violation of the law which created their authority, the courts are without jurisdiction of the subject-matter. Decree affirmed.

(183 Pa. St. 234)

WARNER v. HASTINGS et al.

(Supreme Court of Pennsylvania. Nov. 10, 1897.)

CAPITOL COMMISSION—SELECTION OF ARCHITECT—INJUNCTION.

It is no ground for compelling commissioners, for the erection of a state capitol, to award prizes for best plans submitted, that they, in violation of the conditions of submission, allowed complainant's designs to be photographed and published; any right of action on account thereof being against them personally for damages.

Appeal from court of common pleas, Lancaster county.

Suit by Warner against Daniel H. Hastings and others for mandatory injunction. Bill

dismissed, and complainant appeals. Affirmed.

B. Frank Eshleman, George Nanman, and John G. Johnson, for appellant. Weiss & Gilbert, Robert Snodgrass, and Brown & Hensel, for appellees.

MITCHELL, J. This case was argued with *Cope v. Hastings* (opinion filed herewith) 38 Atl. 717, and differs only in minor features. That bill was defective in not showing any but a remote and contingent interest in the subject-matter. This one remedies that defect by the averment that complainant's plan was one of the eight favorably recommended by the board of experts, and was in fact assigned the first place in the choice of the board. For the reasons assigned in the former case, the court was without jurisdiction of the subject-matter, and in the present case there is, in addition, a doubt of the jurisdiction over the persons of the respondents. The record is sent up in very ragged condition, without any original papers showing the service on defendants, and without even a certified copy of the docket entries in the court below. But, as printed in the paper book, they show an injunction issued the day the bill was filed, without service on any one. It was said in the argument that service was accepted by the governor, and thereupon the court ordered service on the other respondents outside the county. The authority for such order may be questionable. To what extent the act of April 6, 1859 (P. L. 387), authorizes courts of equity to acquire jurisdiction by service outside the county, is not very definitely settled; and we only notice this point at present to avoid an apparent precedent for such practice.

The complainant charges that the respondents, in violation of their pledge, in consideration of which his drawings were put in competition, allowed his design to be photographed and published, whereby he lost the advantage of his skill and labor, etc. This is a separate ground of complaint, which could not be remedied by the injunction asked for in the bill. How far the commissioners by their action may have made themselves personally liable to the plaintiff is a question to be settled at law, in a suit based on this separate cause of action. The dismissal of the present bill will therefore be without prejudice to complainant's rights, if any, in such an action. Decree affirmed.

(67 N. H. 227)

PIKE v. NEW HAMPSHIRE TRUST CO.

(Supreme Court of New Hampshire. Hillsborough. July 29, 1892.)

LANDLORD AND TENANT — INTERFERENCE WITH TENANT'S POSSESSION — INJUNCTION.

A lessee of a part of an entire block, on being notified to quit, admitted that his lease was forfeited, that he could not legally hold the property, and that he did not intend to oppose the lessor in tearing down the old block and building a new one. The lessee desired to be

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reimbursed for the expense he would incur in removing, and the lessor agreed to pay him what was right, and afterwards proceeded to tear down the block. *Held*, that the lessor would not be enjoined from interfering with the lessee's possession, if it gave a bond to the lessee in a sufficient amount, conditioned to pay the lessee such sum as should be found to be equitable.

Chase, J., dissenting.

Bill by Samuel P. Pike against the New Hampshire Trust Company. Case discharged.

Bill in equity for an injunction to restrain the defendants from interfering with the plaintiff's possession of the store occupied by him in the Stark Block, in Manchester. March 24, 1887, John Kennard and Joseph F. Kennard leased to the plaintiff the store for the term of five years from May 1, 1887, with the privilege of renewing the same for an additional term of five years. The parties bound themselves in the lease by mutual covenants as to peaceable possession, the payment of rent monthly, and against underletting, etc. February 1, 1892, the Kennards leased the Stark Block to the defendants for the term of 50 years, "subject to the conditions and provisions of any existing lease heretofore made by the said lessors." The defendants claimed that the plaintiff's lease had been forfeited by his failure to perform the conditions thereof. February 9, 1892, the plaintiff asked Upton, the president of the trust company, what their plans were. He was informed that they intended to rebuild as early as possible in the spring. He said he expected to stay longer, and that it was too bad to take advantage of a technicality for breaking the lease. Upton replied that the company did not desire to do so, unless it was necessary; that the Kennards told him they never regarded the plaintiff's lease as valid, and that he understood, when the company took their lease, that the plaintiff's lease was forfeited. The plaintiff said in reply that he was a business man, and knew enough to understand the box he was in, and that he did not intend to stand in the way of public improvement. Upton asked him how long it would take him to get out, and he said that if he could have a year he thought satisfactory arrangements could be made. Upton said it was impossible to grant so long a time. The plaintiff asked what the company would give him to get out in less time, but Upton declined to make any proposition. They then talked about several places where the plaintiff could move to, and examined one or two places. Early in March the plaintiff complained to Upton of the shortness of the time for getting out, and again asked what they would allow him for moving. Upton said the company would treat him fairly, — would assist him in the expense of moving. But this was not satisfactory to him. February 12th the defendants served notices upon all the occupants in the block, including the plaintiff, to quit April 1, 1892. Upton

testified that, in consequence of what the plaintiff said, as above related, the company, in making its preparations to rebuild, acted upon the assumption that the plaintiff would move out. Before the bill was filed in this suit, the company had torn down a large part of the block, and had made plans for, and was preparing to erect, a new building on the leased land. The court found, so far as it is a question of fact, that the defendants could not reasonably infer from what the plaintiff said or did during his interviews with Upton that he intended to vacate without some arrangement being made with the defendants satisfactory to himself, and that he is not estopped to set up his lease against them. Upon the filing of the bill a temporary injunction was granted.

Charles H. Burns, for plaintiff. Oliver E. Branch and James F. Briggs, for defendants.

PER CURIAM.¹ The plaintiff, in effect, admitted that his lease was forfeited, that he could not legally hold the defendants' property under it, and that he did not intend to oppose them in tearing down the old block and building a new one. He desired to be reimbursed for the expense and loss he would incur in removing, and the defendants agreed to pay him what was equitable and right. Thereupon they proceeded to tear down the block, and to inflict irreparable damage upon themselves, if he is allowed to deny the truth of his admissions. But his and their understanding was that he would not yield to their legal right, and leave the premises, without an equitable adjustment of his claim for remuneration. During the time required for an adjustment of his claim, the full and complete protection of his rights does not, in equity, make it necessary that the defendants should suffer great and irreparable damage by being deprived of the possession of a part of their block. This is not an action at law. The plaintiff's prayer for equitable relief cannot be granted, except on condition that he shall do what equity requires under the circumstances. Though the court found as a fact at the trial that he is not estopped to claim under his lease, yet it is matter of law that he is estopped to ask equitable relief without doing what, in equity, he ought to do; and equity requires him to do what he gave the defendants to understand he would do. He must, therefore, vacate the premises, upon an adjustment of his claim that the defendants pay him what equity requires to remunerate him for the loss to be incurred by his removal. This result may be effectively accomplished by an order that the temporary injunction be dissolved upon the filing of a bond by the defendants running to the plaintiff, in a sufficient amount, conditioned to pay the plaintiff such sum as shall be found to be equitable. Whatever

might be the result at law, equity will not inflict upon the defendants the gross injustice which the plaintiff asks. Case discharged.

SMITH, J., did not sit. CHASE, J., dissented. The others concurred.

(67 N. H. 226)

BEAN et al. v. FITZPATRICK.

(Supreme Court of New Hampshire. Hillsborough. July 29, 1892.)

CONTRACTS—ACTION FOR BREACH—WHEN LIES.

Where a contract provided that plaintiffs should use defendant's office, and print a paper published by them on defendant's press, and with his type, etc., on payment of a specified sum weekly, and defendant agreed to furnish fuel for the boiler, and a hand to run the boiler and press, he was not liable to plaintiffs for refusal to furnish the same on their failure to pay as agreed.

Action by Emery C. Bean and another against Charles L. Fitzpatrick. Judgment for defendant.

Case, for depriving the plaintiffs of the use of a printing office. Facts found by the court: In September, 1889, the parties entered into a contract by which the plaintiffs were to have the right to print a paper, of which they were the publishers, in the defendant's printing office. They were to have the use of the press, engine, boiler, and types, and the privilege of occupying the editorial room. The defendant was to furnish fuel for the boiler, and a hand to run the boiler and press. The plaintiffs agreed to pay the defendant \$2 per week for the press work, including use of press, boiler, and engine, and \$3.50 per week for use of the office, type, and other printing material. The plaintiffs soon became delinquent in their payments, and on November 9th the defendant demanded of the plaintiffs immediate payment of the amount then due. Upon the plaintiffs' neglect to comply with the demand, the defendant notified them that he should not furnish them with power. In the evening the plaintiffs started a fire under the boiler, and were preparing to print their paper themselves, when the defendant turned down the gaslights, opened the boiler door, and told the plaintiffs they could not print their paper there unless they paid up. Thereupon the plaintiffs left the office.

William Little, for plaintiffs. Charles A. O'Connor, for defendant.

PER CURIAM.¹ The plaintiffs contend that they were tenants of the defendant, and that they could not be ejected, or deprived of the occupancy of the printing office, because the defendant had not given them notice to quit. Whether they were tenants entitled to notice, we need not inquire, as they were not evicted or deprived of the occupancy. The defendant merely refused to perform the executory con-

¹ See footnote, 36 Atl. 607.

¹ See footnote 36 Atl. 607.

tract on his part, and he was justified in his refusal by the plaintiffs' violation of the contract in regard to payment. The defendant was to furnish fuel for the boiler, and a hand to run the boiler and press. This he properly refused to do, and the contract did not provide that the plaintiffs might do it. Turning down the gas was a reasonable mode of preventing the plaintiffs' running the boiler and press, which they had no right to run. Judgment for the defendant.

SMITH, J., did not sit. The others concurred.

(69 N. H. 144)

LAVOIE v. BURKE.

ROWE et al. v. SAME.

(Supreme Court of New Hampshire. Rockingham. July 30, 1897.)

LIENS—BRICKMAKING—PROPERTY AFFECTED.

Under Pub. St. c. 141, § 11, providing that any person who performs labor or furnishes materials for making brick, through a contract with the owner thereof, shall have a lien "upon the kiln containing such brick," a general lien attaches to all the kilns upon which the labor was performed, or any part of the materials was furnished.

Exceptions from Rockingham county.

Separate actions in assumpsit by one Lavoie and by one Rowe and another against one Burke and others. From judgments in favor of plaintiffs, defendant's assignee in insolvency and certain attaching creditors bring exceptions. Exceptions overruled.

Assumpsit,—the first case for labor, and the second for materials. Facts found by the court: Lavoie worked for the defendant in making brick from the beginning of the brick-making season of 1896 (in April) until the defendant stopped doing business (the latter part of September), under a contract with the defendant, who was the owner of the brick, by which he was to work during the season at an agreed price per month. Rowe & Dearborn, the plaintiffs in the second action, furnished wood to the defendant, under a contract made with him before February 13, 1896, by which they were to deliver from time to time, upon request, all the wood there was upon certain lots of land, at an agreed price per cord, but no time of payment was fixed. Others performed labor and furnished materials upon similar contracts. The yard where the brick were made was of sufficient size to furnish room for 10 kilns at a time. Sixteen kilns were burned, and other brick were ready, or nearly ready, for burning. The brick of several kilns were in process of manufacture at the same time. Lavoie's labor was not confined to those that went into any particular kiln, but was performed upon brick indiscriminately, some of which went into each of the 16 kilns, and some were unburned. The wood furnished by Rowe & Dearborn was used in burning brick in the defendant's yard, but it

is impossible to say how many, or which, of the kilns. It is also impossible to assign to each kiln the labor performed in making its brick. The defendant failed September 29, 1896; and the brick then in the yard, consisting of six full kilns, two parts of kilns, and the unburned brick, were attached by creditors. These brick were all made after July 25th; those made prior to that time having all been sold and removed. The plaintiffs and others claim liens for their labor and materials, and made attachments to secure the same within the prescribed time. There was due Lavoie \$135.33, of which only \$102.72 was for labor performed after September 25th, and there was due Rowe & Dearborn \$1,438.88, of which only \$527.63 was for wood used after September 25th. Judgment was ordered for each for the full amount claimed, subject to exception by the defendant's assignee in insolvency, and by attaching creditors, who contended that Lavoie's judgment should be for \$102.72, and that the judgment in Rowe & Dearborn's action should be for the defendant.

Drury & Peaslee and A. E. Boisvert, for plaintiffs. G. K. Bartlett, for assignee in insolvency. A. O. Fuller and J. S. H. Frink, for attaching creditors.

BLODGETT, J. The statute (Pub. St. c. 141, § 11) upon which the plaintiffs' actions are founded, and by which any person who performs labor or furnishes materials for making brick, through a contract with the owner thereof, is given a lien "upon the kiln containing such brick," was obviously designed to give to laborers and material men a lien upon the property into which the labor and materials have gone; and as such it is not only to be construed liberally, so as to afford the protection and security intended by the legislature, but, as a part of the general lien law of the state, it is to be given such an exposition as has been given to other sections, all of which are to be taken together as one system, and construed consistently with, and by a mutual reference to, each other, as well as with the apparent intent of the lawmakers, and the language of its expression. Assuming the wood was contracted for the use to which it was applied, the application of the foregoing well-settled rules is adverse to both of the defendant's contentions, and brings the case within the principle and reasoning of the decision in *Bean v. Brown*, 54 N. H. 395, which was a suit to enforce a lumberman's lien for a balance due for drawing a lot of lumber at the contract price of \$2.50 per 1,000, and which involved the construction of the statute enacting that "any person who labors at cutting, hauling or drawing wood, bark, logs or lumber shall have a lien thereon for his personal services." Gen. St. c. 125, § 14. Among other defenses, it was contended by the defendant that the plaintiff had a special lien on each 1,000 feet of the lumber, for the contract price of drawing it, and not a general lien on the whole

lot for the amount of the unpaid balance. This contention was not sustained, the court saying: "The statutes creating this lien must have a reasonable construction, and the construction contended for by the defendant would be most unreasonable. It would require the laborer to preserve for sixty days the identity of each thousand feet, although the lumber was in possession of another. It would involve endless care, perplexity, uncertainty, disputes, and litigation. In fact, it would be wellnigh or quite impossible to keep each thousand feet distinct and separate. Such a construction would practically annul the statute. We entertain no doubt that the legislature intended to give the person cutting or drawing lumber a lien on the whole quantity drawn, for his personal services." The construction given in *Bean v. Brown* has since been approved and followed in *Calef v. Brinley*, 58 N. H. 90, *Hill v. Callahan*, Id. 497, *Hale v. Brown*, 59 N. H. 551, and *Pike v. Scott*, 60 N. H. 471; and when applied to the facts of the present case, in connection with the general statutory provision that "words importing the singular number may extend and be applied to several persons or things" (Pub. St. c. 2, § 3), it gives to the plaintiffs a general lien which attaches to all the kilns upon which the labor was performed, or any part of the materials furnished, and consequently makes the division of time before and after July 25th of no importance. Exceptions overruled.

CHASE, J., did not sit. The others concurred.

(69 N. H. 180)

PERREAULT v. SHAW et al.

(Supreme Court of New Hampshire. Merrimack. July 30, 1897.)

BRICKMAKER'S LIEN.

One who furnishes board to employes of a brick manufacturer, under a contract with the latter, does not perform labor or furnish materials for making the brick, within Pub. St. c. 141, § 11, providing that if a person, by himself or others, perform labor or furnish materials for making brick by virtue of a contract with the owner, he shall have a lien, etc.

Action of assumpsit by Mederic Perreault against Shaw & Whittemore. Heard on an agreed statement of facts. Case discharged.

The defendants owned and operated a brickyard in Pembroke from April 29 to August 29, 1896. August 28, 1896, they were decreed insolvent. The plaintiff, under a contract with the defendants, boarded their workmen to the amount of \$1,467.26, for which amount he claims a lien upon the brick made that season, and brings this action to enforce such lien.

D. B. Donovan, for plaintiff. A. F. Burbank and Albin, Martin & Howe, for defendants.

BLODGETT, J. "If a person shall, by himself or others, perform labor or furnish mate-

rials to the amount of fifteen dollars or more for making brick, by virtue of a contract with the owner thereof, he shall have a lien upon the kiln containing such brick for such labor or materials." Pub. St. c. 141, § 11. The legislative purpose in the enactment of this statute evidently was to protect the laborer who performs manual work in making the brick, and the person who furnishes materials which are used therefor; and such, also, is the reasonable import of the language employed, in its common and ordinary signification. Assuming the correctness of this interpretation, the plaintiff fails to make a case which entitles him to the remedial advantages of the statute. At most, the board furnished by him contributed only in an indirect manner to the making of the brick. He neither performed labor nor furnished materials within the statutory contemplation, which limits the lien to such labor performed and materials furnished as enter into, and become a part of, the brick. See *Bradford v. Lumber Co.*, 80 Wis. 50, 48 N. W. 1105; *Williams v. Coal Co.*, 25 Or. 428, 431, 432, 36 Pac. 159; *McCormick v. Water Co.*, 40 Cal. 185; *Dudley v. Railway Co.*, 85 Mich. 655, 32 N. W. 884; *Central Trust Co. v. Texas & St. L. Ry. Co.*, 27 Fed. 178; *Gordon Hardware Co. v. San Francisco & S. R. Co.* (Cal.) 22 Pac. 406. To give to the statute the elastic power claimed for it by the plaintiff would require an unnatural and strained construction, which, if carried to its logical conclusion, would extend the lien indefinitely to every one who, by virtue of a contract with the owner, contributes, however remotely, to the making of brick, by any kind of services rendered or supplies furnished to the workmen which aid them in any degree to perform the labor. The obvious result of such a construction would be interminable litigation and confusion of liens, as well as materially subversive of the general principle upon which all lien laws of this character proceed, which is that those who have directly contributed by their labor, or by furnishing materials, are entitled to a lien upon the property into which the labor and materials have gone, and to that extent added to its value. Authorities supra; *Davis v. Alvord*, 94 U. S. 545; 15 Am. & Eng. Enc. Law, 46, note. There is no other solid or distinct ground upon which to stand. The plaintiff has not a lien on the brick attached. Case discharged. All concurred.

(87 N. H. 229)

COUSINS v. CITY OF MANCHESTER.

(Supreme Court of New Hampshire. Hillsborough. July 29, 1892.)

OFFICERS DE FACTO—FIREMAN—RIGHT TO COMPENSATION.

A city fireman is not disentitled to compensation for services rendered because of defect in the manner of his appointment, in the absence of objection to his services by the city, and of any other rightful claimant.

Action by Charles S. Cousins against the city of Manchester to recover for services rendered as a fireman. Judgment for plaintiff.

Facts agreed. In February, 1890, the plaintiff was appointed a fireman by the board of mayor and aldermen of Manchester, upon the written presentation of the board of fire engineers, as provided by the ordinances of the city, and served as such in good faith during the year next ensuing, without objection by the defendant. At the time of his appointment he was a member of the common council of the city.

Burnham, Brown & Warren, for plaintiff.
Edwin F. Jones, for defendant.

PER CURIAM.¹ Whether the board of mayor and aldermen of Manchester could legally appoint the firemen upon the presentation or nomination of the board of fire engineers, need not be decided. See Gen. Laws, c. 103, § 13; Attorney General v. Lowell, 67 N. H. —, 38 Atl. 270. If they were authorized to exercise that power, it is claimed that the plaintiff's title is defective, because it is provided in section 2, c. 48, Gen. Laws, that "no person shall be elected by the city councils, or appointed by the mayor and aldermen, to any office of profit, who at the time of such election or appointment is a member of the board of aldermen or common council." But, whatever defect there may be in his appointment, he was a fireman de facto (Jewell v. Gilbert, 64 N. H. 13, 5 Atl. 80), and the defendant has had the benefit of his services as such. If a city ordinance had enacted that carpenters and bricklayers employed in the construction of the buildings of the fire department should be appointed by the mayor and aldermen, on the written presentation of the fire engineers, and an official character had been given to their employment by the legislative power of the city and state, and the plaintiff, being a bricklayer, and a member of the common council, had been formally presented to and appointed by the mayor and aldermen to the office of bricklayer in the construction of buildings of the fire department, and in that capacity had laid brick for a year, could the city receive the benefits of his labor, and withhold his wages, because he and all other inhabitants of the city happened to be ignorant of that flaw in his official title, until it was accidentally discovered after the work was done? On what legal ground can the bricklayer's case be taken out of the operation of the rule adopted in Britton v. Turner, 6 N. H. 481, and the rule of all the books, that, when municipal or other corporations or unincorporated persons whose business is managed by an agent receive money hired, materials bought, or the benefit of labor performed, they cannot keep the benefit received, and refuse to pay for it, on account of a legal defect in the proceedings? Under what exception to that rule can the bricklayer be deprived of his wages? He has held the office de facto, and

performed its duties. How can the service of such an officer be distinguished, so far as his right to payment therefor is concerned, from the same service rendered by a workman holding no office? It is said of a merely de facto officer, suing for compensation, that he can rely on nothing but his official title, and that a defective title is no title; that, though his acts are valid as to third persons, he cannot acquire rights based on his defective title (Dill. Mun. Corp. § 235, note; Mechem, Pub. Off. §§ 331-333); that he puts in issue his title to the office, and must stand or fall by the finding thereon (Matthews v. Copiah Co., 53 Miss. 715); that his position is like that of one who takes possession of land, claiming the title, which is in another (Mayfield v. Moore, 53 Ill. 428). These reasons apply when the plaintiff holds an office knowing that he is a usurper, and that the office belongs to another, who claims it; as in Meeham v. Board, 46 N. J. Law, 276, where the plaintiff, with full knowledge that the office belonged to one who was in possession, forcibly ejected him, and kept him out, until the plaintiff, as a trespasser and usurper, was removed by a legal judgment. Mayfield v. Moore, supra, was assumpsit for money had and received for fees received by the defendant, and it was held that, as the action was an equitable one, the plaintiff, being entitled to money received by the defendant which in equity and good conscience belonged to the plaintiff, could recover as on a bill in equity for an account; that the defendant should account for the fees and emoluments of the office received by him, after deducting reasonable expenses in earning them, and that a different rule would have been applied if he had intruded without pretense of legal right. In McCue v. Wapello Co., 56 Iowa, 698, 10 N. W. 248, it was said: "The case of a de facto officer is not unlike that of one in possession of land without right or title. He must account to the person holding the title for the rents and profits." In that case the de facto officer was in law the deputy of the officer de jure, and might be entitled to compensation as such from the latter. But there is no similarity between the official whose office is not claimed by any other person and the occupant of land under a disputed title. Accounting for rents and profits to the landowner in the case of a disputed land title would be wholly unlike Manchester's keeping the wages earned by the plaintiff, when those wages were claimed by no other person. There is no sound distinction between service rendered by an official layer of bricks and an official extinguisher of fires. The latter is as equitably entitled to his wages as if all the property protected by him from fire had belonged to the city. Whatever defect there was in his official title, his service as fireman does not come within any exception to the doctrine of Britton v. Turner. Judgment for the plaintiff.

CHASE, J., did not sit. The others concurred.

¹ See footnote, 36 Atl. 607.

(99 N. H. 164)

FELKER v. MOWRY et al.(Supreme Court of New Hampshire. Strafford.
July 30, 1897.)**MORTGAGES—SALE OF EQUITY OF REDEMPTION—
PAYMENT—ASSIGNMENT—MISTAKE—
EQUITABLE RELIEF.**

1. A mortgagee, B., was in possession, and the equity of redemption had been sold to M. on execution. The time of redemption would expire May 3d. On April 29th, the mortgagor filed a bill against B. and M. for a receiver, and for an extension of time for redemption. After a hearing, on May 2d, the justice restrained M. from transferring his interest in the lands, and sent to all of the counsel a memorandum reciting: "No occasion to extend year of redemption."

* * * Question of receivership can be determined upon final hearing in suit. The injunction issued will hold title to property in present shape." Plaintiff understood that M. would redeem, and all understood that plaintiff could redeem from the mortgage and the sale of the equity before the expiration of the time of redemption from the execution sale. May 4th, B. conveyed the premises to M. by a quitclaim deed reciting: "This release is given by reason of redemption on the part of said M., he having purchased the equity." *Held*, that as to M., against plaintiff, the release would be held an assignment, and not an extinguishment of the mortgage, in order to effectuate the common understanding and allow plaintiff to redeem.

2. Plaintiff was also entitled to relief as against M., on the ground of misapprehension, it being self-evident from the memorandum order that the court intended to preserve plaintiff's right to redeem as against the mortgage till the expiration of the time of redemption from the execution sale.

Bill by one Felker against one Mowry and another to redeem mortgaged premises. Heard on facts agreed. Case discharged.

November 16, 1895, the right in equity of F. M. and C. B. Wentworth to redeem certain lands in Dover from a mortgage held by the Coheco Savings Bank, one of the defendants in this suit, was sold on execution, and the purchaser afterwards sold the same to the defendant Mowry. The bank was at that time in possession, for the purpose of foreclosure, and the time of redemption expired May 3, 1896. April 29, 1896, the Wentworths filed a bill in equity against the bank and Mowry, praying for the appointment of a receiver and an extension of time for redeeming from the mortgage. A hearing was had upon said bill before a justice of the supreme court, May 1, 1896, at which both the bank and Mowry were present or represented. The justice hearing said petition granted, May 2, 1896, a preliminary injunction against Mowry, restraining him from making transfer of his interest in said lands, and at the same time sent to counsel for both parties in the case the following memorandum: "No occasion to extend year of redemption from bank mortgage. See Pub. St. c. 233, § 26. Question of receivership can be determined upon final hearing in suit. The injunction issued will hold title to property in present shape. May 2, 1896." The Wentworths understood that Mowry would redeem from the mortgage, and that they

could redeem from the mortgage and the sale of the equity at any time on or before November 16, 1896. The question whether the bank or Mowry knew that they so understood is in dispute, and, if material, the right to try it is reserved. This understanding of the Wentworths was derived from the memorandum given above, and neither that nor their understanding that Mowry would redeem was induced by anything said or done by the bank or by Mowry, except their silence. At the meeting of the bank's investment committee, May 4, 1896, it was voted to release to Mowry the bank's interest in the premises; and on the same day the bank conveyed the premises to Mowry, such conveyance being by an ordinary quitclaim deed, containing, after the description of the premises, the following clause: "This release is given by reason of redemption on the part of said Mowry, he having purchased the equity." At the September term, 1896, the Wentworths' bill was heard, and was dismissed on the ground, among others, that the mortgage was foreclosed, and that they had no interest in the property. November 16, 1896, they conveyed their interest to the plaintiff, who, on the same day, tendered the amount due under the mortgage and the sale of the equity to an agent of Mowry. If, on the admitted facts, or on such facts and proof of the bank's and Mowry's knowledge of the Wentworths' understanding, the plaintiff is entitled to redeem, the right is reserved to the defendants to try certain other questions involved in the case; otherwise, the bill is to be dismissed.

W. T. Gunnison, J. Ryan, Jr., and J. S. H. Frink, for plaintiff. J. Kivel and W. F. Nason, for defendant Mowry.

BLODGETT, J. The justice of the case manifestly requires that the conveyance by the bank to the defendant Mowry of its interest in the mortgaged premises should, as between him and the plaintiff, be treated as a redemption of the mortgage by Mowry for the purpose of protecting and preserving the interest previously acquired by him through the execution sale; and, in addition, the agreed facts sufficiently show that such was the understanding and intention of the defendants themselves at the time the conveyance was made. No reason has been given, and we think none can be, why this understanding and intention may not properly be effectuated, for "equity will give effect to the real intentions of the parties, as gathered from the objects of the instrument and the circumstances of the case, although the instrument may be drawn up in a very artificial and untechnical manner" (1 Story, Eq. Jur., 12th Ed., § 168); and payment of a mortgage debt by one having an interest to protect, although accompanied by a release from the mortgagee, will operate as an assignment, and not as an extinguishment, of

the mortgage, whenever justice requires it (Bacon v. Goodnow, 59 N. H. 415, 417; Fletcher v. Chamberlin, 61 N. H. 438, 468, and authorities cited).

But the plaintiff is likewise entitled to relief upon the ground of misapprehension and mistake. It is self-evident from the memorandum order that the court intended to preserve, and supposed he had preserved, to the plaintiff's grantors, the right to redeem, as against the bank mortgage, until the expiration of the time of redemption from the execution sale; and not only did the grantors so understand, but the evidence afforded by the wording of the vote under which the conveyance was subsequently made, the qualifying clause in the conveyance itself, and the other admitted facts, make it reasonably certain, in view of the situation then existing, that the defendants had the same understanding. Under these circumstances, it would be marked injustice to permit Mowry, to retain the benefit of undue advantage by means of the conveyance, and especially when no rights or interests have intervened, so that it is not now entirely practicable to do exact justice by all parties, and place them in the same position they would have been in if the mortgage had been formally assigned to him. To deny relief in such a case would be contrary to the fundamental principles of equity jurisprudence. And we are not aware of any rule that excludes it; for while the maxim, "*Ignorantia legis neminem excusat*," is equally as much respected in equity as in law (1 Story, Eq. Jur. § 111), and while it is a well-established general rule that mere naked mistakes of law are not remediable in equity (Hunt v. Rousmaniere, 1 Pet. 15; Bank v. Daniel, 12 Pet. 32, 55, 56; 1 Story, Eq. Jur. § 138), it is equally well established that the rule is not absolute and inflexible in its operation, and does not apply in cases where the result of denying relief will be to give the other party an unconscionable advantage, and the fact of such misapprehension is admitted or clearly proved, nor in cases of imposition, misplaced confidence, or surprise, unless the plaintiff has been grossly negligent, or other rights have intervened, and the parties cannot be placed in statu quo (Id. §§ 137, 138, 138c-138f, 138i). Substantially the same general principle obtains and the same rules apply when the mistake is one of fact (Id. § 138), which "is ordinarily said to take place either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist" (Hurd v. Hall, 12 Wis. 112, 115, per Dixon, C. J.; Kerr, Fraud & M. 406). For aught that appears, the plaintiff is entitled to redeem. Case discharged.

CARPENTER, C. J., and CLARK and PIKE, JJ., did not sit. The others concurred.

(68 N. H. 14)

WIGGIN v. SWAMSCOT MACH. CO. et al.
(Supreme Court of New Hampshire. Rockingham. July 27, 1894.)

CONSTRUCTIVE TRUSTS—AGENCY—LACHES.

Where a firm for 20 years sold the products of a manufacturing corporation, in which the members of the firm were directors, and one was president, and accounted for them at the price which the corporation received from other customers, a bill filed by a stockholder 12 years after the dissolution of the firm, claiming that the net profits received by the firm from the sale of the corporate goods belonged to the corporation, would be dismissed on the ground of laches.

Bill by Mary M. Wiggin against the Swamscot Machine Company and Amos Paul for discovery and an accounting. Bill dismissed.

The plaintiff is a stockholder in the Swamscot Machine Company, a corporation created July 9, 1848, to carry on a manufacturing business at Newmarket, in this county. At the hearing, another stockholder, Tebbetts, moved for leave to join in the bill as a plaintiff. Receivers of the property of the corporation, appointed September 21, 1893, have prosecuted the suit since May 7, 1894, with the leave of the court. The facts were found by a referee. From 1857 to 1878, the defendant Paul was a director and the president and agent of the corporation. There were five directors; and, during the same time, Paul, two of the other directors, and two other persons were partners, doing business in Boston, Mass., under the firm name of George K. Paul & Co., the three directors owning the greater part of the capital of the firm. The corporation consigned some of its manufactures to the firm, who sold them, and accounted and paid for them at prices which the corporation received for like goods from other customers. The firm enjoyed no advantage over others in this respect. Their entire sales amounted to over \$3,000,000, more than half of which were of the corporation's goods. They generally made a profit in selling these goods, but the amount of their net profits upon them cannot now be ascertained. They made losses otherwise, and became insolvent in 1878, and then sold their stock and business to the corporation, at a fair valuation. In 1872, the corporation received, in payment of a debt, an equity of redemption of certain real estate in Boston, worth \$12,000, and mortgaged for \$7,000. The title was taken in the name of Paul. In September of that year, a minority of the stockholders, owning less than half of the capital stock, represented in writing to the directors that, in their opinion, the corporation had not paid Paul adequate compensation for his services as president and agent, and "ought to recognize in a substantial way the fact that, mainly by his individual talents and faithfulness," it had paid regular dividends, and increased its property exceptionally; and they requested the directors to release to him the interest of the corporation in the above-mentioned

equity of redemption. This the directors subsequently did, Paul not acting with his associates in the matter. Paul accepted the release, has paid the mortgage debt, and now holds the property. The stock now owned by the plaintiff, Wiggin, formerly belonged to her father, George O. Hilton, who died in 1866. By his will, he bequeathed the stock to his widow for life, and to the plaintiff after her decease. The widow died in 1872. Hilton and his widow knew that Paul was interested in the firm of George K. Paul & Co., and, as early as 1887, Wiggin learned of it, and of the release by the corporation to Paul of its interest in the Boston real estate. Tebbetts had no knowledge of these facts until after this suit was begun, but the person of whom he purchased his stock in 1867 knew of Paul's membership in the firm. If, upon these facts, the bill cannot be maintained, it is to be dismissed.

S. W. Emery, E. G. Eastman, and Woodward Emery, for plaintiff. Frink & Batchelder, for defendants.

CHASE, J. "If an agent to sell become the purchaser, or if an agent to buy be himself the seller, a court of chancery, upon the timely application of the principal, will presume that the transaction was injurious, and will not permit the agent to contradict this presumption, unless, indeed, he can show that the principal, when furnished with all the knowledge he himself possessed, gave him previous authority to be such buyer or seller, or afterwards assented to such purchase or sale." 1 Pars. Cont. 87; *Pearson v. Railroad Corp.*, 62 N. H. 537, 543; *Fisher v. Railroad Co.*, 50 N. H. 200, 206. Relying upon this principle, the plaintiffs claim that the net profits received by George K. Paul & Co. from sales of the Swamscot Machine Company's goods belonged to the corporation, and are constructively held in trust for it by the firm, and that Paul, as a member of the firm, should now account for them. The bill was not filed until 33 years after the firm commenced, and 12 years after it ceased, business. The question is whether equity will enforce the claim, if well founded, after so great a lapse of time. In *Beckford v. Wade*, 17 Ves. 87, Sir William Grant said: "It is certainly true that no time bars a direct trust as between cestui que trust and trustee; but, if it is meant to be asserted that a court of equity allows a man to make out a constructive trust at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be; so far from it, that not only in circumstances where the length of the time would render it extremely difficult to ascertain the true state of the fact,

but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who, after long acquiescence, comes into a court of equity to seek that relief." To the same effect are *Townshend v. Townshend*, 1 Brown, Ch. 550, 554; *Wentworth v. Lloyd*, 32 Beav. 467; *Hovenden v. Annesley*, 2 Schoales & L. 607, 633; *Edwards v. University*, 21 N. C. 326; *Ashhurst's Appeal*, 60 Pa. St. 290; 1 Perry, Trusts, § 228; 2 Story, Eq. Jur. § 1520, and notes; *Adams, Eq.* 62. "Nothing can call forth" a court of equity "into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation of suits in this court." *Smith v. Clay*, 2 Amb. 645; *McKnight v. Taylor*, 1 How. 161, 168; *Sullivan v. Railroad*, 94 U. S. 806, 811, 812; *Brown v. Buena Vista Co.*, 95 U. S. 157, 160; *Hall v. Clagett*, 48 Md. 223, 243; *Foster v. Rison*, 17 Grat. 321, 347; *Harrison v. Gibson*, 23 Grat. 212; *Hatcher v. Hall*, 77 Va. 573, 576; *Lawrence v. Rokes*, 61 Me. 38, 42; *Royal Bank of Liverpool v. Grand Junction R. Co.*, 125 Mass. 490, 494; *Snow v. Manufacturing Co.*, 158 Mass. 325, 33 N. E. 588; *Pickering v. Pickering*, 38 N. H. 400, 406; *Hathaway v. Noble*, 55 N. H. 508; *Chamberlain v. Lyndeborough*, 64 N. H. 563, 564, 14 Atl. 865; *Clark v. Clough*, 65 N. H. 43, 79, 23 Atl. 526.

Examining the circumstances of this case in the light of these principles, nothing is discovered that calls the court into activity. On the other hand, satisfactory reasons appear why it should remain inactive. The prior owners of the stock now owned by Mrs. Wiggin knew of the Boston store, and of Paul's membership in the firm carrying on business there; and she learned of these facts three years, at least, before she instituted this suit. Considering the character and magnitude of the business transacted between the corporation and the firm, and the length of time it continued, it is hardly conceivable that any stockholder, exercising reasonable diligence in respect to his corporate interests, should fail to learn of the existence of the firm, and of its relations to the corporation before those relations ceased. Equity will not lend its aid to enforce a claim set up after such long and unexplained delay, especially when it appears that complete justice cannot be done. No ground is shown on which the claim concerning the real estate transferred to Paul in 1872 can be maintained. The transfer was made in part payment for services, and it does not appear that it would have been set aside in a suit seasonably brought. Bill dismissed. All concurred.

(68 N. H. 171)

McDONALD et al. v. FERNALD.

(Supreme Court of New Hampshire. Coos.
July 27, 1894.)

STATUTE OF FRAUDS—SUFFICIENCY OF MEMORANDUM—GUARANTY—CONSIDERATION—DEMAND—NOTICE—SUNDAY LAW.

1. A memorandum signed by a contractor, promising that all the men then at work for a subcontractor should "have their pay in the spring, if they remain until spring, and work for the interest of the operation," is a sufficient memorandum under the statute of frauds (Pub. St. c. 215, § 2).

2. A promise by men to work for a subcontractor for a specified time is a sufficient consideration to support a promise by the principal contractor to be responsible for their pay.

3. A promise by a contractor that men working for his subcontractor should "have their pay in the spring" is an unconditional guaranty of payment, under which the contractor will be liable without demand being first made upon the subcontractor, and notice of his failure to pay being given.

4. An offer made on Sunday, but not accepted until Monday, does not avoid the contract, as violative of the Sunday law (Pub. St. c. 271, § 3).

Assumpsit for labor by Lewis McDonald and others against O. W. Fernald. Question of defendant's liability reserved. Case discharged.

The facts in this and seven other actions against the defendant involving the same questions were found by a referee. In September, 1890, the defendant took a job to haul timber from certain lots in Success. He sublet a part of the job to B. R. Condon, by whom the plaintiffs were employed, at a stipulated price per month. They and others, fearing they would not be paid for their work, threatened to leave. To prevent their leaving, Condon's foreman, on Sunday, December 28, 1890, procured from the defendant a writing of that date, as follows: "This is to certify that I, O. W. Fernald, will see that all men such as are now at work for B. R. Condon (subcontractor) shall have their pay in the spring, if they remain until spring, and work for the interest of the operation. O. W. Fernald." The writing was shown to the plaintiffs in the evening of the same day, but they did not definitely accept the proposition. On the following day they went to work, with the view of accepting the proposition, and relying upon it as a guaranty that they would be paid for their labor. They continued to work until spring, and worked for the interest of the operation. The defendant knew of their work. They never released Condon from his obligation to them as their employer, and never demanded their pay of him. The question of the defendant's liability was reserved.

Twitchell & Libby, for plaintiffs. Daley, Goss & Niles, for defendant.

CHASE, J. The memorandum signed by the defendant was sufficient to answer the requirements of the statute of frauds. Pub. St. c. 215, § 2. Reading it in the light of the circumstances attending the making of it (Brown v. Whipple, 58 N. H. 229, 233), it appears that the plaintiffs were the other parties to the

agreement therein proposed, and that the sums to be paid thereunder would be ascertainable by computation. In these respects the agreement resembles the one considered in *Wills v. Cutler*, 61 N. H. 405. Although it was unnecessary (*Britton v. Angier*, 48 N. H. 420; *Lang v. Henry*, 54 N. H. 57, 59), the consideration for the defendant's promise was stated in the memorandum, namely, the promise of the men to remain until spring, and work for the interest of the operation. This was a sufficient consideration. *Wills v. Cutler*, supra; *White v. Woodward*, 5 Man., G. & S. 810. The defendant's promise was that he would see that the men should "have their pay in the spring"; not that only which was subsequently earned, but "their pay,"—all that would then be due to them, whenever earned. The language used aptly expresses a contract of guaranty, and leaves no uncertainty as to its scope. The promise was unconditional. It did not require the plaintiffs to demand payment of Condon, and, failing to get it, to notify the defendant, before he would become liable to pay them. *Dearborn v. Sawyer*, 59 N. H. 95; *Bank v. Sinclair*, 60 N. H. 100. The defendant's promise was not affected by the statute (Pub. St. c. 271, § 3) prohibiting the doing of business of one's secular calling on Sunday. The proposition made by the defendant was not accepted by the plaintiffs until Monday, when they went to work. Until that time it was a mere proposition. Then, being accepted, it became a contract. The fact that the negotiation began on Sunday did not render the contract invalid. *Stackpole v. Symonds*, 23 N. H. 229; *Merrill v. Downs*, 41 N. H. 72; *Provonchee v. Piper*, 67 N. H. —, 36 Atl. 552. Case discharged. All concurred.

(68 N. H. 187)

DOWNING v. TOWN OF FARMINGTON.

(Supreme Court of New Hampshire. Strafford.
March 15, 1895.)

TAXATION—ABATEMENT—APPEALS—TIME.

Pub. St. c. 59, § 11, provides that an appeal may be taken from the selectmen's refusal or neglect to abate a tax on personal property at any time within nine months after notice of the tax. Chapter 60, § 2, provides for notice to the taxpayer, but also provides that "no notice of the tax shall be necessary under this section if the tax is against a person who is not an inhabitant of the state." *Held*, that a nonresident, taxed for personal property, may appeal at any time within nine months after actual notice of the tax.

Petition, filed January 12, 1894, by Amos W. Downing, for the abatement of a tax assessed in Farmington against the plaintiff, April 1, 1892, upon his stock in the Farmington National Bank. Facts found by the court: The plaintiff was a resident of Haverhill, Mass. In July or August, 1892, the collector of taxes of Farmington sent a bill of the tax, by mail, addressed to the plaintiff at Haverhill, which he did not receive. He first learned of the tax in August, 1893. If

the sending of the bill was sufficient notice of the tax, the petition is to be dismissed; otherwise, the tax is to be abated. Tax abated.

R. G. Pike, for plaintiff. G. E. Cochrane, for defendant.

CHASE, J. An appeal may be taken from the selectmen's refusal or neglect to abate a tax at any time within nine months after notice of the tax. Pub. St. c. 59, § 11; *Larkin v. Portsmouth*, 59 N. H. 26; *Town of Farmington v. Downing*, 67 N. H. —, 30 Atl. 345. The manner of giving notice to a nonresident of a tax assessed upon his personal property is not prescribed in the statutes. Nonresidents are expressly excepted from the operation of Pub. St. c. 60, § 2; and section 2 of chapter 61 relates to taxes assessed upon real estate. The statute "does not require the person taxed to appeal within a particular time from the assessment of the tax; but it allows him to appeal within nine months after he has had notice of the tax, and that might be years after the assessment." *Guaranty Co. v. Portsmouth*, 59 N. H. 33, 34. It contemplates actual notice. Whether the notice must be in writing, or may be given orally (*Gordon v. Clifford*, 28 N. H. 402, 413), is a question that need not be considered, because it is found that the plaintiff had no notice, written or oral, until August, 1893. The mailing of a bill of the tax to the plaintiff might justify an inference that he received it, and became informed of its contents, in the absence of proof to the contrary (*Sabre v. Smith*, 62 N. H. 663, 665); but, it being shown that he did not receive it, there is no room for inference. According to the provisions of the case, the tax is abated. Tax abated.

SMITH, J., did not sit. The others concurred.

(68 N. H. 224)

WEBBER v. OSGOOD.

(Supreme Court of New Hampshire. Hillsborough. March 15, 1895.)

CONDITIONAL SALES—RIGHTS OF SELLER—ATTACHMENT—DUTIES OF OFFICER.

Plaintiff bought property on the installment plan, and it was afterwards attached in an action against her. The attachment was abandoned, but the property was not returned to plaintiff, nor did she demand it. Afterwards, on plaintiff's refusal to pay installments past due, the seller resold the property to the attaching creditor. *Held*, that the sale passed title and right of possession, since plaintiff lost the right to possession by her failure to make payments as agreed, and therefore the attaching officer properly surrendered the property to the attaching creditor.

Trover by Mary Webber against Joel F. Osgood, Jr. Facts found by the court: May 3, 1890, the plaintiff bargained in writing with George W. Brown for an organ at the price of \$100, of which \$10 was paid down and \$5 was

to be paid each month until the price and interest were paid in full, when the organ was to become the plaintiff's property, and in the meantime was to remain the property of Brown. If the plaintiff failed to make payments, Brown had a right to retake the organ. Possession was given to the plaintiff, together with the right to use the organ in her dwelling house in Milford, and not elsewhere, without Brown's consent. October 20, 1892, the defendant attached it as the property of the plaintiff in an action in favor of H. S. Hutchinson. The plaintiff was then owing \$25 of the price and some interest. The attachment was abandoned prior to January 9, 1893, but the organ was not returned to the plaintiff, nor demanded by her. On that day and previously Brown demanded of the plaintiff payment of the balance, but she neglected, and finally refused, to pay. Afterwards, on the same day (January 9th), Brown sold the organ to Hutchinson for the balance due from the plaintiff, and gave Hutchinson a bill of sale, who took possession, and has held it ever since, claiming to own the organ. After this, and on the same day, the plaintiff offered to pay Brown the balance due, but he refused to receive it, on the ground that he had sold the organ to Hutchinson. Judgment is to be rendered for the party entitled to it upon these facts; and, if for the plaintiff, it is to be for \$75 and interest from the date of the writ. Judgment for defendant.

Doyle & Lucier, for plaintiff. Carl E. Knight and O. H. Burns, for defendant.

CHASE, J. At the time of the attachment, Brown had the title to the organ, and the right to its possession; the plaintiff having failed to make payments in accordance with her agreement. *Bailey v. Colby*, 34 N. H. 29; *McFarland v. Farmer*, 42 N. H. 386, 391; *Proctor v. Tilton*, 65 N. H. 3, 4, 17 Atl. 638. The surrender of the possession to Hutchinson, to whom Brown had sold and transferred his title and right of possession, was a surrender to the owner, and a discharge of the defendant's duty. *Littlefield v. Davis*, 62 N. H. 492. The plaintiff, having no title, and no right of possession, has no cause of complaint on account of such surrender. Judgment for the defendant.

SMITH, J., did not sit. The others concurred.

(68 N. H. 209)

STEVENS v. DOUGLASS et al.

(Supreme Court of New Hampshire. Merrimack. March 15, 1895.)

WILLS—CONSTRUCTION—INCOME.

Where testator gave the residue of the estate to A., in trust for B., to whom the income of the property was to be paid during his life, and on B.'s death the principal was to go to B.'s surviving children in equal portions, when they should severally attain the age of 21 years, *held*, on the decease of B. before any of the children

became of age, that the income belonged to them, and should be paid to their guardian as collected.

Bill by Lyman D. Stevens, trustee under the will of Marion D. Lake, deceased, against Mary Douglass and others. Case discharged.

Bill in equity by the trustee under the following clause of Marion D. Lake's will, praying for direction in the execution of the trust: "As to all the residue and remainder of all my estate of every kind, I give, devise, and bequeath the same unto the said Henry J. Crippen, to hold the same in trust for the benefit of John Douglass, of Lancaster, aforesaid; to have the care and control of, and keep the same properly invested, and pay over the income thereof to the said John Douglass during his natural life, and at his decease to pay over the principal of said fund to his surviving children, in equal portions, as and when they shall severally attain the age of twenty-one years, free from said trust." The plaintiff is the successor of Crippen in the trusteeship. The testatrix was a resident of this state at the time of her decease. The residue of her estate consisted of personal property and a piece of real estate situated in Concord. John Douglass, a resident of Canada, died in May, 1893, leaving a widow and eight children, the oldest of whom was 14 years old. Direction is sought upon the following points: (1) Can the plaintiff rightfully pay the Douglass children or their guardian, during their minority or at the time they become 21 years old, the income of the trust fund; and, if not, to whom shall it be paid? (2) If either child should die before becoming 21 years old, to whom would his share of the trust fund go? If its disposition would be governed by laws of distribution, which laws would operate,—those of his domicile at the time of his decease, those of his domicile at the time of John's decease, or those of the testatrix's domicile?

L. D. Stevens, in pro. per. Leach & Stevens, for defendants Douglass children.

CHASE, J. The beneficiaries of the trust fund are John Douglass and his eight surviving children. Together they take the whole of the fund and its income. John's interest was the income arising from the fund during his life. Immediately upon his decease the fund became vested in his surviving children, although it was not to be paid over to them until they should severally attain the age of 21 years. *Brown v. Brown*, 44 N. H. 281; *Ordway v. Dow*, 55 N. H. 11; *Crosby v. Crosby*, 64 N. H. 77, 5 Atl. 907; *Sanborn v. Clough*, 64 N. H. 315, 10 Atl. 678; *O'Brien v. O'Leary*, 64 N. H. 332, 333, 10 Atl. 697; *Parker v. Leach*, 66 N. H. 416, 31 Atl. 19; *Hall v. Wiggin*, 67 N. H. 89, 91, 29 Atl. 671. The subsequent income passed with the property to the children, but the time of its payment was not postponed like that of the principal. The reasonable inference from

this circumstance is that the testatrix intended it should be payable as soon as collected by the trustee. That which arises before the children become 21 years old may properly be paid to their guardian. *Sanborn v. Clough*, 64 N. H. 315, 320, 10 Atl. 678. It is unnecessary to consider the second question at this time. The contingency that will require an answer to it may never happen. It is, at least, doubtful if the court has power to give an answer that will bind the parties. *Hodgdon v. Darling*, 61 N. H. 582; *In re School-Law Manual*, 63 N. H. 574, 4 Atl. 878. If facts hereafter occurring render an answer necessary, another application therefor can be made. *Gafney v. Kenison*, 64 N. H. 354, 10 Atl. 706. Case discharged. All concurred.

(68 N. H. 200)

STATE v. BROWN.

(Supreme Court of New Hampshire. Belknap. March 15, 1895.)

PERJURY—LEGALITY OF TRIAL—MATERIALITY OF EVIDENCE.

1. Though a complaint in a criminal proceeding be defective, witnesses may be prosecuted for perjury committed at the trial.

2. In a trial under Pub. St. c. 264, § 2, prohibiting the use of annoying and offensive epithets in the public streets, the truth of the statements contained in the epithets alleged to have been used is irrelevant, and hence not the subject of perjury.

Frank J. Brown was indicted for perjury. Submitted on facts agreed. Indictment quashed.

H. was arraigned and tried in the Laconia police court, on a complaint made by the defendant, alleging that H., "in a certain public street in Laconia, called Messer street, did address certain offensive, derisive, and annoying words to him, the said Brown, and did call him by offensive and derisive names, viz. 'You are a God damned black-mailer,' and other offensive words and epithets." At the trial, H. admitted that, on the occasion specified, he called Brown a "God damned blackmailer," and claimed that he was justified in doing so, because, as he testified, he had himself paid Brown money, in consideration of which Brown agreed to refrain, and did refrain, from prosecuting him for the unlawful sale of spirituous liquor. Thereupon Brown testified, in substance, that he had never received from H., or from anybody, money or anything else as a consideration for abstaining from prosecuting H. or any other person for the unlawful sale of liquor. The indictment charges that this testimony of the defendant was false and perjured.

W. B. Fellows, for the State. E. H. Shannon and Cox & Dyer, for defendant.

CHASE, J. The complaint was for a violation of section 2, c. 264, Pub. St., which provides that "no person shall address any

offensive, derisive, or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend, or annoy him, or to prevent him from pursuing his lawful business or occupation." An intent to deride, etc., was not alleged in the complaint. If such an allegation was necessary, its absence is not material here. Perjury might be committed at the trial, although the complaint was bad upon demurrer or motion in arrest of judgment. *Reg. v. Meek*, 9 Car. & P. 513; *State v. Whittemore*, 50 N. H. 245, 248. The fact that the forbidden words express the truth does not justify their use. The statute makes no distinction between truthful and untruthful expressions, but prohibits both alike. Its purpose was to preserve the public peace. The direct tendency of such conduct, like that of libel (4 Bl. Comm. 150, 151), is to provoke the person against whom it is directed, to acts of violence. The circumstance that the offensive language is true does not destroy or lessen the tendency, but, on the contrary, is liable to increase it, by stimulating a spirit of revenge. *Com. v. Foley*, 99 Mass. 497; *State v. Burnham*, 9 N. H. 84, 41. H.'s testimony was irrelevant to the issue on trial, and consequently the defendant's testimony in rebuttal was immaterial. Testimony affecting the credit of a witness is, no doubt, material, and so may be the subject of perjury. *Rex v. Gripepe*, 1 Ld. Raym. 256, 258; *Rex v. Greepe*, 2 Salk. 513; *Reg. v. Overton*, 1 Car. & M. 655; *Reg. v. Muscot*, 10 Mod. 192, 195; *Com. v. Pollard*, 12 Metc. (Mass.) 225; *People v. Courtney*, 94 N. Y. 490; *State v. Norris*, 9 N. H. 96, 90, 100. But the defendant's testimony was not received, and was not competent, for such purpose. Indictment quashed. All concurred.

(68 N. H. 254)

STEVENS et al. v. MOULTON.

(Supreme Court of New Hampshire. Grafton. July 15, 1895.)

WITNESSES—COMPETENCY—WAIVER.

Under Pub. St. c. 224, § 16, which provides that "when one party to a cause is an administrator * * * neither party shall testify in respect to facts which occurred in the lifetime of the deceased * * * unless the * * * administrator * * * elects so to testify," where the administrator identifies deceased's books, and testifies that entries made upon them are in deceased's handwriting, and have not been changed since they came into witness' possession, it is not such an election to testify as constitutes a waiver of his right to object to defendant's testifying as to facts that occurred during deceased's lifetime.

Exceptions from Grafton county.

Action in assumpsit by M. M. Stevens and O. G. Smith, administrators of the estate of W. H. Cummings, deceased, against Andrew W. Moulton. Facts found by a referee. Mr. Ste-

vens, one of the plaintiffs, was sworn as a witness, at their request, without reservation, qualification, or limitation in respect to his testimony. He produced and identified Cummings' account books, and testified that the entries upon them against the defendant relating to the items in suit were in Cummings' handwriting, and had not been changed since the books came into the possession of the witness, in 1891. Upon cross-examination, he testified that he understood the entries were made from a mill book kept by the miller; that he had thoroughly examined Cummings' papers, and had not found an order drawn by Cummings upon his miller in favor of the defendant; and that the defendant, after looking the account over, had said it was all right, but that Cummings owed him. The defendant was sworn as a witness in his own behalf, and, subject to the plaintiffs' exception, testified that he omitted to enter a lien suit brought by him against one Sherman, in consideration of Cummings' promise to pay him the amount of the claim and costs; that, in fulfillment of this promise, Cummings subsequently gave his miller an order to deliver the grain mentioned in the plaintiffs' specification to the defendant, and that the grain was not sufficient to pay the sum due the defendant by virtue of the promise. The referee's finding was in favor of the defendant, if the defendant's testimony was taken into consideration, and in favor of the plaintiffs if it was not. Judgment was ordered upon the report in favor of the plaintiffs, subject to the defendant's exception. Exception overruled.

G. F. Morris, for plaintiffs. Smith & Sloane, for defendant.

CHASE, J. The statute removing the disqualification of witnesses by reason of their interest in the event of the suit (Laws 1857, c. 1952; Laws 1858, c. 2090; Laws 1865, c. 4074; Gen. St. c. 209, §§ 13-17; Gen. Laws, c. 228, §§ 13-17; Laws 1889, c. 74; Pub. St. c. 224, §§ 13-17) was designed "to enlarge, and not contract, the field of testimony." Accordingly it has been uniformly held that the exception in it providing that a party to an action shall not testify if the adverse party is an administrator or the guardian of an insane person, unless the administrator or guardian elects to testify, does not exclude a party from testifying concerning facts about which he was at liberty to testify at common law under the same circumstances. *Moore v. Taylor*, 44 N. H. 370, 374; *Page v. Whidden*, 59 N. H. 507, 511; *Peirce v. Burroughs*, Id. 512; *Sheehan v. Hennessey*, 65 N. H. 101, 102, 18 Atl. 652. Before the passage of the statute, entries upon the book of account of a deceased party, supported by the suppletory oath of his administrator, were competent evidence in an action between the administrator and the surviving party, if they related to the main issue on trial. The suppletory oath required the witness to make true answers to the questions propound-

ed, and the questions related to the identity of the book and the handwriting of the entries upon it. To this extent the administrator had the right to testify. *Dodge v. Morse*, 3 N. H. 232. This right was not affected by the exception in the statute, although its terms may be broad enough to include it. *Bailey v. Harvey*, 60 N. H. 152, 155; *Sheehan v. Hennessey*, 65 N. H. 101, 18 Atl. 652; *Lassone v. Railroad Co.*, 66 N. H. 345, 352, 24 Atl. 902. Whenever an administrator testifies in this way, he exercises a common-law right, and consequently makes no election under the statute. From 1865 to 1889 the statute, so far as it related to a question like that under consideration, was in these words: "Neither party shall testify in a case where the adverse party is an * * * administrator * * * unless the * * * administrator * * * elects to testify." Laws 1865, c. 4074; Gen. Laws, c. 228, § 16. The construction given to this provision was that, whenever an administrator elected "to testify for any purpose or to any extent whatever," the adverse party might testify generally and without restriction. *Ballou v. Tilton*, 52 N. H. 605; *Dow v. Merrill*, 65 N. H. 107, 18 Atl. 317. The defendant claims that the change made by the law of 1889 was one of form merely; and he cites these cases as authorities for his position that the act of the plaintiff Stevens, in testifying, was an election within the meaning of the statute, and gave the defendant the right to testify generally. The court evidently did not intend that the comprehensive language used in *Dow v. Merrill* should be applied to the testimony of an administrator given under a suppletory oath in relation to the books of account of the deceased, for, at the same term, they decided in *Sheehan v. Hennessey* that the giving of such testimony by an administrator did not authorize the surviving party to testify generally. In *Ballou v. Tilton* (decided in 1873) the court reluctantly yielded to what they understood to be the plain letter of the statute, at the same time suggesting that the letter did not correctly express the probable intention of the legislature, namely, to place the parties on an equal footing by not allowing the living party to a transaction to be a witness concerning it when the other party, being dead, could not testify. In *Dow v. Merrill* (decided in July, 1889) the court, after referring to the defect in the statute as interpreted and to the suggestion of an amendment contained in the former decision, said that, "as more than fifteen years have elapsed without the requisite legislation, the construction adopted in *Ballou v. Tilton* must be regarded as having received the legislative approval." The present statute (Pub. St. c. 224, § 16) took the place of the prior statute August 16, 1889 (Laws 1889, c. 74), and, omitting the parts not material to the inquiry, is as follows: "When one party to a cause is an * * * administrator * * * neither party shall testify in respect to facts which occurred in the lifetime of the deceased * * * unless the * * * administrator * * * elects so

to testify." The prohibition is specifically directed to testimony relating to facts that occurred in the lifetime of the deceased. Neither party has the right to testify concerning such facts, unless the administrator elects "so to testify." It obviates the injustice occasioned by the earlier statute, as interpreted in *Ballou v. Tilton* and *Dow v. Merrill*, and at the same time leaves either party at liberty to testify, under the authority of section 13 of the same chapter, in respect to facts that occurred after the death of the deceased. The act of Stevens in testifying was not an election that gave the defendant a right to testify generally, unless the rights of the parties were affected by the manner in which the testimony was introduced. The case shows that he did not testify to any fact that he was not at liberty to testify to without making an election under the statute. He identified the books and the handwriting of the deceased, and stated that the account had not been changed since the books came into his possession. The defendant knew the nature of this testimony, and confined his inquiries to the subject therein referred to, and to matters that occurred after the death of the deceased. Manifestly, he did not change his course by reason of a misunderstanding of the situation. There is therefore no ground for claiming that the plaintiffs are estopped from denying that they made an election under the statute on account of their manner of procedure. The defendant's claim that the question of election, being one of fact, is not reviewable here, does not arise. The plaintiffs' exception referred to a ruling that the defendant had a right to testify, and not to a finding upon the question of election. As the defendant's testimony related to facts that occurred in the lifetime of the deceased, it should have been excluded. Exception overruled.

WALLACE, J., did not sit. The others concurred.

(67 N. H. 226)

SABINE v. MERRILL.

(Supreme Court of New Hampshire. Hillsborough. July 29, 1892.)

ACTION FOR SERVICES—EVIDENCE—RELEVANCY—TRIAL—REMARKS OF COUNSEL.

1. Evidence of defendant's financial ability is irrelevant to prove the value of services for housework and nursing.
2. Improper remarks of counsel that did not prejudice the case of the party objecting thereto are not grounds for reversal.

Assumpsit by Elizabeth F. Sabine against William T. Merrill, administrator of the estate of William G. Perry. Plaintiff moves to set aside a verdict of \$300 in her favor. Denied.

Assumpsit for services in doing housework for and in the care and nursing of the defendant's intestate, W. G. Perry, from May 3, 1877, to the time of his decease, November

9, 1887. The evidence tended to show that in April, 1877, the plaintiff engaged to take charge of Mr. Perry's household for four dollars a week; that she acted in that capacity from May 3, 1877, until his death; that at various times she rendered additional services for him, doing the housework, and nursing him in sickness; that she was usually paid every four weeks at the rate of four dollars a week, for which she gave receipts contained in diaries, generally expressed to be "in full to date." There was also evidence that Mr. Perry recognized that four dollars a week did not pay her for her extra services. Among the receipts in the diaries was the following unsigned receipt: "Settled up with Mrs. Sabine from August 7th to Sept. 30th, 1887, \$18 ⁶²/₁₀₀ dollars, in full to date." This was not put in evidence. By request of the administrator, she had charge of the property in the house until December 23, 1887, and gave him a receipt, the first item of which is as follows: "Settled with William G. Perry up to date Oct. 1st, at \$4.00 per week, continuing until Nov. 9th, 1887, making 5 weeks & 4 days,—22.57." The plaintiff offered to show that the estate of the intestate amounted to over \$57,000. The evidence was excluded, subject to the plaintiff's exception. Counsel for the defendant, in his closing argument, referring to the receipts, read the entry of the unsigned receipt, and commented upon it. To this the plaintiff excepted.

Burnham, Brown & Warren, for plaintiff.
James F. Briggs and Sulloway & Topliff, for defendant.

PER CURIAM.¹ The plaintiff's claim is founded, not on the express contract by which Mr. Perry agreed to pay her four dollars a week for taking charge of his household affairs, but on an implied promise to pay her for other services in doing his housework, and nursing him in sickness. The defendant contended that she had been paid in full for all her services, and relied principally upon certain receipts signed by her. Upon this issue the jury returned a verdict for the plaintiff; that is, they found that her receipts, though generally expressed to be "in full to date," were intended to be evidence of payments for her services as the intestate's housekeeper only, and that she was entitled to recover upon the implied contract. Having obtained a verdict establishing the contract, she cannot complain that she was not allowed to introduce other unnecessary evidence to prove it. If evidence of the amount of Mr. Perry's estate was competent on this question, its exclusion was harmless; nor can it be claimed that it had any legitimate bearing on the question of the value of her services.

It is not apparent how the statement of the defendant's counsel in argument prejudiced her case. If the unsigned receipt had been

admitted in evidence, and had been in the plaintiff's handwriting, its only effect would have been that of an admission that she had received pay for all her services; and this was the only effect of the counsel's statement in regard to it. But the jury found that the unsigned receipt, as well as those which were signed, and expressed to be "in full," did not amount to such an admission. The remarks of counsel did not produce the result intended, and the plaintiff's case was not prejudiced thereby. Judgment on the verdict.

SMITH, J., did not sit. The others concurred.

(68 N. H. 28)

HARMON v. HAINES et al.

(Supreme Court of New Hampshire. Caroll. July 27, 1894.)

APPEALS FROM PROBATE—WHEN LIE.

Where a judge of probate denied a motion to recommit, and accepted the report of a referee allowing a claim of an administrator against the estate, *held*, that an appeal would lie therefrom, under Pub. St. c. 192, § 18, providing for the reference of claims of an administrator against the estate to a referee, "whose report, when accepted by the judge, shall be final," and chapter 200, § 1, allowing appeals generally from decrees or other final orders of judges of probate, since section 18 gives finality only to the referee's findings of fact, and not where there has been irregularity in the proceedings, or bad faith on the part of the referee.

Appeal from probate court, Carroll county.

One Harmon, administrator of his deceased wife's estate, settled as insolvent, had a claim against the estate, which was contested by one Haines and others, heirs at law. The parties not agreeing that the judge of probate should decide the question, he referred it to a referee, who reported in favor of the plaintiff. The judge denied the defendants' motion to recommit, and accepted the report. The defendants appealed. The plaintiff's motion to dismiss the appeal was granted *pro forma*, subject to the defendants' exception. Exception sustained.

A. L. Foote and Frank Weeks, for appellants.
J. H. Hobbs, for appellee.

CHASE, J. Prior to the revision of the probate laws in 1822 (Laws 1822, cc. 27-34; Laws [Ed. 1830] pp. 331-375), there was no statute of general application authorizing appeals from a judge of probate, but appeals were allowed in certain cases by statutes particularly referring to them. Laws (Ed. 1815) p. 202, § 15; *Id.* p. 206, § 3; *Id.* p. 213, § 20; *Id.* p. 217, § 2; *Id.* p. 223, § 4; *Id.* p. 228, § 4; Laws 1820, c. 21, § 9. The act relating to the settlement of insolvent estates provided, among other things, for the appointment of commissioners to allow the claims of creditors, and for an appeal from their decision. Laws (Ed. 1815) p. 218. After setting forth the method of claiming and prosecuting an appeal, it provided that "the creditor and ex-

¹ See footnote, 36 Atl. 607.

executor or administrator may agree before the judge of probate to submit any dispute between them to referees, in which case their report, being returned to the said judge, and accepted by him, shall be final between the parties." *Id.* § 3. It contained no provision for an appeal from such acceptance. Accordingly it was held in *Bond v. Dunbar*, 2 N. H. 216, that no right to an appeal existed. In the revision the provisions for appeals in particular cases were omitted, and the following general provision was introduced: "Any person or party aggrieved by any decree, sentence, appointment, order, grant, or denial of any judge of probate, which if not appealed from might conclude the interest of such person or party, or which is not strictly interlocutory, may appeal therefrom," etc. *Laws* 1822, c. 33, § 1; *Laws* (Ed. 1830) p. 373, § 1. The provision for the allowance of the claims of administrators against the estates settled by them as insolvent was as follows: "The commissioners on such estate shall take no cognizance of any claim or demand in favor of the executor or administrator thereof against the deceased; but in all such cases, in the citation to the heirs and creditors to hear the account of such executor or administrator, notice shall be particularly given of the claim or demand against the estate which the executor or administrator wishes to have allowed to him, and if at the time of rendering the account no heir or creditor appear to contest the said claim, the judge of probate may examine the same and allow such sum, as to him appears legal, and the same shall be placed by him on the list of claims; or the judge may, and if any heir or creditor appear to contest the claim, he shall, unless the parties agree in writing to have him decide upon it, refer the same to one or more referees, whose report, when accepted by the judge, shall be final in the case." *Laws* 1822, c. 29, § 4; *Laws* (Ed. 1830) p. 362, § 4. No change in the substance of these statutes has been made since that time. *Pub. St. c. 200, § 1; Id. c. 192, §§ 17, 18. Sawyer v. Copp*, 6 N. H. 42, decided in 1832, was an appeal by heirs or creditors from the decree of a judge of probate allowing a private claim of the executor against the deceased, no person appearing before the judge to contest the claim. The executor moved to dismiss the appeal on the ground that no appeal was given by law, and that the statute made the decision of the judge final. In denying the motion, the court say that, upon advertent to the statute authorizing appeals, "we find it enacted, in the broadest terms, that 'any person or party aggrieved by any decree * * * may appeal therefrom.' The decree from which this appeal has been taken is within the words, and we see nothing that leads us to doubt that it is within the true intent and meaning, of this provision in the statute." *Abbe v. Norcott*, 8 N. H. 51, was an appeal by an heir or creditor from the decree of a judge of probate accepting the report of a referee allowing the

private claim of the administrator against the deceased. It was held that the notice of the claim in the citation for the settlement of the administrator's account was not sufficiently full and explicit, and that the award was defective because the referee had given no notice of the hearing before him. In the course of the opinion, Parker, C. J., says: "Had the judge examined and decided himself, an appeal might have been taken from his decision at any time within sixty days. * * * And upon such appeal a hearing might be had upon the merits. But upon an appeal from a decree accepting the report of a referee we can only inquire into the regularity of the proceedings, for, if regular, the statute makes the report final." The decree of the judge of probate was reversed. *Piper v. Clark*, 18 N. H. 415, was an appeal by the administratrix from a decree of the judge of probate disallowing her private claim against the deceased. The administratrix and heirs agreed in writing to submit the claim, together with an offset, to the determination of the judge of probate. The award was in favor of the estate. The reason alleged for the appeal was that the debt was due the administratrix as claimed by her. The heirs moved to dismiss, because the law gave no appeal for such reason. In the course of the opinion sustaining the motion it is said: "When the claim is committed to the determination of referees, their report is made final, in express terms, and it could not have been intended that the decision should be less so when the parties agree that the judge shall decide the controversy. He acts as a referee, in such case, by agreement. The case is not, therefore, within the general provision for appeals from all the decrees, etc., of the judge of probate." Bearing in mind that this language relates to an appeal grounded upon alleged error in the decree arising from a consideration of the merits of the claim, and not from an irregularity in the procedure, the language is not inconsistent with that of the same judge in *Abbe v. Norcott*, just quoted. *McLaughlin v. Newton*, 53 N. H. 531, is to the same effect. In the statute relating to the assignment of the widow's dower in her deceased husband's real estate, and the division of the real estate among the heirs, it is provided that "the written report of the committee [to assign dower, etc.], being accepted by the judge upon due notice, shall be final and conclusive upon all parties." *Pub. St. c. 197, § 3.* A party aggrieved by a decree accepting a committee's report is not deprived, by this statute, of the right of appeal granted by the general statute of appeals. But such appeal does not necessarily open the controversy for a new trial upon its merits. The findings of the committee upon questions of fact "cannot be set aside or rejected merely because the revisory tribunal might or would have come to a different conclusion." In accordance with the general rule, applicable alike to the findings of juries, referees, committees, and

other tribunals created by law to determine questions of fact, the findings will not be set aside if the proceedings were regular, and without error in law, unless "the court can see that the triors, whether a jury or other tribunal, in coming to their result, 'were influenced by passion, prejudice, partiality, or corruption, or unwittingly fell into a plain mistake.'" *Doughty v. Little*, 61 N. H. 365; *Eastman v. Barnes*, 62 N. H. 630. In *Gage v. Gage*, 64 N. H. 543, 14 Atl. 869, the report of a committee was set aside upon appeal because they received evidence in the absence of the parties, and at a hearing of which the parties had no notice. The language of the statute under consideration is so plain that it seems impossible to mistake the legislative intent. Before the report of referees becomes final, it must be "accepted by the judge." Pub. St. c. 192, § 18. Authority to accept necessarily implies authority to reject. This does not include authority to review questions of fact tried before the referees, for the statute makes their decision of such questions final, if they conduct themselves fairly and according to law. The judge of probate and this court upon appeal have authority to try questions relating to the regularity and good faith of the trial before the referees, and to accept or reject their report according to their finding on those questions. In the present instance the case does not disclose the reasons of appeal, and the question whether they are sufficient, if established, to sustain the appeal, is not raised. Exception sustained.

BLODGETT, J., did not sit. The others concurred

(69 N. H. 35)

STATE v. MANCHESTER & L. R. R.
(Supreme Court of New Hampshire. Rockingham. March 12, 1897.)

RAILROADS—CHARTER—PAYMENT OF EARNINGS TO STATE—CONSTITUTIONAL LAW—UNIFORMITY—PLEADING—DEBT.

1. Gen. St. c. 144, § 5 (Pub. St. c. 157, § 19), providing that, when the net receipts of railroad corporations "shall be found to exceed the average of 10 per cent. on their expenditures from the commencement of their operations, the excess shall be paid into the treasury," is not unconstitutional, as not being uniform or equal, though applicable to railroads only.

2. Debt is a proper remedy to recover such excess.

Action by the state against the Manchester & Lawrence Railroad. There was a demurrer to the declaration. Overruled.

The declaration is as follows: "In a plea of debt, for that the defendants are a corporation organized and existing, under and by virtue of the laws of said state, to construct and maintain a railroad from the city of Manchester, in our county of Hillsboro, to the state line, in Salem, in said county of Rockingham; and it was and is provided in and by their charter (section 5, c. 549, Laws 1847)

that, in any and every year when the net receipts from the use of said road shall exceed the average of ten per cent. per annum from the commencement of their operations, the excess shall be paid into the treasury of the state. That in the year A. D. 1849 the defendants constructed their said railroad from said Manchester to the state line, in said Salem, and have maintained their said railroad to the day of the purchase of this writ; and the plaintiff avers that the net receipts received by the defendants from the use of said road have in each and every year since the 1st day of January, 1867, exceeded an average of ten per cent. per annum from the commencement of their operations, by a large sum, to wit, the sum of seven hundred and fifty thousand dollars, which said sum the defendants, though hitherto requested, have neglected to pay into the treasury of said state, whereby and by reason whereof an action has accrued to the plaintiff to have and recover of the defendants said sum of seven hundred and fifty thousand dollars. Also, for that the defendants are a corporation duly chartered and organized, under and by virtue of the laws of said state, to construct and maintain a railroad within said state, and from the 1st day of January, 1849, to the date of this writ, have owned and maintained a railroad extending from the city of Manchester, in our county of Hillsboro, to the state line, in Salem, in said county of Rockingham; and the plaintiff avers that the net receipts received by the defendants from the operation of their said railroad have exceeded the average of ten per cent. per annum on its expenditures from the commencement of its operations in each and every year from said 1st day of January, 1849, to the date of the purchase of this writ, by a large amount, to wit, by the sum of seven hundred and fifty thousand dollars, which said sum the defendants, though requested, have neglected to pay into the treasury of the state, whereby and by reason whereof an action has accrued to the plaintiff to have and recover of the defendants said sum of seven hundred and fifty thousand dollars." The defendants demurred.

E. G. Eastman, Atty. Gen., for the State.
Worcester, Gafney & Snow and O. E. Branch, for defendants.

CARPENTER, C. J. The policy of the state to limit the profits of persons and corporations to whom it grants the franchise of constructing public highways, and of taking tolls for the use of them, as compensation for their services and disbursements, is older than the constitution, and has been uniformly maintained. It has been effectuated in various ways. The act entitled "An act to regulate ferries," passed February 28, 1783 (Laws [Ed. 1797] p. 341), and reciting in the preamble that "the demands of ferrymen within this state for carrying the subjects thereof and oth-

ers across the rivers in the same state are exorbitant and arbitrary," required the courts of general sessions of the peace in each county to establish the rates of ferrage for every ferry in the county, and prohibited ferrymen from charging or taking any greater tolls than those prescribed by the courts. In many of the subsequent grants of ferries an equivalent provision, though superfluous was inserted. 11 Priv. Laws 1798,¹ p. 268; 12 Priv. Laws 1799, pp. 12, 16, 104, 150; 13 Priv. Laws 1800, pp. 118, 247; 13 Priv. Laws 1801, p. 247; 15 Priv. Laws 1804, p. 174; 16 Priv. Laws 1805, p. 116; 21 Priv. Laws 1817, p. 8. The act, with amendments not here material, has ever since been in force. Laws (Ed. 1830) p. 181; Rev. St. c. 64, § 2; Gen. St. c. 72, § 2; Pub. St. c. 80, § 2. Toll-bridge charters have contained a similar provision, or have specified the rates of toll that may be taken. 4 Priv. Laws 1783, p. 495; 6 Priv. Laws 1792, p. 533; 8 Priv. Laws 1794, p. 256; 9 Priv. Laws 1795, pp. 77, 86, 246; 12 Priv. Laws 1802, p. 231; 16 Priv. Laws 1805, p. 227; Priv. Laws 1836, c. 69; Laws 1878, c. 150. Many charters provided that the bridge should become public property, free of toll, whenever the proprietors were reimbursed, by tolls or otherwise, for the expenses of erecting and maintaining the bridge, with interest at a specified rate. Priv. Laws 1839, cc. 30, 32; Laws 1848, c. 795. In some cases the justices of the court were required to so regulate the tolls that the proprietors should receive not more than a named annual per cent. of profit upon their investment. Laws 1816, c. 71; Laws 1817, cc. 10, 11; Laws 1818, c. 75; Priv. Laws 1835, c. 6; Priv. Laws 1836, cc. 69, 105; Priv. Laws 1838, c. 19. In 1877 the legislature, after reciting that the charter of Portsmouth bridge, granted in 1819 (Laws 1819, c. 50), required the proprietors to exhibit to the justices of the court an account of the sums expended on the bridge, and the justices thereupon to fix the tolls; that the proprietors had negligently omitted to exhibit such account, and had themselves, without legal authority, established excessive and unreasonable rates of toll,—resolved "that the justices of the supreme court are hereby instructed to revise the rates of toll now collected by said proprietors of Portsmouth bridge and to establish the same at reasonable rates." Laws 1877, c. 180. Similar provisions are found in canal charters. 6 Priv. Laws 1792, p. 541; 8 Priv. Laws 1792, p. 92; 15 Priv. Laws 1804, p. 41; 20 Priv. Laws 1816, p. 419; 22 Priv. Laws 1824, pp. 448, 506, 513, 524; 24 Priv. Laws 1827, pp. 325, 389; 30 Priv. Laws 1833, p. 86. The last charter, granted in 1836, prescribed the tolls that might be taken, and provided that the "rate of toll may be increased or diminished by the court of common pleas on application to them, as in their opinion justice may

require." Priv. Laws 1836, c. 102. The first turnpike charter was granted June 16, 1796. Laws (Ed. 1797) p. 325. It specified the rates of toll, and provided "that at the end of every twenty years an account of the expenditures upon said road and the profits arising therefrom shall be laid before the judges of the superior court for the time being; * * * and if the net profits for the said twenty years shall exceed twelve per cent. per annum, the said court may reduce the future toll, so far as that it may not exceed twelve per cent., and if the profits shall not amount to six per cent. the said court may raise the toll, so that it shall not be less than six nor exceed twelve per cent." All the numerous subsequent charters of turnpikes intended and necessary for the common and ordinary use of the general public have contained a like provision, with various modifications of time, rate per cent., and of the method of fixing the tolls, so that the authorized profits should not be exceeded. A few only are cited: 12 Priv. Laws 1799, p. 185; 13 Priv. Laws 1802, pp. 79, 326; 15 Priv. Laws 1804, pp. 57, 76, 112, 320; 16 Priv. Laws 1805, pp. 99, 118, 127, 279; 17 Priv. Laws 1807, p. 145; 18 Priv. Laws 1809, p. 243; 19 Priv. Laws 1812, pp. 154, 181; 21 Priv. Laws 1820, p. 537; 26 Priv. Laws 1828, p. 135; 30 Priv. Laws 1834, p. 297; Priv. Laws 1837, c. 3; Laws 1852, c. 1360. The first railroad charter, enacted January 1, 1833 (29 Priv. Laws 1832, p. 215), created the Boston & Ontario Railroad Corporation, granted tolls, to be fixed by the directors, and provided that, "if at the expiration of ten years from and after the completion of said road, the net income or receipts from tolls and other profits, taking the ten years aforesaid as the basis of calculation, shall have amounted to more than ten per cent. per annum upon the cost of the road, then the legislature may take measures to alter and reduce the rate of tolls and other profits in such manner as to take off the surplus for the next ten years, * * * and at the expiration of every ten years the same proceedings may be had," and "that the legislature shall not at any time so reduce said tolls and other profits as to produce less than ten per cent. per annum upon the cost of said road without the consent of the corporation." Under this charter no effective action was taken. The Concord Railroad was next incorporated, June 27, 1835. Priv. Laws 1835, c. 1. The charter granted a toll, to be fixed by the directors, and provided that, "if at the expiration of five years from and after the opening of said road for use, the net income or receipts from tolls and other profits shall have amounted to more than ten per cent. per annum upon the whole cost of the road from the time of the disbursements the legislature of this state may take measures to alter and reduce the rate of tolls and other profits in such manner as to take off the surplus for the next five years, calculating the amount of transportation upon the road to be the same as the five preceding years; and at the expiration of

¹ Private acts prior to 1835 have, with some exceptions, never been printed. The references to private laws enacted before 1835 are to the volumes of manuscript laws in the custody of the secretary of state.

every five years the same proceedings may be had." The same provision, in nearly identical terms, is found in the other 12 railroad charters granted before December 25, 1844, except that in four of them the net profits were limited to 8 per cent. Priv. Laws 1835, cc. 7, 14, 37; Priv. Laws 1836, c. 66; Priv. Laws 1837, c. 1; Priv. Laws 1839, cc. 18, 20; Priv. Laws 1842, c. 3; Priv. Laws 1844, cc. 111-113, 188. The obvious purpose of the legislature in limiting and providing for the regulation of the tolls granted was to restrict the profits of the grantees within limits deemed reasonable, and thereby to secure to the public the enjoyment of the property devoted to public use, at reasonable rates. In the railroad charters, as well as in many others, the authorized net profits were made the standard of reasonable tolls.

The eleventh section of the general railroad law (*Railroad v. Greely*, 23 N. H. 242), approved December 25, 1844 (Laws 1844, c. 128), provided that "such corporations shall keep exact accounts of all their receipts and expenditures and make annual reports thereof to the railroad commissioners who shall annually communicate the same to the legislature, and in any and every year when their net receipts shall be found to exceed the average of ten per cent. on their expenditures from the commencement of their operations, the excess shall be paid into the treasury of the state until otherwise disposed of by the legislature." This enactment has ever since remained in force. Gen. St. c. 144, § 5; Pub. St. c. 157, § 19. To it every railroad charter thereafter granted has been subject. Its operation is uniform. It applies to all railroads in the state. For many years after its adoption (as in the case of ferries) an equivalent, but superfluous, provision was inserted in railroad charters. Laws 1844, c. 189, § 4; Id. c. 190, § 4; Id. c. 191, § 4; Laws 1845, c. 286, 287, § 4; Laws 1847, c. 549, § 5; Id. c. 550, § 4; Laws 1849, cc. 906-908, § 4; Laws 1854, c. 1596, § 4; Laws 1859, c. 2297, § 4; Laws 1863, c. 2792, § 4; Laws 1866, c. 4318, § 4; Laws 1867, c. 85, § 4; Laws 1868, c. 100, § 4; Laws 1869, c. 70, § 4; Laws 1870, cc. 58-60, §§ 4, 5; Laws 1871, cc. 71, 72, § 4. The general statute was not a change of policy, but of method. Its purpose was, not to obtain revenue, but to enforce the established policy of the state. The profits of the proprietors of railroads were limited to 10 per cent. for the sole purpose of securing to the public reasonable rates of toll. The reason for the change of method is obvious. Railroads were in their infancy. It was impossible to estimate with reasonable accuracy the cost of building, or the expense of maintaining and operating, them. The rates of toll requisite to give the grantees of the franchise their authorized profits, and no more, could not, as in the case of bridges and turnpikes, be approximately estimated in advance; nor was it practicable for the legislature, the court, or for any official board, except the

officers of the corporations, to make the frequent modifications of the tolls necessary to bring the net income up to, and not exceeding, the authorized limits. Ten per cent. annual profits remained, as before, the standard of reasonable tolls. Any inducement to maintain or to increase them so as to reap greater profits was effectually taken away. If they were established so as to yield a greater income than 10 per cent., the legislature deemed it reasonable that the excess should, as nearly as practicable, be returned to those who suffered from the exaction; that is to say, to the taxpayers of the state. It was impossible to return to each individual the excess above a reasonable toll that he had been compelled to pay for transportation. Excessive tolls were injurious, not only to the immediate patrons of the road, but to every citizen who resided within the scope of its influence,—more or less, in fact, to every property owner in the state. Refunding to them the excess of tolls taken was the nearest approach to exact justice that was possible.

The defendants say in argument that the state can take the property of citizens against their will in one of three ways only, namely: (1) Under the power of eminent domain; (2) that of taxation; and (3) in the exercise of the police power, by imposing fines and forfeitures as punishment. Whether this proposition is or is not sound, need not be considered. The state, in this action, is not seeking to take the defendants' property against their will, except as every action to enforce a legal obligation is a proceeding against the defendant's will. It seeks to recover its own property. Unless it shows that the defendants have in their hands \$750,000, or some part of that sum, legally belonging to the state, its action must fail. The action is, in effect, for money received by the defendants for the use of the state. A judgment in favor of the state, and its enforced satisfaction, will be no more a taking of the defendants' property against their will than would be a levy by the state of an execution upon the lands of a recognizor against whom it had obtained judgment. The state, in this action, stands precisely as an individual in a like action. It is subject to the same rules of law and evidence. It has no greater power, rights, or privileges than any plaintiff. It must establish the defendants' legal indebtedness, or it must fail.

The fifth section of the defendants' charter provides "that in any and every year when the net receipts from the use of said road shall exceed the average of ten per cent. per annum from the commencement of their operations, the excess shall be paid into the treasury of the state until otherwise ordered by the legislature." Priv. Laws 1847, c. 549. This clause of the defendants' charter is identical with the general railroad law of 1844 (Laws 1844, c. 128,

§ 11), and was superfluous. Opinion of the Justices, 66 N. H. 629, 671-673, 33 Atl. 1076. The general law and the charter imposed on the defendants no duty which they did not directly and voluntarily assume. They presented to the defendants a proposition which they were at liberty to accept or to reject. The defendants accepted the charter subject to the burdens by it imposed. The provision that they should pay to the state the excess above 10 per cent. was a qualification of, or burden imposed upon, the franchise granted them, exactly like the various other duties required of them, as, for example, in case their road should cross any canal, turnpike, or other highway, to so construct it as not to "obstruct the safe and convenient use of such canal, turnpike or other highway," and to maintain in good repair all bridges "they may construct for the purposes of conducting their railroad over any canal, turnpike or other highway, or any private way, or for conducting such private way, turnpike or other highway over said railroad." Charter, §§ 11, 13. The limitation of their income to 10 per cent. was no more a tax upon their property than were the various obligations imposed upon them. It and they alike were burdens upon the granted franchises, diminishing their value, and to be considered in assessing the value of the defendants' property for the purpose of taxation, or under the law of eminent domain. The objection that the provision of the charter, as well as the general law, violates the principle of uniformity and equality, has no foundation in fact. All railroad corporations in the state, by virtue of the express provision of their charters or of the general law, are subject to the same obligation. The law applies uniformly and equally to all railroads. It is said, however, that it does not apply to other corporations, and therefore is unequal. But this is not an unconstitutional discrimination. It might as well be claimed that laws regulating the business of dentists (Pub. St. c. 134) are unconstitutional because they do not apply to farmers.

In answer to the plaintiff's claim that the action is founded upon the defendants' contract, they say that by the law of this state, whatever may be the federal law, a charter is not a contract; that is to say, not a contract within the meaning of the clause in the federal constitution which forbids the enactment by the states of any law impairing the obligation of contracts. Whether this proposition is sound or not, need not be considered. It is not here material whether the legislature, in the absence of a reserved right, and without the grantees' consent, can or cannot repeal or alter a charter which they have granted. The question is not whether the defendants' charter may be repealed or modified, but whether, as long as it subsists, they are bound by its provisions. No case has been cited or found in which it has been held or

suggested that the grantees of a franchise are not obligated to do and perform all things expressed in the grant to be by them performed, as long as they enjoy the benefit of the grant. The obligations to the public imposed on the grantees of the right to take tolls are always a part, and not unfrequently the whole, of the consideration of the grant. By the common law, one who accepts a grant from the sovereign, containing a provision that he shall perform acts therein specified to be performed by him, covenants that he will perform them; and for their nonperformance an action of covenant lies, where that form of action is an appropriate remedy. *Ewre v. Strickland*, Cro. Jac. 240; *Bret v. Cumberland*, Id. 399, 521; *Lyme Regis v. Henley*, 3 Barn. & Adol. 77; Id., 2 Clark & F. 331, 349, 350.

There is nothing in the Opinion of the Justices, 66 N. H. 629, 33 Atl. 1076, that supports any position taken by the defendants. There the state claimed that, regardless of the seventeenth section of the charter of the Concord Railroad, it could take the road, upon paying its owners less than its value, upon the grounds (1) that the constitution does not require compensation to be made for private property taken for public use, and that the state is not bound, by contract or otherwise, to refrain from partial confiscation; and (2) that by the terms of the charter "the legislature may at any time hereafter alter, amend, or modify this act or any of its provisions," and therefore that, short of total confiscation, there was no limit to the power of amendment. It was the opinion of the justices that neither of these positions could be sustained, for the obvious reasons (1) that the property of a partnership called a "corporation" is as fully protected by the constitution as that of an individual; and (2) that authority to alter, amend, or repeal the charter of a corporation is not authority to confiscate the corporate property, or any part of it, either during the existence of the corporation, or after its dissolution. The third and principal ground on which the state claimed authority to take the road was founded upon the seventeenth section of the charter, by which it was expressly provided that the state might purchase the road at any time after 20 years from its completion, by paying to the corporation "the amount expended in making the road," and "such additional sum as, together with the tolls and profits of every kind which they shall have received from said railroad, will be equal to a net profit of ten per cent. per annum on the cost of said road from the time of payment thereof by the stockholders to the time of purchase." This position of the state, the justices did not sustain, for the sole reason that in their opinion section 17 of the Concord Railroad's charter, and section 11 of the general railroad act of 1844, to the same effect, were repealed in 1867. By the repeal the state renounced or released its right of purchase. It was not claimed by the

counsel for the road, nor intimidated by the justices, that section 17 of the charter, or the general law, was unconstitutional, and therefore void. It was conceded by the parties, and assumed by the justices, that the state was entitled to purchase the road at the price stated, unless the clause in the charter and the general statute authorizing the purchase were repealed. Upon no question now presented was any opinion expressed. All the rights, powers, and property vested in the state are held by it in trust for the people. *Connecticut River Lumber Co. v. Olcott Falls Co.*, 65 N. H. 290, 387, 21 Atl. 1090. One of its powers is that of granting franchises. The franchise of taking tolls is property. Ever since the act of June 27, 1816 (Laws 1816, c. 33), it has been subject to attachment and levy like other property (Rev. St. c. 184, § 13; Pub. St. c. 220, § 15). A grant by the state of such a franchise differs in no respect that is here material from its grant of any other property—as, for example, the public lands—which it has the power to convey. An individual may convey his property, upon such terms and conditions, consistent with law, as he pleases. The power of the state cannot be less. It is sovereign, except in so far as its powers are limited by the state and federal constitutions. No constitutional provision has been pointed out or discovered which denies to the state the power to convey whatever it has the right to convey—whether lands or franchises—upon such terms and conditions as to the legislature may seem fit. The grantee need not accept the grant unless he chooses to do so. It is for him to say whether the benefits conferred outweigh the burdens imposed. He may reject the gift, but, if he accepts it, he must take it with all the qualifications and burdens that to it are annexed. The defendants, by accepting their charter and acting under it, bound themselves to do all things therein required of them. For their nonperformance of their various obligations the law provides appropriate remedies. *Mor. Priv. Corp.* §§ 1132-1136. For the nonpayment of moneys which they have bound themselves to pay to the state, debt or covenant is a proper remedy. Demurrer overruled. All concurred.

(60 N. J. L. 533)

**PENNSYLVANIA R. CO. v. BRECKEN-
RIDGE et al.**

(Court of Errors and Appeals of New Jersey.
Nov. 18, 1897.)

**ADVERSE POSSESSION — BRIDGE OVER HIGHWAY —
DEED — CONSTRUCTION.**

B. claimed to be the owner of record, subject to the public use, of a highway, where it is crossed by a railroad bridge. The highway antedates the railroad, which was built more than 40 years ago, and has been continuously operated. The railroad company brought ejectment against B., and against a pipe-line company which had laid pipe in July, 1896, under said bridge, beneath the surface of the highway, and claimed to recover—First, under a deed from L.;

and, secondly, because of possession adverse to the defendants. The trial judge left the question as to the plaintiff's title by deed to the jury, who found for the defendants, and withheld from the jury the subject of adverse possession, on the ground that under the proof this claim was unavailable to the plaintiff. Error was assigned on exceptions to so much of the charge as withdrew this question from the jury. *Held:*

1. That the adverse right derived from mere possession is limited to that which has been possessed. The right asserted by a railroad company to build, maintain, and use a bridge over a highway for the passage of trains is consistent with the right asserted by other persons to possess the land, subject to the public use, and to lay pipe beneath the surface of the highway. The former claim of right is not inherently adverse to the latter.

2. That the right of said railroad company was not enlarged beyond actual possession and use by the execution and delivery of an agreement by R. and S. to convey to it such land, then owned by them in severalty, or by both in common, as might be sufficient for the construction of said railroad, with its ditches and appendages—First, because the land in suit was not proved to have been then owned by R. and S., either severally or together, and the agreement was therefore inapplicable; and, secondly, because the description of the premises to be conveyed, being indefinite, should, if the agreement were applicable to the land in suit, be interpreted by the mode of construction adopted by the company, and should be referred to the land actually occupied.

3. The agreement by R. and S. to convey to the company, in fee simple, "both so much of the land they now hold in common," means land held by them together in common, and does not refer to land held by either of them in common with a third person.

(Syllabus by the Court.)

Error to circuit court, Warren county; before Justice Gummere.

Ejectment by the Pennsylvania Railroad Company against Henry W. Breckenridge and the United States Pipe-Line Company. Defendants had judgment, and plaintiff brings error. Affirmed.

Alan H. Strong, for plaintiff in error. Joseph N. Roseberry, for defendant in error Henry W. Breckenridge. Henry S. Harris, for defendant in error United States Pipe-Line Co.

ADAMS, J. The Pennsylvania Railroad Company, which is the plaintiff in error and was the plaintiff below, brought ejectment against Henry W. Breckenridge and the United States Pipe-Line Company. At the trial the plaintiff claimed judgment on two distinct grounds: First, under a deed from Thomas Lomasson and wife; secondly, by possession adverse to the defendants. The defendants denied that the Lomasson deed embraced the land in suit, and denied that the plaintiff had possessed the land adversely. The trial judge charged the jury that the facts in proof were not such as to make the claim of title by adverse possession available to the plaintiff. Exception was taken to, and error has been assigned on, this part of the charge. The question of location was left to the jury, who found for the defendants, and thereby conclusively determined

that the land in suit is not covered by the Lomasson deed. The inquiry is whether the trial judge erred in withdrawing from the jury the plaintiff's claim to title by adverse possession. The land in suit is described as follows: "All that certain piece or parcel of land in the township of Oxford, county of Warren, and state of New Jersey, lying within the public highway leading from Belvidere past the Shippen spring, where the said highway is crossed by the railroad embankment and culvert of the Belvidere-Delaware Railroad Company [now under lease from said company to the said plaintiff] at a distance in a straight line of about two hundred feet southeasterly from said Shippen spring; bounded on the east and west by the extreme easterly and westerly lines of said embankment, as produced and carried across said highway, and on the north and south by the northerly and southerly foundation walls and abutments of the arch or culvert by which the said railroad is carried over said highway." The railroad was built more than 40 years ago by the Belvidere-Delaware Railroad Company, and was leased to the United New Jersey Railroad & Canal Company, by which the lease was assigned to the plaintiff. For more than 40 years before the commencement of this suit the plaintiff maintained and used a bridge over said highway at the place described. Its right to do this is not denied by either defendant. This action is brought to establish against the defendants a claim to the possession, subject to the public use, of the land above described, lying within the limits of said highway. The defendant Henry W. Breckenridge claims title by deed to the land in suit. It is in proof that William P. Robeson and Anna M. Robeson, his wife, were tenants in common of a piece of land known as the "Robeson Acre," of which the defendant Breckenridge has become the owner, through divers conveyances, and of which the defendants in error insist that the land in suit is part. The United States Pipe-Line Company in July, 1896, prior to the commencement of this action, laid a line of pipe along said public highway, beneath the surface of the ground, through the land which is the subject of suit.

An examination of that part of the charge which was excepted to, and on which error has been assigned, shows that the trial judge considered the plaintiff's claim of title by adverse possession under two heads: First, as a claim of title by mere naked adverse possession, unsupported by any written instrument; and, secondly, as a claim of title by adverse possession, supported by a written instrument, to be mentioned hereafter. Under the first head the conclusion of the trial judge was that the plaintiff's possession is reconcilable with, and therefore not adverse to, any right of possession claimed by the defendants, or by either of them. In this conclusion there is no error. The plain-

tiff's possession, of which the evidence affords proof, is the use of a bridge over a highway. The right to this use is consistent with the right of other parties to possess the soil, subject to the public easement, and to lay pipes below the surface of the highway, since all these rights may be exercised without interference. Things that can co-exist in harmony are not mutually adverse. A title depending solely on acts of adverse possession, and deriving no color from any deed, does not extend beyond the *pedis possessio*. The right is commensurate with the use. The enjoyment is limited to that which has been actually enjoyed. Especially is this the rule in the case of a corporation invested with the prerogative of eminent domain, for the purpose of enabling it to construct and operate a public highway. The public grant will be interpreted strictly, and construed to give merely the power to take an easement adequate to the accomplishment of the corporate design. *New Jersey Zinc & Iron Co. v. Morris Canal & Banking Co.*, 44 N. J. Eq. 398, 15 Atl. 227; *Id.*, 47 N. J. Eq. 598, 22 Atl. 1076.

Under the second head the trial judge considered the plaintiff's claim of title by adverse possession in its relation to, and as affected by, a certain written agreement. It appears that, before the Belvidere-Delaware Railroad was built, William P. Robeson and John M. Sherrerd, both of Belvidere, entered into articles of agreement with the Belvidere-Delaware Railroad Company, bearing date June 25, 1851, whereby, in consideration of one dollar to be paid to each of them by said company, and of the benefits which the railroad, if constructed, would produce to their property, they, among other things, agreed to convey to said company, in fee simple, to use the words of the instrument, "each so much of the land as belongs to himself separately, and both so much of the land they now hold in common," lying on the route of said railroad in said township of Oxford, anywhere between the farm of William White (below Thomas Lomasson's farm) and the land of John Hoff, Jr. (above Abraham McMurtrie's land), as might be sufficient for the construction of said railroad, with its ditches and appendages, and for procuring materials; reserving the timber on said land, and certain rights of crossing, and other privileges. The words, "both so much of the land they now hold in common," are equivalent to the words, "both so much of the land they now hold together in common." This instrument, unacknowledged and unrecorded, was produced at the trial from the custody of the railroad company, and offered and received in evidence on behalf of the defendants. It is alleged on behalf of the plaintiff in error that this agreement is applicable to the land in suit. This being the situation, the trial judge, in delivering his charge, dealt with a suggestion made by counsel for the plaintiff, and con-

sidered the bearing of the agreement above mentioned upon the plaintiff's claim of title by adverse possession, introducing the topic with these words: "It has been suggested by counsel for the plaintiff that even if this land, where the culvert is, is not included within the Thomas Lomasson grant, but lies within the Robeson acre, nevertheless, by reason of the fact that they have constructed their railroad embankment and their culvert over his highway, and have occupied it for a period of more than twenty years before the beginning of this suit, or before the laying of this pipe in this highway by the defendants, they have acquired a title to that land by adverse possession, as against parties claiming under the Robeson title." The trial judge then refers to the agreement above mentioned, and treats it as a consent to the entry of the railroad company, which would create a right merely permissive, and not adverse, unless the company should assume a position of hostility, and give notice of that fact. On this view that the agreement was a consent or license to enter, and that no notice of a hostile claim had been given, the trial judge concluded that no right could be built upon it adverse to parties claiming under the Robeson title. In answer to this view, it is urged by counsel for the plaintiff in error that the instrument under consideration is not a mere license or consent to enter, but is an agreement to convey; that a person who pays the purchase money, and enters under an agreement to convey, holds adversely to the proposed vendor, because he who so enters is clothed with an equitable title, and may demand a deed; and that this rule applies to the case in hand. If all these propositions are admitted, the conclusion will still be unfavorable to the plaintiff in error. This results from the terms of the agreement, which is a contract to convey such land as might be sufficient for the construction of the railroad, with its ditches and appendages, which, in a specified locality, was then owned by William P. Robeson or by John M. Sherrerd in severalty, or by both of them together in common. In the first place, the best attainable evidence as to what land was sufficient for the construction of the railroad is afforded by the actual construction. What the company took does not clash with what the defendants claim. There is therefore no adversity of possession. In the second place, there is no proof that the land in suit belonged, when the agreement was made and the railroad constructed, to William P. Robeson or John M. Sherrerd in severalty, or to both of them in common. On the contrary, the evidence at the trial was that the land in question was either in the Lomasson title, or was part of the Robeson acre. The case presented no other alternative. On neither supposition was this land owned by Robeson or Sherrerd in severalty or together. The agreement is therefore inapplicable to the premises. In no

view of the case is there error in the conclusion that the agreement does not sustain the plaintiff's claim of title by adverse possession. The judgment should be affirmed.

(60 N. J. L. 461)

STEELMAN et al. v. ATLANTIC CITY SEWERAGE CO.

(Court of Errors and Appeals of New Jersey.
Nov. 15, 1897.)

DEED—DESCRIPTION.

In a deed of conveyance the description is: "Second tract being an undivided third part of all the salt marsh belonging to the said party of the first part, situate, lying, and being north of the fourth line of the aforesaid three hundred and forty-seven acres, and extending to the thoroughfare." *Held*, that all that follows the word "marsh" refers to the marsh as a whole, and not to the part conveyed by way of limitation.

(Syllabus by the Court.)

Error to supreme court.

Action by John D. Steelman and others against the Atlantic City Sewerage Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

M. R. Sooy, for plaintiffs in error. D. J. Pancoast and C. L. Cole, for defendant in error.

GARRISON, J. This is an action of ejectment. The plaintiffs and the defendant each claim title to the locus in quo from Andrew Leeds,—the plaintiffs under the residuary devise contained in his will, the defendant through mesne conveyances made by Andrew Leeds in his lifetime. If these conveyances include the locus, the judgment rendered for the defendant should be affirmed; if they do not, the judgment must be reversed. The sole question is one of construction of three deeds made by Andrew Leeds to his three sons, which are now gathered up in the defendant's title. These deeds bear the same date, viz. March 31, 1849. At that date, Andrew Leeds was seised in fee simple of two tracts of land in Atlantic county,—one a tract of beach land set off to him by metes and bounds in the division of the real estate of his father, Jeremiah, containing 347 acres; the other a tract of marsh, contiguous in part to the first tract. By the three deeds above mentioned, Andrew divided the beach land among his sons James, Steelman, and John, conveying to each a portion in severalty. In each of these deeds a second tract of land is conveyed, which in the deeds to James and John is thus described:

"Second tract being an undivided third part of all the salt marsh belonging to the said party of the first part, situate, lying, and being north of the fourth line of the aforesaid three hundred and forty-seven acres, and extending to the thoroughfare."

—And in the deed to Steelman is described as follows:

"The second being the undivided one-third part of all the salt marshes belonging to said party of the first part, situate, lying, and be-

ing north of the aforesaid three hundred and forty-seven acres, and north of the fourth line thereof, and extending to the thoroughfare."

It will be observed that in each of these descriptions mention is made of the fourth line of the original division by which Andrew took his title; and, as the locus in quo is not included within perpendiculars dropped directly from the north to the ends of this line, the plaintiffs contend that it was not conveyed by these descriptions. This contention is the whole case. The question thus presented is whether, by these three descriptions, the grantor conveyed all his marsh in undivided thirds, or whether he conveyed to each grantee all of the undivided third of so much of the marsh as lay between the thoroughfare on the north and the fourth line of the division on the south. And this, in turn, depends upon whether the expression "situate, lying, and being north," etc., "and extending to the thoroughfare," was used as descriptive of the location of "the salt marsh belonging to the party of the first part," or whether it was employed to limit the conveyance to so much of the marsh as had the said fourth line for its southerly boundary.

If the mind halt between these two constructions, deeming each to be of equal weight, judgment must be for the defendant, not only because the burden of proof is upon his adversary, but also because of the maxim, "*Verba chartarum fortius accipiuntur contra proferentem.*"

The contentions do not, however, seem to me to rest in equipoise. On the contrary, I find in the deed to Steelman Leeds a clear assertion that the north line of the division was not the boundary of the land conveyed. By the citations given above, it will be observed that the language in the deed to Steelman differs in two particulars from that used in the deeds to James and John: First, in that it speaks of "marshes" in the plural; and, second, that it speaks of these marshes as situate, lying, and being north, not of the fourth line of the 347 acres, but of "the aforesaid three hundred and forty-seven acres, and north of the fourth line thereof." Now, as the first course of the description to which reference is thus made runs south, 25 $\frac{1}{4}$ deg. east, and its third course is parallel thereto, running north, 25 $\frac{1}{4}$ deg. west, 79 chains and 60 links, it is evident that the southeast corner of the tract extends to the east of its fourth course by the length of the base of a right-angled triangle, having an hypotenuse of 79 chains and 60 links, leaving the plane of the perpendicular at an angle of 25 $\frac{1}{4}$ deg.,—a distance, when reduced to feet, of 2,281 $\frac{22}{100}$ feet, or nearly half a mile, whereas the fourth line is barely a quarter of a mile in length. As this is undoubtedly the effect of the description by which Steelman Leeds took his undivided third, the contention of the plaintiffs would lead to a result by which one of the sons would be a tenant in common with his brothers as to a narrow strip of the

marsh, a tenant in common with his father as to a much wider strip, while the greater part would remain in the grantor, although he had qualified his grant by the word "all," and spoken of his marshes in the plural. It is not pretended that the deeds were given to effectuate so absurd a division. It is, on the contrary, entirely consonant with reason and with sound construction to take the words of the deeds as referring to the location of the marsh as a whole, and not to the part conveyed by way of limitation. This is the natural sense of the words, as if the conveyance had been of land lying north of the manor house or of a stone corner to other land, in which case it would not be seriously contended that all that passed was a strip of land of the width of the house or of the stone.

The expression "and extending to the thoroughfare," which occurs in each of the deeds, concords with this view. The context deals with land, not with mathematical lines; hence the natural synonym for "extending" is "reaching" or "stretching," and not "produced" or "protracted." This construction is, moreover, the only one that fairly harmonizes with the topography. This was the construction given to these instruments by the court below, and is the only question raised in the bill of exceptions.

The judgment of the supreme court is affirmed.

BLYTHE et al. v. GREEN et al.

(Court of Chancery of New Jersey. Nov. 8, 1897.)

TRUSTS—CONSTRUCTION OF DEED—BENEFICIARIES.

A settlor of a trust expressed his purpose to make provision for the support of complainants, daughters of his sister; and he created a trust fund for their benefit, and provided that the trustee should pay the income, or so much thereof as he might deem necessary, at his discretion, to complainants, and, in case the whole of the income should not be needed or used for their support, then to apply the surplus, or a part thereof, to the use of any other child of said sister, or to invest or accumulate the same as part of the principal. *Held*, that there was no manifestation of a general intention in favor of complainants alone, beyond a right to such part of the income as they might need to maintain them in their position in life, which conferred on them a vested interest in all the income, subject only to divestiture by act of the trustee in applying it to the use of the other children of said sister, or investing it as part of the principal.

Bill by Margaret Blythe and others against Ellen G. Green, executrix, and others, for an accounting, a new trustee, and the distribution of a trust fund. Accounting had, trustee appointed, and conditional decree rendered.

William M. Lanning, for complainants. Elmer E. Green, for defendant Ellen G. Green. Edward D. Duffield, for defendant E. E. Duffield and others. Depue & Parker, for other defendants. Rutherford Coleman, for guardian Phillip Kissam. Henry W. Green, for guardian ad litem.

REED, V. C. This bill is filed by certain cestuarius que trustent for the purpose of getting—First, a new trustee; second, an accounting; third, a decree directing the payment to the complainants of the accumulated income, as well as the future income, of the corpus of the trust property. The complainants are the unmarried daughters of Ellen H. Green, deceased, who was a sister of John C. Green. The trust was created by John C. Green, who on September 18, 1874, executed an instrument in the following form: "To All to Whom These Presents shall Come, John C. Green, of the City and State of New York, Sends Greeting: Whereas, it is my purpose and desire to make some provision for the support and maintenance of Margaret Blythe and Elizabeth C. Blythe, unmarried daughters of my deceased sister, Ellen M. Blythe, and with that view to settle and secure the stock and securities hereinafter mentioned for their use and benefit: Now, know ye, that I, the said John C. Green, in consideration of the premises, and of the sum of one dollar to me in hand paid by Caleb S. Green, of the city of Trenton, and state of New Jersey, have, and by these presents do give, grant, assign, transfer, and set over unto the said Caleb S. Green twenty-five mortgage bonds of the Lehigh Valley Railroad Company, of the denomination of one thousand dollars each (Nos. 301-325, both inclusive), all dated June 1st, 1868, and payable June 1st, 1898, and one hundred shares of the capital stock of the South Branch Railroad Company of New Jersey, of the par value of one hundred dollars each, now standing in the name of the said Caleb S. Green, as trustee (the whole of the said bonds and stock, at the par value thereof, amounting to thirty-five thousand dollars), to have and to hold the same unto the said Caleb S. Green, his executors, administrators, and assigns. But nevertheless upon the trusts and to and for the uses and purposes following: That is to say, upon trust, in the first place, to collect and receive the interest and dividends of the said trust fund, and the net annual income thereof, or so much thereof as he may deem necessary, at his discretion, from time to time to pay to the said Margaret and Elizabeth, to and for their own sole and separate use and benefit, free from the debts or control of any husband either of them may at any time hereafter have, or otherwise, at his discretion, to pay and apply the same to their support and maintenance in such shares and proportions, and in such manner, as their several necessities may require, and as he may deem best and proper; it being my wish that my said nieces shall both share in the benefits of the said trust fund, without restricting their trustee to an equal division of the income thereof. And, in case the whole of said income shall not be needed or used for the support of my said nieces, then I authorize and empower the said trustee to apply the surplus, or any

part thereof, to and for the use and benefit of any other child or descendant of my deceased sister, Ellen, or to invest and accumulate the same as part of the principal of the said trust fund. And in case either of my said nieces die, leaving lawful issue her surviving, then upon the further trust to pay and divide one equal moiety or half part of the principal of said trust fund to and among the children of her so dying, in equal shares, the issue of any that may be deceased to take their parent's share; and upon the death of the other of my said nieces, leaving issue, then to pay and divide the remaining moiety or half part of said trust fund to and among her issue in manner aforesaid. But, in case either or both of my said nieces die without leaving lawful issue, then upon trust, if but one of them so die, to pay and assign one equal moiety or half part of said trust fund; and, if both so die, upon trust to pay and assign the whole of said trust fund to any other child or children, descendant or descendants, of my said sister Ellen, or of my brothers, or any of them, as he, in his discretion, may deem expedient, and in such shares and proportions as he, under then existing circumstances, shall think right and proper. And upon the further trust that the said Caleb S. Green shall and may, at his discretion, at any time, sell and dispose of the bonds and stock above mentioned, and the proceeds of such sale invest in such other manner and in such securities as he shall think proper and best for the interest of my said nieces, which new securities shall go and remain upon the same trusts and for the same purposes as the securities so sold as aforesaid: provided, always, and it is hereby declared, that it shall and may be lawful for me, the said John C. Green, and I do hereby reserve the right and power, at any time during my life, by writing under my hand and seal, to alter, change, revoke, annul, and make void all and every the uses, estates, and trusts hereby created, limited, and declared, and any other use, estate, or trust of and concerning the said fund to limit, appoint, and declare as I shall think meet and proper: provided, also, and it is likewise declared, that it shall and may be lawful for the said Caleb S. Green, at any time after my death, to settle and secure the principal of the said fund in trust for the separate use of my said nieces and of their respective issue in such shares and with such limitations and provisions as he may deem expedient, or otherwise to nominate and appoint some other fit and proper person or persons to be trustee or trustees in his place and stead, and the principal of the said trust fund to assign and convey to him or them upon the same trusts hereinbefore set forth, or upon such further and other trusts, and to and for such other uses and purposes, and with such other limitations and provisions, as he, in his discretion, may then deem fit and proper, and in as full and

ample a manner as I myself could do if then living: provided, also, and it is further declared, that it shall and may be lawful for any trustee or trustees under this deed of trust from time to time to retain, and to pay to himself or themselves, out of the income of the said trust estate, all necessary charges and expenses, with reasonable fees and commissions (not exceeding those allowed by the laws of New Jersey to trustees under a will) for their services and trouble for or by reason of the trusts hereby created, or transacting anything pursuant thereto."

The bonds and securities mentioned in the deed of trust were delivered to the trustee. John C. Green, the settlor of the trust, died April 29, 1875, without having altered or annulled the same. Caleb S. Green, the trustee, died on February 19, 1891, testate, leaving his widow his sole executor and legatee, and without having settled the principal of the trust fund, or appointed any trustee in his place. During his life, he, as trustee, paid the complainants about \$6,000 out of the income of the trust property, and invested the rest of the income. Since his death his executrix has received and invested all the income. It is now desired by the executrix of Caleb S. Green, the trustee, that she may be relieved of the duties cast upon her by reason of her position as executrix and universal legatee of her husband. It was stated at the time of the argument that the court would accede to this desire, and appoint a new trustee in her stead. It was also, at the time of the hearing, directed, by the desire of all parties, that an account should be taken of the transactions involved in the past execution of the trust. It was also announced at the time of the hearing that the investments which the trustee had made of such portion of the income of the trust estate as was not paid over to the complainants by him were to be regarded as accumulations,—as a part of the principal of the trust fund. The question left for present decision is in respect to the disposition of the income which has accumulated since the death of the original trustee, and which will accrue until the termination of the trust. The insistence of the complainants is that this income should be paid to them. The counter insistence of the defendants is that the complainants are only entitled to receive such parts of the income as they may need for their maintenance, and that the remainder of the income is to be added to the corpus of the estate. The ground upon which the complainants put their claim to the entire income is that they (the complainants) constitute a class in whose favor the settlor of the trust manifested a general intention, with a particular intention in favor of such of the class as the trustee should select, which particular intention has failed because the selection was not made; that such being the conditions, and the trustee, in his lifetime, having failed to make any selection of the beneficiary, and failed to apportion the income between the complainants, the court

will now do so, by apportioning the income equally between them. 2 Lewin, Trusts, par. 840; 1 Perry, Trusts, para. 250-255; Burrough v. Philcox, 5 Mylne & C. 73-92; Brown v. Higgs, 18 Ves. 192. The basic fact upon which this argument is erected is, of course, that the complainants constitute a class, in respect to the members of which the general favor of the testator is confined. In support of this insistence, attention is called to the express purpose of the settlor, viz. to make some provision for the support and maintenance of Margaret Blythe and Elizabeth O. Blythe, and with that view to secure the stock and securities mentioned for their use and benefit. The further language employed by the settlor of the trust is also pointed out, viz. that the trustee shall pay the net annual income thereof, or so much thereof, as he may deem necessary, at his discretion, to the complainant, and, in case the whole of said income shall not be needed or used for the support of the complainants, then to apply the surplus, or a part thereof, to the use of any other child of Ellen, or to invest or accumulate the same as part of the principal. The argument is that this language confers upon the complainants a vested interest in all the income, subject only to divestiture by the act of the trustee during his life, in applying it to the use of the other children of Ellen, or investing it as part of the principal. I am unable to find in this language a manifestation of a general intention in favor of the complainants alone. The primary object of the settlor in creating the trust, as expressed, was a desire to provide for the two unmarried daughters of his sister Ellen; but in carrying out his primary purpose he included others within the pale of the benefits which might flow from the trust, and the benefits which those others might receive was also dependent upon the particular favor of the trustee. These others were the other children of Ellen, and indirectly, through the power to accumulate, also the issue of the complainants, or next of kin of the settlor. The degree of favor manifested towards the complainants differs from the degree of favor exhibited towards the others, in this: that the former had the right to the exercise of the judgment of the trustee, upon the existence of a need that any part of the income should be applied to their support. If there were need, and the trustee refused to exercise his discretion, or to aid them, in such a way as to show mala fides, then this court would have compelled the trustee to perform his duty, or the court itself would have executed the trust. Apart from this particular, the complainants stood upon an equal footing with the other parties included within the scope of the settlor's general intention. The trustee, as to the selection of any of them as the objects of his particular favor, had an absolute discretion. He could have given the entire income to one or both of the complainants, to one or all of the other children of Ellen, or could have added all of it to the corpus of the trust property.

In my judgment, the complainants do not constitute a class which entitles them to any part of the income in excess of what they may need to maintain them in their position in life. Again, the provision for the accumulation of that part of the income which the trustee did not choose to assign to the complainants or to the other children of Ellen Blythe contained within it an implied limitation over of the portion of the income so unapplied. The power of the trustee was of two kinds: He was first to exercise his discretion in regard to the propriety of the application of the income, or any part of it, to the complainants, or to the other children of Ellen, or to its accumulation. Having exercised that discretion, and accumulated a portion of the income as part of the principal of the trust fund, his power over the latter ceased until revived by a subsequent event. If both nieces should die, leaving lawful issue, the deed of trust itself provided for the course which the corpus would take. If either or both of the nieces should die without leaving lawful issue, then one-half or all of the corpus became subject again to the power of the trustee, to pay the whole of said trust fund to any other child or descendant of Ellen, or child or descendant of the settlor's brothers, as the trustee, in his discretion, might deem expedient, and in such shares and proportions as the trustee might think right. There was therefore a limitation over of the income in case the trustee did not think it advisable or discreet to pay it to the complainants, or the other children of Ellen. By the act of accumulation, which was the only contingency left the trustee, the income became a part of the corpus, which was contingently limited over to the issue of the complainants, and also further limited over to become subject to the power of the trustee to select and distribute finally among the descendants of the brothers and sister of the settlor. Now, if, after the manifestation of the general favor of the settlor towards a class, with power in a trustee to select out of the class, there is a limitation over of the fund upon the failure of the trustee to appoint among the class, the doctrine that the court, upon the failure of the trustee to appoint, will execute the trust in favor of the class, is manifestly inapplicable. There is no evidence that the complainants are in need of any portion of the income. The income which has accrued since the death of the original trustee should be accumulated; and, unless it be shown that the complainants are in need, I think any income that may accrue in the future should be accumulated as a part of the corpus.

(61 N. J. L. 102)

SMITH v. FELTER.

(Supreme Court of New Jersey. Nov. 8, 1897.)
LIMITATIONS—RUNNING OF STATUTE—INFANTS AND LUNATICS—PLEADING.

1. The statute of limitations does not begin to run against an infant or a lunatic until after the

infant reaches the age of 21 years or the lunatic is restored to sound mind; and a person suffering under either of these disabilities may commence his action during the continuance thereof, or within 6 years after it ceases.

2. Where a defendant, in his rejoinder, departs from the issue tendered by his plea, such rejoinder will be held bad upon demurrer.

(Syllabus by the Court.)

Action by Edna Smith against Ann O. Felter, executrix of the estate of Ann E. Horton, deceased. Heard on defendant's demurrer to surrejoinder. Demurrer overruled.

To the declaration in this case, which contained only the common counts, the defendant pleaded the general issue and "*actio non accrevit infra sex annos*." The plaintiff joined issue on the first plea, and replied to the second that she ought not to be barred from maintaining her action by reason of anything contained therein, because, at the time her cause of action accrued to her, she was, and ever since has been, a lunatic and insane. The defendant, by her rejoinder, admitted the lunacy of the plaintiff, and charged that on the 9th day of February, 1884, by an inquisition duly taken by the county court of Orange county, in the state of New York (that being the domicile of the plaintiff), she was found to be of unsound mind and incapable of the government of herself or of the management of her property; that, on the 16th day of the same month, the said finding was confirmed by the judgment of said court, and one James Scott appointed a committee of her person and estate; that the causes of action mentioned in the replication did not accrue to the plaintiff, but to the said James Scott, as her committee; and that the same did not accrue to him within six years next before the commencement of the suit. The plaintiff, in her surrejoinder, admits the appointment of a committee of her person and estate by the New York court, but charges that such appointment was without extraterritorial effect, and that her committee had no power or authority over any of her property in this state, and was not entitled to any rights and credits or demands due or to become due to her from a resident of this state, and that so far as any rights of action belonging to her, or moneys due or to grow due to her from a resident of this state, are concerned, she remains in all things as though no committee had ever been appointed by the New York court. To this surrejoinder the defendant filed a general demurrer.

Argued June term, 1897, before MAGIE, C. J., and DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Wallis, Edwards & Bumsted, for plaintiff.
Corbin & Corbin, for defendant.

GUMMERE, J. In determining which of these parties is entitled to judgment on this demurrer, it is necessary to look through the whole of the pleadings in the case, for it is

an established rule that judgment will be given against the party whose pleading is first defective in substance. 1 Chit. Pl. 668. It is insisted on behalf of the defendant that the first substantial defect appears in the plaintiff's replication; and the contention is that, under the fourth section of our statute of limitations, a lunatic, after the expiration of six years, cannot maintain an action on simple contract until she has been restored to sound mind. The language of the statute is appealed to in support of this contention. It is as follows: "That if any person, or persons, who is, are, or shall be entitled to any of the actions specified in the three preceding sections of this act, is, are, or shall be, at the time of any such cause of action accruing, within the age of twenty-one years or insane, that then such person or persons shall be at liberty to bring the said action so as he, she, or they institute or take the same within such time as is before limited, after his, her or their coming to or being of full age, or of sane memory, as by other person or persons having no such impediment might have done." 2 Gen. St. p. 1975, § 11, subsec. 4. It seems to me clear that the effect of this provision is to stay the running of the statute while the disabilities mentioned therein continue to exist, and that a party suffering from any of such disabilities may maintain an action at any time during their continuance, or within six years afterwards. But conceding, for the sake of argument, that it is doubtful from the language of this statutory provision whether it permits an infant or a lunatic to maintain an action after the expiration of six years unless the disability under which he rests has been removed, the result is the same. This legislative provision has been a part of the statute law of our state since the year 1799 (Patterson's Laws, 353), and its language remains to-day as when it was first enacted, except that it then included within its protection *femes covert*, as well as infants and lunatics. It is almost a transcript of the proviso of the English statute of 21 Jac. I. c. 16, the only practical difference being that the latter act applies also to persons imprisoned and beyond the seas. This being so, the construction to be put upon it depends upon the construction put upon the English statute by the courts of that country prior to its adoption into our own system of laws; for it is a well-settled rule that where a statute of doubtful import has been adopted in one country from the statutes of another, after its language has been judicially construed, it will be presumed that the interpretation adopted in the country from which it was taken has been accepted, as well as the words. *Gray's Lessees v. Askew*, 3 Ohio, 466; *Adams v. Field*, 21 Vt. 256; *Rutland v. Mendon*, 1 Pick. 154; *Langdon v. Applegate*, 5 Ind. 327; *Rigg v. Wilton*, 13 Ill. 15. An examination of the English reports will show that at least twice before the year

1799 was this provision of the statute of 21 Jac. I. c. 16, judicially construed by the courts of that country—First, by the court of king's bench, in the twenty-first year of the reign of Charles the Second, in the case of *Chandler v. Vilett*, 2 Saund. 120; and, again, by the court of common pleas, in the year 1770, in the case of *Strithorst v. Graeme*, 3 Wils. 145. In the case first referred to, suit was brought by an infant to recover a debt. The defendant pleaded the statute of limitations, to which the plaintiff replied that at the time of the promises, and also at the time of bringing suit, he had been, and still was, an infant within the age of 21 years. To this replication the defendant demurred. In the report of the case in *Saunders*, it is stated that "it was said [on the argument] that the infant should have waited until his full age, because the six years were elapsed during his infancy, and therefore he could only pursue his action according to the words of the saving clause of the act, which is 'in six years after his full age'; but this was not regarded by the court." In the second case cited, the plaintiff replied to a plea of the statute that he was abroad at the time of the making of the several promises in the declaration, viz. at A., in the kingdom of S., and that he had ever since been, and still was, abroad, out of the kingdom. The replication was demurred to. In disposing of the demurrer, the court say: "If the plaintiff is a foreigner (as it seems he is), and doth not come to England in fifty years, he still hath six years after his coming to England to bring his action; and, if he never comes to England himself, he has always a right of action while he lives abroad, and so have his executors or administrators after his death. An infant may sue before he comes of age if he pleases; but, if he does not, he has six years after he comes of age to bring his action. While any of the disabilities mentioned in the statute of limitations continue, the party may, but is not obliged to, commence his action. The statute does not run while any of those disabilities continue." In view of the rule of statutory construction to which I have referred, we must accept these cases as settling the meaning to be given to that part of the fourth section of our statute of limitations which has been appealed to by the defendant. The attack upon the plaintiff's replication cannot be successfully maintained.

It is also insisted upon behalf of the defendant that the plaintiff's surrejoinder is demurrable, but, before considering that pleading, it is necessary to scrutinize the defendant's rejoinder, as that follows next in order after the replication. And, upon doing so, we find it fatally defective, in that the facts set forth in it constitute no answer to the plaintiff's replication. The situation developed by the pleadings is this: The defendant, as an answer to the plaintiff's claim, says that the supposed causes of action men-

tioned in the declaration did not accrue to the plaintiff within six years next before the commencement of the suit. To this the plaintiff replies that she ought not to be barred by the lapse of time, because, at the time her cause of action accrued, she was, and ever since has been, insane. It will be perceived that the only issue raised by this pleading was whether the plaintiff's insanity was a legal justification for her neglect to commence her action within six years. The defendant, in her rejoinder, instead of setting up facts to show that the lapse of six years after her cause of action accrued ought to bar the plaintiff notwithstanding her insanity, sets up that prior to the commencement of the suit the plaintiff had been judicially declared a lunatic; that one James Scott had been appointed her committee; that the causes of action mentioned in the replication (and they are the same as those mentioned in the declaration) accrued to him as such committee; and that they none of them accrued to the plaintiff. These facts are a denial of the existence of the causes of action set out in the plaintiff's declaration. They can be taken advantage of under the plea of general issue, but afford no ground for holding that the lunacy of the plaintiff, when set up as a bar to a plea of the statute of limitations, is not a good answer thereto. The rejoinder departs from the issue tendered by the plea of "actio non accrevit infra sex annos," and must therefore be declared bad upon this demurrer. The plaintiff is entitled to judgment on the demurrer.

(61 N. J. L. 148)

STATE (HAND, Prosecutor) v. HOWELL.
(Supreme Court of New Jersey. Nov. 8, 1897.)
CONVERSION BY SHERIFF—SUFFICIENCY OF EVIDENCE—CLAIM BY THIRD PERSON—NOTICE—ADMISSIONS—UNANSWERED LETTER.

1. To hold an officer liable to a landlord, under section 4, 2 Gen. St. p. 1815, for sale on the demised premises, or removal therefrom, of the tenant's chattels taken in execution, without paying rent then due, proof that he had notice that rent was due is necessary, but such notice need not be in writing.

2. Failure to reply to a letter not sent in course of correspondence is not to be taken as an admission of the truth of its contents. Letters are not, in this respect, on the plane of oral declarations received in silence. Such an unanswered letter is not competent evidence against one to whom it is sent, except to prove notice or demand.

(Syllabus by the Court.)

Certiorari to court of common pleas, Mercer county; Woodruff, Judge.

Certiorari by the state, on the prosecution of Robert E. Hand, against William G. Howell, to review a judgment against the prosecutor rendered on appeal from a district court. Reversed, and venire de novo awarded.

Hand was sheriff of the county of Cape May, and as such, at the suit of Hubbard & Co., took in execution the goods and chattels of one Elliott, a tenant of Howell, and on May

24, 1894, on the demised premises, sold the same. On June 8, 1894, he paid to the plaintiff in execution the proceeds of such sale. Howell sues for eight months' rent due at the time of the sale. At the trial, Howell testified that on May 23, 1894, he posted, prepaid, at Morrisville, Pa., a letter, directed to the sheriff of Cape May county, Cape May Court House, N. J., containing notice of his claim for rent; that on the envelope was printed his business card, and a request for a return of the letter if not delivered within five days; and that the letter had never been returned. He further testified that on the same day he sent to the same address a telegram of like purport. Hand testified that he had never received either the letter or the telegram. Elliott testified that on the day of the sale the sheriff asked him if there was rent due, and that he replied that there was. Hand testified that Elliott told him that no rent was due, and, further, that he had no knowledge or information when he paid over the proceeds of sale that any rent was due. Howell had judgment on verdict, which Hand now attacks as erroneous, for various reasons. The following only need be considered: (1) The court charged the jury that Howell was entitled to a verdict if Hand, before paying over the proceeds of execution, received notice in any way that the rent was due. (2) The court refused to charge, as requested in behalf of Hand, as follows: "The mailing of a letter, directed and properly superscribed with the defendant's proper address, raises only a presumption that it was received; and the defendant's positive denial that any such letter was received rebuts the presumption, and disproves, therefore, its receipt." (3) The court admitted in evidence proof of the contents of a letter from Howell to Hand, written and received December 22, 1894, as follows: "When may I expect a settlement of my claim in the Elliott matter, in which notice was served on you in May last?" to which letter Hand sent no response.

Argued June term, 1897, before DIXON, LUDLOW, and COLLINS, JJ.

Barton & Dawes, for prosecutor. Carroll Robbins, for defendant.

COLLINS, J. (after stating the facts). Liability of the sheriff in this case must rest on the "act concerning landlords and tenants" (2 Gen. St. p. 1815). Section 4 of that act is the descendant of the statute of 8 Anne, c. 14, which forbade the removal from leased premises of the tenant's goods taken in execution, unless rent to the time of the levy—but not exceeding for one year—should be first paid. Our act carries the claim for rent down to the time of removal, and extends to other process. If a sheriff or other officer ignores this statute, he is liable for such rent; but, in order to hold him, it is necessary that he shall have notice that rent is due. The English courts hold that such notice may be given after removal, so long as the goods or the proceeds of sale

remain in the officer's hands. *Arnitt v. Garnett*, 3 Barn. & Ald. 440; *Watson, Sheriffs*, 193. But in this state it was held that the notice must be before removal. *Ayres v. Johnson*, 7 N. J. Law, 119; *Peacock v. Hamblitt*, 15 N. J. Law, 165. In *Ryerson v. Quackenbush*, 26 N. J. Law, 236, it was decided that the distress act was to be considered as in pari materia with the other statute; and this court construed a sale by the officer upon the demised premises to be a removal, within the terms of the law. The charge of the court in this case, therefore, on the subject of notice, was not correct; but it did the prosecutor no harm, as the only notice of which competent proof was offered was before or at the sale. The point of objection to the charge was not that it permitted notice up to time of payment, but because it was not limited to a notice in writing. Section 5 of the act does require notice in writing, but that section, enacted after *Ayres v. Johnson*, supra, and doubtless because of that decision, is only applicable to cases where there has been an actual removal by the officer, from the demised premises, of a tenant's goods, before sale, and before notice of rent due. The notice, under section 5, must be given within 10 days after such removal. Under the statute of Anne, and section 4 of our act, formal notice is not necessary. In one case the court of king's bench held that notice might be inferred from the sheriff's conduct. *Andrews v. Dixon*, 3 Barn. & Ald. 645. Credible information sufficient to put the officer on inquiry seems to be all that is requisite. *Tayl. Landl. & T.* § 598. I would not reverse on the first ground of objection.

The second is more serious. In *McCourry v. Suydam*, 10 N. J. Law, 245, error was assigned for ordering on a trial in a court of common pleas against the defendant's objection and exception. The court reversed the judgment on other grounds, holding that the ordering on of a trial was not subject to review; but it was thought important that an opinion on the subject should be expressed. It appeared that when the case was moved in the pleas there was read an affidavit of the posting in due season, by plaintiff's attorney to defendant's attorney, of a letter containing notice of trial. There was then read an affidavit of defendant's attorney that he had not received the letter, or any notice of trial in the cause. The court ordered the trial to come on, and in this court it was said by Ewing, C. J.: "In making this order the court erred. The plaintiffs were not entitled to bring on the trial. Proof of placing in the post office a letter containing a notice of trial, directed to the defendant's attorney residing in a post town, in due season to be received the legal period prior to the day of trial, would, if made in the presence of the defendant's attorney, and until repelled, raise a presumption, and stand for proof, of the service of notice. The affidavit of the defendant's attorney that he had not received the notice entirely de-

stroyed the presumption, and left the plaintiffs without any proof of service. It only raises a presumption of service, which is neutralized and destroyed by another, to the contrary, of equal weight; and such other is found in the affidavit of the defendant's attorney. The plaintiff, in transmitting his notice by mail, takes on himself the entire risk of delay or miscarriage, and cannot require the defendant to bear the slightest portion of it. 'Qui sentit commodum sentire debet et onus.' " Of course, if there is such a presumption as is assumed, it is one of fact for the jury; and both the presumption and the evidence to repel it stand, as does all evidence, subject to credibility and other incidents. We do not decide that it was error to refuse the request as framed, but, as there must be a new trial in this case, we think it wise to call attention to the foregoing deliverance in this court. It has not been criticised in any later decision.

The third ground of objection is well taken. The letter of December 22, 1894, could have had no relevancy in the case, except to work an implied admission of notice in May of the claim for rent. It was not legal evidence. Oral declarations made to one sought to be charged thereby may in some cases be considered as admitted by silence, but the rule is otherwise as to letters. The recipient is not called on to reply, or be considered as admitting what is written. The following decisions are in point, and we have been referred to no case holding otherwise: *Fairlie v. Denton*, 3 Car. & P. 103; *Richards v. Frankum*, 9 Car. & P. 221; *Draper v. Crofts*, 15 Mees. & W. 166; *Gaskill v. Skene*, 14 Q. B. 664; *Bank v. Coumbe*, 47 Mich. 358, 365, 11 N. W. 196; *Bank v. Delafield*, 126 N. Y. 410, 27 N. E. 797, and earlier New York cases therein cited; *Hill v. Pratt*, 29 Vt. 119. An unanswered letter, not received in the course of a correspondence, is not evidence at all against the recipient, except to prove notice or demand. It was argued in this case that the letter of December 22, 1894, might stand on this footing; it being claimed that when it was offered the date of paying over the proceeds of execution had not been proved. This we think immaterial, and we do not so read the state of the case. It is expressly stated as one ground of objection to the letter that it was written after the money had been paid. The judgment of the common pleas is reversed, that a venire de novo may be awarded. Costs will abide the event.

(61 N. J. L. 146)

STATE (MEEKER, Prosecutrix) v. MEEKER et al.

(Supreme Court of New Jersey. Nov. 8, 1897.)

SUPPORT OF GRANDCHILDREN—"POOR PERSON"—ORDER FOR RELIEF AND MAINTENANCE.

1. An infant who has a vested remainder in a large estate, to be enjoyed at the death of one in possession, is not a "poor person," within section 30, p. 2510, 2 Gen. St., charging upon certain relatives, if of sufficient ability, the relief

and maintenance of poor persons not able to work.

2. An order for relief and maintenance under said statute must declare and adjudge the existence of the prescribed conditions, must direct the manner of relief and maintenance (not payment of a fixed sum), and must not embrace several poor persons in a joint provision.

(Syllabus by the Court.)

Certiorari to court of general quarter sessions, Essex county.

Certiorari by the state, on the prosecution of A. P. Meeker, against Irene H. Meeker, guardian of Henry L. Meeker and others, to review an order directing the executrix to pay to said guardian \$10 per week for the equal relief and maintenance of three infant wards of said guardian, grandchildren of said prosecutor. Order set aside.

Argued June term, 1897, before DIXON, LUDLOW, and COLLINS, JJ.

George F. Tuttle, for prosecutrix. Joseph A. Beecher, for defendants.

COLLINS, J. The writ in this case brings up an order of the court of general quarter sessions of the peace of the county of Essex, directing Anna P. Meeker to pay to the guardian of her three infant grandchildren, or to the overseer of the poor of the city of Newark, \$10 per week for the equal relief and maintenance of said grandchildren. The infants are the children of a deceased son of the prosecutrix, who is a widow with a large income. The only foundation for the order is section 30 of the "Act for the settlement and relief of the poor" (2 Gen. St. p. 2510), which charges upon the grandmother, among various relatives (when of sufficient ability), of every poor person not able to work the relief and maintenance of such poor person, in such manner as the court of quarter sessions shall direct. There are several technical objections to this order. There is no adjudication that the infants are unable to work. The petition admits and the proofs show that one of them does work, at three dollars weekly wages. The order does not provide for relief and maintenance, but directs payment arbitrarily to the guardian or the overseer of the poor. This is not authorized by the statute. *Ackerman v. Ackerman*, 55 N. J. Law, 422, 27 Atl. 807. The order is joint as to all the infants. It should be several for each, by the plain words of the law. It may be doubtful, however, if the causes assigned for reversal cover these defects.

On the merits, the prosecutrix must prevail. The infants are not poor persons. They have a vested remainder in an undivided fourth part of the residuary estate of their grandfather, William S. Meeker, deceased, which estate is admittedly worth upwards of \$400,000. The grandfather's will was published in 1880. By its fourth clause the residuary estate was given to the testator's wife, the said Anna P. Meeker, for life, for the support of herself and his children.

The wife was appointed executrix, with power of sale. The ultimate disposition of the estate was thus directed: "Fifth. At the death of my said wife, I give, devise, and bequeath all the rest and residue of my estate to my children then living, to be equally divided between them, the child or children of any deceased child to take the parent's share, if any of my said children shall be then dead, leaving children." The testator, at the time of publishing this will, had four children. One of them, William S. Meeker, Jr., the father of said infants, died in 1890. The testator died in 1892. Another child has since died, leaving issue. Testator's living children have, under the will, only a contingent remainder, but the estate of the grandchildren is a vested remainder. *Price v. Sisson*, 13 N. J. Eq. 168, affirmed 17 N. J. Eq. 475. So far as the estate is in personalty, the interest of the infants may be assigned by their guardian with the assent of a court of competent jurisdiction. So far as it is in realty, there is statutory authority to make it available. The orphans' court, where necessary for maintenance or education of infants, may order a sale of land of or to which they are seised or entitled (2 Gen. St. p. 1712); and Chancellor Zabriske seems to have entertained no doubt of his power under the general act for sale of infants' lands (2 Gen. St. p. 1712) to order sale of an estate in remainder, even in a case where he thought the estate might be defeated by death of the infants before the life tenant. *In re Heaton*, 21 N. J. Eq. 221. True, in that case he refused to order a sale because of probable sacrifice owing to the supposed cloud on the title and the uncertainty of the duration of the life estate. There is, of course, that uncertainty here, the life tenant being only 65 years of age; and there is the further complication of an outstanding power of sale. Still, where it is a question of such a sacrifice, or an alternative of leaving the infants deprived of the necessities of life, it is plain that the judicial determination must be in favor of some disposition of their interest in a part of the lands, at least. The order of the sessions will be set aside, but without costs.

(61 N. J. L. 151)

STATE (MITTAG, Prosecutor) v. MAYOR, ETC., OF BOROUGH OF PARK RIDGE.

(Supreme Court of New Jersey. Nov. 8, 1897.)

MUNICIPAL CORPORATIONS—RESOLUTIONS—APPROVAL BY MAYOR—ELECTION TO AUTHORIZE BONDS—VALIDITY—STATUTES—REPEAL.

1. The supplement of 1888 (1 Gen. St. p. 196) to the general borough act of 1878 (1 Gen. St. p. 179) authorized the submission to the legal voters of any borough formed under that act of a resolution authorizing an issue of bonds, but enacted that the mayor and council should first determine that it was expedient to issue such bonds, and, in case of calling a special election for the vote, should cause the borough clerk to give 20 days' notice thereof. *Held*: (1) That a resolution of the council that it was expedient

to issue the bonds tended to peculiarly obligate the borough, and therefore, under section 4 of its organic law, was required to be presented to the mayor for approval or veto; (2) that an election held less than 20 days after such a resolution became operative was nugatory, although 20 days' notice thereof was given by the borough clerk.

2. Said supplement was superseded by the "act concerning boroughs," of March 28, 1892 (1 Gen. St. p. 275), so far as applicable to the issue of bonds for street improvements.

3. "A general act relating to boroughs" (Revision 1897; P. L. 285) supersedes all pre-existing borough laws, as to future bond issues; and therefore corporate action, taken after it was in effect, looking towards a bond issue not justified by that law, is illegal.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Frank O. Mittag, against the mayor and council of the borough of Park Ridge, to review proceedings of defendants for an issue of bonds for the purpose of macadamizing streets. Proceedings annulled.

Argued June term, 1897, before DIXON, LUDLOW, and COLLINS, JJ.

David Harvey, Jr., for prosecutor. Frank P. McDermott, for defendant.

COLLINS, J. The prosecutor, a taxpayer of the borough of Park Ridge, attacks the validity of proceedings taken under the supplement of March 23, 1888 (1 Gen. St. p. 197, pl. 114), to the act for the formation of borough governments, approved April 5, 1878 (1 Gen. St. p. 179). Said supplement permits the issue of borough bonds for divers purposes, including the macadamizing of streets, roads, and avenues. It provides that on presentation of a petition of one-fourth of the legal voters of the borough, requesting an issue of bonds, and specifying their amount and object, the mayor and council shall fix a time (not less than 20 days thereafter) and a place for its consideration, and shall cause the clerk to give notice thereof. If the mayor and council shall then determine that it is expedient to issue such bonds, they shall cause to be submitted to the legal voters of the borough, at the annual election, or at a special election, a resolution of authority therefor, and, if the vote is to be taken at a special election, shall cause the clerk to give at least 20 days' notice of such election. Park Ridge is a borough formed under said act of 1878. Petition for such a bond issue was on April 5, 1897, presented to its council, which body, by resolution, fixed April 26, 1897, for consideration thereof, and directed the necessary notice. The mayor approved the resolution April 9, 1897, before which date, however, the clerk had published notice of the meeting. On April 26, 1897, the council adopted the following resolutions: "Resolved, that it be and is expedient to issue said bonds as prayed for in said petition; and be it further resolved, that the following resolution be submitted to the legal voters at a special election to be held in said borough on Tuesday, May 18th, 1897,

polls open from 6 a. m. to 7 p. m., at Forester's Hall, Park Ridge; that is to say: 'Resolved, that the bonds of the mayor and council of the borough of Park Ridge, to the amount of ten thousand dollars, for macadamizing the streets, roads, and avenues in said borough, be issued, payable in not less than ten years, or more than thirty years, as may be most advantageous to procure the lowest rates of interest.'" The mayor approved these resolutions April 30, 1897. On April 27, 1897, the borough clerk published notice of the special election, which was held, and at it a majority of votes was cast in favor of the issuing of the bonds.

By section 4 of the organic law of the borough (1 Gen. St. p. 186, pl. 38), it is provided "that every ordinance passed by the council and every resolution of such council appropriating, or tending in any way to peculiarly obligate the borough * * * shall, before the same or either of them take effect and within five days after the passage thereof (Sundays excepted) be presented to the mayor; if he approves it he shall sign it, if not he shall return the same within seven days (Sundays excepted) after its receipt by him, to the borough clerk, with his objections thereto in writing, and the council shall, at their next regular meeting, cause the objections to be entered at length on their minutes, and proceed to reconsider the same, and if two-thirds of all the members of the council shall vote to pass the same it shall take effect; if such ordinance or resolution shall not be so returned by the mayor within seven days (Sundays excepted) after he receives it, then it shall take effect the same as if he shall have signed it: provided, that if any resolution or bill shall contain more than one distinct section, clause or item the mayor may approve one or more thereof and veto the rest." If either of the resolutions above recited tended in any way to peculiarly obligate the borough, its presentation to the mayor for approval or veto was essential, and until the conditions of the statute were fulfilled it remained inoperative. *Booth v. City of Bayonne*, 56 N. J. Law, 268, 28 Atl. 381. Our conclusion is that the determination made by the first resolution of April 26, 1897, did tend to peculiarly obligate the borough. It was the first step towards obligation, and a sine qua non for the issue of the bonds. As above stated, the mayor's approval was on April 30, 1897, and therefore the notice of the special election published before that day was abortive; and, as there was less than 20 days' time between such approval and the date of the election, no legal notice thereof could be given. The requirement of notice of a special election is mandatory. *Morgan v. Gloucester City*, 44 N. J. Law, 137. The election, therefore, of May 18, 1897, was nugatory. Probably the resolution of April 5, 1897, being a mere designation of a meeting required by law to be held, did not need

to go to the mayor, and the notice given thereunder was sufficient.

But there is a fundamental infirmity disclosed in the case, though not covered by the causes assigned for reversal, that renders the entire proceeding void. The petition was based on the act of 1883. The "act concerning boroughs," approved March 28, 1892 (1 Gen. St. p. 275), superseded all such statutes, as far as the issuing of bonds for street improvements is concerned. *Oakes v. Mayor, etc.* (N. J. Sup.) 36 Atl. 708. And all bonding legislation for boroughs was superseded by a "general act relating to boroughs," approved April 24, 1897 (P. L. p. 285). If the prosecutor so desires, a cause for reversal may be assigned, to charge such invalidity.

(61 N. J. L. 149)

STATE (KNIGHT, Prosecutor) v. CITY OF CAPE MAY et al.

(Supreme Court of New Jersey. Nov. 8, 1897.)
MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS.

Municipal action involving the erection at public expense of a building upon land neither owned nor possessed by the municipality is illegal.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Annie C. Knight, against the city of Cape May and others, to review a resolution of the council of such city. Resolution set aside in part, and affirmed in part.

Argued at June term, 1897, before DIXON, LUDLOW, and COLLINS, JJ.

Thomas E. French, for prosecutrix. David J. Pancoast, for defendants.

COLLINS, J. This certiorari brings before us resolutions authorizing the building of a pavilion on the beach at the foot of Jackson street, and the alteration of a pavilion on the beach at the foot of Perry street, in the city of Cape May, and the contracts made in pursuance thereof. The prosecutrix is a taxpayer of that city, and claims to own the land embracing the pavilion sites. It is objected that the act passed March 16, 1896 (P. L. p. 71), that authorizes cities located on or near the Atlantic Ocean to erect and maintain pavilions along the ocean front, is unconstitutional, because local and special. The authority of that statute was not needed in order to enable the city to improve its lands by the erection thereon of buildings for public use. Such power would seem to be implied, if not expressed, in the city charter (P. L. 1875, p. 206). But the provision of the act for the issue of bonds to raise money to pay for the improvements therein authorized, so far as it is made to depend upon previous acceptance by a city of some former act, may be special, and therefore void. The act is claimed by the defendants to be operative in the city of Cape May by reason of the acceptance by that city of an act approved April 3, 1891 (P. L. p. 317). That act was rejected by Cape May in 1891,

but again submitted to vote in 1895, when, as claimed, it was accepted. We think that the legislature did not authorize resubmission after rejection. These difficulties, however, need not concern us now; for, as we read the state of the case, the city has issued its bonds, and disposed of them, and has money in the treasury to pay for the pavilions.

The prosecutrix proves title to the land on which it is proposed to erect the pavilion at the foot of Jackson street, and neither title nor possession in the city is shown as to that land. We hold, therefore, that it is illegal for the city to erect a pavilion upon it, or to expend the public money therefor, and the resolutions and contract with respect thereto must be set aside.

At the foot of Perry street a pavilion has been standing for several years, and has been, and is, in the possession of the city. The resolutions and contract concerning it involve only its inclosure with glass sashes, and other alterations of an existing structure. We will not interfere with such municipal action. The prosecutrix, as to that site, must settle her title by ejectment.

The contractor at Jackson street was made a party to the writ. By inadvertence, the contractor at Perry street was omitted; but, as our decision is favorable to his contract, there is no need to delay it in order to make him a party. The resolutions and contract as to the pavilion at the foot of Perry street are affirmed. Inasmuch as neither party wholly succeeds in this controversy, costs will not be awarded to either party as against the other.

(61 N. J. L. 136)

STATE (MAYOR, ETC., OF CITY OF BAYONNE et al., Prosecutors) v. EAST JERSEY TELEPHONE & TELEGRAPH CO. et al.
(Supreme Court of New Jersey. Nov. 8, 1897.)
STREETS FOR TELEGRAPH AND TELEPHONE LINE—POWER OF COURT—ULTRA VIRES REQUIREMENTS—ENFORCEABILITY.

1. Under 3 Gen. St. p. 3459, pl. 21, the circuit court, in its order designating streets for a telegraph or telephone line, and the manner of placing posts or poles, has no power to insert requirements outside the statute, although conceded by the company.

2. If the court desire to make its designation depend on such concessions, it should make its action dependent upon the tender, to the municipality affected, of a contract therefor.

3. Requirements ultra vires inserted in such order are unenforceable, and, on certiorari at the prosecution of the municipality or an interested landowner, will avoid the order.

4. *Quære*: Is said statute constitutional?

(Syllabus by the Court.)

Certiorari to circuit court, Hudson county; Nevins, Judge.

Certiorari by the state, on the prosecution of the mayor and council of the city of Bayonne, and of Anna M. Lord and others, and of Hannah E. Wilson, against the East Jersey Telephone & Telegraph Company and John G. Fisher, clerk of the circuit court of the county of Hudson, to review an order of the cir-

cult court of Hudson county designating streets for a telegraph and telephone line, etc. Order set aside.

Argued June term, 1897, before DIXON, LUDLOW, and COLLINS, JJ.

T. F. Noonan, Jr., and James Benny, for city of Bayonne. De Witt Van Buskirk, for private prosecutors. George T. Werts and Melville Egleston, for defendants.

COLLINS, J. An act of the legislature of this state (8 Gen. St. p. 3459, pl. 21) provides that: "Whenever any telegraph or telephone company * * * shall apply to the common council of any city * * * through which it is intended to construct or extend any telegraph or telephone line, for a designation of the street, streets or highways, in or upon which the posts or poles of said company may be erected, it shall be the duty of such common council * * * to give to such company a writing designating the street, streets or highways, in which the posts or poles of said company shall be placed, and the manner of placing the same, subject in other respects to the provisions of the act to which this is a supplement; the street, streets or highways * * * shall be designated with due regard to the improvement of facilities for telegraphic or telephonic communications. * * * In case such common council * * * shall not within fifty days from the time of the making of such application give to such company a writing designating the street, streets or highways, in which the posts or poles of such company may be erected and the manner of placing the same, * * * it shall be lawful for such company to apply to the circuit court of the county, * * * and such court, * * * upon twenty days' notice to such common council, * * * shall as speedily as possible hear the matter in question and may in the discretion of said court * * * designate the street, streets or highways in which the posts or poles of such company may be erected and the manner of placing the same, which designation shall have the same force and effect as if made by the legislative body of said city." Conditions existing, as claimed, to make this statute applicable, the East Jersey Telephone & Telegraph Company applied to the circuit court for the order authorized thereby. Jurisdiction over the city was questioned, but we think that the alleged defects were cured by due appearance. The constitutionality of the statute was the principal point of attack of the prosecutors. It was argued that by it unauthorized powers were conferred upon the judicial department of the state government. If we found the order that was made to be within the authority of the statute, this question would present serious difficulty, as would also another constitutional question, not mooted at the argument, but worthy of consideration. If the power to be exercised is judicial, it is so because it concerns the regulation of a common easement.

This power was held by Beasley, C. J., sitting for the chancellor, in the case of Delaware, L. & W. R. Co. v. Erie Ry. Co., 21 N. J. Eq. 298, 304, to be inherent in the court of chancery, a constitutional court. It is questionable whether such a power can be vested in any other tribunal. It is not necessary, however, to decide either of these questions, because we find the order that was made to be unauthorized by the statute. After designating the streets and highways in which the posts or poles of the company might be erected, and the manner of placing the same, the order proceeds as follows: "And said petitioner having on said hearing, in open court, expressed its willingness to grant, accept, abide by, and comply with all the concessions, terms, conditions, and requirements sought to be exacted, imposed upon, or required of it in and by said proposed ordinance, Exhibit C, annexed to said petition, the court doth thereupon order as follows: All posts or poles shall be placed and erected so as not to interfere with the safety or convenience of any persons traveling along, across, or upon any of such streets or avenues, and said posts and poles shall be straight, neatly shaven, and well painted, and shall be kept well painted, and not more than fifteen inches thick at the base; and no wires shall be strung thereon less than thirty feet from the grade of the street or avenue. Nothing herein shall be construed so as to grant unto said company any exclusive right upon any of said highways, nor to prevent said city from granting similar privileges to any other individual, company, or corporation. Said company shall properly replace any and all part or parts of any sidewalk or sidewalks which may be displaced by or in the placing or erection of any and every of such posts or poles, and, upon failure so to do, after ten days' notice, the street commissioner of said city shall have the right to so replace, and charge the cost thereof to said company, and recover the same from said company for the benefit of the city, by an action at law. If said city shall give or grant to any person or persons the right or license to remove or transport any building through, upon, or across any street, avenue, or highway upon which the said company shall have its poles and wires erected and strung, and said wires shall interfere with or obstruct the removal or transportation of such building, said company, at its own expense, and at the request of the person or persons having the right or license to remove or transport such building, shall cut said wires, or so adjust the same as to permit the free and unobstructed passage, removal, and transportation of said building. Said company, its successors and assigns, shall indemnify and save harmless the said city from any and all actions and causes of action at law and in equity to be brought against it by any person or persons, corporation or corporations, by reason of the erection of said line and fixtures, or by reason of anything therewith connected. In case any au-

thorized public or street improvement necessitates the changing of the location of said poles and wires, or any part thereof, said company will, at their own expense, change the location of the same to accommodate and conform to any such public or street improvement within twenty days after receiving from said city written notice so to do; and in case said company shall neglect for the space of twenty days after the service upon said company of said notice, said city may remove said poles, and change the location thereof, as aforesaid, at the expense of said company, and said city shall not be liable for any damages whatever caused by said removal of said poles and wires. Said company shall furnish, free of charge to said city, for its fire alarm and police wires, upon all poles erected pursuant to this ordinance, and shall furnish the police and fire department of said city telephone connection with such of its engine houses and police stations as the mayor and council of said city shall from time to time designate, at the rate of twenty-five dollars per year for each house or station, payable quarterly, for each instrument, except an instrument shall be placed and maintained at police headquarters in the city hall free of charge; and said company shall connect the telephone instruments so to be placed and maintained at police headquarters by a separate and independent wire with the telephone exchange of the New York and New Jersey Telephone Company, located in said city of Bayonne; all such instruments to be used for fire, police and city purposes only. Said company shall also keep the above instruments and appliances and wires connecting the same in proper order and repair. Said company shall also furnish and keep in repair, without extra charge, the necessary switch and connections between police headquarters and the various fire houses and police stations. Such connections with any new fire houses or police stations shall be made within sixty days after formal written demand is made therefor by said city upon the general manager's department of said company: provided, that within that time the said city furnish to said company the right of way necessary for the construction of a line to such new station or stations from the main or other line of said company. Said company shall deposit with the city treasurer the sum of two hundred and fifty dollars as a forfeit, to have said poles properly painted, in case said company fails, for three months after said proposed line is completed, to properly paint the said poles."

There is no authority given by the statute to the circuit court for some of these requirements of its order, nor can we think of any way in which they could be enforced. Such requirements might very properly enter into a municipal ordinance, which, if accepted, would form a contract between the telephone company and the municipality, bind-

ing on both parties (*Humphreys v. City of Bayonne*, 55 N. J. Law, 241, 26 Atl. 81); but the circuit court has no power to make a contract. The power of the court to designate a route is, indeed, discretionary, and we do not say that it may not impose as a condition precedent to its action a tender by the company to the municipality of a contract embracing proper protection, and a reasonable return for the privilege to be afforded, or make its designation conditional upon such a tender; but that is very different from what was attempted in this case. It is argued that these ultra vires requirements of the order were at the voluntary concession of the company, of which the city of Bayonne need not avail itself unless desirable, and therefore should not be heard to complain; but we cannot adjudge that they did not influence the discretion exercised in making the designation of a route, or in the selection of the particular streets designated. On the contrary, we think that in legal presumption they did influence that discretion, and, being unenforceable, must avoid the action based upon them. The order under review must be set aside, with costs to the city. The order thus falling, it is not necessary to consider the objections, to the statute and proceedings, of the private prosecutors. As abutting owners on some of the streets affected, they have a standing for their writs, and are entitled to costs.

(61 N. J. L. 8)

RIDER v. KITE.

(Supreme Court of New Jersey. Nov. 8, 1897.)

MALICIOUS PROSECUTION—WHEN ACTION LIES—TERMINATION OF PROSECUTION.

1. When a committing magistrate, upon examination, discharges from custody an accused person who has been brought before him by virtue of an arrest, upon a warrant issued upon a complaint of a breach of the criminal law, the prosecution commenced by such complaint is terminated, so that the accused may commence an action for malicious prosecution against the complainant.

2. The supplement to the criminal procedure act of March 12, 1878 (1 Gen. St. p. 1144, pl. 124), and the supplement to the same act of March 24, 1892 (1 Gen. St. p. 1152, pl. 162), do not continue the prosecution of such a complaint after the discharge of the accused.

(Syllabus by the Court.)

Certiorari to circuit court, Mercer county; before Justice Gummere.

Action by Frank H. Kite against Andrew J. Rider for malicious prosecution. There was a judgment in favor of plaintiff, and defendant brings error. Affirmed.

The record returned with this writ shows a judgment against plaintiff in error in favor of defendant in error in an action for malicious prosecution. A bill of exceptions shows that, to prove the termination of the prosecution complained of, evidence was given that Kite was arraigned before a justice of the

peace upon a charge of breaking and entering, etc., made by Rider; that a hearing was demanded by Kite, and accorded by the justice; and that, upon such hearing, the justice dismissed the complaint, and discharged Kite from custody. It further appears that the above was the only evidence that the prosecution had been terminated before the commencement of the action. Thereupon a nonsuit was asked, and refused, and an exception to said refusal was allowed.

Argued June term, 1897, before MAGIE, C. J., and DEPUE, VAN SYCKEL, and GUMMERE, JJ.

W. Holt Apgar, for plaintiff in error. Aaron B. Dawes, for defendant in error.

MAGIE, C. J. The only question presented in this case is whether there was sufficient evidence that the prosecution which was claimed to be malicious had been terminated before the commencement of the action. If not, it was error to refuse the nonsuit, for nothing is better settled in this state than that such action cannot be maintained unless the prosecution complained of had been terminated before the commencement of the action. *Potter v. Casterline*, 41 N. J. Law, 22; *Apgar v. Woolston*, 43 N. J. Law, 58; *Lowe v. Wartman*, 47 N. J. Law, 413, 1 Atl. 489. The contention on the part of the plaintiff in error is that under our criminal procedure act, as amended, the discharge by the magistrate of an accused person upon examination does not terminate the prosecution, but that it remains pending until the grand jury has considered, or at least has had an opportunity to consider, the complaint by which the prosecution was commenced. It is not denied that prior to the adoption of the amendments to the criminal procedure act, to which our attention is called, such a discharge would have terminated the prosecution, so as to give a cause of action to the injured party if the prosecution was malicious. Clearly, it would have been so; for such an action may be brought whenever the particular prosecution complained of has been ended, although the accused may still be liable to be called to answer for the same offense. The prerequisite is only that the particular prosecution be disposed of in such a manner that it cannot be reviewed, and the complainant, if he intends to proceed further, must institute proceedings *de novo*. *Apgar v. Woolston*, *ubi supra*; *Clark v. Cleveland*, 6 Hill, 344. When, upon a criminal complaint, an accused person is arrested, and brought before a magistrate, the latter, upon examination, may require the accused to enter into recognizance to abide the action of the grand jury, and, in default of such recognizance, commit him to jail for the same purpose, or he may dismiss the complaint and discharge the accused from custody. When the former course is pursued, it is obvious that the prosecution has not terminated, for the accused is either confined or

under recognizance until the complaint whereon he was arrested has been further considered. But when the latter course is taken, and the accused discharged, it is equally obvious that the particular prosecution is at an end; for although the complaining witness may voluntarily go before the grand jury, and charge the accused with the same offense, and an indictment may even be found, yet such prosecution would be a new one, commenced by the complainant before the grand jury, and not founded on the original complaint. *Apgar v. Woolston*, *ubi supra*; *Fay v. O'Neill*, 36 N. Y. 11; *Robbins v. Robbins*, 133 N. Y. 597, 30 N. E. 977; *Moyle v. Drake*, 141 Mass. 238, 6 N. E. 520.

The legislation which, it is contended, has changed this rule, is contained in two supplements to the criminal procedure act,—the first approved March 12, 1878 (1 Gen. St. p. 1144, pl. 124); and the second approved March 24, 1892 (1 Gen. St. p. 1152, pl. 162). By the first of these supplements, every justice of the peace is required to transmit to the prosecutor of the pleas of his county "every complaint, warrant, recognizance, and all other papers in every criminal case," and a failure to perform this duty by delivering such matters to the prosecutors by the day before the first day of each term is made a misdemeanor. The second supplement requires every committing magistrate to keep a book in which he shall enter the name of every person against whom he shall issue a warrant, with other particulars respecting the charge and the proceedings thereon, and to transmit the book to the prosecutor, within 10 days before each term, with all papers in his possession "relating to criminal business." The contention is that, notwithstanding a complaint has been dismissed and the accused discharged from custody under the warrant, the fact that the complaint and warrant are transmitted to the prosecutor of the pleas continues the prosecution originally begun by the complaint. But this contention cannot prevail. If it be assumed that the legislative intent expressed in this supplement was to require the transmission of dismissed complaints (which admits of a doubt), it is impossible to discover an intent to impose upon the prosecutor, as a duty, to submit such complaints to the grand jury. Doubtless, if, upon examination, he should be of opinion that the accused in any case had been improperly discharged, he might lay that case before the grand jury, but the prosecution thus commenced would be a new one, not founded on the original complaint, although begun upon information derived therefrom. This supplement has not changed the rule that fixed the termination of a criminal prosecution, for the purpose of maintaining an action of this kind, at the period of the discharge of the accused from custody under the warrant. The other supplement has no applicability. Its purpose is expressed to be merely to enable the prosecutor to have a check upon committing magistrates, and to assure

himself that all papers relating to criminal matters had been sent to him. The result is that the nonsuit was rightfully refused, and the judgment must be affirmed.

(61 N. J. L. 20)

STATE (KENNEDY, Prosecutor) v. BOROUGH OF BELMAR et al.

(Supreme Court of New Jersey. Nov. 8, 1897.)

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER—MUNICIPAL CORPORATIONS—BOROUGH—ELECTION TO ADOPT BOROUGH ACT.

1. The act entitled "An act relating to boroughs and borough commissions," approved April 21, 1896 (Laws 1896, p. 339), is a valid exercise of legislative power, and not within constitutional prohibitions.

2. Municipalities which by that act were created boroughs, and brought within the provisions of the act for the formation of borough governments, approved April 5, 1878, are properly characterized as boroughs organized under that act.

3. Such a borough may take advantage of the supplement to the last-mentioned act, approved March 14, 1893 (1 Gen. St. p. 204), and hold an election to determine whether to adopt the provisions of that act or not.

4. *Beverly v. Waln*, 30 Atl. 545, 57 N. J. Law, 143, distinguished.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Clarence Kennedy, against the borough of Belmar and others, to review a resolution of defendant borough. Certiorari dismissed.

Argued November term, 1896, before DE-PUE, GUMMERE, and MAGIE, JJ.

E. A. Armstrong, for prosecutor. Halstead H. Walnwright, for defendant.

MAGIE, J. Prosecutor seeks to set aside a resolution of the borough council of the borough of Belmar submitting to an election of its voters the acceptance or rejection of an act entitled "A further supplement to an act entitled 'An act for the formation of borough governments,' approved April 5, 1878," which supplement was approved March 14, 1893 (1 Gen. St. p. 204, pl. 152). By the terms of that supplement, boroughs organized under the borough act of 1878 are given authority to construct sewers; but it is expressly provided that the supplement shall not go into effect, or be binding on any such borough, unless it shall have been submitted to the votes of the voters of the borough, and accepted by the votes of a majority at a special election held for that purpose in the manner provided in section 16.

Prosecutor first contends that this legislation is within the prohibitions of the constitution, because the legislative power is thereby delegated to the voters of a municipality, and because it provides a rule only for such boroughs as accept its terms, and so lacks the required generality of application. But these objections cannot avail prosecutor, for the questions they raise have been disposed of in this state, so that they cannot be reopened. *Warner v. Hoag-*

land, 51 N. J. Law, 62, 16 Atl. 166; *In re Cleveland*, 51 N. J. Law, 319, 17 Atl. 772; *Id.*, 52 N. J. Law, 188, 19 Atl. 17; *Noonan v. Hudson Co.*, 52 N. J. Law, 398, 20 Atl. 255.

The next contention is that the provisions of the supplement in question do not apply to the borough of Belmar, because it was not organized under the borough act of 1878. It appears in the statement of the case that Belmar was originally incorporated under the provisions of the act entitled "An act for the formation and government of boroughs," approved March 12, 1890 (1 Gen. St. p. 225). That act has been declared to be in opposition to constitutional requirements and void. *Attorney General v. Borough of Anglesea*, 58 N. J. Law, 372, 33 Atl. 971. Defendant's claim that it is properly characterized as a borough "organized" under the borough act of 1878 is put solely upon the provisions of "An act relating to boroughs and borough commissions," approved April 21, 1896 (Laws 1896, p. 339). By that act the legislature repealed the act of March 12, 1890, above cited, the "Act for the formation and government of boroughs," approved April 2, 1891 (1 Gen. St. p. 236), the "Act for the formation of borough governments in seaside resorts," approved March 29, 1878 (1 Gen. St. p. 254), and the "Act for the formation of borough commissions," approved March 7, 1882 (1 Gen. St. p. 286), and all supplements or amendments to said acts, and further enacted that every borough or borough commission established and formed under them, and now a de facto corporation, exercising corporate powers, should thereby be created a borough by its present corporate name, and be a body corporate, in fact and in law, and be governed by the borough act of 1878, and the supplements and amendments thereto, and other general laws relating to boroughs, and that each such borough should have the powers conferred, and be subject to the duties imposed, by said acts last mentioned. Passing for the present the question of the right of the legislature to adopt such legislation, and assuming that the borough of Belmar became endowed thereby with the corporate powers which were conferred by the borough acts of 1878 upon the boroughs incorporated under its provisions, let us inquire whether this borough may be properly said to have been organized under that act. Corporate life exists for the performance of certain functions prescribed by legislation, by the means and in the mode likewise thus prescribed. Like living organisms, the functions of a corporate body may be few or many, simple or complex, and be performed by means or in modes correspondingly varied. But the rule which fixes such functions and the means and modes of their performance is the rule of the organization. So legislation which prescribes the functions of municipal corporations, and the means and modes of their performance, may be said

to be the law which organizes such corporations. Therefore, in my judgment, if the borough of Belmar, by the act of April 21, 1896, *ubi supra*, has been endowed with the powers conferred upon boroughs by the borough act of 1878, and that act prescribes the means and modes of its exercising its municipal functions, it may well be characterized as a borough organized under this act, and the supplement of March 14, 1893, *ubi supra*, does apply to it.

But prosecutor attacks the validity of the act of April 21, 1896, and contends that it is without legislative force, because, he claims, it is in opposition to provisions contained in paragraph 11 of section 7 of article 4 of the constitution.

It is first contended that it is violative of the last clause of that paragraph, which forbids legislation providing that any existing law shall be made or deemed a part of the act, or shall enact that any existing law shall be applicable, except by inserting it in such act. If this contention is correct, it is obvious that the plain purpose of this act could not have been effected except by setting out in it the whole borough act of 1878, with all its amendments and supplements, and all the general borough laws on our statute books. I will not attempt to review our decisions upon this clause of the constitution, which are perhaps not easy to reconcile. I will content myself with saying that I feel bound to pronounce this objection ineffectual, upon authority to which we must bow. The legislation which was under consideration in this court and the court of errors, and reported under the title "*In re Cleveland*," *ubi supra*, created, in such municipalities as should adopt it, a board of street and water commissioners, and provided that they should be endowed with the power of certain removed officers of those municipalities, without setting out those powers, or the acts by which they were conferred. In both courts the legislation was held valid. Legislation which expressly declared that all laws relating to the board of chosen freeholders in counties subject to the act should apply to the board of chosen freeholders thereby directed to be elected was sustained by the court of errors. *Mortland v. Ghustian*, 52 N. J. Law, 521, 20 Atl. 673. The subject was declared by the chief justice to be *res adjudicata*. *In re Haynes*, 54 N. J. Law, 6, 22 Atl. 923.

It is further contended that this act is violative of the provisions of the clause of the paragraph which requires every law to embrace but one object. But a consideration of the contents of this act and the circumstances under which it was passed will dispel this objection. At that time the borough act of 1890 had been pronounced unconstitutional. The ground upon which the decision of the court of errors upon that act was put, seemed applicable to the other acts which were repealed by the law now under con-

sideration. Many of these municipalities had become incorporated under these acts. By virtue of the apparent authority thus obtained, taxes had been exacted, property had been acquired, contracts had been entered into, and obligations incurred. If the authority to do these acts should be declared to have been wanting, it is obvious that great injury would result to the inhabitants of these districts and their creditors. The circumstances called for relief from the legislature. The plain purpose of the act was to afford such relief as the legislature deemed appropriate. The legislative scheme for relief was this: To repeal the denounced and doubtful laws; to create the inhabitants of each district, which had obtained apparent corporate existence, boroughs under general laws, in which they were to find their rule of corporate action; to vest in them the property acquired, and make them liable to the contracts and obligations incurred, under their apparent corporate existence. There are other provisions looking to the same general object, and aiding the transition from the old to the new state. It is well settled that, where the general object of the law is single, it will not be brought within this clause of the constitution by the inclusion of provisions not inconsistent with that object, but designated to effectuate the legislative design. *Easton & A. R. Co. v. Central R. Co.*, 52 N. J. Law, 267, 19 Atl. 722; *Jersey City v. American Dock, etc., Imp. Co.*, 54 N. J. Law, 215, 23 Atl. 682. Therefore, if the mode of relief was within legislative power, I think the object of the act designed to give such relief is single.

Prosecutor lastly contends that, if the law embraces but a single object, that object is not properly expressed in the title. The title of the act is, "An act relating to boroughs and borough commissions." The criticism upon the title is that it expressed an object having relation to all boroughs, as well as borough commissions, while the real object of the act has relation only to boroughs formed under certain acts. It is argued that the boroughs formed under the act of 1878, and boroughs created by special acts anterior to the adoption of the amendments to the constitution, are not affected by this legislation, and that, therefore, its title, which is broad enough to include them, must be held not expressive of its limited object. For this counsel rely upon *Beverly v. Waln*, 57 N. J. Law, 143, 30 Atl. 545. The purport of the opinion in that case is often misunderstood. The title of the act considered was, "An act relating to the cost of improving sidewalks in the cities of this state." Mr. Justice Reed construed that title to express a purpose to legislate for all the cities of the state with respect to the cost of improving sidewalks, and concluded that the object of the act, which in its body was limited to cities of the third class, was not expressed in the title. So the

title of the act which was before this court in *Coutleri v. City of New Brunswick*, 44 N. J. Law, 58, was construed to express a purpose to legislate for all cities in this state, and legislation affecting a single city was held not to be effective under such a title. But the title of the act before us is not definite, and there is nothing in it expressing a purpose to legislate for all boroughs or all borough commissions. There is nothing either false or deceptive about its language, and legislation relating to any proper class of such municipalities is, in my judgment, sustainable, because that object is expressed in the title. Besides, the object pointed out by this title is one inclusive of both boroughs and borough commissions. The purpose is to relieve a class of municipalities affected by similar peculiar circumstances, some of which were called "boroughs," and others "borough commissions." Such an act could not operate upon other boroughs not so affected. Where therefore, this title couples together these two differently named municipalities, in my judgment, it expresses that the object of the act relates to both, and sufficiently expresses the real object of the legislation to be to relieve these endangered municipalities, and to bring them in under a general law.

Counsel has not contended that this legislation was not general, within the meaning of the constitutional provision on that subject. But, from what has been said, it will be understood that, in my view, these municipalities, for which it was designed, were so distinguished from others by the circumstances of their situation as to render legislation for their relief appropriate to them, and to no others, and that consequently they formed a class for which legislation affording such relief was general, and not special. The result is that the certiorari in this case will be dismissed.

(61 N. J. L. 16)

WOOLEY et al. v. MOORE.

(Supreme Court of New Jersey. Nov. 8, 1897.)

ACTION ON GUARANTY—WHO MAY MAINTAIN.

1. An assignment of a bond for the payment of money, not limited in its scope, carries with it, to the assignee, a guaranty of such payment, connected with the bond, and intended to secure it.

2. The assignee may maintain an action on such guaranty in his own name, when the assignment was made prior to the amendment of section 19 of the practice act (Revision, p. 850) by the act of March 4, 1890 (2 Gen. St. p. 2591, pl. 340), by the original terms of said section 19. (Syllabus by the Court.)

Action by Albert D. Wooley and others, executors, against Sarah J. Moore, executrix. Heard on demurrer to declaration. Demurrer overruled.

The declaration sets out a bond from Charles Miller to William H. Robinson, its assignment by Robinson to James A. Punderferd, a guaranty of the payment of the sum named in the bond made by defendant's

testator in writing, under seal, and a subsequent assignment of the bond to plaintiffs' testator. Recovery is sought upon the guaranty.

Argued February term, 1897, before MAGIE, C. J., and DEPUE, VAN SYCKEL, and LIPPINCOTT, JJ.

Robert S. Woodruff and James Buchanan, for plaintiffs. Aaron B. Dawes, for defendant.

MAGIE, C. J. Two questions are presented by this demurrer and the briefs filed by counsel. The first question is upon the right of plaintiffs to maintain their action upon the guaranty of defendant's testator, in their own names. As the assignment of the bond, which was the subject of such guaranty, to the plaintiffs' testator, was made before the passage of the amendment of section 19 of the practice act by the supplement approved March 4, 1890, the terms of that section as amended are not involved, for it has been held in this court not to have a retrospective effect. *Lydecker v. Babcock*, 55 N. J. Law, 394, 26 Atl. 925. But we think that by the terms of section 19, before amendment, as they were interpreted by this court in *Marts v. Insurance Co.*, 44 N. J. Law, 478, plaintiffs' testator, if surviving, had a clear right to sue thereon in his own name; and it is not denied that, if such were the case, his personal representatives may, after his death, maintain the action in their names.

The second question is whether, upon the facts stated in the declaration, plaintiffs' testator acquired any right of action upon the guaranty. The declaration does not show any express assignment of the contract of guaranty. If plaintiffs' testator acquired any right of action thereon, it must have been by the assignment to him of the bond the payment of which was guaranteed. The researches of counsel and my own have failed to discover that the precise question thus presented has been authoritatively dealt with in the courts of this state. In *Hayden v. Weldon*, 48 N. J. Law, 128, a question arose regarding the effect of an irregular indorsement upon a promissory note, made after the note had come into existence, and the liability of such an indorser to a holder to whom the note had been transferred. It was held that such an indorsement gave no authority to the holder to write over it a contract of guaranty. Mr. Justice Knapp, in his opinion in that case, proceeded to discuss the question whether, if the contract of the irregular indorser could be considered as a guaranty, it would be governed by the law relating to commercial paper, and the guarantor would be debarred from questioning its consideration. In that discussion the learned judge expressed some opinion as to the transmissibility of collateral guaranties by a transfer of the original debt, which were unnecessary to the decision, and were, more-

over, largely founded upon cases in the courts of New York which have since been overruled. In our judgment, that case does not determine the question now presented. Elsewhere the decisions upon the question before us are conflicting, as will be seen by the cases collected in Brandt, Sur. §§ 33, 35. See, also, 2 Daniel, Neg. Inst. § 1774 et seq. An examination of the cases has led us to the conclusion that the better view is that an assignment of the principal debt, if not limited in its scope, carries with it the promises and undertakings connected therewith, and tending to secure its payments. *Craig v. Parkis*, 40 N. Y. 181; *Clafin v. Ostrom*, 54 N. Y. 581; *Stillman v. Northrup*, 109 N. Y. 473, 17 N. E. 379; *Lemmon v. Strong* (Conn.) 22 Atl. 293. For this reason, we think the declaration discloses a cause of action in plaintiffs, and the demurrer must be overruled.

(60 N. J. L. 444)

CONSOLIDATED TRACTION CO. v. HONE.

(Court of Errors and Appeals of New Jersey.
Nov. 16, 1897.)

ACTION FOR WRONGFUL DEATH—DEFENSE—CONTRIBUTORY NEGLIGENCE OF SOLE NEXT OF KIN—DAMAGES.

1. In a suit to recover damages under the statute for death occasioned by the negligent act of another, the court divided equally upon the question whether contributory negligence on the part of the sole next of kin will defeat the action.

2. In such action, funeral charges are not recoverable as part of the damages under the statute.

(Syllabus by the Court.)

Error to supreme court.

Action by Henry Hone, administrator of the estate of Edward Hone, deceased, against the Consolidated Traction Company. There was a judgment in favor of plaintiff, which was affirmed by the supreme court (35 Atl. 899), and defendant brings error. Reversed.

Depue & Parker, for plaintiff in error. Thos. F. Noonan, for defendant in error.

VAN SYCKEL, J. This suit was brought, under the statute, by Henry Hone, the father of Edward Hone, an infant of the age of four years and seven months, to recover the damages with reference to the pecuniary injury resulting to the plaintiff as the next of kin from the death of his minor child, which was caused, as is alleged, by the negligence of the traction company. The statute upon which this suit is based provides: First, "That whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action of damages notwithstanding the death

of the person injured," etc. The second section provides that the suit shall be brought by the personal representative of the deceased for the exclusive benefit of the widow and next of kin, and that the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person. The father, who instituted the suit below, is not only the personal representative, but is also the sole next of kin of the deceased infant.

It was insisted on behalf of the traction company in the trial court—First, that the traction company could defeat the action if it could show that the death in question was in part the result of the negligent conduct of the sole next of kin, although such negligence is not to be imputed to the infant; second, that the father could not recover in such suit for the funeral expenses of his deceased son, which were paid by him. The trial court decided both these questions adversely to the traction company, and the judgment of the trial court was affirmed by the supreme court. The case is before us by writ of error to review the judgment of the supreme court. In regard to the first question, this court is equally divided, and therefore no opinion is expressed. The second question will be the only subject for discussion.

By the common law, no action will lie for an injury caused by the death of a human being. *Grosso v. Railroad Co.*, 50 N. J. Law, 317, 13 Atl. 233; *Myers v. Holborn*, 58 N. J. Law, 193, 33 Atl. 389. This action being the creature of the statute, such damages only can be assessed as are clearly within the contemplation of the positive law. Lord Campbell's act (9 & 10 Vict. c. 93) provides for an action by the next of kin in case of death caused by wrongful act or neglect, and "that in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action shall be brought." The interpretation of this statute was involved in the case of *Dalton v. Railway Co.*, 4 C. B. (N. S.) 296. That action was brought by the father, as administrator of his son, who had been killed through the negligence of the defendant company's servants. The court unanimously held that the jury might find that the father had a reasonable expectation of pecuniary benefit from the continuance of his son's life, and that damages might be given in respect of that expectation being disappointed, and the probable pecuniary loss thereby occasioned. But the court refused to allow the expenses for the funeral and mourning, saying: "The subject-matter of the statute is compensation for injury by reason of the relative not being alive; and there is no language in the statute referring to the cost of the ceremonial of respect paid to the memory of the deceased in his funeral or in putting on mourning for his loss." The construction put upon this statute by the

English courts is that "the only injury resulting from such death" which the court can notice is pecuniary loss. *Blake v. Railway Co.*, 83 E. C. L. 93. Our statute has uniformly received a like construction. In *Paulmier v. Railroad Co.*, 34 N. J. Law, 151, Chief Justice Beasley, in delivering the opinion of the court, said "that the pecuniary injury designated by the statute is nothing more than a deprivation of a reasonable expectation of a pecuniary advantage which would have resulted by a continuance of the life of the deceased, and it is upon this principle that our statute is to be applied." *Demarest v. Little*, 47 N. J. Law, 28, is to the same effect. Under this interpretation of the statute, there is no language in it which refers to funeral expenses. Such disbursements are not included by the terms "pecuniary advantage which would have resulted by a continuance of the life of the deceased." The damages recoverable are for those benefits only of which the next of kin are deprived by the decedents not living, and are to be distributed among the widow and next of kin, to the exclusion of creditors. *Kinney v. Railroad Co.*, 34 N. J. Law, 274. No part of the sum recovered can be applied to the payment of funeral expenses. The estate of a decedent is liable for the payment of his funeral expenses, and they cannot properly be considered to constitute a deprivation of a pecuniary advantage resulting from his death to the next of kin. Death must inevitably occur to all, and, when it is occasioned by the wrongful act of another, the necessity for the payment of funeral charges is not thereby created; the time for payment is merely advanced. In our opinion, there was error in permitting funeral charges to be included in the compensation awarded to the next of kin, and the judgment below should therefore be reversed.

(61 N. J. L. 12)

MORRIS v. OCEAN TP.

(Supreme Court of New Jersey. Nov. 12, 1897.)

STATUTES—LOCAL AND SPECIAL ACTS—TOWNSHIP COLLECTOR—COMPENSATION.

1. The act entitled "A further supplement to an act entitled 'An act to establish a system of public instruction,' approved March 27th, 1874," which supplement was approved April 5, 1878, is invalid, as being local and special legislation on matters in respect to which such legislation is prohibited by the constitution.

2. A township collector, who paid over all school moneys, to which a school district was entitled, to a treasurer appointed under the act above mentioned, is not entitled to a percentage on such moneys, as moneys "paid out" by him, because such payment is not within the meaning of the act providing compensation for such collector.

(Syllabus by the Court.)

Case certified from circuit court, Ocean county; before Justice Van Syckel.

Action by Charles Morris against Ocean township, in the county of Monmouth, N. J., to recover for services rendered by plaintiff for defendant. Heard on case certified in the circuit court.

Upon the trial of the case before the circuit court without a jury, the following facts were agreed to: "(1) It is admitted: That the defendant is a municipal corporation, and that Charles Morris, the plaintiff, was the duly elected and qualified collector of taxes for Ocean township, in the county of Monmouth and state of New Jersey, from March, 1885, until March, 1891. That Matthias Woolley was appointed and qualified treasurer of school district No. 85, located in said township, from March, 1887, until September 1, 1893, under an act entitled 'A further supplement to an act entitled "An act to establish a system of public instruction,"' etc., approved April 5, 1878, which act applies to school district No. 85, aforesaid, and is binding on all parties hereto, if the same is constitutional. See Pamph. Laws 1878, p. 413. (2) In the year 1886 said Morris made a verbal claim and demand before the township committee for one and one-half per cent. of the school moneys collected by him in said year, which said claim was referred to counsel, and, by said counsel's advice, payment thereof was refused by said committee; and thereupon said Morris afterwards presented a bill for three-quarters of one per cent. of the school moneys collected by him in said year, 1886, and a like bill for three-quarters of one per cent. in the other years mentioned in the declaration. That said Matthias Woolley presented a bill to defendant for three-quarters of one per cent. of the school moneys disbursed by him as treasurer in the years aforesaid, and the township committee, acting for and on behalf of the defendant, paid said claims to the respective parties as they became due in each year. (3) That the fees and commissions which the plaintiff now demands were paid by the defendant to Matthias Woolley at the end of each fiscal year for disbursing said school moneys as treasurer of the said board of education; such payments being made with the knowledge of said Charles Morris. The moneys disbursed by said Matthias Woolley were voluntarily paid to him direct by said Charles Morris, while acting as collector of said township. (4) That the payment of all school moneys by Charles Morris to Matthias Woolley were made without any orders from the district clerk or the board of education, and were in large sums, varying in amounts from five hundred to four thousand dollars, over which defendant had no control, and that said Matthias Woolley, as treasurer of the board of education aforesaid, disbursed said school moneys in detail for teachers' salaries, school improvements, fuel, and other lawful purposes, upon the written orders of the district clerk of said school board, duly signed, etc., specifying the object for which they were given. That the said Matthias Woolley was during all the time covered by the claim of plaintiff a duly-elected member of the board of education of school district No. 85. (5) The law of 1878 having been de-

clared unconstitutional by Judge Magie in the Somerset circuit court, this action is brought to recover three-quarters of one per cent. for disbursing said school moneys in the years mentioned in plaintiff's declaration; the plaintiff insisting that said three-quarters of one per cent. heretofore paid to Matthias Woolley as aforesaid should have been paid to said plaintiff, as his fee fixed by law. C. Ewing Patterson, Attorney of Plaintiff. John W. Slocumb, Attorney for Defendant."

The following questions were thereupon certified: "(1) Whether the act entitled 'A further supplement to an act entitled, "An act to establish a system of public instruction," approved April 5, 1878, is constitutional. Laws 1878, p. 413. (2) Whether the statute which limits the time within which certain actions should be brought to the period of six years from the time action accrues is applicable to plaintiff's demand. (3) Whether the said Charles Morris disbursed any school moneys (within the meaning of the statute) during his term of office; and is he entitled to any compensation for simply paying said school moneys to the treasurer of the school board? (4) If the act of 1878 is unconstitutional, was not Matthias Woolley nevertheless the de facto disbursing officer of the school moneys of the said school district? And, the identical fees and commissions for which this suit is brought having been paid by defendant to Matthias Woolley at the time and in the manner set forth in the statement of facts agreed upon, can the plaintiff maintain his action against the defendant, a municipal corporation? (5) Is not the plaintiff estopped from maintaining his action against the defendant by reason of his having recognized Matthias Woolley as the disbursing officer of the school moneys of said district, and voluntarily turning over all of said school moneys to him?"

Argued June term, 1897, before MAGIE, C. J., and DEPUE, VAN SYCKEL, and GUMMERE, JJ.

C. Ewing Patterson and Aaron E. Johnston, for plaintiff. John W. Slocumb, for defendant.

MAGIE, J. (after stating the facts). In regard to the first question referred to us, we are of opinion that the act therein mentioned is lacking in validity, because it is a local and special law upon matters about which such legislation is prohibited by the constitution.

The second question must be answered in the negative. *Cowenhoven v. Freeholders*, 44 N. J. Law, 232.

In respect to the third question, we think that Morris, the township collector, in paying over all school moneys to Woolley, acting as a treasurer of a school district under the legislation above declared invalid, did not "pay out" that money, within the meaning of the law giving to a collector three-fourths of 1 per cent. upon all school moneys received and paid out by him. In *Demarest v. New Bar-*

badoes Tp., 40 N. J. Law, 604, the court of errors approved a construction of this law which allowed to a collector his percentage on all school moneys received, and also on all school moneys paid out, except on such moneys received by him from his predecessor in office, and on such moneys paid over by him to his successor in office. His percentage on moneys paid out was limited to such moneys as he paid out on the order of the district clerks. A like construction excludes Morris' claim for percentage on the school moneys paid over to Woolley. As these answers dispose of the case, it is not deemed necessary to respond to the other questions.

(60 N. J. L. 408)

STATE (HUMPHREYS et al., Prosecutors) v.
MAYOR, ETC., OF CITY OF
BAYONNE.

(Supreme Court of New Jersey. Nov. 22, 1897.)

MUNICIPAL CORPORATIONS—OPENING AND WIDENING STREETS—MAPS BY CITY SURVEYOR—ASSESSMENT OF BENEFITS.

1. The fifty-eighth section of the charter of the city of Bayonne provides that when an ordinance for the opening, extending, or widening of any street or avenue is introduced into the board of councilmen, it shall, before its passage, "be referred to the commissioners of assessment, and a city surveyor not interested in such improvement, who shall thereupon make a map of such improvement showing the real estate to be taken therefor, and all the property which in the judgment of said commissioners will be benefited thereby." *Held*, that this provision does not prohibit the city surveyor from preparing such maps and doing such surveying and engineering work as may be necessary to enable the commissioners of assessment to make their final assessment of benefits for a street improvement. *Held*, further, that the provision referred to applies only in those cases in which the improvement for which the assessment is made consists in the opening, extending, or widening of a street, and not otherwise.

2. An assessment for benefits will not be disturbed on account of the failure of the commissioners to assess all the property benefited by the improvement, unless it is made to appear that such failure has operated to injure the party complaining thereof, by imposing on his lands an assessment greater than they would otherwise have been called upon to bear.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Solon Humphreys and others, against the mayor and council of the city of Bayonne, to review the action of defendant in assessing property for a street improvement. The court set aside the final assessment, on the application of the prosecutors, and appointed commissioners to make a new assessment, and said commissioners filed their report. Heard on rule to show cause why their assessment of benefits should not be confirmed. Assessment confirmed.

Argued February term, 1897, before GARRISON and GUMMERE, JJ.

Van Buskirk & Parker, for prosecutors. Thomas F. Noonan, Jr., for defendants.

GUMMERE, J. The final assessment in the matter of the improvement of East Twenty-

Second street, in the city of Bayonne, having been set aside by this court on the application of the prosecutors, and commissioners having been appointed by this court to make a new assessment of the costs and expenses of said improvement, and the said commissioners having made a new assessment in pursuance of the order of this court, and having filed their report thereof, application is now made for an order confirming the same. The prosecutors resist the application to confirm the new assessment on several grounds.

The first ground is that the commissioners appointed one Emmett Smith, who was the city surveyor, to prepare the necessary maps, and do the engineering and surveying work required by them, in violation of the provisions of the city charter. In support of this objection the prosecutors appeal to section 58 of the charter, which provides that when an ordinance for the opening, extending, or widening of any street or avenue is introduced into the board of councilmen, it shall, before its passage, "be referred to the commissioners of assessment, and a city surveyor, not interested in such improvement, who shall thereupon make a map of such improvement showing the real estate to be taken therefor, and all the property which in the judgment of said commissioners will be benefited thereby, designating each lot and parcel on said map by number," etc. It is a sufficient answer to this contention of the prosecutors to say that the assessment made by the commissioners in this case was neither for the opening, the extending, nor the widening of East Twenty-Second street, but for the improvement thereof in other ways, and that the making of improvements of the character of those for which this assessment is made is regulated by the sixty-second and sixty-third sections of the charter, and not by the fifty-eighth section thereof, which consequently has no application to the matter before us. But, even if it were otherwise, it is manifest, from a reading of the section, that it only prohibits a city surveyor, who is interested in a proposed improvement, from acting in matters connected with the preliminary assessment, and does not prevent him from rendering to the commissioners appointed to make the final assessment such services as they might require of him.

It is further objected by the prosecutors that the assessment put upon their lands is in excess of the benefits received by the improvement. It is enough, on this point, to say that the proofs offered by the prosecutors in support of this contention are not of such a character as to justify this court in refusing to confirm the assessment. There is nothing which suggests that the commissioners, in making their assessment, have disregarded any rule of law, or been influenced by prejudice. An assessment will not be set aside because the commissioners might reasonably have reached a conclusion different from that at which they arrived. It must be made to appear affirmatively that their conclusion is erroneous. It is their

judgment of the amount to which property has been benefited, and not that of third persons who are called as witnesses, which is controlling; and, in order to warrant this court in interfering with their action, it must appear, as was said in *Hegeman v. City of Passaic*, 51 N. J. Law, 109, 16 Atl. 63, "that some rule of law has been violated, or that the assessments are so excessive or unreasonable that some rule of law must have been disregarded, through prejudice or misjudgment. It must be shown clearly that some injustice has been done before an assessment will be set aside on the facts."

The only other ground upon which the prosecutors seek to contest the confirmation of this assessment is that the commissioners did not assess all the lands which have been benefited by the improvement. But it is settled in this court that an objection of this kind will not be sustained unless it is made to appear that the failure of the commissioners to assess all property benefited has operated to injure the prosecutor, by imposing on his lands more than a proper assessment. *Righter v. City of Newark*, 45 N. J. Law, 104, 109; *Davis v. City of Newark*, 54 N. J. Law, 145, 147, 23 Atl. 276. In the present case, as has already been stated, the evidence fails to show that the assessment placed upon the property of the prosecutors is in excess of the benefits received from the improvement. But, even if the contrary had appeared, it would have been too late, after the final assessment had been made, to have taken advantage of the error. The charter of Bayonne (section 62) provides that, where an improvement such as is involved in this case is about to be made, the commissioners of assessment shall first "cause a survey and preliminary map to be made of said improvement, distinguishing each lot or parcel by numbers on said map, and they shall estimate the whole cost of said improvement according to the best of their judgment, and shall assess such estimated cost upon the lands and real estate benefited in proportion to the benefits received, and report the names of the owners of the lots or parcels with the amounts assessed to each, and file said report and map with the clerk of the city within twenty days thereafter." By the same section it is provided that the clerk shall give notice of the filing of the map and report in the manner therein specified. The sixty-fourth section of the charter provides "that all expenses and cost of proceedings for such improvements, when the same shall be completed shall be assessed by the commissioners of assessments upon, and be paid by, the lands and real estate benefited by the improvement, in proportion to the benefit received by said lands and real estate." *Pamph. Laws 1872*, pp. 717, 719. Evidently one of the objects to be attained in requiring a preliminary assessment to be made, and notice thereof to be given, was that the owners of property upon which the assessment was to be laid might be apprised, not only of the probable cost to them of the improvement, but also be afforded an opportunity of ascertaining whether in fact all property which

would be benefited thereby would be called upon to bear its proportion of the expense thereof; so that, if any legal objection to the extent of the assessment existed, it might be taken before the expense of making the improvement had been incurred. This, it seems to me, is made manifest by the fact that both the preliminary and final assessments are to be made upon the same property, viz. "upon the lands and real estate benefited by the improvement." The charter provision being that the final assessment should conform to the preliminary one, so far as the lands to be embraced therein are concerned, and the parties interested therein having been advised by the preliminary assessment of the lands upon which the final assessment would be laid, they cannot sit by, after receiving such notice, and permit the improvement to be made, and then take advantage of the error of the commissioners in omitting lands which have been benefited thereby, and which should therefore have been included in the assessment. And this is equally true whether the assessment is made by the commissioners of assessment created by the charter, or by commissioners appointed by this court. The assessment should be affirmed, with costs to the defendants.

(61 N. J. L. 18)

SHIELDS v. STATE.

(Supreme Court of New Jersey. Nov. 8, 1897.)

CRIMINAL LAW—APPEAL—ABSENCE OF EXCEPTIONS—EFFECT.

In the course of a trial upon an indictment, the court excluded certain persons from the court room. The action of the court was objected to, but no exception was taken thereto. The writ of error is returned, with a record of the proceedings at the trial, duly certified, under the provisions of the supplement to the criminal procedure act approved May 9, 1894 (1 Gen. St. p. 1154, pl. 170). *Held* that, in the absence of an exception, this court cannot consider whether the action of the court deprived plaintiff in error of his constitutional right to a public trial, but only whether it appears from the record of the proceedings returned that he suffered manifest wrong or injury by such action.

(Syllabus by the Court.)

Error to court of general quarter sessions, Warren county; Morrow, Judge.

William F. Shields was convicted of abortion, and brings error. Affirmed.

The judgment returned with the writ of error is a judgment of conviction upon an indictment charging the crime of abortion. The proceedings certified by the trial judge contain the following statements: "In the progress of the trial, while the young woman, Lizzie Silker, was on the stand, giving her testimony, she became nervous and embarrassed by a great number of men, young and old, gazing upon her. She seemed unable to proceed with her testimony on that account, and in the interests of justice, as well as of morality and decency, on account of the character of the testimony, and against the objection of the defendant's

counsel, I excluded from the court room the general public having no connection with the case on either side, permitting officers of the court and members of the bar to remain. The defendant did not ask that any particular person or number of persons should remain; the objection being to the exclusion of the public generally."

Argued June term, 1897, before MAGIE, C. J., and DEPUE, VAN SYCKEL, and GUMMERE, JJ.

George M. Shipman, for plaintiff in error.
George A. Angle, for the State.

MAGIE, C. J. The act of the trial judge in excluding persons from the court room in the manner shown in the preceding statement forms the sole ground of complaint before us. While that act was objected to by plaintiff in error, he took no exception to it; and that the judge did so act is not shown by any bill of exceptions, but only by a certificate made under the supplement to the criminal procedure act, approved May 9, 1894 (1 Gen. St. p. 1154, pl. 170), returning with the writ of error what that act curiously calls the "record of the proceedings at the trial." It is obvious, therefore, that it is impossible to review the order complained of, as could be done if before us on a bill of exceptions, or to determine whether or not the trial judge lacked power to make such an order. All that the court can do upon the proceedings before us is to determine whether or not, assuming that the action of the trial judge was a matter of discretion, the plaintiff in error appears to have suffered manifest wrong or injury thereby. This leads to the affirmance of the judgment below, for there is nothing to indicate that any wrong or injury was suffered by him by reason of that order.

(55 N. J. E. 305)

CUMMINGS et al. v. JACKSON et al.

(Court of Errors and Appeals of New Jersey.
Nov. 17, 1897.)

EQUITABLE MORTGAGE—WHAT CONSTITUTES—PRIORITY OF LIENS—VALIDITY.

1. A contract in writing to secure a debt which is duly specified therein, in which the parties expressly declare their intention to create a lien, by way of mortgage, upon certain real estate particularly mentioned and described in the writing, upon the failure of certain conditions fully set forth in the contract, is an equitable mortgage, and, upon nonpayment and breach of the conditions, may be foreclosed in the ordinary way in a court of equity, and the interest of the mortgagors in the lands so pledged sold to satisfy the debt.

2. When an agreement has been made that a mortgage shall be subject and subordinate to a subsequent lease of the same lands, provided and so long as certain payments mentioned in the agreement are made on the mortgage, a failure to make such payments will ipso facto restore the priority of the mortgage.

3. When a purchaser of lands assumes the payment of a mortgage thereon, and deducts the amount of the same from the consideration paid, he is precluded from assailing the validity of the

mortgage assumed, or denying that the amount assumed by him, and withheld from the purchase money, is a good and subsisting lien upon the lands.

(Syllabus by the Court.)

Appeal from court of chancery.

Action by James Jackson against Sylvanus D. Brown and Mary Brown, his wife, and others, to foreclose an instrument in writing given to secure the payment of money. From the decree, defendants James M. Cummings, Laura M. Roosevelt, and Ira D. Cummings appeal. Affirmed.

Dickinson, Thompson & McMaster, for appellants. William I. Lewis, for respondents.

NIXON, J. The controversy in the case under review grows out of the foreclosure of an instrument in writing, made on the 14th day of August, 1882, between Sylvanus D. Brown, and Mary Brown, his wife, and James Jackson, the respondent, in order to secure to Jackson the payment of \$1,900 on the 1st day of August, 1883, and not sooner, unless the parties should elect to sooner repay the same, which writing was duly acknowledged and recorded. For the payment of this sum, the said instrument pledged 19 shares of stock in the Layton Iron Company, the rents, royalties, profits, and increase derived by Mary Brown by virtue of certain leases of mining properties, known as the "Pellington Mine" and the "Brown Mine," then held under leases by the Midvale Ore Company, the right, title, and interest of Sylvanus D. Brown in a certain agreement then made, and afterwards to be formally executed, with one John Huyler, and finally stipulated and provided "that in case the Midvale Ore Company should surrender up the aforesaid lease of the said Brown Mine, or either portion thereof, or the same should become forfeited in any manner, the said instrument providing both for surrender and forfeiture, then the transfer, assignment, and conveyance hereinbefore made of the rents, royalties, profits, etc., arising out of said lease, as collateral security for the debt hereinbefore mentioned, shall be deemed to operate upon the real estate composing the said tract, known as the 'Brown Mine,' and being the subject-matter of the said lease, and this conveyance shall be held and construed to be a lien by way of mortgage upon the said real estate, as and for the said collateral security, subject to all the conditions and limitations herein contained, in so far as they may be applicable; the said two parcels of real estate being particularly bounded and described as follows, viz.: [Description of lands.]" No note or bond was given with this instrument. On March 12, 1886, Sylvanus D. Brown and Mary Brown, his wife, executed a mortgage on the same premises in question and other property, to James Jackson, Charles Du Pont Breck, and George Fisher, to secure the payment of \$10,000, which was afterwards as-

signed to Breck, in trust for himself, Jackson, and Fisher. On March 14, 1891, Mary Brown and her husband made a lease of all the iron ores and metals and mineral substances in or upon the lands in question, to A. G. N. Vermilya, reserving an annual rent therefor of \$2,500, and providing for the forfeiture and making void of said lease on the failure to pay said rent. On the same day it was mutually agreed by the Browns, Vermilya, Jackson, and Breck that the rent reserved in said lease should be paid to Jackson until the "mortgages" given by the Browns to Jackson, and to Jackson, Breck, and Fisher, should be paid, and that the mortgages should be subordinate to the lease to Vermilya, "so long as the conditions and covenants of said conveyances are kept and performed by said Vermilya, his heirs, assigns, or legal representatives." On March 17, 1891, Vermilya and wife executed a mortgage of his interest in all the ores, metals, and mineral substances in or upon the lands in question, to James M. Cummings, to secure the sum of \$25,000; and on March 24, 1891, Vermilya conveyed all his interest under the Brown lease to the Midvale Mining Company, subject to the conditions and reservations of rent contained in the lease from the Browns. On November 14, 1893, Mary Brown and her husband conveyed all their right, title, and interest in the Brown Mine lands to James M. Cummings, Laura M. Roosevelt, and Ira D. Cummings, the appellants.

The bill to foreclose the aforesaid instrument was filed August 8, 1894, and all the parties interested were made defendants; and the case was heard upon the bill, the answer, and cross bill of the appellants, and the answer and cross bill of the Midvale Mining Company, and the respective answers of Breck and Mary Brown, and the proofs; the bill having been taken as confessed against the other defendants. The chancellor decreed that the instrument set forth in the bill of complaint is a valid and subsisting incumbrance and lien, by way of mortgage, upon the estate, rights, and appurtenances therein described, against all the defendants, and that there was due on the date of the decree to the complainant James Jackson \$3,534, for principal and interest; that the mortgage executed by Mary Brown and her husband to pay James Jackson, Charles Du Pont Breck, and George Fisher to secure the payment of \$10,000 is also a valid and subsisting lien upon the estate, ores, mining rights, etc., and that the sum of \$8,738.25 found due thereon is entitled to be secondly paid; that the mortgage of Allen G. N. Vermilya and wife to James M. Cummings, on which the sum of \$33,617.90 was due, is entitled to be thirdly paid; that "all the estate, rights, title, and interest which the said Mary Brown and Sylvanus D. Brown mortgaged to the said James Jackson by the said instrument, bearing

date of the 14th day of August, 1882, in the tracts of land described therein, be sold to raise and satisfy the several sums of money due"; and that the said defendants, and each of them, stand absolutely barred and foreclosed of and from any equity of redemption in the said mortgaged premises, to wit, of, in, and to "all the estate, ores, mining rights, title, and interest which the said Mary Brown and Sylvanus D. Brown, her husband, mortgaged to the said James Jackson, by said instrument bearing date August 14, 1882, when sold as aforesaid, by virtue of this decree." The foregoing are the only parts of the decree pertinent to the questions raised by the appeal. From each and every part of this decree, three of the defendants (the appellants) appealed, upon the following grounds: (1) That the instrument bearing date August 14, 1882, is not a mortgage, and does not contain words and language sufficient to convey an interest in real estate; (2) that, if held to be a mortgage upon real estate, it conveyed only an estate for the life of the mortgagors, and did not convey a fee therein; (3) that, if there was anything due under that instrument which could be held to be a lien upon the land, it was a much smaller amount than that named in the decree, and that some of the money paid to Jackson should have been credited on that instrument; (4) that, if the instrument is not a mortgage of real estate, no interest in the lands described can be sold under it; (5) that, if the instrument is not a mortgage, then no decree can be made in this case establishing the amount due upon any other lien on the premises; and (6) that no counsel fee or costs for searches should have been allowed.

It will be perceived that the primary question raised by the appeal is whether the instrument foreclosed is a valid and subsisting incumbrance and lien, by way of mortgage, upon the real estate, rights, and appurtenances described therein, and the answer to it will, at the same time, dispose of the fourth and fifth grounds of appeal. Counsel for the appellants have founded their argument that the instrument upon which this suit was brought is not a mortgage, and does not contain words sufficient to create a lien upon real estate, upon the common-law definition and construction of a "mortgage" formerly held in England and in some of the earlier decisions in this state. But the later and now almost universally accepted definition of a mortgage was given by Mr. Justice Depue in the case of *Woodside v. Adams*, 40 N. J. Law, 417, 422, where the learned judge said: "It may now be considered the established doctrine of the courts of this state that a mortgage of lands is not a common-law conveyance with a condition, but a mere security for the mortgage debt, the legal estate being considered subsisting in the mortgage only for that purpose." Mr. Justice Story, in *Flagg v. Mann*,

2 Sumn. 486, 533, Fed. Cas. No. 4,847, said: "If a transaction resolves itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity a mortgage." Another distinction in mortgages should not be overlooked. We refer to that class called "equitable mortgages." Jones on Mortgages (4th Ed., § 162) says: "It has been noticed that a conveyance accompanied by a condition, contained either in the deed itself, or in the separate instrument executed at the same time, constitutes a legal mortgage at common law. In addition to these former instruments, which are properly entitled to the designation of 'mortgages,' 'deeds,' and 'contracts,' which are wanting in one or both of these characteristics of a common-law mortgage, are often used by parties for the purpose of pledging real property or some interest in it as security for a debt or obligation, and with the intention that they shall have effect as mortgages. Equity comes to the aid of parties in such cases, and gives effect to their intentions. Mortgages of this kind are called 'equitable mortgages.' There are many kinds of equitable mortgages, as many as there are varieties of ways in which parties may contract for security by pledging some interest in lands. Whatever the form of the contract may be, if it is intended thereby to create a security, it is an equitable mortgage." This definition is peculiarly apt when applied to the instrument upon which this suit was founded. It was a writing expressly designed by the parties making it to secure a debt by pledging real property in the event that other anticipated sources of revenue mentioned therein failed of realization; and the two tracts of real estate upon which, in the language of the instrument, "this conveyance shall be held and construed as a lien, by way of mortgage," are specifically designated and described therein at length by metes and bounds. There is no ambiguity in the phraseology of the instrument from beginning to end. It specifies the debt it is intended to secure, and that its purpose is to create a lien, by way of mortgage, is clearly expressed, and the lands upon which it is to take effect are particularly described. No requisite of an equitable mortgage is lacking.

We do not find in the record any issue framed by the pleadings or raised by the proofs to which the second ground of appeal is applicable, and its discussion is therefore not necessary to the disposition of the case.

The validity of this instrument as an equitable mortgage being sustained, the next question is whether the conditions upon which the debt secured by it was made payable have been fulfilled by the grantors, and whether payment or satisfaction, in whole or in part, has been obtained in some other way. It clearly appears by the proofs that nothing was realized from the other securities mentioned in the instrument. The 19 shares of the Layton Mine Company became

worthless, and the property of the company was sold, and the stockholders lost all. The proposed agreement with John Huyler was never consummated, and the complainant received nothing from the Pellington Mine, and the lease became forfeited, and in 1888 the leases of the Brown Mine were also forfeited to Mrs. Brown, and thus all the conditions existed under which this instrument was intended to operate as a lien by way of mortgage upon the real estate described therein. The agreement made by the complainant and Breck with Vermilya, that his lease should be paramount to the mortgage of the complainant and the Breck mortgage, was only "provided and so long as the rents or royalties are paid, as provided in said lease, by said Allen G. N. Vermilya, aforesaid, and in said agreement of even date, made between said Mary Brown and Sylvanus D. Brown, her husband, said Allen G. N. Vermilya, and the undersigned [Jackson and Breck]." It was not contended or proved that these rents or royalties have been paid as stipulated in the said lease and agreement, and therefore they cannot operate as an impediment to the foreclosure of the complainant's mortgage, or affect its priority.

The third ground of appeal is that a less amount is due upon the mortgage than that found by the court. This contention is based upon an alleged misapplication of the payments made to the complainant, Jackson. There is no dispute as to the amount paid, and no claim is made that the full amount has not been credited in the schedule of account annexed to the chancellor's decree, and forming part thereof. The payments were all made to James Jackson, the complainant, in pursuance of the provisions of the agreement dated March 14, 1891, between the Browns, Vermilya, the complainant, and Breck. There were two mortgages recognized in the agreement,—one to the complainant, for \$1,900; and one to the complainant, Breck, and Fisher, for \$10,000,—and the payments were to be applied to these until they should be paid and satisfied, but nothing whatever was said in the writing as to which should be paid first. They were all applied to the second mortgage by Jackson. Both Jackson and Breck testify that it was mutually agreed between the Browns and themselves that these rents and royalties should all be applied to the payment of the second mortgage, of \$10,000. This evidence is given further weight by the fact that, while the payments were largely in excess of the amount sufficient to pay the first mortgage, yet no request or demand for its surrender and cancellation was ever made. It does not therefore appear that the application of these payments to the reduction of the second mortgage was contrary to the mutual understanding of the parties interested. But in the absence of any such agreement, there being no proof or contention that any directions were given as to how the mon-

ey should be applied, the payee, Jackson, had the right to apply it to either of the two mortgages, as he might see fit. *Bird v. Davis*, 14 N. J. Eq. 467.

It further appears that the appellants were not ignorant of the fact that all of these payments had been applied on the second mortgage. When, on the 14th of November, 1893, the deed for part of the lands described in the complainant's mortgage was executed by Mary Brown and her husband to the appellants, a complete schedule of the amounts due upon each of the mortgages was made out; and upon it all the several payments and their application to the reduction of the second mortgage are set forth, and it forms one of the exhibits in the case. No question was made at that time about the correctness of this statement, and it corresponds in all material respects with the schedule which accompanies and forms a part of the chancellor's decree, excepting, on account of dates, the difference in the amount of accrued interest, and a mistake in stating the amount of complainant's mortgage to be \$2,000 instead of \$1,900, as in the decree, which inures to the benefit of the appellants.

In this deed from the Browns to the appellants, the following words appear: "Subject, nevertheless, to two several mortgages, now good and valid liens upon the above-described premises; the first of said mortgages being made and executed by the parties hereto of the first part to James Jackson, to secure the payment of two thousand [\$1,900] dollars and interest, dated August 14, 1882, and recorded in Passaic county clerk's office on same day, in Book 8, 2, of Mortgages, page 197; and the other of said mortgages being made and executed by said parties hereto of the first part, to James Jackson and others, to secure the payment of ten thousand dollars and interest, dated March 12th, 1886, and recorded in said county clerk's office on Mar. 12th, 1886, in Book B, 3, of Mortgages, page 395; the aggregate amount of principal and interest due and unpaid on said mortgages at this date being nine thousand six hundred and eighty-three dollars and seventy-four cents, which the said parties of the second part hereby assume, and agree to pay, as recorded, together with the interest to grow due thereon, as part of the consideration hereinabove expressed, hereby binding themselves, their legal representatives and assigns, therefor." Holding the above words to mean what they clearly import would, of course, prevent the appellants from assailing the validity of the complainant's mortgage, or denying that it was at the time of the purchase a lien upon the land, the amount due thereon having been deducted from the consideration paid, and the mortgage designated in their deed as a good and valid lien upon the premises. From these disabilities the appellants endeavor to escape, by insisting that the words "as recorded," in the assumption clause of

the deed, relate to certain conditions in the mortgage and in the lease between the Browns and Vermilya. We cannot see any force in the contention made, or any special significance in those words as used in the deed. They may be viewed as merely referring to the fact that the mortgages were of record. They are, in that sense, superfluous, but unnecessary words may be found in almost every written instrument. But granting that the words relate to conditions in the complainant's mortgage, or in the lease of the Brown Mine to Vermilya, it cannot alter the situation. We have already stated that those conditions were not fulfilled. That the Midvale Ore Company's lease became forfeited is not open to doubt; and whether by voluntary surrender, or by dispossession proceedings, as Jackson testifies, is not material, as the instrument provided that, if it should become forfeited in any manner, the lien upon the lands should attach. The agreement to subordinate the mortgages of the complainant and that of Breck to the lease made to Vermilya was only so long as the rents or royalties were kept paid. These payments ceased in 1893, almost a year before the foreclosure proceedings were commenced. We find nothing to impair the legal effect of the assumption clause in the deed to the appellants.

The matters referred to in the sixth ground of appeal rested wholly in the discretion of the court. The decree should be affirmed.

(56 N. J. E. 166)

HERVEY v. HERVEY.

(Court of Chancery of New Jersey. Nov. 1, 1897.)

JURISDICTION—SUIT FOR MAINTENANCE—SERVICE BY PUBLICATION.

1. 2 Gen. St. p. 1273, § 1, provides that the court of chancery shall have jurisdiction of all causes for divorce and of alimony and maintenance, provided either of the parties shall be inhabitants of the state at the time of the injury complained of, or when the marriage shall have taken place within the state at the time of such injury, and at the time of exhibiting the bill. *Held*, that a suit for maintenance involves the marriage status, and where the domicile of both parties is within the state, and defendant is temporarily absent, and has no place of abode within the state, the court acquires jurisdiction, upon service of process by publication, to pronounce a decree for payment of alimony and maintenance out of his property within the state.

2. Defendant, a minor residing in New Jersey, entered a hospital in October, 1895, where he remained till the following April, when he went to his father's residence. He made several trips to summer resorts in and out of the state, and about November 1, 1896, returned to his father's home, and entered into a partnership in the real-estate business. On November 28th he married complainant, and stated to the minister that he resided with his father. Complainant was pregnant at the time of the marriage, and at once requested defendant to care for her. He failed to do so, and after December 2d, when the marriage was published in the newspapers, ceased to visit his wife. He dissolved the partnership, conveyed his property to his father and partner, and on December 12th, he went to Washington, where he stayed a few days, and sailed

December 23d for Cuba, where he traveled a few weeks. Thence he went to the City of Mexico, and returned to New York in February, 1897. *Held*, that at the time the bill for support and maintenance was filed, on December 12, 1896, the legal domicile of defendant was in New Jersey.

3. Since defendant had left the state with intent to remain away for an indefinite time, his father's residence was not his actual place of abode, and service of the subpoena could not be made by leaving it at such residence.

4. Leave to enter a special appearance in such case should not be granted, except on condition that defendant stipulate to submit to the jurisdiction without further process if the question of jurisdiction be decided against him.

Bill for support and maintenance by Eva May Hervey against Lee A. Hervey.

J. E. Howell, for plaintiff. Chandler W. Riker, for defendant.

EMERY, V. C. This is a bill for support and maintenance, under the twentieth section of the divorce act (2 Gen. St. p. 1270). Subpoena was issued against the defendant to answer the bill, and has been duly returned served, and an order for alimony pendente lite and counsel fees has also been made. Application by petition is now made by the defendant (by virtue of special appearance and leave for that purpose) to set aside the service of the subpoena, the order for alimony, and all other orders in the cause. The reason alleged in the petition is that at the time of the service of the subpoena and notices of the application for alimony the defendant had no actual or legal residence in the state of New Jersey; that the subpoena and notices were served after the 12th of December, 1896, by leaving copies at the residence of defendant's father, in the city of Newark; that on that date defendant "left the city of Newark, with the intention of being absent for some years and engaging elsewhere in business"; and that he had previously, on account of the state of his health, closed out his business interests in Newark, with the intention of leaving the city and establishing his residence permanently in Mexico, or some other climate more suited to his health. He claims that since the 12th day of December, 1896, when he actually left the city of Newark, he has not had an actual or legal residence in the city of Newark or state of New Jersey. As to his residence in New Jersey, up to the 12th of December, 1896, the defendant alleges that on October 28, 1895, and previously thereto, he resided in Newark, on Riverside avenue, and not at his father's residence (128 Montclair avenue); that from that date he was in a hospital until April, 1896, when he was taken to his father's residence to be cared for during convalescence, and left there about July 1, 1896, to travel, until the latter part of August, 1896, when he again visited his father, expecting, however, that his visit would not extend beyond the beginning of cold weather, when it would be necessary for him, on account of his health, to go to a southern cli-

mate. As one of the questions to be decided upon this application involves, in my judgment, jurisdiction of the court to make the order in question, and this depends to some extent upon the status of the record and proceedings in the cause, a statement of these in some detail is necessary:

The bill was filed on December 16, 1896. Subpœna thereon was issued December 30, 1896, returnable January 13, 1897, and was duly returned by the sheriff of Essex county, "Served," on December 31, 1896. On the day of filing the bill, notice of an application for alimony pendente lite and counsel fees was served by leaving copies of the bill and affidavits and notice at the residence of defendant's father, Daniel E. Hervey, in Newark. The affidavit of service stated that these were served on the defendant "by leaving the same at his residence, with a member of his family over the age of 14 years, on the 16th day of December." On the day for which notice was given the defendant did not appear, and it being suggested to the chancellor (by whom does not appear) that the defendant had recently left his last place of residence for parts unknown, an order was on that day (December 21, 1896) made by the chancellor reciting the proof of service of notice of the application for temporary alimony upon the defendant "by leaving the same at his last known place of residence," and the suggestion to the court "that the defendant has recently left his said last known place of residence for parts unknown"; and the order then referred the cause to me, as vice chancellor, to hear the same and advise a decree. It was further ordered that the defendant appear on Tuesday, December 29, 1896, to show cause why alimony pendente lite should not be ordered. No special directions as to service of the order were made. A copy of this order was served on December 23d by leaving it at the residence of defendant's father; the affidavit stating that it was served on defendant "by leaving the same at his residence." On the return day of the rule the defendant did not appear; but a solicitor, who stated that he did not appear for the defendant, filed (with the consent of complainant's solicitor) affidavits of Daniel E. Hervey and Ella Hervey, defendant's father and mother, stating, among other things, that the defendant had not resided at his father's residence since the 12th day of December, 1896, and that on that day he left the state. The father further states that "he is unable to locate the said Lee A. Hervey so as to communicate with him"; and the mother, "that she did not know of the present whereabouts of the said Lee A. Hervey." It now appears that as a matter of fact the defendant on or about December 23, 1896, sailed for Cuba, and both his father and mother knew this, and his father took down his trunk to the steamer. The affidavits filed on the return day by the complainant, as to the manner of service of

the original notice of application for alimony, showed that this was served upon defendant's mother on December 16th, who said that the defendant lived there, that he was not at home, and that she did not know when he would return, and that she took the papers, asking when she should deliver them to the defendant. The order of December 21st was served on December 23d, at the same place, by attempting to deliver it to defendant's father, who declined to take it. The defendant not appearing at the return day, an order was made, December 31, 1896, reciting due notice of motion to the defendant, and referring the application to a master to report as to the amount of temporary alimony and counsel fees. The master's summons under the order was served on the defendant "by leaving at his residence," and by subpœna ad testificandum. Defendant's father and other witnesses were examined as to his property. The master reported on January 14, 1897, that the defendant was possessed of property, or had property held in trust for him, a portion of which was productive real estate, the net annual receipts of which was estimated at \$550, and that an allowance of \$4 per week for temporary alimony and \$75 counsel fees should be made. On January 18, 1897, an order for alimony pendente lite at \$4 per week from December 16, 1896, the date of filing the bill, and for \$50 counsel fees, was made. The jurisdiction of the court to entertain the suit for maintenance was, in the original bill, based on the fact of complainant's residence in the state at the time of the marriage, November 29, 1896, and the husband's refusal to provide for her support or to live with her after his marriage; and it was also alleged in the bill that her husband was at the time of the marriage engaged in the real-estate business in Newark, and that he was possessed of property, real and personal, worth not less than \$12,000. But no specification of the property was made. By an amendment to the bill filed January 21, 1897 (after the order for alimony), it was alleged that about the time of the marriage the defendant owned four tracts of land in Newark (specifying them), and also a note of \$5,000 made by a traction company, and due in March, 1897, and that he had transferred all his real estate and personal property (including these) to his father, Daniel E. Hervey, and to his business partner, Charles Roller, without consideration, for the purpose of preventing complainant from obtaining any interest therein, or from being compelled to support her out of his income therefrom, and, further, that her husband had no property outside of the state of New Jersey, and that was his only property, so far as complainant knew; and seizure and sequestration of this property by the process of the court, for proper provision for complainant, was prayed. On January 20th a copy of the decree for temporary alimony was served at the res-

idence of defendant's father, as his place of residence. On January 29, 1897, on defendant's application, and the complainant not opposing, an order was made for leave to enter a special appearance "to apply to set aside the order for alimony pendente lite, and all other orders in the cause, because defendant had not been served with any notice, petition, or subpoena in said cause, and of applying to set aside all record or service thereof, and for no other purpose whatever." This order, it will be observed, did not reach to the setting aside of the service of subpoena, but only of the order for alimony, and other orders; and the order imposed no conditions upon defendant. The appearance entered January 30, 1897, followed the terms of the order, and was specially entered "for the purpose of applying to set aside the order for alimony, and all other rules and orders in the cause, because the defendant has not been served with any notice, petition, or subpoena in the cause, and of applying to set aside all record of service thereof, and for no other purpose whatever."

The petition now coming on to be heard, and which was filed February 9th, included, as above stated, an application to set aside the service of the subpoena, as well as the order for alimony and other orders in the cause; and upon this a rule to show cause why the same should not be set aside was granted,—both parties to have leave to take affidavits on notice to be read on the hearing. On the day of filing this petition by defendant the complainant filed another petition in the cause, setting out that the defendant had not paid either alimony or counsel fees as ordered by the court, and that the defendant was the owner and holder of two certain mortgages on lands in Newark (one given by Charles A. Roller, December 4, 1896, for \$750; another given by Samuel to him on November 11, 1896, for \$700), and praying for a receiver to take charge of these mortgages and any other property of the defendant, and to sequester them for the payment of the decree. Upon this petition, and on notice served at the father's residence (stated to be defendant's), an order was made reciting the two applications of complainant and defendant, and granting an injunction restraining payment of the mortgages to the defendant, and restraining defendant from receiving payment, which injunction was served on defendant in the same manner as the other notices and orders. On February 23d a further order was made, on complainant's application, directing the defendant to show cause why counsel fee and costs should not be paid to complainant on the defendant's application to set aside the proceedings; and this order was directed to be served on Riker & Riker, the solicitors who had entered a limited appearance. Service of a copy of this order was acknowledged by Riker & Riker; not, however, describing themselves as solicitors of the de-

fendant, or as acting in any other capacity for him. In lieu of affidavits, the hearing took place orally in open court, and upon defendant's application the argument extended to setting aside the service of subpoena as well as the orders. The order for alimony pendente lite was not based on the service of the subpoena, but on the application therefor made on notice; and in the view which I take of the jurisdiction of the court of chancery in this case, even if the service of the subpoena should be set aside as not made according to the chancery statute regulating the service of subpoena, which is specially adopted in these cases by Divorce Act, § 6, yet the validity of the order for temporary alimony, so far as the service of the notice of application therefor is concerned, must depend ultimately upon the jurisdiction of the court to render a final decree in the cause for payment by the defendant, or out of his property. If the court has such final jurisdiction in this cause, and can render decree in a suit for maintenance against an absent defendant by publication under the statute and its rules, then the validity of an order for alimony, which is objected to solely because the defendant had no residence or place of abode within this state at which subpoena could be served, under the statute, or notice could be left, depends on different consideration. By rule 20 of this court, all notices of motions, of summons to attend master, etc., are regularly served on persons not resident in this state by setting up the same in the office of the clerk of the court. "Residence," under this rule, means, I take it, "dwelling house or usual place of abode," at which, under section 13 of the chancery act, as amended, process for appearance is to be served. 1 Gen. St. p. 398, par. 136. And this rule, in terms, reaches the present case, as to the orders for temporary alimony, if the defendant be, as he claims, a nonresident. But in proceedings for alimony pendente lite, as in all proceedings for divorce, the object of the court has always been to give the defendant actual notice, if possible, and an opportunity to be heard on the application; and where the defendant is a nonresident the practice is to direct notice of such application in a manner most likely to give actual notice, which would include the leaving of the notices with persons in this state, relatives or others, who would be most likely to communicate the notice to defendant, if complainant had no information how to reach him. As, therefore, the defendant's objection to the order for alimony in this case is not for the purpose of being heard on the merits of the order, or to have service made on him according to the rules as a nonresident, but is based purely on the manner of service of the notice, the order for alimony should not, in my judgment, be set aside, for reason of the manner of service, even if defendant is a nonresident, if the court has jurisdiction to

render a final decree against the defendant as a nonresident, and if the notice which has been actually given has been such as the court, with a view to giving him actual notice, would have directed to be given on the facts as they now appear. In other words, if the court has jurisdiction in this cause to render a final decree against the defendant for alimony or maintenance by any method of proceedings under our statute,—either by service or publication,—I see no reason for setting aside this order for alimony pendente lite simply because defendant has no residence in the state where notice could be served. Whether the court has such jurisdiction for final decree in the cause seems to me, therefore, to be the main question which arises on the evidence given on the hearing as to the defendant's residence and domicile. The question of legal domicile, as well as of actual and legal residence, arises for the reason that, an application for support or maintenance by a wife against her husband being an attempt to enforce an obligation which arises solely out of the matrimonial status, the proceeding is, or may be, one which is like actions for divorce, and other actions directly involving the continuance of the status; and the jurisdiction of the court is therefore dependent, to some extent, on the domicile of the parties complainant and defendant. Our own statute confers the jurisdiction as to divorce and maintenance by the same act, and in the same clause of the act, and in connection with each other, and in each proceeding makes the same conditions as to residence, as giving jurisdiction. The language of section 1 of the act is (2 Gen. St. p. 1273): "That the court of chancery shall have jurisdiction of all causes of divorce and of alimony and maintenance by this act directed and allowed; provided the parties complainant and defendant, or either of them, were or shall be inhabitants of this state at the time of the injury, desertion or neglect complained of, or where the marriage shall have been solemnized or taken place within this state at the time of the injury, desertion or neglect complained of, and at the time of exhibiting the bill." And in this respect of jurisdiction the statute has existed in this precise form from the time of the first statutory provision for maintenance by the act of February 3, 1818 (P. L. 43), which was incorporated in the Revised Laws of 1820 (page 667) on repealing the act of 1818. Now, in reference to the residence of the parties required for purposes of divorce, the court has always held that the residence or inhabitancy contemplated by the act must be the actual legal domicile. *Winship v. Winship* (Chancellor Green; 1863) 16 N. J. Eq. 107; *Coddington v. Coddington* (Chancellor Zabriskie) 20 N. J. Eq. 203; *Firth v. Firth* (Vice Chancellor Van Fleet; 1892) 50 N. J. Eq. 137, 24 Atl. 916, and cases cited.

Inhabitancy or residence, as construed under this act in cases involving the jurisdic-

tion of the court to dissolve the matrimonial status, seems by these cases to be construed as equivalent to such domicile as would, upon the general principles of law, be recognized as conferring jurisdiction to adjudicate upon the status. Under the rule established by these cases, the actual legal domicile by complainant or defendant in actions for divorce under the act would be sufficient to sustain jurisdiction, so far as the point of residence or inhabitancy was involved. No decision, however, has been made in our courts, in the case of the application of a wife for maintenance, directly upon the question of the jurisdiction of the court to pronounce a decree against a defendant nonresident who has property in the state out of which payment may be directed to be made. The fact that the requirements of the statute for the two causes of action (divorce and maintenance) are the same, and are united in the same provisions of the act, would seem to be a legislative declaration that the same rules as to jurisdiction, dependent on residence, apply to both cases; and the further provision of the twentieth section, relating to maintenance, that the court might decree maintenance to be paid by the husband, or out of his property, read in connection with the first clause of the act, would certainly seem to be intended to confer a jurisdiction arising out of possession of property in the state, in connection with defendant's domicile in the state. But whatever be the intention of the statute as to jurisdiction, and however clearly the jurisdiction to make such a decree for maintenance against a nonresident defendant, to be paid out of his property, may be conferred by the statute, the ultimate jurisdiction for a decree for payment, whether by defendant, or out of his property, must, as it seems to me, depend upon the question whether the decree in such cases is to be considered as purely and simply a decree in personam, such as would arise on a personal liability based on contract or tort, or whether it is to be treated as a decree based on the control over the matrimonial status, by reason of the domicile of one or both of the parties, which may be made by the court which has jurisdiction over that status. If the decree is purely of the former character, then, under the decision of the United States supreme court in *Pennoy v. Neff*, 95 U. S. 714, and the cases following it, the decree in personam must be based on service within the state; and the ownership of property within the state will not confer jurisdiction, as in rem, unless, under the statutes of the state, the jurisdiction is based on the seizure of the property as the foundation of the suit. But if, on the other hand, the decree for payment is based on the control of the matrimonial status, as itself the thing relating to which jurisdiction is exercised by reason of the domicile, then, by the recognized principles of the law, the court which has jurisdiction over the status could make a valid decree. The supreme court of

Massachusetts takes the latter view of the nature of the decree for maintenance. This court holds that since the decision in *Pennoyer v. Neff* a judgment in personam against a nonresident, not founded on service of process within the state, is no longer valid, even within the state itself. *Elliot v. McCormick*, 144 Mass. 10, 10 N. E. 705; *Needham v. Thayer*, 147 Mass. 536, 18 N. E. 429. But it also sustains the judgments of the state court on suits under the state statutes for alimony and maintenance against nonresidents. In *Blackinton v. Blackinton* (1886) 141 Mass. 432, 5 N. E. 830, a man and woman, citizens of Massachusetts, were married in that state, and subsequently the husband left his wife without cause, and went to New York, becoming a citizen of that state, the wife continuing to remain a citizen of Massachusetts. Upon petition to the probate court for an order for support and maintenance under a statute, notice of the proceeding by delivery to the defendant was directed, and this notice was served in New York. No attachment of property in the state was made as the basis of the proceedings, and upon a special appearance, and plea to dismiss for want of jurisdiction, the court sustained the jurisdiction to order a monthly payment for support. Mr. Justice Holmes, as to this part of the decree, says (page 436, 141 Mass., and page 832, 5 N. E.): "The whole proceeding is for the regulation of a status. The incidents of that status are various,—some concerning the person, some concerning the support of the petitioner or her child. The order to pay money is not founded on an isolated obligation, as in the case of contract or tort, but upon a duty which is one of those incidents. The status, considered as a whole, is subject to regulation here, because such regulation is necessary rightly to order the daily life, and to secure the comfort and support of the party rightfully living within the jurisdiction. It is quite true that these considerations may not suffice to give the decree extraterritorial force, and that in general courts do not willingly pass decrees unless they think that other courts at least ought to respect them. But this is not the final test." The decree was held to be within the power of the court, and to be carried out against the defendant's property within the jurisdiction, and against his person, if found there. The Massachusetts statute, like our own, makes the same provision as to jurisdiction in divorce and maintenance proceedings, and this feature was relied on to some extent in sustaining the decree. This case, it will be observed, extends the jurisdiction of the court of the wife's domicile in maintenance cases to a decree binding on property within its limits against the husband, who, leaving his original domicile, has become domiciled elsewhere. It is claimed in the present case that the defendant's legal domicile is still in New Jersey, and that at the time of filing the bill and service of the subpoena and notices, and

even up to the time of the hearing, no domicile or citizenship elsewhere has been acquired by the husband. If this be the result of the evidence on this point, then the settled rule is that a legal domicile once acquired remains until another is obtained. 2 Bish. Mar. & Div. (6th Ed.) § 118a; *Cadwalader v. Howell* (1840) 18 N. J. Law, 138; *Firth v. Firth*, 50 N. J. Eq. 137, 138, 24 Atl. 916. An additional basis for the jurisdiction of the court in this case would exist in the fact that the legal domicile of both parties is still here.

A different view of the nature of the decree for maintenance was taken in *Bunnell v. Bunnell* (Brown, District Judge; 1885) 25 Fed. 214; and this learned judge held that where a decree for alimony had been obtained in a suit for divorce, without service within the jurisdiction of the court, upon a defendant resident elsewhere, it could not, under the doctrine of *Pennoyer v. Neff*, be enforced against the property within the jurisdiction. He seems to consider (see page 216) a claim for alimony as a purely personal claim, resting upon the same basis as other personal claims, and, like them, enforceable anywhere by personal service of process within the jurisdiction of the court, but not enforceable otherwise. This view as to the character of the claim for alimony was adopted and stated without any special discussion of its nature, and so far as relates to the jurisdiction of a court to enforce it merely because of personal service of process within its jurisdiction on defendant, irrespective of his domicile, seems to be at variance with the authorities. These declare generally that jurisdiction of suits for support, as well as for divorce, depend upon the domicile either of complainant or of defendant, which gives the court jurisdiction over the status, and that the mere service of process on defendant in a jurisdiction not the domicile of either husband or wife is no basis for jurisdiction, as it would be in the case of a claim purely personal. 1 Bish. Mar. & Div. § 359a. The same view of the personal character of the decree for alimony is taken by other authorities, which hold that, where the defendant's domicile is in another state, alimony cannot be awarded, so as to make the decree therefor valid in another state as a decree in personam. Id. § 170. In *Hunt v. Hunt*, 72 N. Y. 217, the jurisdiction over defendant in a divorce suit, by reason of his domicile within the state, was sustained, although he could not be served within the state, but was brought on by publication as an absent defendant. In *Lynde v. Lynde* (N. J. Ch.; Oct., 1896) 35 Atl. 641, it was said by Chancellor McGill that a decree for alimony against an absent defendant, who did not reside or have his domicile in the state, and did not appear, or have property under the court's control, could not be made in an ex parte suit for divorce, except upon due, actual notice to the defendant; and the decree for divorce

was amended to insert such order. In the present case the defendant has property within the jurisdiction of the court, and, upon the evidence, I reach the conclusion that his legal domicile is still in New Jersey; and, in my opinion, the rule applicable to this case is that the claim for maintenance, under our statute, involves, as a basis for jurisdiction, the status of the parties; and, when this court has jurisdiction over this status by reason of the domicile of both parties, it has power, under our statutes, to pronounce a decree thereon for payment out of the property of the defendant within its jurisdiction, which is binding within its jurisdiction, and to pronounce such decree upon service on a defendant domiciled herein, by publication, as against him, the same as against an absent defendant, under the statute, if he has no dwelling or place of abode within the state where service of process can be made by statute.

The following are the facts which I find to have been proved in reference to the defendant's residence and domicile: Defendant, in October, 1895, being then still under age, and a clerk in a New York store, resided in Newark, which was the domicile of his father, and on Riverside avenue, where he boarded and lodged with one Mrs. Dutch. About that date he was very seriously injured in an accident, and was taken from his then residence to a hospital, where he remained until about April, 1896, when he went to his father's residence, 128 Montclair avenue, in Newark. He was still an invalid, unable to care for himself, but gradually improved, and after two months was at summer resorts, in and out of the state, for his health, and traveling, until near the 1st of November; returning to his father's residence two or three times during this interval. Shortly before November 1, 1896, he returned to his father's house, in Newark, and made that place, and no other, his place of abode from that time until he left Newark, on December 12th. The defendant's claim that his residence still continued at Mrs. Dutch's is not supported by the evidence. About November 1st he entered into the real-estate business with partners at Newark; and this fact, I think, shows conclusively that no intention to remove to a milder climate then existed. On November 28th he was married to complainant, at the residence of her brother-in-law, 127 Montclair avenue, directly opposite the residence of defendant's father; and the defendant gave the latter place as his residence, in reply to questions by the minister performing the ceremony. The complainant was pregnant at the time of the marriage, and immediately applied to defendant to care for her, and take her somewhere with him; but, after interviews on the two or three following days, defendant failed to make any provision for her, and after December 2d did not visit his wife.

On that day an account of the marriage, which had been in the meantime kept quiet, appeared in the newspapers, and defendant says that when this came out he determined to leave the state. He did not disclose this intention to his wife. Between this date and December 10th, he dissolved his partnership, conveyed the real estate standing in his name to his father and his partner, and transferred to his father other property. His trunk was packed, and left in his father's house, to be afterwards sent for; and on December 12th defendant, with a coat case, left his father's house in a manner to avoid observation, and took the train for Washington, where he stayed a few days. His visit there was, however, not for the purpose of remaining, but for the purpose of bidding good-by to a friend. While here he engaged passage for Cuba on the steamer sailing December 23d, and wrote to his father, at Newark, to send his trunk. The father brought the trunk to the steamer, and saw him sail. On arriving in Cuba, December 29th, defendant traveled for two or three weeks in the island, and then took a sailing vessel for Mexico, and finally reached the City of Mexico, where he stayed two or three weeks. He says that while in the City of Mexico he made an arrangement for going in business with persons he met there. These arrangements, however, were not consummated, and he returned to the United States, arriving in New York early in February. He remained there up to the time of the hearing, in April, 1897, subject to the directions of his counsel. On this state of facts, I think it is clear that the legal domicile of defendant, for the purpose of jurisdiction in this suit, at the time of the filing of the bill and of the service of the subpoena and notices, was in this state, and that the domicile of his origin and choice had not been at that time, or up to the hearing, abandoned for another. His intention to leave New Jersey was for an indefinite time; and from his acts, which in cases of this character are better indications than his words, I think the proper inference is that he left the state for the purpose of avoiding the obligations now sought to be enforced, and that his absence from the state, and residence in any other place, either permanently or temporarily, depended mainly upon the course which these and other proceedings to reach the property he owned immediately before the marriage may take. I see nothing in the evidence to justify the conclusion that the defendant has as yet any other domicile than this state. Applying to these facts, therefore, the principles above stated, I hold that there is jurisdiction in this court to make a final decree for payment of maintenance out of his property within this jurisdiction, based upon the domicile of both parties, and its control over the status by reason thereof. This being the case, the or-

der for temporary alimony should not be set aside because of the manner in which the notice of application for it, and of the proceedings therein, were served. Under all the facts now shown, service of notice of the application at the residence of his father was the best notice which could have been given, and the notice which the court would have directed, had the facts now shown been proved.

As to setting aside the service of the subpoena, the application for this purpose was not strictly within the terms of the leave and special appearance; but this was, no doubt, due to oversight, and the petition, which includes the application to set aside the service of the subpoena, was not objected to on this ground at the hearing. The question of the legal service of the subpoena was fully argued, and decision of this question comes up regularly on this branch of the petition. The subpoena, under the statute, must be served at the "dwelling house or usual place of abode." This means, as the courts construe these statutes, the place of actual abode at the time of the service, not a legal domicile. *Stout v. Leonard*, 37 N. J. Law, 492, 495. The evidence shows, in my opinion, that his father's residence was not, at the time of the service, the actual place of abode of the defendant, for the reason that he had left the state with the intention of remaining out of it for an indefinite time, and that his father's residence, after his departure, ceased to be legally, within these statutes, his dwelling house or place of abode. Had the absence been merely in order to escape service of process for a time, and then return, such departure would not, according to many authorities, have changed his residence or place of abode, under statutes providing for serving process at a residence or place of abode. *Reg. v. Farmer* [1892] 1 Q. B. 637, 641; *Reg. v. Webb* [1896] 1 Q. B. 487. But the absence of any intention to return again after a definite time prevents the rule in these cases from being applied. The service of the subpoena must therefore be set aside, and proceedings should be taken to bring in the defendant as an absent defendant. These, in the language of the chancery act (section 18, 1 Gen. St. p. 405, par. 172), are defendants "who are out of the state or cannot on due inquiry be found herein, or who conceal themselves within the state." An order will therefore be advised setting aside the service of subpoena, but denying the prayer of the petition to set aside the order for alimony pendente lite, and the proceedings thereon.

The leave to enter a special appearance was granted in this case without terms, but, as a matter of practice, it should be stated that the more correct practice seems to be to require, as a condition of granting such leave, that there be inserted in the order an undertaking or stipulation that the de-

fendant would submit without further process to the orders of the court if the point should be decided against him. *Romane v. Insurance Co.* (Hammond, J., 1886), 28 Fed. 625. The plain reason is that the special leave, without such condition, places the defendant in the position of drawing the opinion of the court without any risk; for if the court has no jurisdiction, by reason of failure to serve process, its decision that it has such jurisdiction does not settle this question, so that it may not be questioned after judgment, and in any court. Unless, therefore, the defendant agrees to come in if the decision on the point of jurisdiction is against him, he should, as a general rule, be left to question the jurisdiction of the court in a forum where all parties will be bound. The application, in this respect, is on an altogether different footing from one in which a defendant appearing generally in the cause, and submitting to the jurisdiction of the court, applies to set aside an order for irregularity, or to be heard on the merits, for decisions on such applications will be finally settled in the cause itself.

(36 Md. 374)

GOLDSBOROUGH v. LLOYD, Judge.

(Court of Appeals of Maryland. Nov. 17, 1897.)

DISTRICT ATTORNEYS—FEES—MANDAMUS TO JUDGE.

1. Under Const. art. 15, § 1, providing for compensation of certain officials (among others, state's attorneys), and allowing them to retain for their remuneration fees received to the amount of \$3,000, Loc. Acts 1894, c. 213, limiting the compensation of state's attorney in the county of Dorchester to \$1,200, is unconstitutional, if the fees actually earned according to the rates fixed by law amount to more than the sum total specified in the act.

2. Mandamus will not be granted by two of the judges of a judicial circuit to compel a third judge of such circuit to approve the accounts of the district attorney of such circuit, such judge entertaining an opinion variant from that of the other judges as to the amount of fees payable.

Appeal from circuit court, Dorchester county.

Application of Philip L. Goldsborough for writ of mandamus to Henry Lloyd, judge. From an order refusing the same, relator appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BRYAN, RUSSUM, BOYD, FOWLER, and ROBERTS, JJ.

Alonzo L. Miles, for appellant. John R. Patterson, for appellee.

McSHERRY, C. J. This is an application for a writ of mandamus. The petition was filed by the appellant, who is the state's attorney of Dorchester county, and it was filed against the Honorable Henry Lloyd, who is one of the associate judges of the First judicial circuit, which includes that county. Its object is to require the judge to approve an account of the state's attorney for fees claimed by him to be due for professional

services rendered as prosecuting attorney of the county named. The petition is addressed to the judges of the circuit court for Dorchester county, and Judge Lloyd is himself one of those judges. By section 10 of article 36 of the Code of Public General Laws, all state's attorneys are allowed an appearance fee of \$10 in cases where the punishment for the crime charged is death or confinement in the penitentiary, and in all other criminal cases the appearance fee is, by the same section, fixed at \$3.33. The Public Local Laws of Dorchester County (article 10, § 286) authorize the judges of the circuit court to allow, in addition to these appearance fees, such trial fees to be paid by the county commissioners to the state's attorney as the judges may deem just and proper. The local act of 1894 (chapter 213) provides that the judges of the circuit court for Dorchester county may allow to the state's attorney such compensation, not exceeding \$150 per year, as they may think just and proper for services rendered before committing magistrates in preliminary examinations. The same act further provides that for all trials in criminal cases before justices of the peace the same fees shall be allowed to the state's attorney as are now allowed in similar cases before the circuit court, "provided that the compensation so allowed, together with the total of the fees received, shall not amount to more than twelve hundred dollars in any one year." Judge Lloyd construed this statute to mean that the state's attorney was restricted to only \$1,200 a year in full compensation for his services, even though in point of fact the fees actually earned by him exceeded that sum. Accordingly, the judge refused to certify and approve the appellant's account for fees actually earned over and above that amount. The general statute which requires the judges of the several circuit courts to approve the accounts of the state's attorneys, and which imposes upon the county commissioners of the various counties the duty to pay the accounts as certified, will be found in section 21 of article 10 of the Code, and the local law as applicable to Dorchester county in the act of 1892 (chapter 259). Upon the refusal of Judge Lloyd to approve the appellant's account for a sum greater than \$1,200, the pending petition for the writ of mandamus was filed, asking that the judge be required to approve and certify the account which had been presented to him.

We shall not pause to consider whether the construction placed by the learned judge upon the act of 1894 is correct or not, because there are other questions at the very threshold of the case that of themselves are decisive of this controversy, without regard to the meaning and effect of this particular statute. It must be borne in mind that the state's attorneys are officers who are paid by fees. The constitution of the state fixes no salary for them, and they belong to that class of officials the maximum of whose compen-

sation is limited by section 1 of article 15 of the constitution to the sum of \$3,000. By this section, state's attorneys, together with other officers embraced therein, are allowed to retain for their remuneration the fees received by them up to the amount of \$3,000, while all sums in excess of that figure and the expenses of the office are required to be paid into the state treasury. Now, this being so, it is perfectly obvious at the outset that no act of assembly can validly limit the amount of fees which a state's attorney may receive to \$1,200 or to any other sum less than \$3,000, though it would be perfectly competent to the general assembly to make no provision for any fees in cases before justices of the peace. Indeed, there is no limitation on the power of the legislature to adopt such a schedule of fees as it may see fit, even although the result might be to reduce the aggregate for the year far below the sum of \$3,000. But, the constitution having fixed the maximum of compensation at \$3,000, no act of assembly can validly prescribe a lower sum, if the fees actually earned, according to the rates fixed by law, aggregate or reach the designated maximum or amount to more, within that maximum, than the sum total specified in the act. So, then, it becomes immaterial to inquire what the real meaning of the act of 1894 is, because, if it undertakes to limit to \$1,200 the amount which the state's attorney can receive, when the constitution permits him to retain out of the fees of his office more than double that sum, should the fees aggregate so much, it is obviously and palpably in conflict with the constitution, and therefore invalid; and, if it does not so limit the amount which he may receive, it interposes no obstacle to the approval of the account presented to the judge. But, however this may be, there cannot be a serious contention that a writ of mandamus may be issued by the other judges, or by either of the other judges, of the First judicial circuit, to compel Judge Lloyd to do an act which the other judges were equally authorized to do themselves, either without his concurrence or against his dissent. It would certainly be an anomaly in judicial procedure for one judge of a circuit, who happens to entertain a different view as to the meaning of a statute from his colleagues, to be coerced into conforming to their opinion under a writ issued by the others. As the Code requires the accounts of the state's attorney to be certified to the county commissioners by the judges, it obviously means by a majority of the judges; and, if Judge Lloyd entertained an opinion variant from that of his colleagues as to the quantum of fees payable to the appellant, the remedy for the appellant lay in having the other judges certify to his account. Certainly, it was not by an application to compel the dissenting judge to unite with the others. Mandamus is not a writ that will lie where there is another appropriate remedy. The remedy here, as just

stated, was by an application to the other judges for their approval of the account; but those judges had no more authority to control Judge Lloyd's action by mandamus in this instance than he would have had to control the judgment of one of them. Surely, no argument is needed to support this conclusion. Its bare statement is all that is requisite.

We have not deemed it necessary to say anything in this opinion as to whether the statutes requiring the judges of the several circuits to approve the accounts of the state's attorneys are or are not constitutional, and we are not to be understood as passing upon that question at all. Do these statutes impose a duty on the judges which is not judicial in its character, and therefore a duty which they cannot be required to discharge? Do they deprive the county commissioners of the right to dispute an account actually certified, and thus preclude them, without a hearing, from contesting a claim against the county that they may, in the exercise of an honest judgment, believe to be excessive? These are questions we leave untouched, because their solution is not necessary to the decision of this case. We think the circuit court was right in refusing to issue the writ of mandamus. Order affirmed, with costs above and below.

(86 Md. 379)

BALDWIN v. MITCHELL.

(Court of Appeals of Maryland. Nov. 17, 1897.)
ADMINISTRATOR PENDENTE LITE—APPEAL—DISMISSAL.

1. Where an administrator is appointed under Code, art. 93, § 68, he has power to discharge the debts of the decedent, though without power to make distribution of the residue.

2. Under the sixteenth rule of the supreme court, an appeal will not be dismissed because the transcript has not been filed in time, where it appears by affidavits that the delay was that of the register of wills, in failing to prepare the transcript in time, for which act the appellant or his counsel was not responsible.

Appeal from orphans' court, Harford county.

Silas Baldwin, administrator of William Baldwin, appeals from the settlement of the accounts of Noble L. Mitchell, administrator pendente lite of said William Baldwin. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, ROBERTS, BOYD, FOWLER, RUSSUM, and PAGE, JJ.

S. A. Williams, for appellant. Geo. L. Van Bibber and Wm. H. Harlan, for appellee.

PAGE, J. This appeal comes from the orphans' court of Harford county. It appears that pending a controversy as to the validity of the will of William Baldwin, deceased, Noble L. Mitchell was appointed administrator pendente lite. The time at which he was so appointed does not appear in the rec-

ord. He possessed himself, however, of the assets, and paid certain debts of the deceased. On the 9th day of December, 1896, the orphans' court passed a decree setting aside the will, and ordering the costs of the contest to be paid out of the estate. Silas Baldwin was then appointed administrator, to complete the settlement of the estate. On the 14th day of December, Mitchell, the administrator pendente lite, filed his account. He charged himself with assets to the amount of \$2,867, and claimed allowances for the expenses of his administration, including commissions, the costs of the litigation, and for certain payments on account of the debts of the deceased. The appellee objected to the confirmation of the account, and from the action of the court in overruling his objection this appeal is taken. The objection extends only to the item of \$500, "To Joseph E. Ashton, per agreement."

It is contended that Mitchell, being only an administrator pendente lite, had no power, *virtute officii*, to pay any of the debts of the deceased. In this state letters of administration pendente lite are granted, at the discretion of the orphans' court, where the validity of a will is or shall be contested. Code, art. 93, § 68. They confer authority only during the contest, and are to be regarded as revoked by the granting of letters testamentary or of administration. Section 69. There are no provisions in our statutes defining the powers of such an administrator, or establishing particular and exceptional rules for the discharge of his duties, as in the case of an administrator ad colligendum. Sections 61-64. The intention of our law, therefore, seems to be clear that he must be subject to the same general rules as control general administrators. Within 12 months from the date of his letters, he must render his first account, and, if necessary, an additional account every six months thereafter. If his letters be revoked before the 12 months expire, he must then exhibit his account without delay, and hand over to the executor or new administrator all the property of the decedent in his hands. He may sue for the recovery of the assets, and be sued for debts due from the decedent; and, if such suits are still pending when his letters are revoked, the new administrator may prosecute or defend them. Section 69. With powers and duties such as these, no sufficient reason can be assigned why he shall not be required to discharge the decedent's debts, as other administrators are required. We are of opinion, therefore, that our statutes do not contemplate such an administrator as having been appointed for the special purpose only of taking care of the assets. The contest over the will creates the necessity for a temporary administrator, but it by no means follows from this that it was intended that the assets of the estate should be locked up for the indefinite period during which the

litigation should continue. An administrator pendente lite cannot make distribution of the residue, for the manifest reason that the manner of the distribution, and the persons entitled to claim, would depend upon the provisions of the will, in case of the establishment of its validity. But no such reason applies to the discharge of the decedent's debts. That is in no wise dependent upon the issue of the contest over the will. The existence of the debts, and the right of creditors to be paid out of the personal assets, are matters fixed by the law. It could serve no good purpose, but would be grossly unjust, to compel creditors to wait the determination of a suit in which they are in no respect interested. The case of *Kaminer v. Hope*, 18 S. C. 561, was cited at the hearing to support the view that an administrator pendente lite has power only to collect and preserve assets. That case ought not, we think, to be followed in this state, where, as we have said, there is a general intention, to be gathered from our statutes, that he shall have the powers of a general administrator, except that of distribution. Woerner, in his work on the Law of Administrators (page 401), after referring to that case, remarks, "The powers of an administrator pendente lite are enlarged by the English probate act (20 & 21 Vict. c. 77, § 70; *Tichborne v. Tichborne*, L. R. 2 Prob. & Div. 41) to include all the rights and powers of a general administrator, except the right of distributing the residue; and the tendency in America is in the same direction." He cites in support of this statement *Benson v. Wolf*, 43 N. J. Law, 78-81; *In re Duncan*, 3 Redf. Sur. 153; *Cadman v. Richards*, 13 Neb. 383, 14 N. W. 159. In *Re Ellmaker's Estate*, 4 Watts, 36, it was said: "An administrator pendente lite is an officer of the court, whose duty is limited to filing an inventory, taking care of the assets, and collecting and paying debts." These views find support in the opinion of this court in *Ex parte Worthington*, 54 Md. 361. In speaking of the duties of an administrator pendente lite, *Robinson, J.*, said: "It is the duty of such administrator to collect and preserve the property pending the litigation, and although he may sell the same, or part of it, to prevent loss or injury, or when it is necessary to pay debts, yet the law never contemplated that he should make a final settlement and distribution of the estate."

There appears in the record a copy of a paper that was filed in the suit at that time pending between the parties to this appeal. In that paper the parties agree "that the verdict of the jury on the issues shall be entered so that the will be set aside," and, further, "that out of the estate shall be paid" the several sums therein stated, one of the items being as follows: "To Joseph E. Ashton, in full for his and his family's and servant's services, nursing and attending to William Baldwin, \$500⁰⁰/₁₀₀." There

is some dispute whether this paper was offered in evidence at the hearing of the case in the orphans' court. It is conceded, however, that it was in fact read to the court, and its genuineness is not questioned. The appellee contends that the agreement is but a part of the compromise effected between the parties by which the suit was terminated, and is in fact only a memorandum of the amounts which were to be paid. On the same day Mitchell exhibited his account in the orphans' court, both parties filed petitions in which they respectively set forth their claims. The appellee, in his petition, in which he prays the court to confirm the account, alleges that the parties verbally agreed to terminate the suit, and thereby intended to settle and close all litigation over Mr. Baldwin's estate in which Ashton was concerned, and that the \$500 he was to receive was allowed to him clear of all deductions, in consideration of his withdrawing all efforts to sustain the validity of the will. The appellant, in his petition, contends that Ashton is indebted to the estate, and such indebtedness should be accounted for before he is allowed to receive any part of the sum allowed by the agreement contained in the record. Beyond these allegations in the petitions, there is nothing touching the matter in issue in the record. We cannot regard either petition as an answer to the other, so that the rule laid down in *Mickle v. Cross*, 10 Md. 353, can be applied. The petitions were filed on the same day, and no reference was made in either to the statements contained in the other. If it were possible to take one as an answer to the other, it would be difficult to determine which petition is to be treated as the answer whose averments must be accepted as true. It is therefore impossible for this court, in the present state of the record, to pass upon this question. We will therefore remand the case, so that the orphans' court, which has full power, may determine what was the extent of the agreement between the parties; and, if it shall find that the appellant is not estopped by his agreement, it may inquire whether Ashton is in part indebted to the estate, and thereupon allow the claim of Ashton, in whole or in part, or reject the same, as the agreement of the parties or the evidence before them may warrant.

The motion to dismiss the appeal must be overruled. The sixteenth rule is clear, that no appeal shall be dismissed because the transcript shall not have been transmitted within the time prescribed, if it shall appear to the court that such delay was occasioned by the neglect, omission, or inability of the officer whose duty it is to make it out and transmit it; but such neglect, omission, or liability of the clerk shall not be presumed, but must be shown by the appellant. There are filed in this case three affidavits of the register of wills. By the first it appears that the counsel for the appellant on

the 23d of December, 1896 (nine days after the order appealed from was passed, and on the same day the appeal was entered), ordered the record to be made up and transmitted to this court, and that later on he inquired of the register if the record would be made out and transmitted within the time prescribed by law, and was told by the register that he could not have it ready by that time, because of pressure of business which required his attention. In the last affidavit filed the register further states that the delay was his act, with which the appellant or his counsel had nothing to do. This is not contradicted by anything now before the court, and is sufficient to meet the burden of proof put upon the appellant. It shows that the delay was caused by the register, for which the appellant is in no wise responsible. Order reversed, and cause remanded for further proceedings in accordance with this opinion, with costs to the appellant.

(36 Md. 363)

WILLIAMSPORT & H. TURNPIKE CO. v. STARTZMAN et al.

(Court of Appeals of Maryland. Nov. 17, 1897.)

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—REMEDY—TURNPIKE CHARTERS.

Laws 1832, c. 125, specially incorporating a turnpike company, provided (section 12) that the company should be governed by the same regulations, and be subject to the same fines, penalties, and restrictions, as were imposed on turnpike companies organized under Acts 1804, c. 51, which required turnpikes to be kept in perfect repair. The charter did not name an exclusive remedy for compelling repairs to be made, but chapter 51 provided (section 26) that, if a company neglected for 15 days to keep its road in repair, a justice of the peace should, on information, issue a precept commanding a constable to summon three disinterested persons to meet at the place in the road complained of; that, if the road was found defective by inquisition of the justice and a majority of the viewers, the justice should notify the keepers of the gates between which the defect existed, and that they should not demand toll thereafter until the defect should be remedied; that, if repairs were not made before the next county court, a copy of the inquisition should be sent to the judges, who should cause said keepers to appear, and if they were convicted of the offense charged in the inquisition they were to be fined, and if the company neglected to repair for 15 days thereafter it and the president and managers were to be fined. *Held*, that the charter contract was not impaired by Code, art. 23, § 242, as amended by Acts 1894, c. 607, providing a further and similar remedy, differing from the other mainly in that it gives six jurors, who are to be summoned by the sheriff under order of court; that the collection of tolls is not prevented until the court confirms the inquisition; that the company may have a jury trial, before confirmation, to determine whether the road is out of condition; and that no fines are to be imposed.

Appeal from circuit court, Washington county.

Petition of James W. Startzman and others against the Williamsport & Hagerstown Turnpike Company. From an order in favor of petitioners, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, ROBERTS, RUSSUM, and BOYD, JJ.

J. C. Lane and H. H. Keedy, Jr., for appellant. C. D. Wagaman, for appellees.

BOYD, J. The appellant was incorporated by chapter 125 of the Laws of 1832 to make a turnpike road from Williamsport to Hagerstown. Section 12 of its charter clothed it with certain rights and powers held by turnpike companies incorporated by the act of 1804, c. 51, and provided that it "shall be governed by the same regulations and be subject to the same fines, penalties and restrictions, as the said companies now are when the same are not inconsistent with the provisions of this act." The appellees filed a petition in the circuit court for Washington county in pursuance of section 242 of article 23 of the Code of Public General Laws, as amended by the act of 1894, c. 607, alleging that the appellant had failed to keep its road in good repair at points designated in the petition, and seeking such relief as they are entitled to under the laws of this state. By authority of the court, the sheriff summoned a jury of six persons, as directed by the act of 1894, and returned an inquisition, executed by said jurors, in which they found the road was out of repair at the points named, and had been for such times as are stated in the inquisition. The appellant then filed an answer, in which it demurred to the petition on the ground that the provisions in the Code, and the amendment thereto, could not affect its charter, and also made a motion to quash. After hearing the parties, the court below overruled the motion to quash, confirmed the inquisition, and ordered "that tolls shall not be charged by the Williamsport & Hagerstown Turnpike Company at the gate mentioned in the petition in this cause until the Williamsport & Hagerstown Turnpike Road shall be put in good order and repair." No reservation was made in the charter giving the state power to repeal or amend it, nor did the constitution then in force reserve the right to alter or amend charters of corporations, as subsequent constitutions of this state have done. Section 303 of article 23 of the Code confers upon all corporations, whether formed under general or special laws, the benefit of that article, and also makes them subject to the processes, remedies, or proceedings by that article authorized to be taken, by or against the corporations therein referred to, so far as they may be applicable. Section 242, as amended by the act of 1894, is therefore clearly applicable to this company, unless it in some material way infringes upon the protection guaranteed to it by the constitution of the United States, which prohibits the states from passing any laws impairing the obligation of contracts. The question to be de-

terminated, therefore, is whether the act of 1894 has so far altered or amended the charter of the defendant as to impair the obligation of the contract between the state and the appellant. By the charter the state conferred valuable rights upon the company, and at the same time imposed certain restrictions and duties upon it. One of its duties, of most importance to the public, is to keep the road "in good and perfect order and repair," during the continuance of the corporation, as is expressly required by the act of 1804, made part of the charter. If, then, the legislature has provided machinery by which the appellant can be compelled to live up to its part of the contract, or surrender its right to collect tolls while it is in default, there can be no question about the right of those interested to make use of such machinery, unless the use of it will impair the contract itself or be expressly or impliedly prohibited by the charter. It has frequently been held by this and other courts that, although there is a clearly defined distinction between the obligation of a contract and the remedy by which it may be enforced, the state cannot take away a remedy that is necessary to the enforcement of the contract, without furnishing some other adequate one, and it cannot, under the name or guise of a remedy, authorize proceedings that substantially affect the contract itself, unless such power has been reserved. If the state had contracted with the appellant that, in the event of its default in keeping the road in repair, the remedy to compel it should be by some named method, and by no other, then it might insist upon that method alone being used against it, as it would be a part of the contract itself. But this charter does not attempt in terms to exclude other remedies. The company is liable to those using the road for injuries occasioned by the want of repairs. *Crowther's Case*, 63 Md. 558, 1 Atl. 279; *Cassell's Case*, 66 Md. 419, 7 Atl. 805; *Baltimore & R. Turnpike Road v. State*, 71 Md. 573, 18 Atl. 884. The state could proceed by *scire facias* for the forfeiture of its charter for nonuser or misuser (*Washington & B. Turnpike Road v. State*, 19 Md. 239), or the appellant could be indicted if the defective condition of the road amounted to a public nuisance (*Baltimore & Y. T. Co. v. State*, 63 Md. 573, 1 Atl. 285). But those remedies are tedious, and do not furnish such speedy and summary relief as a complaint of this character requires. This company was granted the privilege of collecting tolls from those using the road in consideration of its keeping it in good order and repair. If it fails to do that for a longer period than allowed by its charter, it has no right to exact tolls, and therefore the legislature has provided a speedy method by which it can be determined whether it is thus in default. By section 26, c. 51, Laws 1804, it was provided that if a company subject to that law neglects to

keep its road in good and perfect order for a space of 15 days, on information being given to a justice of the peace of the neighborhood he shall issue a precept, to be directed to a constable, commanding him to summon three disinterested persons to meet at the place in the road complained of. The justice and the persons summoned were then to inquire into the condition of the road, and an inquisition made and certified under the hands of the justice and a majority of the persons summoned. If the road was found by the inquisition to be out of order and repair, the justice was required to send a copy to each of the keepers of the turnpikes or gates between which such defective place was, "and from thenceforth the tolls hereby granted to be collected at such turnpikes or gates shall cease to be demanded, paid or collected until the said defective part or parts shall be put in good and perfect order and repair as aforesaid." It further provided that, if the road was not put in repair before the next county court of the county, the justice should send a copy of the inquisition to the judges, who shall cause to be brought before them the person or persons in charge of the part of the road out of repair, and, if they were "convicted of the offense by the said inquisition charged," the court was directed to fine them according to the nature and aggravation of the neglect, not exceeding \$100 for every week such place shall have been out of order and repair. If the company still neglected to have the place repaired within 15 days after the said fine was imposed, then the court was directed to fine the president, managers, and company, not exceeding \$200. Under the act of 1894, if the road remain out of repair 15 days, any person or persons can file a petition in the circuit court for the county (or in the superior court of Baltimore city, if the road be in that city), alleging the failure of the company to keep the road in good order and repair; whereupon one of the judges of the court must pass an order directing the sheriff to summon a jury of six disinterested freeholders, to meet on the part or parts of the road mentioned in the petition, who shall determine, upon their view of the road and the evidence of such witnesses as may be produced by the petitioners or the company, the condition of the road and the length of time such condition has continued. An inquisition is to be signed and sealed by the jurors, and returned by the sheriff to the clerk's office of the circuit court for the county, and, if the inquisition shall find the road is not in good order and repair, any judge of the court may, within 10 days after the return thereof, confirm the same, and order that tolls shall not be charged by such company at the gates next to the place or places in said road so out of repair until it shall be put in good order and repair. Before the confirmation of the inquisition the petitioners or the company may demand a

trial by jury in court to determine whether said road is in good order and repair, or may move to quash the proceedings for matters of law, provided that the confirmation of the inquisition shall not be delayed more than 15 days by a motion to quash or for a jury trial by the corporation, unless it gives bond conditioned for the refunding of all tolls collected after the expiration of 10 days from the return of the inquisition, if it be affirmed.

A comparison of the provisions of the laws above referred to will establish the fact beyond all question, we think, that the act of 1894 is more favorable to the appellant than the act of 1804. The former gives six jurors, to be summoned by the sheriff of the county under orders of the court, instead of three persons, to be summoned by a constable by virtue of a precept of the justice. By the act of 1804 the decision of three persons that the road is out of repair prevents the collection of tolls until it is put in repair, while under the act of 1894 that result does not follow until the court confirms the inquisition, and, if seasonable application be made, the company can have a jury trial in court. Surely, such a change in the remedy cannot be said to impair the contract or prejudice the appellant. Nor can we see how the failure to provide for fines in the act of 1894 can possibly injure it. If the state is satisfied with a milder punishment of the appellant for neglect of its duty than might be inflicted under its charter, it is difficult to understand how it can be said that the appellant has been injured by the lessening of the penalty. The Code differs in some respects from the methods prescribed in the charter, but the differences are not so at variance with the proceedings contemplated by the charter as to make them either onerous, oppressive, or unconstitutional. We do not mean to say that the remedy named in the charter could not still be pursued, as was done in *Francis v. Weaver*, 76 Md. 457, 25 Atl. 413; but, if the parties entitled thereto see proper to adopt the proceedings pursued in this case, it cannot be objected to on constitutional grounds.

It has been urged on behalf of the appellant that the act of 1894 makes a material change because it also provides this remedy for failure to keep the road "of such width as required by the terms of the laws under or by which incorporated," and that sections 243 and 244 of article 23 of the Code contemplate forfeitures of the roads, for failing to keep them in proper repair and of prescribed width. As those questions are not in any manner involved in this case, it is unnecessary to determine whether the appellant can be affected by those provisions. This proceeding is only to prevent the collection of tolls until the road is put in repair, and, as we have no doubt about the right of the appellees to invoke the remedies furnished by the act of 1894 to accomplish that

end, we will affirm the order of the court below. In *Francis v. Weaver*, *supra*, it was held that there could be no appeal to this court. As the question was not raised, we have thought it best to determine this case on its merits, without passing any opinion on the right of appeal in proceedings of this character. Order affirmed, costs to be paid by the appellant.

(86 Md. 349)

BALTIMORE CITY PASS. RY. CO. v. NUGENT.

(Court of Appeals of Maryland. Nov. 17, 1897.)

INJURY TO PASSENGER—CARE OF CARRIER—INSTRUCTIONS.

1. In an action for personal injuries to a passenger, an instruction that the defendant must exercise the highest degree of care and diligence practicable under the circumstances is proper.

2. In an action for injuries to a passenger on an electric street car, the evidence showed that the trolley wire broke, and was dragged on the back platform, and against a passenger, by the momentum of the car, whereby he was injured. *Held*, that an instruction under such circumstances to find for plaintiff, unless the jury should find "that defendant's employes could not by the exercise of reasonable care have prevented the trolley wire from being dragged up on the platform," was error, there being no evidence to support such hypothesis.

3. Where a passenger on an electric car was injured by the breaking of the trolley wire, which fell upon him while on the back platform of the car, if the accident was caused by a latent defect, which defendant could not discover by reasonable examination, and it employed suitable contractors to erect the wire, and proper material and a skillful method of construction, plaintiff could not recover.

4. In an action for personal injuries by a passenger on an electric car, the declaration counted on the breaking of the trolley wire through negligence of defendant, and did not allege negligence in the operation of the wire, nor negligence in the operation of the car. *Held*, that an instruction asked by defendant, that a street-railway company was not an insurer of the safety of its passengers, and, if it had constructed and maintained the trolley wire and car with every reasonable safeguard, it had performed its duty, and plaintiff could not recover, should have been given.

5. An amendment to the constitution in 1892 provided that the assembly or the supreme bench of Baltimore city might provide rules for requiring causes to be tried before the court without a jury, unless an election to have causes tried before the jury was made. The supreme bench adopted rules providing for trials by the court unless an election in writing was filed for trial before a jury, such election not to be withdrawn except by the written consent of all the parties filed in the case. *Held*, that the election for trial by jury should be a separate and distinct act, evidenced by a writing different from the pleading; and the fact that a declaration filed closed with the words, "Wherefore he brings this suit, and claims \$5,000, and prays a jury trial," was not such an election.

Appeal from court of common pleas.

Action by T. Harry Nugent against the Baltimore City Passenger Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

The following was defendant's first prayer: "The defendant prays the court to instruct

the jury that the law does not make a street-railway company an insurer of the safety of its passengers, or require it to adopt every possible contrivance looking to their safety that human ingenuity can suggest; and that if they find from the evidence that the defendant had, in reference to both the erection and maintenance of the trolley wire and car mentioned in the evidence, used every reasonable safeguard which the nature of its business admitted, it has performed its duty in the premises, and the verdict must be for the defendant."

Argued before McSHERRY, C. J., and BRISCOE, BRYAN, BOYD, FOWLER, and ROBERTS, JJ.

A. W. Machen and Wm. S. Bryan, Jr., for appellant. Thomas C. Ruddell, Sydney Hall, and James W. Bristol, for appellee.

McSHERRY, C. J. This is an action to recover damages for a personal injury. The facts, so far as they need be recited to present the questions of law which are brought up by the second and third bills of exception, are few and simple, and will be stated in a moment. The ruling complained of in the first bill of exceptions has reference to a question of practice, and, though arising earliest on the record, will be considered and disposed of last, because it does not pertain to the merits of the controversy.

The appellant is a corporation owning and operating a street railway in the city of Baltimore. The motive power used to propel its cars is electricity, which is applied by the overhead trolley system. On the day that the injury complained of happened, the appellee boarded one of the company's cars, taking a seat on the inside, but afterwards, owing probably to the crowded condition of the car, going to and standing on the rear platform. Shortly thereafter the trolley wire broke some few inches from a brass sleeve which spliced together the ends of the separate wires that, when united, formed the continuous trolley wire. That part of the broken wire which was above the car, and which stretched in the direction that the car was going, was carried on the trolley pole as the car proceeded; and, as the car moved forward, the wire, charged with the electric current, was paid out over the trolley wheel, and the severed end fell upon the roof of the car, and thence over its rear edge, and came in contact with the appellee, who was thrown by the shock, or who, receiving a shock therefrom, jumped to the ground, and was injured. The period of time intervening between the breaking of the wire and the injury to the appellee was only a few seconds. The record fails to show that the car could have been stopped in a shorter space of time than it was, or that the employes in charge of it could have done anything which they omitted to do to avoid the injury. There was evidence adduced by the appellant tend-

ing to prove that the wire broke from a latent defect that no test or inspection could have discovered, and that no human foresight could have guarded against; that the wire had been subjected to all the tests known to science, if not before it was sent from the factory where it was made, at least before it was put in place; and that, since it had been in use, it had been regularly and carefully inspected. It was further shown that the most skilled contractors had constructed the line, and that the best materials which could be procured had been used. There was also sufficient evidence before the jury from which they well might have found, if they believed that evidence to be true, that the wire broke from no fault or negligence of the company or its employes; and they might likewise have concluded—for the testimony, if credited, warranted the conclusion—that the highest degree of care and caution known to science had been used by the company in providing the best materials, appliances, and workmanship in the building of its trolley system. The declaration contains a single count. It avers that a certain wire, the property of the defendant, and which it was its duty to keep in repair, was, through the carelessness and negligence of the company and its servants, out of repair, and, in consequence, broke, and fell upon the plaintiff, who at that time was using due care and caution. Under this declaration, and upon this proof, each of the parties presented two prayers for instructions to the jury. The court of common pleas granted the plaintiff's second prayer, modified his first, and, as modified, granted it; rejected the defendant's second, modified its first, and, as modified, granted it. To this action of the court the third bill of exceptions was taken.

The plaintiff's first prayer needs no discussion. The objection made to it in the court below was that it left to the jury a question of law, in not defining the degree of care required of the defendant. No point is suggested in the brief against this prayer, and we think the one raised below is not tenable. It defined the degree of care and diligence exacted of the defendant as the "highest degree of care and diligence practicable under the circumstances." This, as we shall see later on, correctly described the extent of the duty owed by the carrier to the plaintiff.

The plaintiff's second prayer should not have been granted. There was a special exception interposed to it in the trial court, upon the ground that there was no evidence to support one of its hypotheses. This objection ought to have been sustained. The prayer instructed the jury that if they should find from the evidence that the plaintiff, while a passenger on the defendant's car, and while using due care, was injured by contact with a broken trolley wire, and that the broken wire was dragged up on the back platform, and against the plaintiff, by the momentum

of the car, then their verdict would have to be for the plaintiff, "*unless they shall further find that the defendant's employes could not, by the exercise of reasonable care, have prevented the trolley wire from being dragged up on the platform.*" Now, there is not a particle of evidence in the record to support the hypothesis we have put in italics, and it was consequently error to have submitted such an hypothesis to the jury. We may remark, in passing, that the theory of the prayer is directly at variance with the declaration. It does not, it is true, refer to the pleadings, and would not therefore, on the ground of variance, be open to criticism; but it shifts the right to recover from the one alleged in the narr. to a totally different ground. If the cause of the injury was, as charged in the declaration, the bad condition or disrepair of the wire, and this bad condition or disrepair was really due to the negligence of the defendant, and injury ensued as a consequence, then the cause of action declared on was proved; and it made and could make no possible difference whether the employes in charge of the car could or could not have prevented the wire from being dragged up on the platform after it had, in consequence of prior negligence, broken and fallen on the car. Even if the employes could not by the utmost care have prevented the wire from being so dragged up on the platform, the right of action would still have been perfect if the efficient cause of the injury was in reality the antecedent imputed negligence of the defendant in permitting the wire to be out of repair.

The substantial error of law into which the learned judge below inadvertently fell was in refusing to grant the defendant's second prayer. By that prayer the defendant sought an instruction to the effect that if the jury should find that the accident to the plaintiff was caused "*solely by a hidden or latent defect, not apparent to the eye, in the trolley wire,*" and which "*the defendant could not have discovered or detected by any reasonable examination,*" and that if the company employed proper and suitable contractors to erect the wire and overhead construction at the place of the accident, and if the contractors used suitable and proper material and a proper and skillful method of overhead construction, "*then the defendant has performed its duty to the passenger in this regard, and the verdict must be for the defendant, even though the jury further find that the plaintiff, without fault on his part, did receive injuries by reason of the breaking and falling of said trolley wire.*" A carrier of passengers is not an insurer of their safety. This is the settled law. Such a carrier is only bound to employ the utmost care and diligence which human foresight can use. *Turnpike Co. v. Case*, 80 Md. 45, 30 Atl. 571; *State v. Baltimore & O. R. Co.*, 24 Md. 102. This is the limit and the measure of the duty which he owes to the passenger. His failure or omission to discharge that duty is an act of negligence, and, if injury results from that neg-

ligence, an action will lie. It is apparent, then, that all actions of the kind we are now dealing with, to be maintained, must be founded on negligence of the defendant, both asserted and proved. If there be no negligence, though there be an injury, no action will lie. Negligence is essentially relative. In the abstract it is a nullity. It does not, and it cannot, in the nature of things, exist. It is metaphysically impossible to evolve a concept of negligence apart from the facts which give rise to it, and independently of some imposed or implied correlative duty. The duty must be essentially related to the particular circumstances; and a variance in the circumstances necessarily begets either a modification of the duty or else extinguishes it altogether. Thus, the duty which a railroad company owes to a passenger whom it is carrying on its train is widely different from the duty it owes to a trespasser on its tracks; not only because the rights of the two are different, but because the attendant circumstances and facts creating the reciprocal rights, in each instance, are dissimilar. This difference in rights and in duties springs from a divergence in the circumstances out of which they respectively grow. Consequently, a condition which would in one case give rise to an inference of negligence would be wholly insufficient to justify its deduction in the other. Because this is so, it follows that the conditions under which an injury to a trespasser and to a passenger happens produce different evidentiary results,—in the one case, the injury, if flowing from defective appliances, being in itself, on grounds of policy and convenience, *prima facie* evidence of negligence in respect to the appliances which produced the injury; while in the other instance it (the injury) is simply neutral and indifferent as respects the proof of negligence. Negligence and injury are cause and effect, but negligence is not the only cause of injury. As, in all cases where the injury itself is treated as *prima facie* evidence of negligence, this *prima facie* evidence is rebuttable, it results that the burden of proof to show that the injury arose from some other cause than negligence is cast upon the party against whom the *prima facie* evidence has raised the inference of negligence. *Prima facie* proof of negligence is not conclusive proof that negligence in fact existed. It furnishes sufficient evidence, if nothing to the contrary be shown. Every injury does not necessarily result from negligence. There are acts of God, involving a *vis major*, and there are accidents, including no elements of negligence, because occasioned by no breach of any imposed or implied duty at all. An act of God injures no one. When an act complained of and alleged to be negligent could not by the exercise of proper diligence have been foreseen, and is concurrent in its origin with the resulting injury, and as simultaneous therewith as physical cause and effect can be, and there is no antecedent dereliction or breach of duty, actual or construct-

ive, constituting an ulterior or primary cause, the act belongs not to the class of negligent acts, but to that described as accidents. *Turnpike Co. v. Case*, supra. For a mere accident, unmixed with negligence or fault, no action will lie, even though an injury has been done; and no action will lie because there has been no breach of a duty that was owed, and therefore no negligence. *Gault v. Humes*, 20 Md. 297; 1 Am. & Eng. Enc. Law (2d Ed.) 272, 273, note 2. If, in a given case, where an injury has happened, and where, by reason of the duty that is owed and the circumstances existing, the presumption of negligence arises from the mere fact of an injury having been sustained, it be shown that the duty which was owed to the party receiving the injury had been performed to the full measure that the law exacts, then there is no breach of duty, and, there being no breach of duty, there is and there can be no negligence. This conclusion must be legally and logically applicable to a case like the one before us, if the carrier is not an insurer of the passenger's safety; and, if the conclusion be applicable, it can only be so because the carrier is an insurer of the safety of the passenger.

The measure of duty which a carrier owes to a passenger is, as we have said, the utmost care and diligence which human foresight can use. If human foresight, with the aid of the most advanced scientific methods yet discovered, is powerless to detect latent defects that are searched for in the appliances used by the carrier, and if proper skill be employed in the construction of those appliances, and if the appliances themselves are appropriate, and still an injury happens, not from negligence in their use, but solely and exclusively from some hidden defects in their structural materials, that adequate and careful inspection, seasonably and faithfully employed, failed to reveal, then such an injury is referable to a nonactionable accident, and not to negligence. There may be negligence predicated of an improper or careless operation or use of a perfectly sound appliance, but that is negligence in the manipulation or employment, and not in the construction, of the thing causing the injury. With that species of negligence the prayer does not deal, and it is consequently not involved in this discussion. The prayer we are considering left it to the jury to find whether the injury sued for resulted solely from a hidden defect in the wire, which defect could not have been discovered by any reasonable examination; and it also left it to them to find whether proper and competent contractors had been employed to erect the structure, and whether suitable materials had been used and a skillful method had been pursued in the work; and it then instructed them, as the legal conclusion from an affirmative finding of these hypotheses, that the appellant had performed its duty to the passenger in so far as that

duty related to the providing of proper appliances that were alleged to have caused the injury; and, of course, it necessarily followed that, if its whole duty in this regard had been done, there was no breach of a duty owed to the passenger, and consequently no negligence of the character charged in the declaration; and, if there was no negligence, there was no cause of action. Under these conditions, the injury was the result of accident. This prayer contained a correct exposition of the law, and the jury ought to have been instructed to that effect. The refusal to do so was error. In addition to the adjudged cases hereinbefore cited, we may, in support of the legal principle announced in the prayer, refer to the following: *Crutchfield v. Railroad Co.*, 76 N. C. 320; *Handelum v. Railway Co.*, 72 Iowa, 709, 32 N. W. 4; *Railway Co. v. Locke*, 112 Ind. 404, 14 N. E. 391; *Carrico v. Railroad Co.* (W. Va.) 19 S. E. 571; *Libby v. Railroad Co.*, 85 Me. 34, 26 Atl. 943; *Spellman v. Transit Co.*, 36 Neb. 890, 55 N. W. 270; *Simmons v. Steamboat Co.*, 97 Mass. 361-367.

There was error, also, in refusing to grant the first prayer of the defendant, as offered. The declaration did not count on negligence in the operation of the trolley wire and car; nor did it allege that an injury had resulted from the negligence of the servants in charge of the car, as negligence in the operation of the car involves; but it proceeded exclusively on the ground that the wire was, through carelessness and negligence, out of repair, and, in consequence, broke, and, breaking, inflicted the injury complained of. The defendant clearly had the right to have the jury confined to the issue made by the pleadings, and its first prayer as presented did this; but the modification of that prayer amplified and enlarged the issue. In this there was obvious error.

The second exception brings up a ruling as to the admissibility of evidence. A witness, not an expert, was asked what was the condition of the plaintiff on September 12th, —one month and eight days after the date of the accident. And the witness replied that he "looked very bad; he was lame, and he could scarcely go up stairs," etc. The question and answer were excepted to. The witness was not asked an opinion. She was simply required to describe the plaintiff's physical condition, and this she was competent to do, because it was merely the description of a fact which she had seen. Its weight and value were for the jury. We see no error in the ruling.

The first exception brings up a new question of practice. By section 6 of article 15 of the constitution, a trial by jury of all issues of fact is guaranteed to every litigant when the sum in controversy exceeds five dollars, though it is competent, under section 8 of article 4, for the parties to a proceeding to waive that right, and to submit the cause to the court for determination without the

aid of a jury. It was found in actual practice that these provisions resulted in congesting the dockets of the common-law courts in the city of Baltimore, and accordingly an amendment of the organic law was proposed by the general assembly during the session of 1892. This amendment was subsequently adopted by the people. Among other things, it declares that "the general assembly may provide by laws, or the supreme bench [of Baltimore city] by its rules, for requiring causes in any of the courts of Baltimore city to be tried before the court without a jury, unless the litigants or some one of them shall, within such reasonable time or times as may be prescribed, elect to have their causes tried before a jury." This amendment, it will be seen, requires the causes therein referred to, to be tried by the court, unless an election to have a jury trial is made, and produces precisely the converse of the condition which prevailed prior to its adoption. Acting under the authority thus conferred upon it, the supreme bench adopted a series of rules to put the amendment into effect. Those rules provide that all causes standing for trial in the common-law courts of the city shall be tried before the court without a jury unless an election in writing be filed for a trial before a jury. They further declare that such election must be made by the plaintiff not later than 15 days after the filing of the declaration, and that defendants must make such election at or before the time of first filing a plea, but in no event after the time allowed by law to plead. It is also prescribed that "such election shall not be withdrawn except by written consent of all the parties filed in the case." The original declaration filed in this case concluded with these words: "Wherefore he brings this suit, and claims \$5,000 damages, and prays a jury trial." Subsequently an amended declaration was filed, and immediately following the claim for damages these words appear: "The plaintiff prays a jury trial." This is the only election made by either of the parties to have the case tried by a jury. When the case was called for trial in the court of common pleas, the appellant filed a motion asking that a trial be had before the court without the aid of a jury, assigning, as a reason in support of the motion, the omission of the plaintiff to file, in the manner and within the time fixed by the rules, an election for a trial before a jury. This motion was overruled, and to that adjudication the first bill of exceptions was taken.

We think there was error in this ruling. There was no election by the plaintiff other than the concluding words which we have quoted from the declaration. These words were in fact a part of the declaration. A withdrawal of the declaration under leave of court would have withdrawn the election for a trial by jury, notwithstanding the rule forbids a withdrawal of an election without

the consent of both parties. It was the obvious intent of the rule that an election for a trial by a jury should be a separate and distinct act, evidenced by a writing different from the pleadings, so that no change in the latter could affect or interfere with the former. Clearly, the correct practice under the rule is the one just indicated. There is an additional reason: By the same rule it is made the duty of the several clerks, as soon as it is ascertained that a cause will not be tried by a jury, to transfer the same to a separate trial docket, entitled "Non Jury Cases," and the trial shall take place before the judge at large. Now, it was manifestly not the design of the rule that the clerks of the several courts should examine all the pleadings to ascertain whether somewhere among them there might be found a claim for a trial by jury; and, to obviate the necessity for such an examination, the rule plainly provides that the election shall be filed in writing, not later (if filed by the plaintiff) than 15 days after the filing of the declaration. The two things, viz. the election in writing and the declaration, are treated by the rule as distinct and independent; and it is clearly error to combine them in one paper. A declaration is simply the statement of the plaintiff's cause of action, and it has nothing to do with the mode of trial. The election is a mere designation of the mode of trial, and has nothing to do with the thing to be tried. Strictly, the declaration should contain no averments or statements beyond those that are necessary to set forth the cause of action; and hence a distinct step in the case relating only to the mode of trial ought not to be made a part of the declaration, with which it has no concern. What is true of the declaration is true also of the pleas, and the election should form no part of them. For the errors we have pointed out, the judgment must be reversed; and, as the truth of the evidence adduced by the defendant is a matter wholly for the jury, or the court sitting as a jury, to pass upon, a new trial will be awarded. Judgment reversed, and new trial awarded, with costs above and below.

(86 Md. 370)

GOLDSCHMID v. MELINE.

(Court of Appeals of Maryland. Nov. 17, 1897.)

ABATEMENT AND REVIVAL—DEATH OF PARTY—APPEAL AND ERROR—WHEN LIE.

1. The statute allowing an appeal to the court of appeals for reviewing judgments of inferior courts does not authorize an appeal to be taken or entertained in a case where a writ of error was not available at common law.

2. If plaintiff dies before errors assigned, the writ of error abates at common law.

3. Code, art. 5, §§ 73, 74, 76, permitting the prosecution of an appeal in actions at law by the personal representative of a party that has died pending suit, all have reference to cases where the appeal has been taken at the time of the death. Therefore, where a plaintiff against

whom judgment has been rendered dies before entering an appeal, his personal representative cannot enter it.

Appeal from circuit court, Montgomery county.

Assumpsit by Rudolph Goldschmid against Manche H. Meline and another, in which there was a judgment in favor of Manche H. Meline. Plaintiff subsequently died, and Mathilde Goldschmid, his executrix, was made a party plaintiff, and she now appeals. Dismissed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Adolph Wolf, B. F. Waters, and D. W. Baker, for appellant. Robert B. Peter and F. E. Chapin, for appellee.

McSHERRY, C. J. The appeal in this case must be dismissed. The facts are these: One Rudolph Goldschmid brought suit in the circuit court for Montgomery county against Manche H. Meline and Louis D. Meline in assumpsit on a promissory note. The issues raised by the pleadings were tried, and the trial resulted in a verdict and judgment for the defendant Manche Meline. This judgment was entered on November 17, 1896. On January 12, 1897, the present appellant, claiming to be the executrix of the last will of Rudolph Goldschmid, the plaintiff of record, who had died after the rendition of the judgment, and before an appeal had been prayed, went into the circuit court, suggested the death of the plaintiff, and had herself, in her capacity as executrix, made a party plaintiff. She thereupon, the same day, entered an appeal in the circuit court to this court. A motion has been made to dismiss the appeal thus taken, and the question presented is: Can an executor of a plaintiff, against which plaintiff in his lifetime a judgment had been rendered, enter an appeal after the death of that plaintiff? At the common law, a judgment was reviewable only by writ of error issued out of the court of chancery, and it brought up to the superior court for review only errors of law apparent on the face of the record, and nothing more. The statute of 2 Westm. 13, Ed. I. c. 31, for the first time authorized bills of exception in civil cases. Rulings of the inferior court, which, under the provisions of that statute, were made the subject of exceptions, were thus spread upon the record, and then brought before the appellate court by writ of error. But now, by acts of assembly, an appeal to the court of appeals has been authorized for reviewing the judgments of inferior tribunals, and this method is "a more convenient and less expensive mode than the writ of error." 1 Poe, Pl. & Prac. § 828. The legislation conferring this right of appeal is quite liberal, but, in the absence of express enactment, no appeal can be taken or entertained in any case where a writ of error could not have been availed of at the common law. *Manufacturing Co. v. Owings*,

3 Gill, 498; *Swann v. Mayor*, etc., 8 Gill, 154. By the rule of the common law, if the plaintiff in error dies before errors assigned, the death abates the writ (*Carroll v. Bowle*, 7 Gill, 34; *Harryman v. Harryman*, 49 Md. 70), and as, unless specially authorized by statute, an appeal will not lie where a writ of error would abate, it becomes necessary to examine the legislation of this state for the purpose of discovering whether a contingency like the one presented by this record has been provided for. Article 5, §§ 73-76, and article 16, § 8, of the Code, contain all the enactments that have been passed upon this subject, and, unless they cover the pending appeal, it must abide the rule of the common law as applied to writs of error. Section 73 prescribes that "no case in which an appeal has been prayed or writ of error applied for, whether the record shall have been transmitted to the court of appeals or not, shall abate by the death of either of the parties," etc. This section obviously relates only to cases where an appeal has been prayed, or a writ of error has been sued out, during the lifetime of the parties. In such instances, whether the record has been transmitted to this court or not, the cases do not abate by the subsequent death of the parties. Clearly, the section does not apply to the state of facts now presented, because here the plaintiff against whom the judgment was recovered died before any appeal was prayed. Section 74 provides for cases where the plaintiff in an appeal or writ of error—that is, in an appeal that has been taken or a writ of error that has been sued out—dies before the term to which the appeal or writ of error was returnable, and it authorizes the executor or heir at law to appear in the court of appeals, and to suggest the death, for the purpose of prosecuting the appeal or writ of error. This section does not meet the case at bar. Section 75 relates to the death of a party while the case is under rule argument, and has no application to this case at all. Section 76 in express terms has reference only to cases where one or more appellants or appellees, or plaintiffs or defendants in error, shall die after an appeal has been taken, or writ of error has been sued out, and before final judgment in the court of appeals; and this case does not belong to that class. These are all the statutory provisions relating to this subject and respecting appeals and writs of error from courts of law. There is, consequently, no enactment covering a case at law where the plaintiff against whom a judgment has been rendered has died before an appeal has been entered. And so in *Harryman v. Harryman*, supra, this court said "that, where a party dies before appeal taken, the acts" of assembly then in force, "did not apply, and that in such case the appeal should abide the rule of the common law." The acts of assembly which were in force when the case just cited was decided are the same as those now upon the statute-book, with a single exception, and that ex-

reption is this: By article 2, § 9, of the Code of 1860 it was provided that "no case pending in the court of appeals shall abate by the death of either of the parties," etc., whereas by section 73 of article 5 of the present Code, embodying the act of 1888 (chapter 42), adopted since the date of the determination of the case of *Harryman v. Harryman*, "no case in which an appeal has been prayed, * * * whether the record shall have been transmitted * * * or not, shall abate," etc. The section of the Code of 1860 related to cases actually pending in the appellate court at the time one of the parties died, while the act of 1888 (chapter 42) went further, and applies to cases where an appeal had been taken before the death of the party, though the record had not been, in fact, transmitted. Article 16, § 8, of the Code relates to cases in equity, and this provision is broad enough to include a proceeding where one of the parties dies after decree, but before an appeal has been taken. *Thomas v. Thomas*, 57 Md. 504. This analysis of the statutes is sufficient to show that no provision has been made for the case of a plaintiff against whom a judgment has been rendered, and who has thereafter died before an appeal has been prayed. It is competent to the legislature to supply this omission, but this court has no authority to do so. The result is that the appeal must be dismissed. Appeal dismissed.

(68 N. H. 181)

PARKER v. DORSEY.

(Supreme Court of New Hampshire. Rockingham. March 15, 1895.)

VALIDITY OF AWARD—UNCERTAINTY.

1. An award, on a settlement of a partnership business, that "D. is to have one-half of the cider now at P., and P. to have the other half," is not void for uncertainty.

2. An award on a partnership accounting giving to one partner one-half of certain property, with the balance to the other, is final, though the actual manual distribution of such property is not provided for.

Action by Wilbur K. Parker against Terrence W. Dorsey on an award.

Facts found by a referee: The plaintiff and the defendant, by an oral agreement, submitted all differences between them growing out of a partnership business they had been engaged in to the determination of an arbitrator, whose decision they agreed should be final. After a hearing, the arbitrator awarded: "That Dorsey pay to Parker the sum of \$289.82; Parker to pay from said sum all demands against the firm of Dorsey & Co. owed in Kensington, N. H., whether for apples, barrels, or casks. Dorsey shall keep to his own use all the empty barrels now in his possession. Dorsey to have one-half of the cider now at Parker's, and Parker to have the other half." Upon the foregoing facts the referee finds in the plaintiff's favor for the amount of the award and interest

from the date of the writ. Judgment for plaintiff.

H. A. Shute, for plaintiff. C. H. Knight, for defendant.

BLODGETT, J. There is no merit in the defendant's objection that the award is uncertain in its provision for "Dorsey to have one-half of the cider now at Parker's, and Parker to have the other half." It is true that the text-books and decisions alike say that an award must be certain, but this means only that it must be reasonably certain. *Truesdale v. Straw*, 58 N. H. 207, 212; *Strong v. Strong*, 9 Cush. 500; *Caldw. Arb.* 109; *Wats. Arb.* *120; *Russ. Arb.* *278. In respect to certainty, all that is necessary to a complete award is that it should be in its terms so reasonably certain as not to leave its own meaning open to future controversy. *Harris v. Manufacturing Co.*, 9 R. I. 99. As to the cider, the award plainly falls within this rule. There can be no mistake as to its meaning. The respective rights of the parties are definitely determined. Nothing is left to be performed but the mere ministerial act (*Russ. Arb.* *274, and cases cited) of division by computation or measurement, and the maxim, "Id certum est quod certum reddi potest," justly applies. It is, however, further contended that the award is not final, because it leaves undivided in fact the thing which it purports to divide. But it is not necessary to a complete award that it should execute itself. That is not always possible. It is enough if it leaves nothing to be performed but the mere ministerial acts needed to carry it into effect. *Harris v. Manufacturing Co.*, supra; *Coghill v. Hord*, 1 Dana, 350. "When it is laid down as a principle of law that an award should be final, the meaning is, not that nothing shall remain to be done to complete the award, but that the thing to be done shall have been determined and defined to a reasonable certainty." *Strong v. Strong*, 9 Cush. 567. "It may require future ministerial acts to be done by the arbitrators or others, but cannot reserve any judicial act to be done." *Russ. Arb.* *272; *Billing, Awards*, *77. Upon this branch of the case, as well as the preceding, *Strong v. Strong* is directly in point. In that case the arbitrators awarded to each of two partners one-half of certain grain, crops, farming implements, and logs, and precisely the same objections were made to the award as are now made here; but the court sustained the award, saying (pages 566, 567): "It is true, the arbitrators do not themselves actually sever the things to be divided, whether hay, grain, utensils, or logs. There is nothing in the submission which requires them to effect such actual severance and manual distribution of these things. They adjudge and award that the things shall be divided, and they decide in what proportions. In many cases, no more is possible to be done,—as of

an award for the division of partnership effects, which may happen at the time to be abroad, or otherwise not in the personal possession of either party, and of which the quantity or value is not known; or as in the case of an award concerning objects not in their nature presently divisible, but hereafter susceptible of division, such as the yet immature crop of a fruit tree; or as in the case of joint interests not in their nature capable at any time of material severance, like the property in a ship. All these, and many other examples which readily suggest themselves, would seem to show that an award which purports to divide property between two persons by prescribing a rule of division may well be final, though the property in question be not actually divided; nay, though it be incapable of actual division. If the award give a definite and certain rule for the division, there is no want of power in the law to apply the rule, and enforce its application." To these views nothing need be added. Judgment on the report for the plaintiff.

CARPENTER, C. J., did not sit. The others concurred.

(69 N. H. 166)

STATE v. WIMPFHEIMER et al.

(Supreme Court of New Hampshire. Strafford. July 30, 1897.)

CITIES—WATER COMMISSIONERS—APPOINTMENT BY COUNCIL—TENURE OF OFFICE.

1. Under Laws 1891, c. 143, the town of Somersworth was authorized to construct waterworks, and to place them in the charge of commissioners, appointed by the selectmen. Under Laws 1893, c. 171, Somersworth was made a city, and the council was authorized to elect certain named officers and all other officers necessary, not chosen in ward meetings or appointed by the mayor and aldermen or by law. By Laws 1895, c. 179, the city council were authorized to elect certain named officers, "and all other officers necessary for the good government of the city, who were not chosen in ward meetings or otherwise appointed by law." Some of the officers named under the previous law had been appointed by the mayor and aldermen. *Held* to authorize the election by the council of water commissioners.

2. Under Laws 1891, c. 143, authorizing the town of Somersworth to place its waterworks under the control of a board of commissioners, but not fixing the tenure of office, and Laws 1893, c. 171, making said town a city and conferring on the city the powers of the town, the common council had a right to appoint commissioners for the term of three years.

Quo warranto by the state against Wimpfheimer and others, who were in possession of the office of water commissioners of the city of Somersworth. Information dismissed.

H. V. Moore, J. S. H. Frink, J. E. Edgerly, and J. Kivel, for the State. Streeter, Walker & Hollis, J. E. Young, and W. S. Pierce, for defendants.

CHASE, J. By chapter 143, Laws 1891, the town of Somersworth was authorized "to

construct, manage, maintain, and own suitable waterworks," for the purpose of supplying the inhabitants of the village of Great Falls with water. It was required to place the works under the control of a board of water commissioners, consisting of three suitable persons, not more than two of whom should belong to the same political party. The selectmen of the town were authorized to appoint the board, and it was to have such powers and duties as were prescribed by the town from time to time. The town was made a city in 1893, and all the powers conferred upon the town by the act of 1891 were transferred to the city. Laws 1893, c. 171, §§ 1, 25; Pub. St. c. 46, § 1. The city councils were authorized to elect a city clerk, board of assessors, city treasurer, chief engineer of the fire department, and assistants, street commissioner, city solicitor, city physician, and "all other officers necessary for the good government of the city who are not chosen in ward meetings, appointed by the mayor and aldermen, or otherwise appointed by law." Laws 1893, c. 171, §§ 17, 18. In 1895, a substitute for section 18 was enacted, providing that "the city councils shall * * * elect a city treasurer, chief engineer and assistant engineers of the fire department, a street commissioner, a city solicitor, a city physician, tax collector, city marshal, assistant marshal, such police officers and other officers as may be provided for by ordinance, and elect all other officers necessary for the good government of the city who are not chosen in the ward meetings or otherwise appointed by law." Laws 1895, c. 179, § 4. Here, in addition to the officers mentioned in the original section, the tax collector, city marshal, assistant marshal, police officers, and other officers provided for by city ordinances are particularly named. As the law previously stood, these officers were appointed by the mayor and aldermen. Pub. St. c. 48, § 15. The water commissioners were also appointed by the same body by virtue of the law making all provisions of the statute relating to the selectmen of towns applicable to the mayor and aldermen of cities, "unless it is otherwise provided by law." *Id.* § 14. The words, "appointed by the mayor and aldermen," were omitted from the exception, leaving as the only officers excluded from the operation of the section those "chosen in ward meetings," such as the supervisors of the check list (Laws 1893, c. 171, § 4), the moderators, ward clerks, aldermen, common councilmen, and selectmen (*Id.* §§ 10, 12); and those "otherwise appointed by law," such as the clerk of the police court (Laws 1895, c. 179, § 4), the president and clerk of the common council (Pub. St. c. 48, §§ 8, 9), the president and clerk of the board of supervisors (Laws 1893, c. 171, § 4), and the clerk of the board of assessors. *Weeks v. Dennett*, 62 N. H. 2. In other words, the substituted section made it the duty of the city councils to elect all of

fers who had previously been appointed by the mayor and aldermen. If such was not the intention, the words dropped from the former section should have been retained in order to fully and clearly express the meaning. They qualified the general terms that followed the particular enumeration of officers, and were as necessary in the new section as they were in the old one, if it was intended to continue the qualification. Their omission tends to prove an intent to include in the general terms all officers previously appointed by the mayor and aldermen not specially named.

It has been suggested that the general terms refer to officers of the same class or general character as those previously enumerated, and therefore that they do not include water commissioners. The conclusion does not follow from the premises. Among the officers particularly named are the city solicitor and city physician, who are not public officers in the sense that the law assigns specific duties for them to perform. Their functions more closely resemble those of a servant. The city employs the solicitor to do its law business, and the physician to attend sick persons for whose welfare it is responsible. In a similar sense the water commissioners are the servants of the city in the business enterprise of supplying water to its inhabitants. They have the control of the waterworks under the direction of the city. There is no such incongruity between the nature of their office and that of other officers specially named as to render it improbable that they were referred to by the general terms. The only apparent reason why the duty of appointing water commissioners was originally imposed upon the selectmen (Somersworth then being a town) was because it was thought that three persons would be likely to act with more deliberation and better discretion in the selection of the officers than the voters could exercise in the midst of the hurry and political excitement attendant upon a townmeeting. This reason ceased when the town became a city. All the powers previously possessed by the town and its inhabitants were then delegated to, and vested in, the city councils, composed of the board of mayor and aldermen and the board of common council. Pub. St. c. 48, §§ 6, 7; Id. c. 50, § 1. The city councils, when assembled in convention, consists of the mayor and 1 alderman and 3 councilmen from each of the 5 wards, or of 21 persons in all (Laws 1896, c. 171, §§ 2, 12),—not so large a number as to seriously impair the capacity of the body for deliberation and the reasonable exercise of discretion. It is also a representative body, in which the voters of each ward have substantially the same ratio of representation that they have in the board of mayor and aldermen, and a larger ratio than the voters of the town had in the board of selectmen. A divided control of a business does not, as a general rule, promote its suc-

cess. It is a business principle that accountability should be due directly to the authority which prescribes the responsibility. In a private corporation the directors are usually clothed with the power of appointing its subordinate officers and agents, as well as the power of deciding the policy to be pursued in the management of its business. An aqueduct corporation, having one class of officers to manage the business and prescribe the duties of its subordinates, and another to appoint the subordinates, would be an anomaly. It would not have the confidence of persons desiring the use of water, nor of persons desiring an investment for their money. The city of Somersworth, in exercising the franchise of supplying its inhabitants with water, closely resembles a private corporation; it is engaged in a business enterprise. See *Blood v. Company* (Hillsboro, June, 1895).¹ Its board of mayor and aldermen and its common council, by concurrent votes, manage the enterprise and prescribe the duties of the water commissioners. Laws 1891, c. 143, §§ 3, 4; Pub. St. c. 50, § 1. They stand in relation to this particular business like the directors of a private corporation in relation to its business; and there is the same reason for giving them authority to appoint the officers and agents charged with the duty of executing the policy prescribed by them for the management of the business as there is for giving such authority to directors. It is presumed that the legislature intended the business should be conducted in a way that would secure reasonable service to the public. It apparently had in view the business principle referred to, for it provided that the city councils may remove at pleasure any officer elected or appointed by them, unless his term of office is fixed by the act. Laws 1895, c. 179, § 4. These considerations show that it intended to give the city councils authority to appoint the water commissioners, as well as the officers specially named in the act. There is no occasion for a divided control of the waterworks in order to secure the representation of more than one political party in the board of water commissioners, for the statute expressly requires such representation. There is nothing in the constitution of the city councils that renders it more difficult for them to comply with this requirement than for the board of mayor and aldermen, or renders it less certain that there will be a compliance.

It is claimed that the ordinance making the term of office of the water commissioners three years is invalid, because (1) the city had no power to pass such an ordinance; (2) if it had power, the ordinance was not published as required by law; and (3) the ordinance had been repealed. The want of power is based on the theory that the tenure of office of the water commissioners is fixed by section 38, c. 43, Pub. St., which provides that "all town officers shall continue in office

¹ Opinion had not been filed Jan. 24, 1898.

until the next annual meeting and until others shall be chosen or appointed and qualified in their stead, except in cases where the law otherwise directs." The act of 1891 provides that, for the more convenient management of the waterworks, the town shall place them under the direction and control of a board of three water commissioners, to be appointed by the selectmen, and to have such powers and duties as the town shall, from time to time, prescribe. Laws 1891, c. 143, § 3. Nothing is said about the duration of the term of office of the commissioners, but there is an implication that the town may, if it sees fit, fix the tenure within reasonable limits. This implication is strengthened by a consideration of the necessities of the case. Acquaintance with the construction of the works, the nature of the machinery in use, the capacity of the works for supplying water under varying conditions, the needs of water takers, and the general methods required for properly conducting such a business, is indispensable to a proper direction and control of the works. Frequent changes of the officers would tend to diminish their efficiency. It would require explicit terms to satisfy one that the legislature intended to disable the town from making a regulation which would extend the term beyond a year, especially when it is considered that the legislature itself has by express provisions in numerous instances made the term of such officers three years. Laws 1893, c. 138, § 4; Id. c. 220, § 3; Id. c. 231, § 4; Id. c. 290, § 4; Laws 1895, c. 177, § 4; Id. c. 204, § 4; Id. c. 259, § 4. Aside from the special authority granted in the act of 1891, the city had, under the general law, authority to make reasonable by-laws for governing its prudential affairs. Pub. St. c. 40, § 7; Id. c. 50, § 1. No good reason has been suggested, and none is perceived, why a city, under the general power thus conferred, may not establish by ordinance the term of office (within reasonable limits) for those of its officers and agents whose terms are not fixed by law. The defendants were elected water commissioners, June 16, 1896, under an ordinance passed that day, and published in a newspaper, June 19, June 26, and July 3, 1896. The publication was according to the requirement of section 23, c. 2, Pub. St., but it was not begun until after the election took place. The statute relating to the publication does not provide that an ordinance shall not go into effect until after the publication; it simply directs that there shall be one. Pub. St. c. 50, § 11. The purpose of it is to notify the public of the ordinance. It is directory, and failure to comply with it does not render an ordinance invalid. *Davis v. Smith*, 58 N. H. 16; *State v. Moore* (N. H.);¹ *Com. v. Davis*, 140 Mass. 485, 4 N. E. 577. The claim that the ordinance was repealed has no foundation in fact. Although, upon the revision of the ordinances, December 15, 1896, this ordinance

¹ Opinion had not been filed Jan. 28, 1898.

was, in form, repealed by the general provision repealing all ordinances previously passed, it was at the same time re-enacted, and, so far as appears, without any change in its terms. In substance and legal effect it has been in force continuously since its first enactment, notwithstanding the formal acts attending the revision. *Lisbon v. Clark*, 18 N. H. 234, 239-244. Information dismissed. All concurred.

(69 N. H. 190)

HANSON v. HEARD.

(Supreme Court of New Hampshire. Hillsboro. July 30, 1897.)

BANKS AND BANKING—NATIONAL BANKS—DEPOSITS—COLLECTIONS—CASHIER—AUTHORITY—PRESUMPTION—FRAUD—USURY—RECEIPTS—EVIDENCE.

1. The cashier of a bank of discount has, *prima facie*, as against the bank, authority to receive deposits in its behalf, and also savings bank books for collections.

2. The cashier of a national bank is presumed to have the same authority as cashiers of other banks of discount in respect to receiving evidences of debt for collection, since national banks, being authorized to carry on a banking business, have incidental authority to make collections for other persons.

3. It is not presumed that the cashier of a bank has authority, on receiving a deposit, to promise interest at a usurious rate.

4. The fact that the cashier of a bank, on receiving a deposit, makes an unauthorized promise of interest at a usurious rate, does not relieve the bank from the obligation to return to the depositor the amount actually received from him.

5. Though receipts given by the cashier of a bank on receiving deposits and evidences of debt for collection appeared on their face to be his personal receipts, the depositor was not precluded from showing that they were understood by him, and intended by the cashier, to be receipts in his capacity as cashier.

6. Where the cashier of a bank receives deposits, and evidences of debt for collection, the bank cannot avoid accounting to the depositor, on the ground that the cashier, without the bank's knowledge, acted in furtherance of an independent, fraudulent scheme to appropriate the funds to his own use.

Exceptions from Hillsboro county.

Assumpsit by Miranda Hanson against William A. Heard, receiver of the National Bank of the Commonwealth, for money had and received by the bank. On a trial by jury, the defendant's motions for a nonsuit and for the direction of a verdict in his favor were denied, subject to exception. Exceptions overruled.

The cashier of the bank collected of a Minnesota savings bank a sum of money due to the plaintiff, and received from her other sums, upon all of which he promised to pay interest at the rate of 8 per cent. per annum. He gave receipts for the money, one of which bore his signature as cashier, and the others his signature without addition. He did not credit the money to the plaintiff upon the bank's books, but credited it to his own account, and subsequently withdrew it, and absconded. The evidence was conflicting on the question, whether, in his dealings

with the plaintiff, he acted in his private or in his representative capacity. The only evidence of his authority to act for the bank was the fact that he was its cashier.

D. A. Taggart and E. M. Topliff, for plaintiff. O. E. Branch, for defendant.

CHASE, J. It was not necessary for the plaintiff to show express authority from the bank to its cashier to receive in its behalf the savings bank book for collection and the deposits of money. The cashier, as one of the executive officers of the bank, *prima facie* had authority to solicit and do such business and to bind the bank to the extent, at least, of the obligations ordinarily pertaining to the business. *Eastman v. Bank*, 1 N. H. 23, 26; *Corser v. Paul*, 41 N. H. 24; *Bank v. Haskell*, 51 N. H. 116; *Hunter v. Railroad Co.*, 116 N. Y. 615, 621, 23 N. E. 9; *Morse, Banks*, 156 et seq. The cashier of a national bank stands no differently in this respect from the cashiers of other banks of discount. National banks, being authorized to carry on the business of banking, have authority to collect notes, checks, bills of exchange, and other evidences of debt for other persons, as an incident of the business, although the authority is not expressly mentioned in the national bank act. *Yerkes v. Bank*, 69 N. Y. 382, 386; *Keyes v. Bank*, 52 Mo. App. 323; *Bank v. Townsend*, 139 U. S. 67, 73, 11 Sup. Ct. 496. But it cannot be assumed that the cashier had the bank's authority to promise interest at the usurious rate of 8 per cent. This promise, although unauthorized and illegal, would not relieve the bank from the obligation to return to the plaintiff the money it actually received. *L'Herbette v. Bank*, 162 Mass. 137, 38 N. E. 368. It is no ground for sustaining the defendant's motions. The question as to the amount of the plaintiff's damages is not raised by the case.

The fact that some of the receipts given by the cashier to the plaintiff appeared upon their face to be his personal receipts did not preclude the plaintiff from showing that they were intended by him and understood by her to be receipts in his capacity as cashier of the bank. *Van Leuven v. Bank*, 54 N. Y. 671; *Pierson v. Bank*, 77 N. Y. 304, 310.

The defendant contends that the cashier's acts having been done in the pursuit of an independent, fraudulent scheme, for his own benefit, and without the knowledge of the bank, the bank is not liable, although the acts were done in his capacity as cashier. The bank's promise, not the cashier's fraud, is the foundation of the plaintiff's action. The cashier's independent fraud did not affect this promise. When the plaintiff's money went into the cashier's possession, it was in the bank's possession, and was its money. If it was lost afterwards through carelessness, larceny, or other means, it was the bank's loss. *L'Herbette v. Bank*, 162 Mass. 137, 139, 38 N. E. 368. A review of

the testimony shows that there was evidence upon which the jury might properly find for the plaintiff. Exceptions overruled.

WALLACE, J., did not sit. The others concurred.

(69 N. H. 182)

WHITTAKER v. ORDWAY.

(Supreme Court of New Hampshire. Merri-mack. July 30, 1897.)

BILLS AND NOTES—PAYMENT—RIGHTS OF INDORSEES.

1. Where the payee of a note boarded with the maker, and both parties understood that the board was furnished and accepted in payment of the note, it constituted a payment, even as against a subsequent indorsee of the note after maturity.

2. Payment by the maker of a note is a defense to an action against him by a subsequent indorsee after maturity, though the indorsee paid value, and had no notice of the payment.

Writ of entry by John Whittaker against Charles P. Ordway. Facts found by a referee. Judgment for defendant.

May 2, 1882, Jonas Foster loaned the defendant \$500 upon his promissory note of that date, payable to Foster's order on demand, with interest annually, and secured by a mortgage of the real estate described in the writ. On the same day, after the note had been delivered to Foster, he and the defendant agreed that, if Foster (who was then about 70 years of age) should become disabled or be thrown out of employment, he should make his home at the defendant's, and board out the amount of the note. September 3, 1884, Foster, being out of employment, went to the defendant's in pursuance of the agreement, and remained there the most of the time, until June 24, 1891, both parties understanding that the board furnished in the meantime was in fulfillment of the agreement. The board, at a reasonable price, more than paid the note. At some time after June 22, 1891, Foster sold and transferred the note and mortgage to the plaintiff for a valuable consideration, the plaintiff having no knowledge of Foster's agreement with the defendant, nor of the defendant's claim that the note had been paid. Each party moved for judgment in his favor.

W. G. Buxton and Albin, Martin & Howe, for plaintiff. A. W. Silsby and W. L. Foster, for defendant.

CHASE, J. The question whether Foster's agreement to "board out the amount of the note" upon the happening of the contingency named could have been enforced need not be considered, for the agreement has been fully executed. As both he and the defendant understood that the board was furnished and accepted in payment of the note, it was payment. *Jameson v. Carpenter* (N. H.) 36 Atl. 554. Payment by the maker of a note prior to its transfer is a good defense to an action against him by an indorsee who took it after

It became due, although he paid a full consideration for it and had no notice of the payment. *Odlorne v. Howard*, 10 N. H. 343; *Hill v. Huntress*, 43 N. H. 480; *Hardy v. Waddell*, 58 N. H. 460; *Leavitt v. Peabody*, 62 N. H. 185, 189. Judgment for the defendant. All concurred.

(69 N. H. 177)

GRATON & KNIGHT MANUF'G CO. v. WOODWORTH-MASON CO.

(Supreme Court of New Hampshire. Carroll. July 30, 1897.)

MECHANIC'S LIEN—NOTICE TO MORTGAGEES.

1. Under Pub. St. c. 141, §§ 10, 16, declaring that "if a person * * * furnish materials * * * for erecting * * * buildings or appurtenances, by virtue of a contract with the owner thereof, he shall have a lien" for 90 days after the materials are furnished, one who, pursuant to contract, furnishes belting, which becomes a fixture, when affixed to the machinery as intended, has a lien from the time the belting is furnished.

2. One who takes a mortgage on a building in the course of construction is charged with notice of the contract under which material entitled to a lien has been furnished, though not yet affixed to the building.

Assumpsit by the Graton & Knight Manufacturing Company against the Woodworth-Mason Company for belting furnished by virtue of a contract with the defendant for its factory, then in the course of erection. The plaintiff claims a lien for the price of the belting (\$432.45), under Pub. St. c. 141, § 10. The belting was affixed to the machinery in the factory October 24 to 28, 1894. The claimant claims the belting under two mortgages from the defendant, both dated October 20, 1894,—one, a personal mortgage of the machinery and belting then in the factory, and the other a mortgage of the real estate. The belting was on the premises when the mortgages were executed. Case discharged.

J. B. Nash, for plaintiffs. Edgerly & Mathews, for claimant.

CHASE, J. "If a person shall * * * furnish materials to the amount of fifteen dollars or more for erecting * * * a house or other buildings or appurtenances, by virtue of a contract with the owner thereof, he shall have a lien thereon and on any right of the owner to the lot of land on which the house, building or appurtenances stand," for 90 days after the materials are furnished. Pub. St. c. 141, §§ 10, 16. Whether the belting was a material to be used in the erection of the box factory or its appurtenances depends upon the question whether it would be a fixture after it was attached to the machinery as intended. Belting may be a fixture. *Burnside v. Twitchell*, 43 N. H. 390; *Langdon v. Buchanan*, 62 N. H. 657. In determining whether it is in a given case, "the purpose of the annexation and the intent with which it is made are the important con-

siderations." *Id.* 660. It is a mixed question of law and fact. *Kent v. Brown*, 59 N. H. 236; *Turner v. Wentworth*, 119 Mass. 459.

It is not found whether the belting became a fixture when affixed to the machinery as intended. If it did, the plaintiffs, by furnishing it, furnished a material for erecting the building or its appurtenances, within the meaning of the statute. In such case the lien would attach upon the furnishing of the belting, although the belting was not affixed to the machinery until a later time. *Barstow v. Robinson*, 2 Allen, 605. The building being in the course of erection when the claimant took the mortgages, he would have constructive, if not actual, notice of the contract under which the belting was furnished; and his security would be subject to the statutory lien, if one existed. *Institution v. Stone*, 52 N. H. 365; *Pike v. Scott*, 60 N. H. 469, 472. Case discharged.

BLODGETT, J., did not sit. The others concurred.

(132 Pa. St. 373)

COMMONWEALTH ex rel. CITY OF PHILADELPHIA POLICE PENSION FUND ASS'N v. WALTON, City Controller.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

CITIES—APPROPRIATIONS TO POLICE PENSION FUND—VALIDITY.

1. Const. art. 9, § 7, providing that the general assembly shall not authorize any county, city, or town to become stockholder in any company or corporation, or to appropriate money to any corporation, association, or institution, does not prohibit the city of Philadelphia from appropriating \$10,000 for the charter purposes of the City of Philadelphia Police Pension Fund Association, which has for its object to accumulate a fund with which to pay pensions to members of the association and to families of deceased members.

2. An appropriation by the city of Philadelphia to the Philadelphia Police Pension Fund Association of a certain sum is not void because leaving to the association the power to distribute the funds.

Appeal from court of common pleas, Philadelphia county.

Petition by the commonwealth of Pennsylvania, on the relation of the City of Philadelphia Police Pension Fund Association, for an alternative writ of mandamus against John M. Walton, city controller for said city. From a judgment refusing the writ, the relator appeals. Reversed.

George Wharton Pepper and John G. Johnson, for appellant. James Alcorn, Asst. City Sol., and John L. Kinsey, City Sol., for appellee.

STERRETT, C. J. In the relator's petition for the alternative writ, it avers, among other things, that it is a corporation created by and existing under the laws of this state, whose objects, as defined by its charter, are to accumulate a fund, from the dues of its

members, from legacies, bequests, gifts, and other sources, with which to pay pensions to members of the association and to families of deceased members; that its membership is 2,386, including the director of public safety, the superintendent of police, all the police captains and lieutenants, 236 sergeants, 2,013 patrolmen, 67 patrol and van drivers, and 30 employes of the electric bureau; that it pays pensions to members who have become permanently incapacitated by reason of injuries received in the performance of actual duty, to members who have served 15 years whatever may be the cause of incapacity (excepting cases in which it results from the member's own vicious habits), to members who have served 25 years, and to the widow or children or dependent parents of a member killed in the discharge of his duty, etc.; that in 1895 an ordinance was passed by the councils of said city of Philadelphia, and approved by the mayor, appropriating \$10,000 for the charter purposes of said police pension fund association; that, in January of that year, a warrant for the payment of said sum was duly drawn by the director of the department of public safety, and presented to the then city controller, who refused to countersign the same; that his successor in office (the present controller), being unwilling to overrule the decision of his predecessor, declined to countersign the warrant,—and praying that an alternative mandamus issue, etc. In the city controller's return to the alternative writ, all the facts recited in the petition are virtually admitted. The only reason he gives for his refusal to countersign the warrant is that the appropriation was to an association or corporation, and is in violation of law and of section 7 of article 9 of the constitution, which reads thus: "The general assembly shall not authorize any county, city, borough, township or unincorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for or to loan its credit to any corporation, association, institution or individual." In support of the demurrer to this return, the following reasons were assigned: (1) The return admits facts which show that the relator is entitled to relief; (2) it discloses no legal ground for refusal to countersign the warrant; and (3) the respondent has neither set up nor offered any matter or thing to defeat the right of the relator as disclosed by its petition. The refusal of the court below to sustain the demurrer, and the entry of judgment thereon for the defendant, constitute the subjects of complaint in this appeal.

It is unnecessary to even outline the history of the constitutional prohibition above quoted. It had its origin in the amendment of 1857, which was prompted by the growing evils of reckless and extravagant municipal subscriptions to railroads, plank roads, etc. Those evils were so aggravated that it became necessary to interfere and prevent by a

constitutional prohibition all future pledges of municipal faith and property for such purposes under the sanction of the legislature, which alone possessed the power to grant the proper authority. *Pennsylvania R. Co. v. City of Philadelphia*, 47 Pa. St. 193; *Speer v. School Directors*, 50 Pa. St. 163; *Brooke v. City of Philadelphia*, 162 Pa. St. 126, 29 Atl. 387. In *Speer v. School Directors*, supra, it was held "that money paid to save a community from a [military] draft is not obtained for a party or individual, but is a direct appropriation to a public purpose, and that raising money by the ordinary powers of borrowing and taxation for a common purpose, affecting the interest, happiness, and welfare of a community, is not obtaining money or loaning credit to any party, within the terms of the amendment." It is evident from an examination of our cases on the subject that no strictly legitimate municipal purpose was intended to be prohibited. The evident purpose of the prohibition was to confine municipalities to the objects for which they were created, and to restrain the legislature from authorizing any perversion of them. By the act of March 11, 1789, which appears to be still in force, the city councils of Philadelphia "have full power and authority to make, ordain, constitute, and establish such and so many laws, ordinances, regulations, and constitutions * * * as shall be necessary or convenient for the government and welfare of said city." 2 *Smith's Laws*, p. 467, § 16. We have no right to assume, nor is there anything from which it may be fairly inferred, that the constitutional prohibition in question was intended to revoke or curtail any of the powers or authorities with which the city councils were theretofore invested by the comprehensive grant above quoted. It is not even suggested that a reasonable appropriation by councils for the creation or maintenance of a police pension fund is not an appropriation to a strictly municipal use, and "necessary for the welfare and comfort of the city." A judiciously administered pension fund is doubtless a potent agency in securing and retaining the services of the most faithful and efficient class of men connected with that arm of the municipal service in which every property owner and resident of the city is most vitally interested. Reasons in support of this proposition need not be stated in detail. They are such as readily suggest themselves to every reflecting mind. But aside from the general charter authority of councils to make such appropriations, and aside from any question of expediency or propriety in their doing so, this case might well be disposed of on the ground that the constitutional prohibition relied on by the defendant is inapplicable to councils. In *Indiana Co. v. Agricultural Soc. of Indiana Co.*, 85 Pa. St. 357, this court held that the section in question "deals only with legislative power. * * * That power is thereby limited and restricted. It de-

clares what the legislature 'should not' do. It annuls nothing that it had done. It forbids such legislation thereafter. It struck down no law. Its prohibitions were wholly prospective." It is not pretended that the ordinance in question was enacted in pursuance of any legislation passed since the adoption of the constitutional prohibition. It therefore follows that the latter has no application here.

There is no merit in the objection that councils delegated the distribution of the sum appropriated to the Philadelphia Police Pension Fund Association, instead of distributing it themselves. If they were satisfied, as they doubtless were, that the distribution of the fund would be better effected through the agency of the association than by an agency of their own creation, they had a right to so provide. As we have seen, the association was incorporated for the express purpose of administering such funds on just and equitable principles. If it should attempt to divert any of the funds to improper purposes, ample redress could be had by application to the proper court. It follows from what has been said that the demurrer should have been sustained, and a peremptory writ awarded as prayed for. Judgment reversed, and judgment is now entered in favor of the plaintiff on the demurrer, and peremptory writ awarded as prayed for.

(69 Conn. 709)

**GUARANTEE TRUST & SAFE-DEPOSIT
CO. v. PHILADELPHIA, R.
& N. E. R. CO.**

(Supreme Court of Errors of Connecticut. Nov. 3, 1897.)

**APPEAL—FINAL ORDERS—RAILROAD RECEIVERS—
WAGES OF EMPLOYEES—COURTS—JURIS-
DICTION—COMITY.**

1. An order directing a railroad receiver to pay a certain rate of wages to his employes is final and appealable.

2. A court has power to direct the acts of a railroad receiver in the management of the entire road, though a part of it extends into another state, as it may rely on the rule of comity, by which the courts in the other state will recognize such directions, and aid in their enforcement.

3. The same person having been appointed receiver first by a New York court, and afterwards by a Connecticut court, to operate a railroad situated in both states, and the receiver having changed the schedule of wages, an order by the Connecticut court restoring the schedule is not void, as in conflict with the business of the road within the jurisdiction of a New York court.

4. A receiver for a railroad was first appointed by a court of New York, and the same person was appointed by a Connecticut court in ancillary proceedings, the road extending into the latter state. *Held*, the Connecticut court had jurisdiction to fix a schedule of wages to be paid employes on the road, though ordinarily the court of initial proceedings should make directions in respect to the management of the property as a whole.

Appeal from superior court, Hartford county; William T. Elmer, Judge.

In an action brought by the Guarantee Trust & Safe-Deposit Company against the Philadelphia, Reading & New England Railroad Company, wherein James K. O. Sherwood was appointed receiver of defendant's property, Silas N. Smith and other employes of the road petition for restoration of the schedule of wages. From an order granting the petition, the receiver appeals. Affirmed.

Arthur L. Shipman and Charles E. Gross, for appellant. John R. Buck and Arthur F. Eggleston, for employes of the Philadelphia, Reading & New England Railroad Company.

HAMERSLEY, J. This is an appeal by the receiver from an order of court directing him to restore the schedule of wages existing at the time of his appointment in respect to persons employed by him in operating the railroad in charge of the court. The order was made in response to a petition by Silas N. Smith and others, being the employes whose wages were reduced by the receiver; and the court ordered that the petitioners be made parties to the record for the purposes of the petition. Smith and others have filed in this court a plea in abatement, which we must consider before disposing of the appeal.

A question might have been raised as to the standing of these petitioners in this court. The superior court has the power to direct a receiver in respect to the wages to be paid in the management of a property under its charge. But it is a power to be exercised only in clear cases of necessity, and with exceeding caution. A main purpose of appointing a receiver is to remit to him those details of management which cannot well be administered by the court. Where plainly necessary, the power may be exercised either by an order establishing a schedule of wages or by the appointment of a receiver in whose discretion the court can place greater confidence. The court may act on the application of a receiver, or without any application. The situation may be such as to justify the employes of the receiver in bringing the subject to the attention of the court by an appropriate petition, and, if an investigation is deemed requisite, they may properly be heard. But that such petition and hearing, in a case like this, where no execution of an existing contract is sought to be enforced, but simply a direction as to the terms of future contracts, can make the proceeding an adversary one, in the legal sense, so that the petitioners are parties to the original action for the purpose of an adjudication, is by no means clear. Some decisions in federal circuit courts seem to support the theory of a power in the court to determine upon complaint, pleadings, and trial, as in a judicial proceeding, all grievances suffered by the employes of a railroad receiver in the operation of a road. *Continental Trust Co. of New York v. Toledo, St. L. & K. C. R. Co.*,

59 Fed. 514, 517; *Thomas v. Railway Co.*, 62 Fed. 17, 18, and cases there cited. If these decisions go further than a recognition of the admitted power of a court to adjudicate and enforce contracts its officer has made, and to direct his conduct as to the terms of those he shall make, they would seem to involve a power in court over all persons who may be employed by the receiver inconsistent with that individual freedom of action and contract deemed essential in all other relations. We express no opinion on this question. Although apparently involved, it has not been raised by the parties. In view of the final conclusion reached, it is of no practical importance in this case, and, under the special circumstances, may properly be treated as waived. Assuming, then, that the petitioners are entitled to appear as parties and file the plea in abatement, it follows that, for the purpose of disposing of this plea, the order appealed from must be regarded as a final adjudication of the rights of parties involved in a judicial proceeding of an adversary nature.

In the course of an action on the equity side of the court in which a receiver is appointed, it is often necessary for the court to make an order which constitutes an adjudication by a judicial finding,—separable from the main action, affecting in some instances persons who are parties to the action only for the purposes of that proceeding, and which cannot be reviewed unless by an appeal from that order. Orders of such a character, which are in fact a final adjudication of the rights involved, may generally be reviewed by an appellate court. The reasons for the rule are well stated in *Blossom v. Railway Co.*, 1 Wall. 655. Under our statute, when a party to such a final order thinks himself aggrieved by the decision of the court on any question of law arising in the trial, he may appeal and remove the question for review in this court. We have heretofore acted on this construction of the statute, and do not doubt its correctness. *Leonard v. Insurance Co.*, 65 Conn. 529, 33 Atl. 511. Even in actions on the law side of the court, a "final judgment," within the meaning of our statute of appeal, may include a judgment in its nature final and separable from any other judgment that may be rendered in the action, although not finally disposing of the action. *Bunnell v. Bridge Co.*, 66 Conn. 24, 37, 33 Atl. 533. But it is claimed that the order in question is not final as to its subject-matter; that it is a mere administrative direction, lying in the discretion of the court, and open to modification at any time. There may be orders of this nature which are not appealable, but, without discussing the limits of that discretion which the court has in making a merely administrative order, we think in this case the receiver was entitled to appeal, because the question of jurisdiction, involving the power of the court to appropriate the funds

of the estate for the purposes covered by the order, was distinctly raised and decided. The order thus becomes a final judgment in the case, determining the power of the court in the application of funds, and directly affecting the interests of parties to the main action. An appeal from a void order affecting the rights of owners and creditors who are represented by the receiver may be permitted under the general rules of chancery practice, and by the broad language of our statute in respect to receivers (Gen. St. §§ 1822, 1842). It is difficult to see how the receiver personally can be aggrieved by the present order; but we cannot say that, as representative of the defendant corporation and creditors, he may not be aggrieved, until the question of law involved is decided. The right of appeal does not depend upon an actual grievance, but on a belief that the decision of a question of law, which, if erroneous, may constitute a grievance, is erroneous. Possibly the insignificance of any effect the present order can have upon interests represented by the receiver might be pressed as sufficient ground for holding that in fact the appeal was taken by him personally, and not in any representative capacity. We think, however, the plea in abatement should be overruled.

The order appealed from relates solely to the wages of engineers and firemen employed by the receiver in running the engines used in operating the road in this state, under the direction of the superior court. Is the order, upon the facts appearing in the record, within the jurisdiction of that court? This is the only question of law presented by the appeal. The material facts appearing in the record and found by the court below are as follows: The defendant corporation owned a railroad within the state of New York. It also was lessee of other railroads, including that belonging to the Hartford & Connecticut Western Railroad Company, a corporation incorporated under the laws of this state. The road belonging to the last-named corporation extends from Hartford, in this state, to Rhinecliff, in the state of New York, and constituted the principal part of the railroad system of the defendant. The other roads owned and controlled by the defendant were operated in connection with the Hartford & Connecticut Western. On August 13, 1893, the supreme court of the state of New York, Second judicial department, appointed Mr. Sherwood receiver of the property and effects of the present defendant, upon application of the present plaintiff; and Mr. Sherwood has since operated some portion of the railroads owned and controlled by the defendant under the orders of said court. The parties to the action and the nature of the action in which the appointment was made and the terms of the order making the appointment do not appear. On October 28, 1893, Mr. Sherwood was appointed by the superior court for Hartford county receiver of the defendant corporation in the

state of Connecticut. The nature of the action in which this appointment was made does not appear. On November 7, 1893, Mr. Sherwood, by virtue of the order of the superior court, took control of the defendant corporation and its leased lines in the state of Connecticut, and is still managing and operating said railroad and said leased lines subject to the orders and direction of said court. The record is not clear as to the portions of the railroad operated under the controlling direction of the New York and Connecticut courts, respectively; but it must be taken as a fact found that the Hartford & Connecticut Western Railroad, in this state, has since November 7, 1893, been operated by Mr. Sherwood, as receiver appointed by the superior court, in accordance with the directions of that court. Upon taking possession of the Connecticut road and property of every description belonging to the defendant, and having a situs in Connecticut, Mr. Sherwood found a schedule of wages existing in respect to the engineers and firemen employed in running the engines used in operating the road, and this schedule he followed until May 1, 1897, when (as appears by necessary implication), without any direction of the superior court or of the New York court, he altered the schedule, by reducing the amounts paid for each day's work. Upon this state of facts, the superior court passed the order in question, restoring the rates of pay, and directing Mr. Sherwood, as receiver of the defendant corporation, under appointment of the court, to pay the engineers and firemen in his employ, as such receiver, the same wages they had received previous to the reduction on May 1st. It appears that, in operating the Connecticut road, some of its engines are run from places in this state to places in New York state, by the engineers and firemen employed by the Connecticut receiver, and to that extent the services rendered to the receiver in pursuance of that employment are actually performed within the territorial limits of New York; and it is on this ground, and on this ground alone, that it is claimed the order is void for want of jurisdiction.

It seems very plain that if the receiver, in operating the road, finds it necessary to send his employes into another state, he may do so, and the fact that he does so does not affect the jurisdiction of the court to direct him as to their wages. And it is equally clear that a receiver appointed in one state may be directed by the court of that state in respect to such matters in the operation of the road as must, for the interests of all concerned, follow one rule, although a portion of the line affected by the direction is situate in another state, in which he has also been appointed receiver of the same road. It is true that no court can enforce its orders beyond the territorial limits of its jurisdiction; but it is also true that, by a rule of comity, based in part upon paramount necessity, the authority of receivers appointed in one state will be rec-

ognized in many ways by the courts of another state within whose jurisdiction it may be exercised (*Blake Crusher Co. v. Town of New Haven*, 46 Conn. 473; *Cooke v. Town of Orange*, 48 Conn. 409); and that, ordinarily, a railroad receiver acting under appointment in different states in respect to the same property may be directed by the court of one state in respect to the management of the railroad under the charge of that court; and, if such direction affect portions of the line in other states where he is receiver, the courts of those states, where unity of action is essential to the best interests of all concerned, will refrain from any action interfering with the direction, or will aid its execution by an independent order. In such cases an order of court cannot be held void for want of jurisdiction, because the court may rely for its full enforcement upon an application of this rule of comity by the courts of another state. It appearing, therefore, as it clearly does by the record in this case, that the superior court is the court charged with the direct operation of the Hartford & Connecticut Western road in this state, which is the main part of the defendant's railroad system; that it is the proper court to direct the receiver in respect to the wages of the engineers and firemen employed in the operation of that road; that it is for the interest of all concerned that the employment of these engineers and firemen should include their services in running engines over those portions of the line in New York essential to the beneficial operation of the road by the court,—it follows that the superior court might properly rely upon such application of the rule of comity by the New York court as would aid, and not obstruct, the full effect of the order.

The receiver alleged that any changes in the wages by the superior court would conflict with the business of the road within the jurisdiction of the New York court. This allegation was in issue, and by its judgment the court has found the allegation untrue. The finding may be justified by the facts in the record. Mr. Sherwood was appointed receiver by both courts for the very purpose of preventing such conflict. For four years the receiver has operated the road without such conflict, under the very schedule the court now orders him to restore. Possibly some conflict might arise through the disobedience of the receiver or the failure of a court to apply the rules of comity, but these are contingencies not to be considered in framing the order. Assuming, as we must, upon this record (for it is found by the court, and admitted by all the parties), that the superior court was the proper court to make an order regulating the wages of those employed by the receiver in running the engines used in operating the Connecticut road, there was no error in making the order appealed from.

Our only doubt has been whether the court and all the parties before us have not erred in so conducting the proceedings as to make

this assumption imperative; i. e. whether a full examination of all relevant facts might not show that the proper course was to seek the direction of the New York court in respect to the whole matter. That is the court of initial proceeding. The order appointing the receiver in Connecticut recites that he is appointed as ancillary to the receiver in New York, and without such recital, unless it otherwise distinctly appeared, he would, ordinarily, by force of the rule of comity, act as ancillary receiver. In matters of management in respect to a property impracticable or difficult to be managed otherwise than as a whole, the direction of the court of initial proceeding, establishing rules which of necessity must apply to the whole property, will ordinarily be followed by the courts appointing the same receiver in other states. But while the court in New York, as the court of initial proceeding, is presumptively the proper court to direct as to the wages of employés whose services are rendered as a whole in both states, nevertheless it is possible that the interests of the property may require and the nature of the proceedings in both courts justify the direction of the Connecticut court as to the wages of these employés, and such is the condition shown by this record. If the record omits to present facts essential to the case of the appellant, this court can simply affirm the judgment. *Schlesinger v. Chapman*, 52 Conn. 271; *Rogers v. Rogers*, 53 Conn. 121, 150, 1 Atl. 807, and 5 Atl. 675.

As the record shows that the primary and independent regulation of the wages of the engineers and firemen employed by the receiver in running the engines used in operating the Connecticut road is lawfully in the superior court, and it being evident that the services rendered in the course of their employment within the territorial limits of New York are a necessary incident to the principal employment, and that the treatment of the employment as a whole is essential to the beneficial operation of the road, the same rule of comity which would require the superior court to aid in enforcing the directions of the court of initial proceeding in respect to matters essential to its management of the property as a whole would require that court to recognize as binding on the receiver within its jurisdiction this order made in the administration of that portion of the management committed to the control of the superior court. The rules of comity may not be departed from unless, in certain cases, for the purpose of necessary protection of our own citizens, or of enforcing some paramount rule of public policy. Such considerations do not enter into the present case, and the limitations of an order passed for that purpose need not be discussed. Upon the facts appearing in the record, the order passed by the superior court is not void for want of jurisdiction, and must be obeyed. The plea in abatement is overruled. There is no error in the order complained of. The other judges concurred.

(69 Conn. 694)

Appeal of HAVENS et al.

(Supreme Court of Errors of Connecticut. Nov. 3, 1897.)

ALLOWANCE TO WIDOW—JURISDICTION.

1. An order that a certain number of dollars "be, and the same are, allowed per month for the support of the widow," being made under Gen. St. § 604, authorizing an allowance of "such amount as they [courts of probate] may judge necessary for the support of the widow or family of the deceased during the settlement of the estate," and on petition praying "that this court allow such amount as it may deem necessary for the support of your petitioner out of said estate during the settlement of the same," and order directing a hearing on notice to the executors to "show cause * * * why the prayer of said petition should not be granted,"—is not limited in operation to one year, notwithstanding a previous order limiting twelve months for settlement of the estate, as such order is not intended to and does not control the time that may be used for the settlement.

2. An order for allowance for the support of a widow during settlement of estate contains an implied finding of necessity therefor.

3. An allowance to widow for support during settlement of estate may be made concurrent with the receipt of an income by her, whether from the estate or elsewhere, if it is inadequate.

4. Even if residuary legatees might be entitled in equity to have some portion of the payments made under order of court by the executors to the widow for her support during settlement of estate set off against a claim of her legal representatives for interest on the trust fund provided by the will, which was due and never paid, such relief could not be granted by the probate court, on accounting by the executors.

Appeal from superior court, Hartford county; William T. Elmer, Judge.

Accounting by the Security Company and others, executors, of Leonard Daniels, deceased. From the order of the court of probate, allowing their account, Owen R. Havens, administrator of Laura P. Daniels, deceased, widow of said Leonard Daniels, and her heirs appealed to the superior court, which rendered judgment for said appellants, and the executors appeal in error. Affirmed.

The material facts as they appear in the record, and the finding of the superior court, are as follows:

Leonard Daniels died in January, 1892, leaving an estate appraised at one and a quarter million dollars. By his will, as modified by three codicils, he gave to five persons legacies amounting to \$6,500; to two persons each a life interest in \$5,000; and to a grandson and nephew his mills and stock on hand, appraised at \$90,000. He provided three trust funds of \$100,000 each; the income of one to be paid semiannually to his wife during her life, and the income of the other two funds to be paid during life in the same manner to his two daughters, Catherine Fisk and Abby D. Ellis, respectively. The principal of each fund, after the termination of the life interest, was to be divided between his daughters and their children. This life interest in the trust fund of \$100,000 was the only provision made for his widow, except a gift of

personal property appraised at \$350. The rest and residue of his estate he gave to his said two daughters and their children, the portion going to his grandchildren being given to trustees upon a specified trust. He appointed the Security Company and Lewis E. Stanton, Esq., trustees of each of the trust funds under the will and codicils, and these trustees were also constituted two of the four executors. The will was proved January 27, 1892, and on that day, or a day or two afterwards, the court of probate made an order limiting 12 months for the settlement of the estate, which order remains unchanged. The estate was not settled in 12 months, and is still unsettled. On February 19, 1892, Mrs. Daniels (the widow) brought a petition to the court of probate, asking "that this court allow such amount as it may deem necessary for the support of your petitioner out of said estate during the settlement of the same." Upon this petition the court made an order of notice, which was duly served upon the executors, and in February, 1892, the court granted the prayer of said petitioner for an allowance during the settlement of the estate by an order recorded as follows: "Ordered, that four hundred sixteen and sixty-six one hundredths dollars (\$416.66) be, and the same are, allowed per month for the support of the widow." This was the only order of allowance for Mrs. Daniels which appears of record as passed by said court, and said order was never appealed from, nor revoked, nor modified in any manner. Mrs. Daniels died April 28, 1896. The executors paid Mrs. Daniels to the time of her death the monthly allowance for her support during the settlement of the estate, as granted by order of court,—51 monthly payments, amounting in all to \$21,232.17. On November 18, 1893, the executors presented an account, which was allowed by the court of probate November 23d. The account showed the payment of all debts, legacies, and expenses, and, reserving \$2,500 for future expenses, showed a "balance on hand for distribution" of \$1,187,289.02. The account, as adjusted and allowed by the court, contained among the payments this item: "To payment to Mrs. Daniels per Schedule D \$8,750.05." Schedule D was an itemized statement of 21 payments of \$416.67 each, from February 25, 1892, to October 21, 1893, inclusive, as "allowance to Mrs. Daniels." Some time after Mrs. Daniels' death, to wit, on July 2, 1896, the administrator on her estate made demand of the executors for the amount due Mrs. Daniels at the time of her death, on account of the income of the trust fund, under her husband's will. On July 23, 1896, the executors replied, denying that anything was due Mrs. Daniels' estate. Afterwards the executors filed another account with the court of probate, claimed by them to be their final account, which was adjusted and allowed by the court October 10, 1896. This account showed a balance on hand for distribution of \$1,323,782.94, as follows:

Or.	
Balance on hand, per account rendered	\$1,187,289 02
Amount reserved for future expenses	2,500 00
Gain on inventory sale of N. Y., N. H. & H. R. R. Co. rights	\$ 23,788 95
Income received per Schedule A	187,925 81
Interest on balance from Security Co. Amount paid Mrs. Daniels from Jan. 2 to Oct., 1893 (referring to monthly payments of \$416.67 each), erroneously charged in former account as "allowance of court"	6,144 64
	<u>8,750 02</u>
	171,609 42
	<u>\$1,361,398 44</u>

Dr.	
Bills paid, per Schedule B	\$ 1,851 47
Legal expenses, per Schedule C	4,530 56
Annuities paid, per Schedule D	750 00
Loss on inventory on uncollected account	2,633 61
Services of executors	11,500 00
Payment to Mrs. Daniels of income on \$100,000 given her under will, computed from Jan. 18, 1893 (referring to thirty-nine monthly payments of \$416.67 each, made to Mrs. Daniels from Jan. 18, 1893, to time of her death), when order for payment of allowance to her as widow expired, and erroneously receipted for as "an acct. of allowance of court"	16,249 84
Reserved for probate fees, etc.	100 00
Balance on hand for distribution, viz.:	
Cash	137,331 59
Personal estate	1,178,451 37
Real estate	8,000 00
	<u>\$1,361,398 44</u>

From the order of the court of probate allowing this last account Mrs. Daniels' administrator (Owen R. Havens) and the heirs at law of Mrs. Daniels (the present appellees) appealed to the superior court, and assigned the following reasons of appeal: "(1) Because the court allowed in said account, upon the credit side thereof, the item of \$3,750.02 as 'amount paid Mrs. Daniels from January to October, 1893, income on \$100,000, erroneously charged in former account as 'allowance of court.'" (2) Because the court allowed in said account, upon the debit side thereof, the item of \$16,249.84, as 'payment to Mrs. Daniels of income on \$100,000 given her under will computed from Jan. 18, 1893, when order for payments of allowance to her as widow expired, and erroneously receipted for as 'an account of allowance of court.'" (3) Because, as to said item of \$3,750.02, the same was not the income received by said executors on \$100,000 of said estate for the period named, from January to October, 1893, and was not paid as such to Mrs. Daniels. (4) Because said sum of \$3,750.02 was paid to the said Mrs. Daniels

out of the general assets of said estate, and not from the income of any particular portion or fund of said estate. (5) Because said sum of \$3,750.02 was not erroneously charged in the former account of said executors as 'allowance of court.' (6) Because said sum of \$3,750.02 was paid by said executors to the said Mrs. Daniels as allowance, under the order of said probate court. (7) Because said sum was paid to the said Mrs. Daniels by said executors knowingly and intentionally as allowance, and was received by her and receipted for by her as such in good faith, and was so charged by the executors against said estate. (8) Because as to said item of \$16,249.84, the same was not the payment of income on \$100,000 given the said Mrs. Daniels under the will of Leonard Daniels, her husband. (9) Because said sum of \$16,249.84 was paid the said Mrs. Daniels out of the general assets of said estate, and not from the income of any particular portion or fund of said estate. (10) Because, under the order of said court of probate, said allowance was to be paid the said Mrs. Daniels during the settlement of said estate, and was paid to her as such during her life, and while said estate was in settlement. (11) Because said sum of \$16,249.84 was paid by the executors of said estate as 'widow's allowance,' and in accord with the order of the court of probate, and was paid by them understandingly as such, and was received by the said Mrs. Daniels as such allowance, and so receipted for by her. (12) Because said sum was charged against said estate by the said executors knowingly and properly as allowance, and not as income. (13) Because the allowance of said items in said account as stated therein would deprive the said Mrs. Daniels and her estate of the legacy provided for her in the will of her husband, Leonard Daniels. (14) Because said will provides that the sum of \$100,000 should be converted into a fund, and be held in trust by certain trustees named in said will; the income, dividends, rents, and profits thereof to be paid over each six months to the said Mrs. Daniels, wife of the testator, during her life, and that said sum of \$100,000 has never been set apart or converted into a fund, and placed in the hands of trustees, as provided in said will, and no income on such fund has ever been paid to the said Mrs. Daniels, or to her legal representatives. (15) Because, under the terms of said will, the executors as such had no legal right to pay the said Mrs. Daniels the income on \$100,000 of said estate. (16) Because said item of \$3,750.02 has already been legally allowed by said court as 'widow's allowance' in said former account, understandingly both on the part of said court of probate and on the part of said executors, and was so received by Mrs. Daniels, and the same cannot now be changed from 'widow's allowance' and allowed as income."

The parties went to trial on a general denial of the facts alleged in these reasons of appeal. The superior court found the issues for the

appellants, "and that all moneys paid to the said Laura P. Daniels by the executors were in fact, as they should have been, paid to her as the wife of said Leonard Daniels, out of his estate, as an allowance for her support during the settlement of said estate, pursuant to an order of said probate court directing and authorizing such payments, and were not otherwise paid; and that said account so accepted and approved by said probate court is erroneous, and should be corrected in the following particulars: First. The item upon the credit side of the account, to wit, 'Amount paid Mrs. Daniels from January to October, 1893, income on \$100,000, erroneously charged in former account as "allowance of court, \$3,750.02,"' is improper, and should not have been allowed, and should be erased. Second. The item on the debit side of said account, to wit, 'Payment to Mrs. Daniels of income on \$100,000 given her under will, computed from July, 1893, when order for payment of allowance to her as widow expired, and erroneously receipted for as "an account of allowance of court, \$16,249.84,"' should not have been allowed, and should be erased, and in lieu thereof there should be the following charge to the said executors: 'Payment to Mrs. Daniels as allowance, \$12,490.82,'"—and rendered judgment accordingly for the appellants. From that judgment the executors (the present appellants) appealed to this court.

Upon the trial to the court below the executors made the following claims, to wit: "(1) That the order of the probate court, making an allowance for the support of Mr. Daniels' widow, ran only to such time as she should become entitled to the benefit of the legacy of \$100,000, mentioned in said second item of Mr. Daniels' will, and that she became entitled to the benefit of said legacy not later than February, 1893, and that from and after January, 1893, the allowance made by said order ceased. (2) That all payments made subsequently to January, 1893, as evidenced by said receipts, were not authorized by said order of the probate court. (3) That the preliminary account of November, 1893, was erroneous in so far as it made payments to Mrs. Daniels after January, 1893, a charge upon the estate of Mr. Daniels as allowance to his widow under said order of allowance. (4) That all payments evidenced by said receipts made to Mrs. Daniels subsequently to January, 1893, should have been charged to her against the income of the legacy provided for her in said second item of Mr. Daniels' will. (5) That in the settlement of the account of October, 1896, it was proper for the executors to correct the error above referred to in the account of November, 1893, and that the action of the probate court in accepting and approving said account of October, 1896, was proper and legal. (6) That the real controversy in this appeal was between the representatives of Mrs. Havens upon the one hand, and the beneficiaries in the residuary

estate of Mr. Daniels upon the other, and that said beneficiaries were not concluded from making the claim that all payments to Mrs. Daniels subsequent to January, 1893, as evidenced by said receipts, should have been charged to the income of her legacy, rather than as allowance under said order by any mistaken action on the part of the executors of Mr. Daniels' estate. (7) That the words, 'during the settlement of the estate,' contained in section 604 of the General Statutes of this state (Revision of 1888), do not define the time during which the allowance made to a widow is to continue, but only the purpose of such allowance, namely, to provide support for the widow while the estate is being settled, and that, if the words, 'during the settlement of the estate,' had been incorporated into the order passed by the probate court making an allowance for Mrs. Daniels, so that it read, 'ordered, that \$416.66 be, and the same are hereby, allowed per month for the support of the widow during the settlement of the estate,' that said allowance would not then have continued during the entire time covered in the settlement of Mr. Daniels' estate, but only to such time as Mrs. Daniels should become entitled to the provision made for her support by the will of her husband. (8) That the fact that previous to the passing of said order the court had already limited the time for the settlement of Mr. Daniels' estate to twelve months, and the further fact that, by the terms of Mr. Daniels' will provision was made for her support after twelve months had expired from the date of probating his will, imposed upon the order of allowance the legal conclusion that it should terminate as early as February, 1893, and that it did terminate by that time. (9) That the fact that the \$100,000 mentioned in said second item of Mr. Daniels' will was not, in fact, set apart as a separate trust fund, did not affect the right of Mrs. Daniels to the income of said fund after one year from the death of her husband, and that said order of allowance and her right to said income did not exist concurrently." The appeal to this court assigns as error the neglect and refusal of the court below to rule in accordance with the above claims.

Arthur F. Eggleston and Albert C. Bill, for appellants. Henry C. Robinson and Frank L. Hungerford, for appellees.

HAMERSLEY, J. The superior court has found that the disputed entries are untrue in fact; that no payments were made by the executors to Mrs. Daniels of income from the fund bequeathed by the trustees for her benefit; but that all the payments covered by these entries were in fact made in pursuance of an order of court directing them to be made as an allowance for the support of the widow during the settlement of the estate. The court of probate having jurisdiction to make such an order, and no appeal

being taken, and the order remaining unrevoked, the executors were fully protected in making the payments, and entitled to charge them against the estate in their administration account. Gen. St. § 445. The finding, therefore, justifies the judgment rendered, unless, in reaching such conclusion, the court below applied some erroneous principle of law.

The errors in law assigned by the appellants all depend upon the determination of their primary claim, to wit, the order making an allowance for the support of the widow of \$416.67 per month must be construed as limiting the monthly payments authorized to a period of one year from the death of the testator; and all payments made subsequent to the expiration of this period were unwarranted by the order, and illegal. We think the superior court did not err in overruling this claim. The allowance authorized by statute is "such amount as they [courts of probate] may judge necessary for the support of the widow or family of the deceased during the settlement of the estate." Gen. St. § 604. The petition of Mrs. Daniels "prays that this court allow such amount as it may deem necessary for the support of your petitioner, out of said estate, during the settlement of the same." Upon this petition the court ordered a hearing to be had, and notice to be given the executors to "show cause, if any they have, why the prayer of said petition should not be granted," and described the petition as "praying that an allowance be granted for her support during the settlement of said estate." Upon this petition, in pursuance of this order, a hearing was had, and the prayer of the petition was granted by a judgment recorded as follows: "Ordered, that four hundred sixteen and sixty-six one-hundredths dollars (\$416.66) be, and the same are, allowed per month for the support of the widow." This order must be read in connection with the statute authorizing it, and in connection with the petition and order of court directing a hearing. So read, it is impossible to construe it otherwise than as a finding by the court of probate that the prayer for an allowance out of the estate during the settlement of the same ought to be granted, and that the amount deemed necessary by the court for the support of the widow during the settlement of the estate is the monthly payment named. In determining, in pursuance of the statute, the amount it judges necessary for the support of the widow during the settlement of the estate, as so many dollars per month, the court necessarily determines that a monthly payment of such sum during the settlement of the estate is the amount it judges necessary for support during that period. No other construction is permissible. Had the court, anticipating the estate would be settled in one year, ordered that \$5,000 be allowed during the settlement, the executors could pay no more, however long the settlement might be delayed, unless a new order should be made.

Had the court, anticipating the estate would not be settled in four years, ordered that \$20,000 be allowed, the executors could not pay less, however soon the estate might be settled, unless the order were revoked before payment had been made. But the court, recognizing the uncertainty attending the settlement of a large estate, has determined the amount necessary for the widow's support during settlement, in accordance with the time the settlement shall consume, and has ordered that so much per month be allowed during settlement. The executors are thereby authorized to make such monthly payments, until the order is modified, revoked, or set aside upon appeal; but no revocation can make illegal, payments previously made in pursuance of the order.

The appellants urge two considerations for reading into the order the limitations claimed by them: First. That the court of probate, having previously made an order limiting 12 months for the settlement of the estate, must be presumed to have contemplated a year's limitation to the monthly allowance. The first order, limiting a time for settlement, is not intended to, and does not, control the time that may actually be found necessary or convenient; and in the case of large estates it frequently happens that the settlement is not accomplished within the limitation of this formal order. The natural presumption is that the court contemplated the uncertainty of the time that might be taken in the settlement of the estate, and therefore, in determining the amount necessary for the widow's support during settlement, directed a monthly allowance that should proportion the whole amount allowed to the length of time it should be needed. Second. That Mrs. Daniels became entitled to the income of the trust fund bequeathed for her benefit upon the expiration of 12 months from her husband's death; and (as claimed in the appellants' brief) "the law of this state is clearly so that a widow's allowance does not continue after the time she becomes entitled to support from a legacy by the will of her husband." The order, therefore, is illegal unless construed as limited in operation to one year. If by this claim the appellants merely mean (as seems to be indicated by other portions of their brief) that the power of a court of probate, in making an allowance out of the estate for the support of the widow or family of the deceased, is limited to such an amount as the court, in view of all the circumstances, shall deem necessary for their support during the settlement of the estate, the claim is true, but has no application to the present case. The record shows that the court has found that so many dollars per month was, in its judgment, the amount necessary for the support of the widow, in view of her expectations under the will and all the other circumstances. It is immaterial whether or not the superior court might, on appeal, take a different view, or whether the court of probate held by the same or some

other judge might now entertain a different view. The fact of making the order, as detailed in the record, involves a finding by the court at that time that the amount then allowed, authorizing monthly payments so long as the estate remained unsettled, was, in the judgment of the court, necessary for the support of the widow. There is nothing in the record that requires us, as intimated in the argument, to treat the allowance as admittedly passing the limits of necessity. The necessity meant by the statute is, within reasonable limits, a relative one. The amount "necessary" for support must, to a certain extent, depend upon the amount of the estate, as well as other circumstances. The allowance in this case is one that might call for different opinions, but it is not one that a court could not honestly deem "necessary," within the meaning of the statute; and it should be remembered in this connection that the allowance was so made that its continuance could be stopped at any time, if occasion should arise, by appropriate action of the court. It is not competent in construing this order, to assume that the court of probate exceeded its power, by authorizing an allowance it did not deem necessary. The plain meaning of the order—a meaning which has been acted on by the executors and court of probate for four years—cannot be changed in this way. If, however, this claim of the appellants is, as its language would seem to indicate, that an allowance by the court of probate for support of the widow, concurrent with her reception of any benefit from the estate, is illegal, or contrary to the policy of the state, the claim is untenable, and is not supported by the language of the statute, or any decision of this court.

It was the practice, from a very early time in our history, if not from the settlement of the colony of Connecticut, for the court administering the estate of a deceased person to make such allowance out of the estate as it deemed proper for the support of the widow or family of the deceased during the settlement of the estate, and this practice became a part of our common law. *Wheeler v. Wheeler*, 1 Conn. 51, 53. In 1825 the present statute on the subject was passed, and this statute is in confirmation of our common law. *Leavenworth v. Marshall*, 19 Conn. 408, 417. Such practice is a result of one of the fundamental conditions on which the law takes possession and control of the property of a deceased person. It applies to personal property, and not to real estate; because the law ordinarily gives to the heir at law or the devisees an immediate right to the latter, and assumes the power of its disposition only when the personal estate is insufficient to pay the debts of the deceased, or for other specified purposes. During the settlement of the estate the personal property is in the hands of the law, charged with the fulfillment of certain legal duties belonging to its former

owner at the time of his death. Among these are the payment of his debts, and the support of his dependent family. To a limited extent the use of the estate for the purpose of that support is even paramount to the payment of debts. *Barnum v. Boughton*, 55 Conn. 117, 118, 10 Atl. 514. Of necessity, the value of the support charged upon the estate must depend in part on the amount of the estate, and the condition and circumstances of the dependent family: Where there is no dependency, there can be no duty to support. Where the dependency is partial, the duty is partial. The necessity of support during settlement may co-exist with the expectancy of future benefit from the estate, and the present enjoyment of an inadequate income, whether from the estate or otherwise, does not wholly relieve the estate from the duty of support. It is impossible to lay down fixed rules for the application of such a principle; and so the determination of the amount necessary in each case for the support of the widow or family during settlement, of the adequacy of any provision made by the will, and of the relation of such provision (whether it takes effect during or subsequent to the settlement of the estate) to the amount that should be allowed, has been left, in the first instance, to the discretion of the court of probate, and upon appeal to the discretion of the superior court; and this discretionary action of the court of probate cannot be reviewed except upon appeal. *Lawrence v. Security Co.*, 56 Conn. 423, 443, 15 Atl. 406. Upon appeal to the superior court, and proper proceeding in error to this court, the action of the superior court may be reviewed, and, if clearly contrary to the radical principles on which such action rests, may be set aside. This was apparently implied in *Leavenworth v. Marshall*, supra. In that case the widow, who was also the executrix, had received under the will substantially the whole of the personal estate, and a life estate in the homestead and home farm, had had actual possession of the whole property during the four years of settlement, and in rendering her final account as executrix (without any previous order or action of the court of probate) had charged the estate a lump sum as paid for her support as "family," and a similar sum as paid for interest on her legacy; and having, by this process of accounting, made her payments as executrix exceed the amount of personal property, had sold, under an order of sale, a portion of the real estate devised to others, and had applied the proceeds to meet the deficit so created. Upon appeal to the superior court from the order of the court of probate allowing this account, and from its order for the sale of the real estate, and motion in error to this court, it was held that the superior court erred in affirming the allowance of the administration account. And, speaking with special reference to the facts

of that case, the court said: "The power of taking the property of an heir or devisee, and appropriating it for the benefit of others, without the consent of the owner, ought to be cautiously exercised, and never carried beyond the necessary requirements of the case. The true rule upon this subject is this: Wherever the widow and family of a deceased person have adequate provision made for their support, either by will or in any other manner, they are not entitled to a support out of the shares of others who are not members of the family." As a rule of guidance to the superior court in acting on the facts disclosed in that case, the language is appropriate; but it cannot be held (as claimed by the appellants) to support the theory that either the law or policy of this state is inconsistent with an allowance (concurrent with some provision by the will) for such amount as the court deems, under the circumstances, necessary for the support of the family during the settlement of the estate. The reasons which justify such an allowance, and should, in general, control the court in determining its amount, are better and more fully stated by Judge Loomis in an opinion given in deciding a case tried in the superior court for Tolland county, September term, 1888: "It [the allowance] has never depended on the certainty or probability of the wife's receiving something upon the distribution of the estate. There may have been no real estate in which she could take dower, and the estate may have been insolvent, leaving nothing for distribution after the payment of debts; perhaps not enough even for the payment of the debts, so that the allowance to the widow may have come wholly out of the creditors. The allowance to a widow for her support is in the nature of a continuance of the support, after the husband's death, which he or his estate had furnished her before his death. But for it, the widow and family, even where there is ample estate, might be subjected to great inconvenience, and perhaps, brought into an extremity. There is at first no legal certainty as to the condition of the estate; and, until that certainty is arrived at by the completion of the settlement of the estate, the widow and family keep on, ordinarily, in the home where they have lived, supported by a reasonable allowance from the estate." *Baker's Appeal*, 56 Conn. 538. We think the considerations urged by the appellants do not justify the construction of the order of the court of probate claimed by them.

The appellants contend "that the real controversy in this appeal was between the representatives of Mrs. Daniels on the one hand, and the beneficiaries in the residuary estate of Mr. Daniels upon the other"; and apparently the court of probate took the same view in allowing the executors' account, and attempted to settle this controversy under the form of authorizing the con-

tested entries. If it be so that the residuary legatees might be entitled in equity to have some portion of the payments by the executors to Mrs. Daniels set off against a claim of her legal representatives for interest on the trust fund which was due her, and never paid, it is plain the court of probate has no jurisdiction to grant such relief in the manner attempted. There is no error in the judgment of the superior court. The other judges concurred.

(80 N. J. L. 320)

HART v. BOYLE.

(Supreme Court of New Jersey. Nov. 3, 1897.)

ACTION ON INSOLVENT BOND—PLEADING.

Where the breach of the condition of an insolvent bond given under the statute, as alleged in the declaration in an action on the bond, is that the defendant did not appear at the next court of common pleas, and petition for his discharge, in accordance with the condition, a special plea to the declaration, which merely avers that the defendant appeared at a "subsequent" court, is bad on demurrer. It does not avoid the facts set up in the declaration, nor the breach of the condition, in compliance with the rule that the plea, to be good, must answer the whole of what is adversely alleged.

(Syllabus by the Court.)

Bill by Mitchel Hart against Thomas Boyle. Demurrer to plea sustained.

Argued February term, 1897, before MAGIE, C. J., and DEPUE, VAN SYCKEL, and LIPPINCOTT, JJ.

Alfred Hugg, for plaintiff. William T. Boyle and Henry S. Scovel, for defendant.

LIPPINCOTT, J. The action in this case, and the declaration therein, is upon an insolvent bond given by the defendant on the 13th day of December, 1896, to the plaintiff, in the penal sum of \$1,729.40. The condition of the bond is that the defendant should appear before the then next court of common pleas to be holden in the county of Camden, and petition said court for the benefit of the insolvent laws, and comply with the requirements of said insolvent laws, and appear in person at every subsequent term until he should be duly discharged as an insolvent debtor, and, if refused a discharge, surrender himself immediately thereafter to the sheriff, there to remain until discharged by due course of law. The declaration avers as a breach that the defendant "did not appear before the then next aforesaid court of common pleas after the making of the said bond or writing obligatory, and petition said court for the benefit of the insolvent laws of the state of New Jersey, and did not in all things comply with the requirements of the said insolvent laws, and did not appear in person at every subsequent court until he should be duly discharged as an insolvent debtor, and, if refused a discharge, surrender himself immediately thereafter to the sheriff of the county of Camden, and there remain until discharged by due course

of law." The second plea to this declaration avers that the defendant "appeared before a subsequent court of common pleas of the county of Camden, to wit, on the 17th day of July, A. D. 1896, being still the April term, 1896, and petitioned the said court of common pleas for the benefit of the insolvent laws, according to the form and effect of said condition." The plea further avers that the court of common pleas fixed September 8, 1896, for the hearing of said petition, and that before the day fixed for such hearing the defendant died. To this plea plaintiff has filed a demurrer, alleging as cause that the plea confessing the fact set forth in the plaintiff's breach of the bond presents no bar to the action.

The breach of the condition of the bond is sufficiently alleged. It is not perceived how the breach could be any differently stated in the declaration. The condition is that the defendant shall appear and petition the court for his discharge. That he did not so appear is distinctly charged. It seems to me that the condition of the insolvent bond is very much likened to the condition of a bail bond; and in an action upon such bond the breach thereof is always, in the declaration, averred generally,—that the defendant did not appear as in the condition of the writing obligatory mentioned, but therein wholly failed and made default, whereby the writing obligatory became forfeited. 2 Chit. Pl. § 449. No fault can be found with the manner in which the condition and breach thereof are set out in the declaration. Breaches of the condition of an insolvent bond differ very much in averments from those which arise out of official bonds, in which the condition is that the official will faithfully discharge his duty. In such cases a specific breach must be alleged. The cases of *State v. Littlefield*, 4 Blackf. 129, and *People v. Brush*, 6 Wend. 454, apply only to the manner of alleging breaches of the conditions of such bonds, and have no application to this case. The second plea in this case is not an answer to the plaintiff's declaration. The condition of the bond is that the defendant should appear at the then next court, and present his petition. The breach is that he did not so appear. The rule is well settled that the plea must be an answer to the whole of what is adversely alleged, if the allegation be one which is material. A plea in bar must deny, confess, or avoid the facts stated in the declaration. In answer to the breach of the condition as contained in the declaration, the defendant answers that he appeared at a "subsequent" court, and presented his petition, without at all averring that the "subsequent" court was the then next court, in compliance with the condition of the bond. This is not an answer to the declaration. It is not deemed necessary to determine under what circumstances, if any, the presentation of a petition at any subsequent court would be a compliance with the insolvent laws of the state, such as to

operate as a discharge of the bond. The construction of the third and sixth sections of the insolvent laws (2 Gen. St. pp. 1727, 1728) is not necessarily involved in the determination of the character of the plea under discussion. The demurrer must be sustained, with costs.

(61 N. J. L. 75)

WHITEHEAD v. BURGESS.

(Supreme Court of New Jersey. Nov. 8, 1897.)

ACTION ON CONTRACT—PROMISE TO THIRD PERSON—DECLARATION—CONTRACTS—VALIDITY.

1. Where an action is founded upon a contract which at common law is valid without writing, but which the statute of frauds requires to be in writing, the declaration need not count upon, or take notice of, the writing.

2. An action may be maintained on a promise made by defendant to a third person for the benefit of the plaintiff; and the fact that the person to whose benefit the promise may inure is uncertain at the time it is made, and that it is dependent on a contingency, will not deprive the person who afterwards establishes his claim to be the beneficiary of the promise of the right to recover upon it.

3. A promise to A., on sufficient consideration, to pay the owner of the foal of the mare of A. by the stallion of the promisor a certain sum of money if such foal is the first of the get of such stallion that trots a mile in 2 minutes and 30 seconds is a valid undertaking, and is not prohibited by our statutes against the offering of purses for running, pacing or trotting.

(Syllabus by the Court.)

Action by Edward Whitehead against William W. Burgess on a contract. Heard on demurrer to declaration. Demurrer overruled.

Argued June term, 1897, before the CHIEF JUSTICE, and DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Howard McSherry and Theodore B. Booraem, for plaintiff. Paul A. Queen, for defendant.

VAN SYCKEL, J. The first count of the declaration sets out that the defendant, being the owner of a stallion known as "Lynne Bel," published a certain circular, in which he offered the services of the said stallion for the sum of \$100, and therein promised to pay the owner of the first one of the foals of said stallion that should trot a mile in 2 minutes and 30 seconds, or less, the sum of \$750. The declaration further sets out that one Pursell, being the owner of a mare called "Eva," bred the said mare to said stallion, and paid the said defendant the sum of \$100 for the privilege of so doing; that the said defendant, in consideration of such payment, promised the said Pursell to pay the owner of the foal of the said mare the sum of \$750 if such foal should prove to be the first one of the get of said stallion that should trot a mile in 2 minutes and 30 seconds; that the plaintiff, having knowledge of the said promise made to said Pursell, did purchase the foal of the said mare Eva by the said stallion, and while the said foal was owned by

the plaintiff the said foal trotted a mile in less than 2 minutes and 30 seconds, and was the first one of the get of said stallion to make the said time. The second count is substantially like the first count, except that it avers that at the time the service money was paid the defendant repeated to said Pursell the promise and undertaking in said circular set forth. A separate demurrer is filed to each count of the declaration.

The first ground of demurrer relied upon by the defendant is that the contract is within the statute of frauds, and must be in writing, and that it must appear affirmatively in the declaration that the contract was in writing, and signed by the party to be charged. In this contention the defendant's counsel has misconceived the rule of pleading. Where an action is founded upon a contract which at common law is valid without writing, but which the statute requires to be in writing, the declaration need not count upon, or take notice of, the writing. If an action is brought upon a promise to pay the debt of another, the declaration need not aver that the promise is in writing, even if such be the fact. The reason is that the statute of frauds merely introduces a new rule of evidence, but does not alter or affect the rule of pleading. As long ago as the time of Lord Holt that was declared to be the rule. 2 Salk. 519. The rule is stated in the same way in the note to *Duppa v. Mayo*, 1 Saund. 276, and has been accepted as the correct rule ever since the time of *Saunders*. *Elting v. Vanderlyn*, 4 Johns. 237; *Gould*, Pl. p. 191. The declaration, in this respect, is not faulty. It alleges a promise which at common law would be good by parol, and whether it was made in such form that it is good under the statute of frauds is a question which will arise on the trial.

A further reason to support the demurrer is that the promise as alleged was made to Pursell, and that there is no privity of contract between the plaintiff and defendant. The law of this state is that an action may be maintained on a promise made by the defendant to a third person for the benefit of the plaintiff without any consideration moving from the plaintiff to the defendant. *Joslin v. Car-Spring Co.*, 36 N. J. Law, 141. The fact that the person to whose benefit the promise may inure is uncertain at the time it is made, and that it cannot be known until the happening of a contingency, cannot deprive the person who afterwards establishes his claim to be the beneficiary of the promise of the right to recover upon it. In the familiar case of a promise to give a reward for the arrest and conviction of a criminal, the right of the person who secures such conviction to recover the reward is well settled. *Sergeant v. Stryker*, 16 N. J. Law, 465; *Furman v. Parke*, 21 N. J. Law, 310.

The remaining reason to be considered is that the alleged contract is illegal and against public policy, and prohibited by section 226,

p. 1091, Gen. St., by which it is enacted "that no person or persons, shall make up any purse, plate or other thing, for any running, pacing or trotting of any horses, mares or geldings, or contribute or collect or ask any other person to contribute or collect, any money, goods or chattels to make up any purse, plate or other thing, to be run, paced or trotted for by any horse, mare or gelding, at any place in this state, except when authorized by a fair or agricultural society," etc., "shall be deemed guilty of a misdemeanor," etc. Also, by section 222, p. 1090: "That if any person not authorized by an agricultural society, or incorporated body of this state, shall be concerned in making up any purse, for any running, pacing or trotting of any horse, or horses, mares or geldings, such person shall be deemed guilty of a misdemeanor," etc. The point made is that the object of this legislation is to prohibit all persons in this state, not within the exceptions stated in the statutes, from offering any reward for the trotting and pacing of horses. There is nothing in the declaration which, by expression or by implication, shows that the defendant undertook or assumed any obligation to provide an opportunity for the trial of speed. The time mark might lawfully be secured at an agricultural fair, or out of the state, as in this case. The defendant was not under any duty to aid the owner of the foal, and was under no obligation to pay the promised sum until the condition was performed. An intention to violate the criminal law cannot be imputed to either party to this contract. The demurrer must be overruled, with costs.

(61 N. J. L. 202)

STATE (CONSOLIDATED TRACTION CO., Prosecutor) v. TOWNSHIP OF EAST ORANGE et al. STATE (SLOCKHOWER, Prosecutor) v. SAME. STATE (HOLLAND, Prosecutor) v. SAME.

(Supreme Court of New Jersey. Nov. 10, 1897.)

MUNICIPAL CORPORATIONS—ORDINANCES—VALIDITY—POLICE POWER—PROTECTION OF SHADE TREES—GRANT TO STREET-RAILROAD COMPANY.

1. An ordinance of the township of East Orange, in the county of Essex, adopted by the township committee of that township, entitled "An ordinance to regulate the running of electric wires in the township of East Orange," which provides "that no person shall trim, cut, or break any tree, limb, or twig thereof, standing upon a public street or highway of the township, without first obtaining permission of the township committee or their authorized agent," and providing for the imposition of a penalty of \$25 for a violation of such provision of such ordinance, is a valid and reasonable exercise of the police powers vested in a municipality, under the statutes P. L. 1867, p. 124, P. L. 1873, p. 324, which authorize the township committee to provide by ordinance for the regulation of the use of the public streets, and "to direct and regulate the planting, rearing, trimming, and preserving of shade trees in the streets and public places of said township; and to authorize or prohibit the removal or destruction of said trees and to re-

strain and punish persons injuring or defacing the same."

2. Permission by an ordinance, or agreement with the township authorities, to an electric street-railway company to operate its cars through the streets, is not a grant, ipso facto, of the right of the township to the trees standing in such street, nor does it vest the properly constituted municipal authorities of the reasonable control over such trees as a part of the street, and a reasonable regulation or ordinance controlling the company in the use of such trees in the operation of the street railway will be upheld as an exercise of the police power of the township.

3. The ordinance in question is a reasonable exercise of such police power.

(Syllabus by the Court.)

Three writs of certiorari,—one by the state on the prosecution of the Consolidated Traction Company against the township of East Orange and Stephen M. Long, township clerk; one by the state on the prosecution of Harrison Slockhower against the township of East Orange and George H. Elliott, justice of the peace; and the other by the state on the prosecution of George L. Holland against the same defendants,—to review the validity and reasonableness of an ordinance under which prosecutors Slockhower and Holland, employes of the Consolidated Traction Company, were convicted of injuring shade trees on a street in said township. Convictions affirmed.

Argued June term, 1897, before GARRISON and LIPPINCOTT, JJ.

Spencer Weart and Jarvis M. Atkinson, for prosecutors. Philemon Woodruff, for defendants.

LIPPINCOTT, J. The Consolidated Traction Company, a corporation of this state, is operating an electric street railway in Main street, in the township of East Orange, by virtue of certain leases from the Newark Passenger Railway Company and the New Jersey Traction Company, and also by virtue of an ordinance of the township authorizing such operation. The agreement to operate an electric street railway in this street was originally made between the township of East Orange and the Newark Passenger Railway Company, and by virtue of the leases above mentioned and the ordinance of the township the Consolidated Traction Company became vested with all the rights and franchises of the other companies. On the southerly side of Main street the Consolidated Traction Company had strung its electric feed wires on poles to supply the motive power to the cars. On that side of the street shade trees were growing along the edge of the sidewalk. On December 21, 1896, the company, deeming it necessary for the operation of the street railway, and to prevent them from interfering with these wires, proceeded to cut off some of the limbs and branches of such trees. The employes of the company, Slockhower and Holland, the other prosecutors herein, did the cutting under the direction of the company. Com-

plaint was made against them, and they were convicted before a justice of the peace of violating the ordinance of the township, and a fine of \$25 each imposed upon them. Thereupon these writs of certiorari were sued out to review the validity and reasonableness of the ordinance by virtue of which the convictions were had.

The title of the ordinance is "An ordinance to regulate the running of electric wires in the township of East Orange." It was formally enacted by the township committee on February 19, 1889. The agreement for the operation of the street railway was entered into July 30, 1896, and the ordinances permitting its operation some time subsequently. The fourth section of the ordinance provides: "That no person shall cut, trim, or break any tree, limb, or twig thereof, standing upon a public street or highway of the township, without first obtaining permission of the township committee or their authorized agent." The fifth section provides for the imposition of a penalty of \$25 for a violation of any of the provisions of the ordinance. The only question arising is whether the ordinance is valid as a reasonable exercise of the police powers of the township authorities. By a supplement to an act entitled "An act to create from a part of the township of Orange, in the county of Essex, a new township, to be called the township of East Orange, approved March fourth, eighteen hundred and sixty-three," approved February 28, 1867 (P. L. 1867, p. 124), it was provided, in section 5: "That the township committee shall have power to pass by a majority of their number such ordinances, by-laws and regulations as they may judge proper, to direct the planting, rearing and trimming of shade or ornamental trees, and to abate and remove all nuisances in the streets and public places of the township of East Orange." By a further supplement, March 10, 1873 (P. L. 1873, p. 324), more ample power was conferred upon the township committee to provide by ordinance for the regulation of the use of the public streets of the township, and "to direct and regulate the planting, rearing, trimming, and preservation of shade trees on the streets and public places of said township, and to authorize or prohibit the removal or destruction of said trees, and to restrain and punish persons injuring or defacing the same." It is clear that under these statutes the township committee were possessed of the power to enact ordinances to determine the mode and the manner in which the shade and ornamental trees standing upon the public streets should be cut or trimmed for the purposes of regulating the running of electric wires through such streets and public places of the township. It was the proper exercise of the police power and control over the streets and this subject-matter. Consolidated Traction Co. v. City of Elizabeth, 58 N. J. Law, 619, 34 Atl. 146; Cape May R.

Co. v. Cape May, 59 N. J. Law, 393, 396, 404, 36 Atl. 678, 679, 696. The ordinance is reasonable in its provisions. It provides only, before the trees shall be cut down, or the branches thereof cut off, that the consent of the township committee shall be obtained. This is necessary and reasonable for the orderly control and regulation of the streets and public places in this respect, to the end that the usefulness of the streets and the trees thereon be, so far as practicable, preserved to the public. Under the power and duty conferred by the legislature it would seem to be reasonable that, before such trees should be cut down, defaced, or the limbs thereof cut off by any person or corporation in the use of the street, the consent of the municipal authorities should be obtained in respect to the mode in which the destruction, partial or wholly, should be effected. The ordinance is not prohibitory, but only regulative, and is reasonable in all its essential features. The question is not whether the act of cutting or trimming these trees were reasonable acts in the operation of this electric street railway, but whether the ordinance requiring consent of the municipal authorities is a reasonable exercise of the municipal police power conferred by the legislature of the state upon them. The conclusion is that it is not only a valid, but also a reasonable, exercise of such power. The ordinance is a reasonable one.

A contention is made by the prosecutors that because the township of East Orange granted permission to operate its cars and string its wires through this street, it has also, ipso facto, granted whatever rights it had in the trees therein, in so far as a proper operation of the cars by the stringing of wires is concerned. This contention cannot for a moment be admitted. As a matter of fact, neither the ordinances nor the agreement by which these wires are strung and the cars operated through this street confer or convey any such rights to the company. The wires are required to be strung on poles, and no mention whatever is made of any control over the trees, or any use to which they can at all be devoted. The clear implication, I think, would be that in erecting the poles and stringing the wires all interference with the trees should have been avoided. Nearly all kinds of reasonable regulations can be imposed upon street railways in the use of the streets by the municipality under the authority granted by the legislature to pass ordinances to regulate the use of the streets, and such resolutions are never declared unlawful on the ground that they impair the franchises of the company. Even direct legislative authority to a street-railway company to carry passengers over the streets of a city does not exempt the corporation from municipal or police control. The principle is a general one that, when a business is authorized to be conducted by a corporation within a munic-

pality, the latter presumptively possesses the same right to regulate it that it has over a like business conducted by private persons. A grant to a corporation of the right to own property and to transact business affairs confers no immunity from police control to which the citizen would be subjected, and a reasonable regulation of the franchise is not a denial of the right, or an invasion of the franchise, nor a deprivation of its property, or interference with the business of the corporation. The company is presumed to know that the business of operating a city street railway must be conducted under such reasonable rules and regulations as the municipality may impose, and, subject to it, its share of the burdens incident to the conduct of the municipal government. *Dill. Mun. Corp. (4th Ed.) 720; Trenton Horse R. Co. v. City of Trenton, 53 N. J. Law, 132, 20 Atl. 1076; Allen v. Jersey City, 53 N. J. Law, 522, 22 Atl. 257; Consolidated Traction Co. v. City of Elizabeth, 58 N. J. Law, 619, 34 Atl. 146; Cape May R. Co. v. Cape May, 59 N. J. Law, 396, 401, 36 Atl. 678, 679, 696; Booth, St. Ry. Law, §§ 223-229.* The case of *Allen v. Jersey City, 53 N. J. Law, 522, 22 Atl. 257*, has no application to the facts presented here. In that case the legislative grant was to do the act which was complained of; i. e. placing its rails and ties on the public street. There is no question that the grant, whether it be by the legislature or by the municipality, to operate a street railway along a street, would incidentally carry with it the right to lay its rails and ties in the public street; and an ordinance providing this should not be done without the consent of any particular municipal board would be unreasonable. See *Kennelly v. Jersey City, 57 N. J. Law, 293, 30 Atl. 531.* Upon these principles the ordinance in question was a valid and reasonable exercise of the police power of the municipality, and it, and the convictions under it, must be affirmed, with costs.

(61 N. J. L. 197)

HAILE et ux. v. CLAYTON & HOFF CO.

(Supreme Court of New Jersey. Nov. 12, 1897.)

CARRIERS—NEGLIGENCE—DRIVER OF STAGECOACH.

The driver of a stagecoach should, before commencing his journey, ascertain that the passengers are seated; but in his journey over ordinary streets and highways, where frequent or occasional necessary stoppages are made because of crowds, parades, or the like, or because of the use of the street or highway by others of the public, he is not bound, before he starts again, to give notice to the passengers that he is about to do so, or to ascertain, in the care required of him, whether the passengers remained seated as before the stoppage was made. In the commencement of the journey, as soon as the passenger has entered and taken his seat, the coach may start, and continue its journey to the end, with such temporary stoppages as are necessary, without notice to the passenger. The driver has the right to assume that the passengers will remain seated in the position assigned to them or which they accepted at the commencement of the journey.

(Syllabus by the Court.)

Action by George Haile and Caroline Haile, his wife, against the Clayton & Hoff Company, for personal injuries to the feme plaintiff, in which there was a verdict in favor of plaintiffs. Heard on rule to show cause why the verdict should not be set aside. Rule made absolute.

Argued June term, 1896, before BEASLEY, C. J., and MAGIE, GARRISON, and LIPPINCOTT, JJ.

Edward Kenny, for plaintiffs. Frank M. Bradner, for defendant.

LIPPINCOTT, J. On August 3, 1893, a committee of the Sunday school of the Davis Memorial Church of Harrison, N. J., engaged five stages of the defendant to carry the members of the Sunday school of that church, and their friends, to a Sunday school picnic to be held at Huntley, in the county of Essex. The supervision of the transportation and of the affair was in the control of one of the members of the Sunday school committee. In one of these stages, one of the plaintiffs, Caroline Haile, rode to the picnic grounds. The stage or omnibus was a long vehicle, with seats extending along each side, with a top frame and side curtain, and an open doorway at the rear, and three steps leading down to the ground from this doorway. Mrs. Haile and another lady, by the name of Mrs. Hooly, went in this stage for the purpose of going to the picnic, and also to take charge of the children riding in it to and from the picnic. No difficulty occurred on the way to the picnic grounds. On the return journey of the stage, the plaintiff Mrs. Haile was seated on the right-hand side of the stage, next to the doorway, with her right side to the driver. Mrs. Hooly sat on the left side of the stage, next to the open doorway, and the children were seated on both sides, between them and the front of the stage, or between them and the driver. The stage, with its load thus seated, proceeded on its way through High street, in the city of Newark, until it reached Springfield avenue, where it was stopped by a policeman, to allow some parade or procession, with music, to pass by. There is evidence showing that Mrs. Hooly and some of the children stood up to watch the procession. The evidence of Mrs. Haile is that she did not stand up; that she was in charge of Mrs. Hooly's luggage, while Mrs. Hooly was standing up; and that she could not stand up. She says that some of the children were standing up on the seats, and that one of the children, a little girl, was standing upon the seat upon which Mrs. Hooly sat, with her body partly out of the window. Mrs. Haile thought that the child was in danger. The evidence is that Mrs. Haile rose up, and reached over to the other side, to get hold of the child, when the driver (the procession having passed) started his horses. To use her own language, she "rebounded back," and was thrown out the back door of the stage.

A scream was heard by the driver, and the horses were stopped within three feet. There is some difficulty in determining whether she was thrown out of the stage by reason of the starting of the horses or the rebound when they were again stopped. The evidence in the case is that the horses attached to the stage were gentle horses, and easily managed. After the parade had passed, the driver pulled the reins, and the horses started, as one of the witnesses relates, "suddenly." The driver did not whip or strike the horses, did not call to them, nor do anything to excite them, and it does not appear that they were excited or frightened. The evidence is that the driver had them under complete control, and stopped them within three feet of starting. Mrs. Halle appears to have been injured quite seriously, and the action is by her and her husband to recover damages arising by reason of her injury. A motion to direct a nonsuit was refused. No evidence was produced on the part of the defendant company, and the motion to direct a verdict was also refused.

The only element of negligence relied on by the plaintiff for a basis of recovery is that the driver should have notified those inside the stage, before starting again, that he intended to start. That is the only element of negligence which could in any event have been submitted to the jury, and it was the only one submitted. The declaration in this case appears to have been framed upon the theory that the defendant had negligently constructed the stage or omnibus, by reason of not having the open door at the rear securely guarded. It will be seen by the facts and circumstances of the case that the proof entirely failed upon any such point of default by the defendant. In fact, no proof of the character of negligent construction was offered, nor could have been of any avail if offered; for, so far as the construction was concerned, those who rode in the stage or omnibus did so at their peril, as it was used by them without protest or remonstrance on their part. The dangers of it because of its construction were as much known to the plaintiff Mrs. Halle as to the defendant. It was engaged by contract between the Sunday school committee and the defendant. It has been a question of some consideration whether the alleged element of negligence relied on is within the averments of the declaration. But, assuming it to be so, it is quite evident that the mere fact that the driver failed to notify the plaintiff inside the stage that he intended to start again was not a negligent omission, which created any liability on the part of the defendant for her injuries. It seems to me that the reasonable rule is that, before commencing a route, a driver should see that his passengers are ready, and that it is safe for him to start; but for the frequent or occasional stoppages during the route or journey, over ordinary streets and highways, where stoppages are made because of crowds or parades or the like, it would be a hard rule

that would compel a driver to take his attention from his horses to look back into his coach to see if his passengers were safely seated, or to notify them that he intended to start, unless there be some occasion to which his attention is called which requires just this sort of conduct in the exercise of due care for the safety of his passengers. If this should be the rule, then there should exist no liability because of any dangers arising from having his attention drawn from his horses. The law cannot, under such circumstances as are presented in this case, require him to care both for his horses and passengers to this extent. It is necessary, in running stages or omnibuses of this character through the streets of a city, to make frequent stops. The use of the streets by others makes this absolutely necessary, and, in the management of his horses, the driver has the right to assume that the passengers will remain in their seats in the same position assigned at the commencement of the journey, rather than that they will be attracted by the movements of a various character in the streets, so as to require care of him to ascertain whether they still retain safe positions. To my mind, when the driver was stopped by the policeman for the parade to pass, it was not his duty to notify his passengers that he was about to start. I think the proposition contended for by the defendant can be safely asserted,—that when the carrier of an adult passenger for hire in a vehicle provided with seats has once started on the journey, and is stopped by some obstruction on the road or street, it is the duty of the passenger to remain seated, and no obligation rests upon the carrier to notify his passengers that he is about to start again, unless it be that his notice is called to the fact that his passengers are in an unsafe or precarious position, or unless some danger presents itself to him rendering this a precaution necessary to take in the exercise of that care required of him. As soon as a passenger has taken his seat, fairly entered the vehicle, and is safely seated, the carrier may start and continue his journey to the end, with such temporary stoppages as are necessary, without further notice to the passenger. *Shear. & R. Neg. (4th Ed.) § 508.* It has also been held that the bare fact of whipping horses when about to start a car full of passengers, after stopping, is not negligence on the part of the driver. *May v. Railway Co., 49 N. J. Law, 445, 9 Atl. 688.*

It is in evidence that, after the start had been made, the driver heard a scream from the stage or omnibus. It was certainly not a negligent act for him then to stop the horses upon hearing the scream. It seems to me as a conclusion that the trial judge should have ruled that it was not the duty of the driver to notify his passengers that he was about to start, and that negligence could not be inferred from the fact of his starting without giving such notice, and without looking to see that all his passengers were seated, and also

that the negligence could not be inferred from the fact of starting the horses in the manner that the driver did start them. The facts of the case were entirely undisputed, and, upon these facts, it seems to me that this conclusion of law should have been drawn, and the jury should have been so instructed. This rule to show cause must be made absolute.

PENROSE v. STEELMAN et al.

(Court of Chancery of New Jersey. Nov. 15, 1897.)

BILL TO QUIET TITLE—WHEN LIES—DEEDS—DESCRIPTION—LOCATION.

1. A bill to quiet title will lie where complainant is in possession, and defendant, though claiming title, has exerted no possessory acts upon the land, which would confer upon complainant the right to bring ejectment.

2. A person owned two tracts of land,—one known as the 347-acre tract, and the other being a marsh lying to the north of the north line of the 347-acre tract, if such north line be protracted east and west to a certain highway that bounded the second tract on the east and the west. This second tract was bounded on the north by a certain thoroughfare. *Held*, that a deed of "all the salt marsh belonging to the said party of the first part, situate, lying, and being north of the fourth line of the" 347-acre tract, "and extending to the thoroughfare," passed the whole of the said second tract, and not merely the part of it lying between two lines drawn to the north from the east and west ends, respectively, of said fourth line.

Bill by Richard A. F. Penrose against John D. Steelman and others to quiet title. Decree for complainant.

D. J. Pancoast, for complainant. Mark R. Sooy, for defendants.

REED, V. C. The complainant holds whatever title John, James, and Steelman Leeds got from Andrew Leeds in the locus in quo by deeds made to them bearing date March 31, 1849. Andrew Leeds, at the date of this conveyance, was admittedly the owner of a tract of land now within the limits of Atlantic City, consisting of one parcel known as the 347-acre tract, and another parcel to the north of the north line of the 347-acre tract, if the north line be protracted east and west to Beach thoroughfare. The second tract was bounded generally on the east and west by Beach thoroughfare, and on the north by Clan thoroughfare. The three deeds conveyed to each of the three sons of Andrew Leeds, viz. John, James, and Steelman Leeds, a specifically described part of the 347-acre tract. They conveyed, also, in addition to these specifically defined parcels, an undivided third part of a tract, which is described in each of the deeds as follows: "Being an undivided third part of all the salt marsh belonging to the said party of the first part, situate, lying, and being north of the fourth line of the afore-

said three hundred and forty-seven acres, and extending to the thoroughfare." The contention of the defendants is that this description includes only the land lying between the two lines, starting, respectively, from the east and west ends of the fourth line of the 347-acre tract, and running directly north to Clan thoroughfare, or as near Clan thoroughfare as the grantor's title would carry it; for it appears that the most westerly of the northerly drawn line would not reach the thoroughfare before the grantor's title stops. Andrew Leeds devised all his property to his widow, Ellen Leeds. It is admitted that if the only portion of the marsh owned by Andrew Leeds, in 1849, which passed to his three sons, was the strip included within the two lines drawn to the north from the east and west ends of the fourth line of the 347-acre tract, then the locus in quo passed by the will of Andrew Leeds to Ellen Leeds, and from her to the defendants. It is not denied that the complainant was at the time of the commencement of this suit in possession of the locus in quo; and it is proved to my satisfaction that the defendants claim title to it, but have exerted no possessory acts upon it which would confer upon the complainant the right to test his title by an action in ejectment. This condition of affairs gives to this court jurisdiction to take cognizance of the present suit. The question, therefore, is limited to one of location under the descriptive portions of the three deeds mentioned. The precise question presented in this case was decided in an action brought in the supreme court, and tried at the Atlantic circuit. The plaintiffs in that action were the defendants in this suit, and the defendants in that suit were the grantees of the complainant in this. The subject-matter of the action was to try the question of title depending upon the construction to be given to the descriptions in the three deeds from Andrew Leeds to his three sons, the description of which has been already set out. In that action the description in these deeds was held by Mr. Justice Ludlow to include all the land owned by Andrew Leeds, not only that portion of it lying directly north of the fourth line of the 347-acre tract, but all the land included by expanding the description east and west until it strikes Beach thoroughfare, and extending in a northerly direction until it strikes Clan thoroughfare. Upon writ of error to the court of errors this view of Justice Ludlow has been recently affirmed. *Steelman v. Sewerage Co.*, 38 Atl. 742. The effect of that decision is a precedent directly in point, and must control this court in construing the same deeds in this suit. The effect of such construction is to confer upon the complainant the right in the locus in quo which John, James, and Steelman Leeds got from Andrew Leeds, their title including the land in question. There must be a decree for the complainant.

(60 N. J. L. 314)

DEMARS v. KOEHLER.

(Supreme Court of New Jersey. Nov. 3, 1897.)

COVENANTS—ACTION FOR BREACH—WHEN MAINTAINED.

Where the grantee in a conveyance of lands and premises in fee simple, which contains a covenant against incumbrances, before he enters into negotiations for the purchase, and before the execution and delivery of the deed of conveyance, has actual knowledge of the existence of a lease of said lands made between the grantor in said conveyance and the tenant, in which the rent is reserved to the grantor and his assigns, the tenant being in actual possession of the premises, the grantee cannot maintain against his grantor an action for the breach of such covenant.

(Syllabus by the Court.)

Error to circuit court, Essex county; Child, Judge.

Action by William Demars against Philip Koehler for breach of covenant. There was a judgment in favor of defendant, and plaintiff brings error. Affirmed.

Argued February term, 1897, before DE-PUE, VAN SYCKEL, and LIPPINCOTT, JJ.

Johnson & German, for plaintiff in error. Philip Lowy, for defendant in error.

LIPPINCOTT, J. The plaintiff below, who is plaintiff in error in this court, instituted an action against the defendant to recover damages for the breach of a covenant against incumbrances contained in a deed of conveyance in fee simple of lands and premises situate in the city of Newark. The deed of conveyance was made, executed, and delivered by the defendant and his wife to the plaintiff, on the 10th day of February, 1896. The deed of conveyance contained the usual covenant against incumbrances. On October 14, 1895, the defendant made a verbal lease to one Henry Mutscheler, for the premises described in the deed of conveyance, for a term commencing on the last-named day, and ending on the 1st day of May, 1897, at the rate of \$25 rent per month. The lease was a valid and subsisting lease at the time of the execution and delivery of the deed, and at that time Mutscheler was in the actual possession of the premises. The evidence, which is undisputed, shows conclusively that, during the pendency of the negotiations for the purchase of the property by the plaintiff from the defendant, the plaintiff had actual notice and knowledge of the existence of this lease, and that Mutscheler was in actual possession of the premises. He had this knowledge at the time he signed the contract of purchase, and at the time the deed of conveyance was executed and delivered to him by the defendant. He was so informed by the defendant during the negotiations, and before the execution of any contract of purchase. This notice and knowledge the plaintiff admits. He was fully informed of the lease, and of the term, and the rent reserved; but, notwithstanding this, he continued his negotiations for the purchase,

and accepted the deed of conveyance. These facts appeared at the trial by the evidence of the plaintiff. Immediately after the delivery of the deed, he entered into negotiations with Mutscheler to induce him to remove from the premises and surrender the lease, which he did on May 1, 1896, after being paid a certain sum for such surrender of the possession. There being no dispute of fact at the close of the case, the trial court directed a verdict for the defendant.

There can exist no question in law but that an outstanding term or an unexpired lease on the premises conveyed is an incumbrance, within the covenant against incumbrances contained in a deed of conveyance. *Fritz v. Pusey*, 31 Minn. 368, 18 N. W. 94; *Jarvis v. Buttrick*, 1 Metc. (Mass.) 480; *Batchelder v. Sturgis*, 3 Cush. 201; *Carter v. Denman's Ex'rs*, 23 N. J. Law, 261-272; *Grice v. Scarborough*, 2 Spears, 545; *Maupin, Real Est.* p. 293, § 125. But the quality of an incumbrance of an ordinary outstanding term or unexpired lease in respect to a covenant against incumbrances contained in a deed of conveyance is of a very different character, as distinguished from an incumbrance by way of a mortgage or judgment, or an incumbrance of a kindred character. The rent, by the common law, and now by statute, is an incident of the reversion, or, in other words, belongs and appertains to it, and follows it whithersoever and wheresoever and into whatever hands it may pass, unless they are severed by the act of the owner or by the operation of the law. *Condit v. Neighbor*, 13 N. J. Law, 83-91; *Ryerson v. Quackenbush*, 26 N. J. Law, 236-249. The rent accruing after the conveyance of the reversion belongs to the grantee thereof. By statute in this state, the attornment of the tenant to a stranger is absolutely void. 2 Gen. St. p. 1920, § 26. Where the owner of a reversion grants the premises, the lessee is bound to pay the accruing rent to the grantee; and such grantee has all the remedies to enforce payment which the lessor had, and the grantee may sue in his own name to recover such rent, and it also vests the grantee with power to re-enter upon a forfeiture, to the same extent as the lessor. *Crosby v. Loop*, 13 Ill. 625; *Howland v. Coffin*, 12 Pick. 125; *Duff v. Fitzwater*, 54 Pa. St. 224; *De Coursey v. Safe-Deposit Co.*, 81 Pa. St. 217; *Scott v. Lunt's Adm'r*, 7 Pet. 596; *Kendall v. Carland*, 5 Cush. 74; *Ryerson v. Quackenbush*, 26 N. J. Law, 236-250; *Condit v. Neighbor*, 13 N. J. Law, 83-91; *Farley v. Craig*, 11 N. J. Law, 262. It was formerly held that an attornment of the tenant was necessary to entitle the grantee of the reversion to stand in the place of the lessor, but that is now unnecessary by statute. The conveyance of the leased premises, together with the rents and profits thereof, and the reversion, operates in law as an attornment wherever the rent has not been reserved to a third party, or has been by

some act of the parties severed from the reversion. *Condit v. Neighbor*, supra; *Ryerson v. Quackenbush*, supra.

In this case the rent was reserved by the lease as payable to the lessor, and necessarily to the grantee of the reversion, and not to a third party; and therefore the plaintiff, upon the delivery of the deed of conveyance, was entitled to the subsequently accruing rent; and it might very well be that the incumbrance of the outstanding lease or unexpired term would operate as a benefit to the grantee, rather than a detriment, which could never be the case if the incumbrance was a mortgage or judgment. This is the character of the incumbrance, of which the plaintiff had full and complete knowledge before his purchase and the delivery of the conveyance to him. But, assuming that it was an incumbrance against the covenant contained in the deed, the question arises whether its existence under those circumstances was a breach of covenant, for which an action could be maintained. This question is only solved by the consideration and determination of the effect of notice and knowledge on the part of the plaintiff of the unexpired lease. The notice was of the character which admits of no misunderstanding or misrepresentation. As stated by the plaintiff himself, he knew there was a tenant in possession, and was informed by the defendant of the existence and terms of letting. The plaintiff then said he would not purchase the property; yet, as soon as convenient, without any further negotiation with the grantor, accepted a contract of purchase and conveyance, without a single further inquiry either of the owner or the tenant, and, immediately after the delivery of the deed, began at once to negotiate with the tenant for the surrender to him of the premises. It is the conclusion that, with this notice and knowledge on the part of the plaintiff, he could not maintain upon the deed an action for covenant broken. Both reason and justice would forbid the action, and to our minds in the law there existed no breach of the covenant. By reason of express notice to him, and his knowledge, he was fully aware that he could only obtain constructive possession until after the tenancy had expired, and that is precisely the character of possession for which he had bargained. The fact that he was prevented from obtaining actual possession constituted no breach of the covenant, and, under the circumstances of the case, no action could be maintained for covenant broken. The case of *James v. Lichfield*, L. R. 9 Eq. 51, was a case, as it is viewed here, in point. The vendor was the owner in fee of certain five houses and six acres of vacant land in the possession of a tenant. The plaintiff, the purchaser, was aware of the fact that the premises were in the possession of a tenant. The plaintiff purchased with a view of building, for which purpose immediate possession

was essential. He supposed the occupation was by a tenant from year to year. The agreement of purchase contained no mention of the lease, and provided for a further formal contract, which, when prepared, was presented to the purchaser, and it appeared therein that the tenant occupied one of the houses under an agreement for a lease for the house and vacant land for 21 years. A bill was filed by the plaintiff, which prayed that the contract might be specifically performed, and that an abatement might be made from the purchase money in respect of the agreement for the lease for 21 years. The bill was dismissed, and the court cited the case of *Daniels v. Davison*, 16 Ves. 251, and said that the principle is thus stated in that case: That "whatever puts a purchaser upon inquiry shall be held notice; and if, therefore, he knows that a tenant is in possession, he is considered as having notice of the whole extent of his interest." Lord Romilly, delivering the opinion of the court, said: "If the purchaser, knowing of the tenancy, is bound to inquire as regards the tenant, as to his interest in the land, and if the purchaser must be taken to be bound to know what would be the result of such inquiry as regards the tenant, why should he not be bound as regards the vendor? And if the purchaser chooses to bind himself by agreement with the vendor knowing of the tenancy, but without having accurately ascertained what was the extent and character of it, and what the results of such inquiry would have led to, he must, as it appears to me, be bound in the same manner as regards all other persons." *Taylor v. Stibbert*, 2 Ves. Jr. 437; *Hall v. Smith*, 14 Ves. 426; *Lewis v. Bond*, 18 Beav. 85; *Wilbraham v. Livesey*, Id. 206. The covenant against incumbrances is broken by the existence of an outstanding term in or lease of the granted premises. *Maupin, Real Est.* p. 293, and cases cited. But, when the conveyance is taken with the knowledge that the land is in possession of a lessee, the existence of the lease will not, under a statute transferring the constructive possession to the grantee without attornment by the tenant, operate as a breach of the covenant. *Kellum v. Insurance Co.*, 101 Ind. 455. Nor is it apprehended that it will so operate, independently of statute, where there is an actual attornment by the tenant, or an apportionment of rent between the parties. *Rawle, Cov.* (5th Ed.) § 78; *Haldane v. Sweet*, 55 Mich. 196, 20 N. W. 902. And generally it may be said that if the purchaser knows that the premises are in the possession of a tenant, and no special contract is made, the occupant becomes the tenant of the purchaser, and there will be no breach of covenant against incumbrances. *Lindley v. Dakin*, 13 Ind. 388; *Page v. Lashley*, 15 Ind. 152; *Maupin, Real Est.* p. 293; *Weld v. Traip*, 14 Gray, 330. The judgment of the circuit court must be affirmed, with costs.

(61 N. J. L. 191)

STATE (TITMAN, Prosecutrix) v. SMITH.
(Supreme Court of New Jersey. Nov. 10, 1897.)

PARTITION FENCES—OWNERSHIP OF MATERIALS—
ADJUDICATION OF TOWNSHIP COMMITTEE—POWERS.

1. The division of a fence on the boundary line between two owners of land in accordance with the provisions of the fourth section of the act of the legislature relating to fences and boundary lines (2 Gen. St. p. 1461), does not in any respect change the ownership of any of the materials of which the fence theretofore has been composed.

2. The adjudication of the township committee must be, having regard to the quantity of fencing and the conveniences of fencing, that an equal division shall be allotted to each owner, in such manner that each owner shall take an equal share of such fence, to make or amend and maintain thereafter at his own expense, and so that it shall be known to each owner which part thereof is his own for the purpose of making or amending and maintaining; and the township committee can exercise no further or other powers, and cannot, by such adjudication of division or otherwise, award any damages or money values to be paid either owner in order to equalize such division.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Margaret Titman, against Charles Smith, to review a line-fence division made by committee-men. Certiorari dismissed.

Argued June term, 1897, before GARRISON and LIPPINCOTT, JJ.

L. De Witt H. Taylor and Joseph M. Roseberry, for prosecutrix. Henry S. Harris, for defendant.

LIPPINCOTT, J. This writ brings up for review the division by William Miller, Jr., and Elias J. Mackey, two of the township committee of the township of Oxford, in the county of Warren, of the line fence between the lands of the prosecutrix and Charles Smith, situate in that township. The application to the township committee to divide the line fence was made by Charles Smith. The proceedings of the township committee are in conformity with the provisions of the statute of this state relating to fences and boundary lines. 2 Gen. St. p. 1461, § 4. The proceedings, upon their face, are in all respects unimpeachable. The sole argument of the prosecutrix rests in the conception that some portion of the old fence rails, or the materials which constituted the old fence, which had subsisted between the lands of the prosecutrix and the defendant, had changed ownership by reason of the adjudication made by the township committee; or, in other words, that because of the division of the parts of the fence to be maintained by each party, the property which the prosecutrix had in the fence rails of the portion of the fence which had been assigned to the defendant to keep and maintain before the division belonged to her, and that, therefore, by the division, such rails were a benefit to the defendant in the maintenance of his share of the fence, for which she had received no compensation, but

for which she should be paid. So far as this contention, as matter of fact, is concerned, it does not so clearly appear. The evidence is quite conflicting as to the manner in which the fence had been maintained in the past. Evidently it had been maintained without conflict, by acquiescence merely; and as to the portions which each maintained, from the evidence it would be very difficult to determine what exact portions were owned and maintained by either of these parties. Under these circumstances disputes arose, and this application was had, and the adjudication regularly made by the township committee, and, as it appears, this point—it being the only one presented in the argument—cannot at all be determined by the court for the purpose of setting aside the determination of the township committee. The township committee could make no award as a part of its adjudication of any damages to the other party, or award any money to the other because of any changes made by the division. The fourth section of the statute provides that the place where any partition fence is or shall be made shall be equally divided, regard being had to the quantity of fence necessary, and other conveniences of fencing; and each party shall take an equal share of such fence, to make or amend and maintain, so that it may be known which part thereof is his own; and, if the parties cannot agree in making such division, then the township committee, having regard to these same circumstances, shall, "in the presence of the parties (if they will be present) make such division and determine the part or share of such fence, which each party is to make or amend and maintain; which determination shall be binding upon such parties and the succeeding owners or occupiers of the same lands." There is no evidence here that any agreement existed on the part of either owner to perpetually maintain this fence, nor had any perpetual easement been created by one in favor of the other (*Castner v. Riegel*, 54 N. J. Law, 498, 24 Atl. 484), and the question to be submitted to the township committee was the single one of a just division of the fence to be made or amended and maintained by each party. The mere fact that one party claimed more of the fence as originally belonging to him, as theretofore made and amended by him, would not confer upon him the right, if the making or amending and maintaining of one portion of that part was imposed upon the other party by the division, to have the value of the materials of that portion awarded to him by the township committee. The committee have only a statutory duty to perform, which affects the parties so far as making or amending and maintaining the fence by them after the determination of the township committee. It is not shown that the committee acted upon any erroneous principles, or that the division is unjust (*Ivins v. Ackerson*, 38 N. J. Law, 220), and, it being in conformity with the statute, the writ of certiorari must be dismissed, with costs.

(61 N. J. L. 129)

STATE ex rel. VANNATTA v. SMITH et al.
(Supreme Court of New Jersey. Nov. 10, 1897.)BENEFICIAL ASSOCIATIONS — REINSTATEMENT OF
MEMBER—MANDAMUS.

1. In order that a mandamus issue, the right of the relator to have the thing required to be done must be clear, and it must be determined that no other adequate remedy exists.

2. Where an exempt fireman claims to be entitled to relief from the Firemen's Relief Association, and his claim has been adjudicated upon by the trustees of such association, the officers in whom by statute the jurisdiction is vested to consider the matter, and the claim denied, no remedy exists by mandamus to revise such determination, and it is not the office of such a writ to direct and command a further or other consideration and adjudication in his favor.

3. Where one, as an exempt fireman, seeks a mandamus to restore him to the roll or list of members of a fire relief association, he must show that the roll or list originally contained his name, and that he has been dropped from the roll or list, or that he has been expelled from the membership of such association. Where no roll ever existed, or he has not, by some action of the association, been dropped from such roll, or has not been expelled, he is not entitled to a mandamus to restore his name to the roll, or restore him to such membership.

Quere: Where an exempt fireman, as a member of the Firemen's Relief Association, is entitled to relief, is not his remedy by action at law for such dues or relief as he may be entitled to receive, and of which he has been illegally deprived?

(Syllabus by the Court.)

Application by the state, on the relation of Edward Vannatta, against John K. Smith, Samuel Felver, and John H. Vannatta, trustees of the Firemen's Relief Association of Washington, N. J., for a writ of mandamus. Heard on order to show cause. Refused.

Argued June term, 1897, before GARRISON and LIPPINCOTT, JJ.

Oscar Jeffery, for relator. William A. Stryker, for defendants.

LIPPINCOTT, J. This is an application for a mandamus to restore one Edward Vannatta to a roll or list of those who are entitled to relief from the Firemen's Relief Association of Washington, N. J., and to consider his application for relief as an exempt fireman, the same as any other member of said Firemen's Relief Association. It appears from the evidence the relator has been granted, at various times, relief, according to his application. The statute makes the trustees of the association the officers who are to consider all applications for relief. 2 Gen. St. p. 1498, § 112. On February 8, 1897, upon a pending application, the trustees refused, after consideration, to extend further relief to the relator. He requested relief because he was an exempt fireman, and because he came within the rules of the association which entitled him to such relief. The minutes and evidence show that this application was fully considered by the

trustees, and it was decided against him. There is no contention at all in the case but that such consideration was had, nor of the character of the conclusion reached by the trustees. If mandamus, therefore, was the appropriate remedy, it could not go, because the very duty which he insists should be compelled has been performed, and therefore the right to this remedy does not exist.

The relator further seeks the direction by mandamus that he be restored to the roll of membership of the Firemen's Relief Association. The decision of the trustees, as appears by the evidence, against extending relief to him, was that he was not eligible to relief from the Firemen's Relief Association, and that he was not a legally exempt fireman. I have examined the evidence, and find that it is seriously controverted whether any roll of members exists. The records of the association presumably show who are the members, and the fact exists that a legally exempt fireman of any fire company within the jurisdiction of the association is entitled to relief, and presumably the records of such fire company show who the members are, whether legally exempt from duty or not; and it is by these that the relator's title to relief, if he be entitled to any, must be established. I am not clear at all, under the evidence, whether any formal roll of members of the Firemen's Relief Association was ever in existence. There have been lists of members at one time and another exhibited, and the records are in existence. But whether any formal roll of members exists or not is, as it seems to me, entirely immaterial. The evidence does not show that the relator's name has ever been stricken or erased from it, if it ever existed, or that the records of the association have ever been changed to his detriment by any act of the association. If the roll exists, and his name was ever on it, the evidence does not show that it has been changed so that his name is erased or dropped from it. If his name ever appeared in the records of the association as a legally exempt fireman, the evidence does not show that the record has been changed to his exclusion. The roll and the record remain as they always have existed, and therefore no facts are presented which can give rise to a mandamus to the trustees to do the specific act of restoring his name to the list or roll of membership. The fact is that the whole basis for the remedy sought by mandamus is that his case has been considered by the trustees, and further relief to him, upon such consideration, refused. It matters little upon what reason this refusal was based. There appears to be no occasion for relief by mandamus. The whole matter appears to be the subject of an action at law against the association, but the court in no wise determines what relief, if any, could be so obtained. Mandamus is refused, with costs.

(61 N. J. L. 194)

STATE (EARLES, Prosecutor) v. RAMSEY,
Township Collector.

(Supreme Court of New Jersey. Nov. 20, 1897.)

TAXABLE PROPERTY—CANCELED MORTGAGE—ERRONEOUS TAXATION—REMEDY.

1. Where the owner of a farm, who was a mortgagor, conveyed the same in fee simple to the mortgagee, and the owner of the mortgage, as mortgagee, discharged the bond, and surrendered the mortgage for cancellation in good faith, as the consideration of the conveyance, and the mortgage was canceled and discharged of record, the mortgage is no longer a ratable of personal property for the purpose of taxation, and cannot be included by the assessor in the list of ratables of property belonging to the former owner thereof, although it be that at the time of the assessment he remains the owner of the farm covered by the mortgage.

2. Certiorari is a proper remedy for relief where the property assessed for the purpose of taxation has no existence whatever; and it is within the discretion of the court to grant such relief, although no appeal has been made by the person assessed for such property to the commissioners of appeal of the township wherein such assessment has been made.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Eldorado Earles, surviving executor of the estate of Stephen Earles, deceased, against John Ramsey, collector of the township of Raritan, in the county of Hunterdon, to review an assessment of tax. Assessment set aside.

Argued June term, 1897, before GARRISON and LIPPINCOTT, JJ.

Fluck & Parker, for prosecutor. H. L. Stout, for defendant.

LIPPINCOTT, J. This writ of certiorari brings up for review an assessment of tax for the year 1895, against one Stephen Earles, now deceased, upon a mortgage, on the farm of one Stewart Bellis, for the sum of \$1,750. The tax for school and township purposes on the mortgage as a ratable amounted to the sum of \$24.50. One Stewart Bellis had been the owner of the farm, which he had purchased of Stephen Earles, who resided in Morris county, and upon which he had made and executed a bond and mortgage to Earles for the sum of \$1,750. Bellis continued to be the owner up to April 3, 1895. On that day he made and executed a deed of conveyance of the farm to Earles, and Earles delivered the bond and mortgage to Bellis for cancellation. Bellis, after this, rented the farm of Earles. In June following, the assessor of Raritan township assessed the land to Bellis, and assessed the mortgage, which before that time had been canceled, to Earles. It appears from the evidence that the assessor, when making the assessment, had a conversation with Bellis about the assessment of taxes for the year 1895. Bellis testifies that he told the assessor when he came to him that he was no longer the owner of the farm; that he had conveyed the same to Earles, in satisfaction of the bond and mortgage, and he now only leased the farm from Earles. The

assessor, in his evidence, testifies that he does not recollect any such conversation, and denies that it took place, and that he assessed the farm as formerly to Bellis, and the mortgage to Earles, supposing that no change in the situation had been made. I have not attempted to determine, so far as this evidence is concerned, which statement should be relied on. I think it is quite immaterial to the case now to be decided which statement is the true one.

This mortgage was not assessable. There is no question raised against the good faith of Bellis and Earles, or that the conveyance of the farm and the cancellation of the mortgage were made with any intent to evade taxation, or for any other fraudulent purpose. The transaction was for a proper and legal purpose, and by it the bond and mortgage were surrendered and canceled, and Earles became the owner of the premises, instead of remaining the holder of the mortgage. The mortgage ceased to exist in any form or for any purpose. The debt represented by the bond as property no longer existed, but was paid, and the collateral by way of mortgage was surrendered and discharged. This thing, therefore, which had formerly existed, no longer existed, as a ratable for taxation. Taxation must be based upon property either owned or held in possession, and, when it is not in existence or in possession as a ratable, it cannot be subject of taxation. At the time of the assessment it did not exist as a debt due from Bellis to Earles, nor had it assumed any other tangible existence in the hands of Earles, as a personal chattel or chose in action, or as a ratable in any shape. The assessment of a mortgage to a mortgagee who had previously assigned it was set aside as a void assessment. *Crispin v. Vansyckle*, 49 N. J. Law, 306, 8 Atl. 120. An assessor can only assess property to the owner. *Reese v. Sherer*, 49 N. J. Law, 610, 10 Atl. 286. Whenever the defect is a matter of form, or the procedure of assessment is irregular, a technical defect cannot be set up to defeat the assessment. 3 Gen. St. p. 3404, § 547. But, where the complaint is based upon the ground that the property or the person is not taxable at all, certiorari is the effective remedy. *Conover v. Honce*, 46 N. J. Law, 348. Earles failed to apply to the commissioners of appeal for a correction of the assessment. When he ascertained through his agent that he had been assessed for the mortgage, he applied to the township committee for relief, but it was refused. The fact that he failed to appeal to the commissioners, it is contended, debars him from relief by this writ. This court has legal discretion to grant relief or refuse it by this writ, although the appeal may not have been made. *Hall v. Snedeker*, 42 N. J. Law, 36; *Poulson v. Matthews*, 40 N. J. Law, 268. Where it is a mere question of the value of interest, or of the ratable assessed, the discretion will be exercised against the relief, unless an appeal was tak-

en and properly presented, especially if the evidence upon the certiorari tends to show control and ownership. *Hall v. Snedeker*, 42 N. J. Law, 76. Where a mere mistake in the name of the owner of a farm was made, the assessment was held not invalidated. *Poulson v. Matthews*, 40 N. J. Law, 268. In this case the ratable had no existence whatever, and therefore there was no need for an appeal to the commissioners, for there was nothing for them to act upon. The assessment was entirely void. *Crispin v. Vansyckle*, 49 N. J. Law, 366, 8 Atl. 120. An attempt to enforce the collection of this tax would be of no avail, for the ratable which is the primary object against which the enforcement of the tax would be sought is found to have no existence at the time of the assessment. This assessment of tax must be set aside, with costs.

(61 N. J. L. 179)

BOYS et al. v. ROBINSON et al.

(Supreme Court of New Jersey. Nov. 12, 1897.)

MINING LEASE—CONSTRUCTION—FORFEITURE—RIGHTS OF LESSOR AND HIS GRANTEES—WAIVER—EJECTMENT—NECESSITY OF DEMAND.

1. Under the act of the legislature entitled "An act enabling grantees of reversions and lessees mutually to avail themselves of covenants and conditions" (1 Gen. St. p. 880, §§ 135, 136), the grantees of a reversion have the same right as the grantors to take advantage of a forfeiture which occurs by reason of an express condition of a mining lease that the same shall become null and void upon a failure on the part of the lessees or their assigns to pay the rent reserved, or the royalties upon the ore sold and delivered, at the times provided in, the lease for such payment.

2. When such forfeiture occurs, the lessor or his grantee of the reversion may bring an ejectment to recover the possession of the lands contained in the lease, without making any demand for the rent or royalties due and unpaid, and without making any re-entry upon the demised premises.

3. Where a mining lease reserved a rent of \$400 per year, payable quarterly, and this amount to be deducted from the royalties when they were in excess of that sum, and which also were payable quarterly on ore as sold and delivered to purchasers, the lease further providing that, if payments were not made at such times, the lease should be null and void, this condition required the full payment of all royalties on ore sold and delivered at the end of each quarter year, and, if not so paid, it was a forfeiture of the lease.

4. The payment of the rent and royalties was a condition subsequent, the nonperformance of which had the effect of defeating the estate granted, and rendered the agreement null and void, and as if it had never existed. A grant with a proviso to pay a certain rent by a certain day, and, unless done, the estate granted and the agreement should be void, is a condition, and upon the nonperformance of which the grantor may re-enter, or bring ejectment.

5. Where the ore sold and delivered could only be ascertained by the books and accounts of the lessees, the acceptance of a part of the rents and royalties by one of two joint lessors, without knowledge on his part that any greater sum than that tendered and received by him was due and unpaid, will not be a waiver of the forfeiture caused by the nonpayment of the full amount due. If the acceptance is by one of the

two joint lessors with such knowledge, then it operates as a waiver against the other.

6. Where the evidence as to the existence of such knowledge as an essential element of a waiver is in dispute, the questions must be submitted to the jury.

(Syllabus by the Court.)

Ejectment by George W. Robinson and John H. Dalke against James Boys and William O'Neill, receiver of the Enterprise Mining & Transportation Company, in which there was a verdict in favor of plaintiffs. Heard on rule to show cause why the verdict should not be set aside. Rule discharged.

Argued November term, 1896, before BEASLEY, C. J., and VAN SYCKEL, GARRISON, and LIPPINCOTT, JJ.

John H. Dalke and William H. Morrow, for plaintiffs. George M. Shipman and John T. Van Cleef, for defendants.

LIPPINCOTT, J. This is an action of ejectment to recover possession of premises held by the defendants under an agreement or mining lease made by Charles Osmun, a former owner of the premises, to William C. Folkner and Thomas Craig, bearing date December 31, 1890, to run for 20 years from the date thereof. Through several deeds of conveyance, the title to the lands and premises and the reversion became vested in the plaintiffs, and the interest of the lessees became by two assignments vested in the defendants. This action, and the recovery therein, are based upon an alleged forfeiture of the agreement or mining lease, according to its terms, whereby the plaintiffs claim to be entitled to re-enter and recover possession. The defendants claim that the lease is still a valid and subsisting one, and that no forfeiture has occurred, and therefore they are still entitled to the possession. The cause was tried at the Warren circuit of the supreme court. The learned trial justice held that a forfeiture had occurred, and that the plaintiffs were entitled to recover unless there had been a waiver of the forfeiture, and, upon that question being submitted to the jury, a verdict in favor of the plaintiffs was returned, and thereupon this rule to show cause was allowed why the verdict should not be set aside.

The first question arising in the case is as to the true construction of the agreement or mining lease out of which this action arose. The lease, by its terms, granted, bargained, and sold to the lessees, their heirs and assigns, for the term of 20 years, commencing from the date aforesaid, the exclusive right to all iron ore contained in or under the lands and premises therein described, being a tract of land of about 163 acres, situate in the township of Oxford, in the county of Warren, in this state, with all the necessary right of exploration and other rights in order to mine the iron ore therein. One clause of the lease provided

that, in consideration of the lease, "the said party of the second part [the lessees], their heirs and assigns, covenant to pay to the said party of the first part [the lessor], his heirs and assigns, for every ton of twenty-two hundred and forty pounds in weight of clean, merchantable iron ore raised, mined, and taken away by them, or by their order, from the said premises, the price of forty cents per ton as aforesaid, payable every three months after sale and delivery of the ore to the purchaser or purchasers, the weight to be ascertained on the scales of such purchaser or purchasers. * * * It is further agreed that nine months from the date of this lease shall be allowed the party of the second part for the development of said tract. Each and every year thereafter during the term of this lease they shall pay unto the said party of the second part the sum of four hundred dollars, in quarterly payments, the same to be deducted from royalties that may each year be due to the said party of the first part. In case of nonpayment of royalties as aforesaid during any quarter of any year of the term of this lease, after the nine months as above named, to said party of the first part, by said party of the second part, then, in such case, this lease shall become null and void." It will be seen that by the terms of this lease all royalties of whatever amount were to be payable quarterly after sale and delivery. The sum of \$400 was to be payable each year in quarterly payments, whatever might be the amount of actual royalties less than that sum. On December 27, 1890, Folker and Craig assigned this lease to one James Boys, who, on February 4, 1892, assigned the same to the Enterprise Mining & Transportation Company. All the rights under this lease were, by these assignments, transferred upon and in consideration of the performance by the assignees of all the terms, covenants, and conditions therein contained. Osmun, on November 17, 1892, conveyed, by the usual deeds of conveyance of bargain and sale, the leased premises to George W. Robinson. Robinson, April 19, 1893, conveyed the one-sixth part thereof to John H. Dalke. Dalke, on same day, conveyed this one-sixth part thereof to Joseph M. Roseberry. Roseberry, on April 13, 1894, conveyed the one-twelfth part thereof to Robinson. On the same day Roseberry conveyed the other twelfth part which he owned back to Dalke, so that at the commencement of this action Robinson and Dalke were the owners of the land and the reversion, and the defendants were in possession thereof under the mining lease. Before the plea was filed in the cause, the Enterprise Mining & Transportation Company had become insolvent, and the plea was filed by William O'Neill, receiver of said company. Boys, not claiming possession, failed to file any plea, and judgment by default was taken against

him. The facts out of which it is alleged the forfeiture arose occurred during the joint ownership of Robinson and Roseberry, the title of Dalke being in no wise concerned, save as a formal party entitled to take advantage in this action of any forfeiture if it had occurred. All the facts in relation to nonpayment of royalties, forfeiture, and waiver occurred between the defendants and Robinson and Roseberry. No question is raised as to defendants' possession of the premises, both at the time when the alleged right of action of the plaintiffs occurred and at the time of the commencement of this action; nor is there any dispute but that the title to the premises and the reversion is vested in the plaintiffs in this action.

The first objection is, on the part of the defendants, that, assuming that there was a forfeiture of the lease, and a right of re-entry, and to maintain this action, Osmun, the original lessor, alone can take advantage of the forfeiture. This objection is controlled by statute in this state. This act is entitled "An act enabling grantees of reversion and lessees mutually to avail themselves of covenants and conditions." 1 Gen. St. p. 880, §§ 135, 136. Under this statute the grantees of Osmun of the premises and the reversion have the same right as Osmun had to take an advantage of a forfeiture. By this statute the rule of the common law is changed, and the grantee of the lands and of the reversion is given all the rights of re-entry for nonpayment of rent or other forfeiture that the lessor or grantor might have exercised. 4 Griff. Law Reg. 1308; Field v. Mills, 33 N. J. Law, 257; Suffern v. Butler, 19 N. J. Eq. 202; Fulton v. Greacen, 36 N. J. Eq. 221; Manufacturing Co. v. Lorillard, 44 N. J. Eq. 1, 13 Atl. 613; Watson v. Idler, 54 N. J. Law, 467, 24 Atl. 554; Richman v. Lippincott, 29 N. J. Law, 44; Southard v. Railroad Co., 26 N. J. Law, 21.

Another objection to the recovery in favor of the plaintiffs is that they made no demand for the payment of the royalties due and unpaid before bringing this action of ejectment. The answer to this objection is that, if a forfeiture occurred, then it was within the option of the plaintiffs, or rather Robinson and Roseberry, to demand and accept the royalties unpaid, out of which the forfeiture arose, and thus waive the forfeiture, or to insist upon the terms of the lease, which, with the facts, constituted the forfeiture. Robinson and Roseberry were in no wise bound to waive a forfeiture if the facts existed creating it. If the forfeiture existed, then the lease became null and void; the right of possession of the defendants had ended; and this was a situation upon which Robinson and Roseberry could rest as an authority to re-enter or maintain ejectment. If they desired to insist upon the situation created by the defendants, a demand for the rent and a payment of it would be a

waiver of that situation, and of the forfeiture which grew out of it. A demand for the rent would have been an absurd or anomalous position if they desired to maintain their rights upon a forfeiture created by the express terms of the lease. No demand was necessary, either for the rent or for the possession, before commencing the action. The right of action accrued, by the terms of the lease itself, whenever the situation provided for in the lease, creating a forfeiture, was found to exist. When a forfeiture was discovered by the plaintiffs, they were not bound to take any steps which might lead to a waiver. Their right, then, was, at their option, to insist upon the forfeiture. They were not bound to make any change in the situation whatever, and it was only by a rigid insistence of the situation remaining unchanged after forfeiture was discovered that the plaintiffs could be permitted to insist upon its legal force and effect.

The next question in order which arose in the case was whether there had been a forfeiture of this mining lease. The learned trial justice held as matter of law that a forfeiture had been established, and so directed the jury. The facts were not in dispute that at least for the quarter ending June 30, 1893, there had been royalties received, which had not been paid, in excess of the \$100 provided to be paid quarterly in any event. The fact also was established, and without dispute, that the royalties due and unpaid for the quarter ending September 30, 1893, were quite largely in excess of the payment of the \$100 so as aforesaid reserved to be paid each quarter. The amount appears to be \$356.66 in excess of the two quarterly payments of \$100 each. This amount remained due and unpaid on September 30, 1893, for the sales and deliveries of ore to that extent previously made, and due and payable at these dates under the lease which provides that these royalties should be paid every three months after sales and deliveries. Upon these facts the learned trial justice directed the jury that there had been a forfeiture. Without citing the exact language of the learned trial justice at the circuit to the jury, the charge was, in substance, that the failure to pay the royalties in full within three months from the time the ore was sold and delivered to the purchaser or purchasers forfeited the lease, inasmuch as there were quarters of years, or periods of three months, in which there was ore mined in excess of the \$100 due for royalty in every three months; and, when this was so, Robinson and Roseberry were entitled to receive the total amount of royalty for such quarter, and that the failure to pay such royalties in full operated as a forfeiture of the lease. Now, notwithstanding the forcible argument of counsel for the defendants in his construction of this lease, it seems that this conclusion of the

trial justice arises by no implication whatever, but is derived from the plain and express language of this lease. The provision of the lease is clear that these royalties (not the \$100) must be paid every three months after sale and delivery (not at the end of the year, but every three months); and it is equally clear, in another provision of the lease, that the \$100 must be paid quarterly (that is, \$400 in quarterly payments), and only deducted in each year when the royalties exceed that sum; and it follows necessarily that the whole amount of the royalties must be paid within three months after sale and delivery, deducting, of course, the \$100 paid quarterly. The conclusion reached by the trial justice was, upon the undisputed evidence, that there were quarters when there was more than \$100 due and payable as royalties, and, as there were never more than \$100 paid or tendered to be paid at the end of any quarter, the failure to pay such royalties in full operated as a forfeiture. The conclusion reached is that this direction to the jury was in accordance with the express provisions of the lease. That the payment of the royalties was a condition, the nonperformance of which defeated the lease, was not disputed. It was a condition subsequent, but its nonperformance had all the effect of defeating the estate granted, or rendering the agreement null and void, and as if it had never existed. *Tayl. Landl. & Ten.* § 271. A grant with a proviso to pay a certain rent by a certain day, and, unless done, the estate thereby granted should be void, is a condition, and upon the nonperformance of which the grantor may re-enter. 4 Kent, Comm. §§ 11, 123. There is no need of an express clause of re-entry. *Tayl. Landl. & Ten.* § 291. Actual entry is no longer necessary; the right to re-enter is all that is required. *Cornellus v. Ivins*, 26 N. J. Law, 376; *Adams, Ej.* § 11, note 1. "For the avoiding of a lease for years, such precise words of condition are not so strictly required as in case of freehold and inheritance." *Co. Litt.* § 330. "And the reason is that a lease for years is but a contract, which may begin by words, and by words be dissolved." *Id.* The question of whether the forfeiture was waived by Roseberry or not was, by the trial justice, submitted to the jury, and upon that question the verdict of the jury was made to depend. The court charged the jury that, if Roseberry had waived the forfeiture, it made no difference whether Robinson had waived the forfeiture or not; the verdict must pass for the defendants. The jury were instructed that Robinson had not waived the forfeiture, because the fact was undisputed that after the discovery of the forfeiture by reason of the nonpayment of the royalties, especially after the failure in payment of September 30, 1893, Robinson had never accepted any further payment, but, on the contrary, when further payments, but not all that was due,

had been tendered to him personally, he had refused to accept them, and at all times after the forfeiture occurred insisted upon his rights to consider the lease at an end. These facts were undisputed, and the learned trial justice was correct in saying that as to him no waiver of the forfeiture existed.

It was in evidence that Roseberry received two small payments after September 30, 1893. One, of \$16.67, was made on December 30, 1893; the other, for \$16.67, was made on March 20, 1894. These sums represented the one-sixth part of the quarterly payments of \$100 each due on those days. The trial court charged the jury that, if he had knowledge of the forfeiture, this was a waiver of nonperformance of the condition of the lease out of which the forfeiture arose, and the verdict would be for the defendants against both of the plaintiffs. Whether Robinson had waived it or not would be immaterial. He would, in any event, be bound by the waiver of Roseberry. There was much evidence in the case upon the point in dispute whether Roseberry had any knowledge whatever that any greater amount was due and unpaid in excess of the sums that he received. Under the provisions of the lease the defendants were to keep the account of the sales and deliveries. This account seems never to have been revealed to Roseberry, or at least there is much dispute of evidence on that subject. No question arose at all but that much larger amounts were due and unpaid. Whether he had knowledge of these facts out of which the forfeiture arose was a much controverted question. It was a question of fact, proper to be submitted to the jury for their determination. If he was possessed of such knowledge, then the verdict was to be for the defendants; if he had no such knowledge, then the jury could find for the plaintiffs. Or, in other words, if there was a waiver of the forfeiture by Roseberry, the verdict would pass for the defendants and against the plaintiffs. Upon questions of this character knowledge of the facts out of which the forfeiture arises is essential to waiver. Without such knowledge, a waiver cannot be said to be established or exist. Waiver could only be found upon knowledge that the condition of the lease was broken. *Tayl. Landl. & Ten.* §§ 497-499. The forfeiture must be known, as one of the essential elements of waiver. *Dendy v. Nicholl*, 4 C. B. (N. S.) 376; *Collins v. Hasbrouck*, 56 N. Y. 157-164; *Murray v. Hawley*, *Id.* 337; *Conger v. Duryea*, 90 N. Y. 594; *Croft v. Lumley*, 4 El. & Bl. 608. Waiver is, where one in possession of any right, whether conferred by law or by contract, with knowledge of the material facts, does, or forbears doing, something inconsistent with the right, or of his intention to rely upon it, thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterwards. *Bish. Cont.* (Ed. 1887) § 792. It must be made with

knowledge and intent to waive. *Bennecke v. Insurance Co.*, 105 U. S. 357. The question here being one of knowledge and intent, and the evidence being much disputed, and the acts upon which it was contended it was established being of an inconclusive nature, it was a question for the jury. *O'Key v. Insurance Co.*, 29 Mo. App. 111; *Fitch v. Iron Works*, 29 Conn. 91; *Fox v. Harding*, 7 Cush. 520; *Traynor v. Johnson*, 1 Head, 51. The cause was properly submitted to the jury, and the verdict was, upon this, the vital question of the case, one supported by the evidence. The rule to show cause must be discharged, with costs.

(61 N. J. L. 129)

STATE (MORRIS CANAL & BANKING CO.,
Prosecutor) v. BOARD OF CHOSEN
FREEHOLDERS OF HUDSON COUN-
TY.

(Supreme Court of New Jersey. Nov. 8, 1897.)

CANALS—REGULATION.

The regulation of the Morris Canal Company, adopted April 7, 1873, "that every bridge rebuilt and every new bridge, whether built by the company or by any other authority, over its canal, should leave a clear space of ten feet above high-water mark of the canal under the lowest part of the bridge," is binding on public authorities, when the circumstances of the particular case do not render its enforcement unreasonable.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of the Morris Canal & Banking Company, against the board of chosen freeholders of Hudson county, to review a resolution of defendant authorizing the construction of a bridge over a waterway of the prosecutor. Resolution set aside.

Argued June term, 1897, before LUDLOW, COLLINS, and DIXON, JJ.

C. L. Corbin, for prosecutor. John Griffen, for defendant.

DIXON, J. The question for decision in this case is whether the Morris Canal & Banking Company has a right to insist that a public bridge to be built over its canal in Pacific avenue, Jersey City (a street laid out since the canal was constructed), shall leave a clear space of 10 feet above high-water mark of the canal under the lowest part of the bridge. By the charter of the company passed December 31, 1824, and a supplement thereto passed January 26, 1828, the company was authorized to construct a canal connecting the waters of the Delaware river, near Easton, with the waters of the Hudson, at or near Jersey City, and "to adopt, establish and carry into execution such by-laws, ordinances and regulations as shall by its president and directors be judged necessary or convenient for the said corporation in respect to its canal: * * * provided the same be not contrary to the constitution or laws of the United States or of the state of New Jersey." On April 7, 1873, the

company adopted a resolution that every bridge rebuilt, and every new bridge, whether built by the company or by any other authority over the canal, should be of the height above stated. This regulation seems to us to be within the power delegated by the charter. Evidently, immovable bridges across the canal might be placed so near the surface of the water as to destroy the utility of the canal; and the legislature therefore intended to give to the corporation the right to prescribe their elevation, provided the rule adopted did not contravene the law of the land, and was not unreasonable. It is not suggested that any law is violated by the rule above mentioned, and we find nothing to indicate that its enforcement in the present instance would be unreasonable. The engineer employed by the defendant to prepare plans and specifications for the proposed bridge testifies that a proper bridge and proper approaches, giving the company the clearance specified, can easily be constructed, the only trouble being the raising of the grade of the street. The trouble in raising the grade of the street, which the engineer had in mind, and which has been urged in argument before us, is that the grade is fixed by the authorities of Jersey City, who may not consent to change it. But the defendants, empowered by law to build the bridge, are likewise empowered to construct the necessary approaches (Board of Freeholders v. Strader, 18 N. J. Law, 108), and can therefore, without the city's consent, alter the actual grade sufficiently to render access to the bridge safe and convenient. The resolution of the defendants to erect a bridge below the prescribed height is illegal, and must be set aside, with costs.

(61 N. J. L. 121)

STATE v. BARR et al.

(Supreme Court of New Jersey. Nov. 8, 1897.)

EMBEZZLEMENT BY EMPLOYE—INDICTMENT.

1. An indictment charging the embezzlement of "certain moneys, to wit, the sum of three thousand dollars," sufficiently shows the value of the money.

2. Under section 57 of the criminal procedure act, an indictment charging the embezzlement of "certain moneys, to wit, the sum of three thousand dollars," sufficiently specifies the money embezzled.

3. In section 161 of the crimes act, the terms "employé or agent of any individual," on the one hand, and "employer," on the other, are correlative; so that, when the employés or agents of an individual embezzle his money, they embezzle the money of their employer, within the intendment of the law.

(Syllabus by the Court.)

Henry J. Barr and others were indicted for embezzlement. Motion to quash indictment. Overruled.

Argued June term, 1897, before LUDLOW, COLLINS, and DIXON, JJ.

Alan H. Strong, for the motion. John S. Voorhees, opposed.

38 A.—52

DIXON, J. The first count of this indictment charges that the defendants, being the agents of Frank M. Oliver, did take and receive certain moneys, to wit, the sum of \$3,000, belonging to said Oliver, with intent to defraud said Oliver thereof, and willfully, fraudulently, and unlawfully did retain and appropriate to their own use the said moneys, to wit, the said sum of \$3,000, knowing the same to belong to said Oliver, with intent to defraud said Oliver. The objections urged against this count are (1) that it does not show the kind or value of the moneys referred to; (2) that it does not aver that Oliver, to whom the money belonged, was the master or employer of the defendants.

In support of the first objection, Stephens v. State, 53 N. J. Law, 245, 21 Atl. 1038, is cited. What was there said on this point was mere obiter dictum, and was intended only to call attention to the doctrine previously enunciated in State v. Stimson, 24 N. J. Law, 9. On referring to State v. Stimson it will be perceived that these rules were there recognized: (1) Where the larceny, embezzlement, or criminal conversion of any article, whether coin or security or chattel, is charged, the article should be described with reasonable certainty. (2) The value of the article should be stated, unless it be a coin of the government, in which case, the value being established by law, the courts will take notice of the value. (3) The term "dollar" is an expression of value, as well as the name of a coin; and hence the word "dollars" is uncertain as a description, since it may be used to denote a number of cents or dimes as well as of dollars proper, but is certain as an expression of value. From this it seems to follow that the present indictment, in charging an appropriation of certain moneys, to wit, the sum of \$3,000, properly alleged the value of the moneys, since the court must judicially notice that \$3,000 in money, no matter of what coins, have the value of \$3,000. In considering the sufficiency of the description of the articles embezzled, we are relieved by section 57 of the criminal procedure act, which declares "that, for preventing difficulties in the prosecution of offenders in any case of embezzlement * * * where the offense shall relate to any money, * * * it shall be sufficient to allege the embezzlement or fraudulent application or disposition, to be of money, without specifying any particular coin." This enactment was not in existence when State v. Stimson was decided, and was not adverted to in Stephens v. State. Under it, the allegation in this indictment is sufficient.

On the second objection, that the count does not allege the money to have been the money of the master or employer of the defendants, the position of counsel appears to be that alleging the defendants to be the agents of Oliver is not equivalent to an allegation that Oliver was the master or employer of the defendants. We think otherwise. We understand the terms of the statute, "employé or

agent of any individual," on the one hand, and "employer," on the other, to be correlative; so that, when the agents of an individual embezzle his money, they embezzle the money of their employer, within the intentment of the law.

In our judgment, the first count is good. This renders it unnecessary to decide on this motion as to the validity of the second count. But we may suggest that while it is clearly bad as a charge of conspiracy, for want of an averment of some act done "in execution of the agreement to effect the object thereof," it may perhaps be sustained as an indictment for obtaining a valuable thing by false pretenses; section 51 of the criminal procedure act helping out the defective statement of the ingredients of the offense, as they are set forth in section 171 of the crimes act. The motion to quash is denied. Let the indictment be sent to the Middlesex sessions for trial.

(61 N. J. L. 114)

STATE v. HUDSON COUNTY ELECTRIC CO.

(Supreme Court of New Jersey. Nov. 8, 1897.)
EVIDENCE—JUDICIAL NOTICE—FILES OF CERTIORARI SUIT.

Proceedings to punish a party for disobedience of the stay implied in a writ of certiorari do not form part of the certiorari suit, so as to authorize the court in those proceedings to take notice of the files in the certiorari suit without their being put in evidence in the contempt proceedings.

(Syllabus by the Court.)

Proceedings by the state against the Hudson County Electric Company. Heard on rule to show cause why defendant should not be punished for contempt, in disobeying a stay implied in a writ of certiorari which brought up for review an order of the mayor and council of the city of Bayonne. Rule discharged.

Argued June term, 1897, before LUDLOW, COLLINS, and DIXON, JJ.

Mr. Van Buskirk, for the State. T. N. McCarter, Jr., for defendant.

DIXON, J. This matter comes before us on proofs taken under a rule requiring the Hudson County Electric Company to show cause why it should not be punished for contempt, in disobeying the stay implied in a writ of certiorari which brought up for review an ordinance of the mayor and council of the city of Bayonne. Among the proofs submitted we find neither the ordinance nor the writ, and without them it is impossible to determine whether the acts done were in violation of the stay or not. This omission probably results from an assumption by counsel prosecuting the rule that the present proceeding is part of the original suit, and that, therefore, the court would take judicial notice of the files in that suit without their being formally put in evidence here. But such an assumption is erroneous.

If the object of this proceeding had been to further the orderly progress of the original suit, or to obtain private relief in the execution of some order therein made, precedents might be cited for considering this proceeding as a part of that cause. *Buck v. Buck*, 60 Ill. 105; *Andrew v. Andrew* (Vt.) 20 Atl. 817. But when the purpose is, as in the present case, merely to punish a party for an alleged disregard of the authority of the court, the proceeding is quasi criminal, and entirely distinct from the suit out of which it sprang. *Magennis v. Parkhurst*, 4 N. J. Eq. 433; *New Orleans v. Steamship Co.*, 20 Wall. 387; *McDermott v. Clary*, 107 Mass. 501; *In re Dissosway*, 91 N. Y. 235; *Stafford v. Brown*, 4 Paige, 360; *Lester v. People* (Ill. Sup.) 37 N. E. 1004; 4 Enc. Pl. & Prac. 771. For lack of evidence, therefore, the rule to show cause must be discharged. No costs are allowed.

(61 N. J. L. 120)

STATE ex rel. ROWE v. BOARD OF CHOSEN FREEHOLDERS OF HUDSON COUNTY.

(Supreme Court of New Jersey. Nov. 8, 1897.)
DISCHARGED UNION SOLDIERS—REMOVAL FROM OFFICE.

A resolution of a board of chosen freeholders appointing a lawyer as "attorney to the board" does not place him in "an office or position" which is within the protection of the veteran acts.

(Syllabus by the Court.)

Application by the state, on the relation of Norman L. Rowe, for a writ of mandamus compelling the board of chosen freeholders of Hudson county to restore the relator to his position as attorney to the respondent. Order discharged.

Argued June term, 1897, before LUDLOW, COLLINS, and DIXON, JJ.

John A. Dennin, for relator. John Griffen, for respondent.

DIXON, J. On August 1, 1895, the board of chosen freeholders of Hudson county, by resolution, appointed Mr. Rowe (a member of the bar of this state) as "attorney to the board," without defining the term, his compensation to be at the rate of \$1,800 per annum. The subsequent board having removed him, he, being an honorably discharged Union soldier, claims the protection of the veteran act of March 14, 1895 (3 Gen. St. p. 3702). But this statute applies only to offices, and positions which are analogous to offices in the permanence of the duties which pertain to them. *Lewis v. Jersey City*, 51 N. J. Law, 240, 17 Atl. 112; *Stewart v. County Freeholders* (N. J. Sup.; Nov. Term, 1897) 38 Atl. 842. There is no law creating or recognizing such an office as attorney to the board of chosen freeholders, and we think the whole force of this resolution was to employ Mr. Rowe as attorney of that particular board, so that, when the board expired by limitation of the law, his employ-

ment as its attorney necessarily came to an end. His duties, not being otherwise defined, were only temporary in their nature, and therefore his post was not within the scope of the veteran acts. The rule for mandamus must be discharged.

(61 N. J. L. 127)

MAYOR, ETC., OF CITY OF BAYONNE v. MORRIS et al.

(Supreme Court of New Jersey. Nov. 8, 1897.)
MUNICIPAL CORPORATIONS—SEWER ASSESSMENTS—RIGHTS OF PROPERTY OWNERS.

1. Where a new sewer becomes necessary to furnish a proper outlet for an existing sewer, land assessed for the old sewer may be further assessed for the new one; and if, in levying such further assessment, the assessors regard both sewers as a unit, estimate the value of the benefit afforded by this unit, make due allowance for what had been charged for the old sewer in excess of the benefit derived from it, and levy only the residue, no injustice will be done.

2. Where property owners assessed for a public improvement in a city have paid the assessment, and afterwards it has been set aside, the city cannot levy upon them another assessment for the same improvement until it has refunded the money paid.

(Syllabus by the Court.)

Proceeding by the mayor and council of the city of Bayonne to assess benefits resulting from the construction of a sewer. Heard on motion to confirm report of commissioners appointed to make the assessment, which was resisted by William L. Morris and others. Assessment confirmed.

Argued June term, 1897, before LUDLOW, COLLINS, and DIXON, JJ.

T. F. Noonan, Jr., and Allen Benny, for city of Bayonne. De Witt Van Buskirk, for Conrad Miller and others. G. P. Smith, for executor of William H. Gunther.

DIXON, J. At the February term, 1896, commissioners were appointed by this court to make an assessment for benefits resulting from the construction of a sewer from Cottage street, through Fifth street and Ingram avenue, to the Kill Von Kull, in the city of Bayonne, in lieu of a former assessment which the court had set aside. The commissioners having presented their assessment to the court, the city, on due notice to all parties interested, now moves that the same be confirmed. Several years ago, a sewer known as the "Cottage and Fifth Street Sewer" was constructed, which emptied its sewage into a tidal creek opening in the Kills. For this an assessment was levied by the city upon the property drained. After a while the discharge from the sewer created a nuisance around its outlet, and the court of chancery, on bill filed by an owner of land in the neighborhood, enjoined the city from permitting the discharge to continue. In consequence of this, it became necessary to extend the sewer, and the present sewer was accordingly built, to carry the sewage directly into the

Kills. In determining the benefits derived from this new sewer, therefore, two distinct conditions had to be borne in mind,—the property drained into the old sewer, which had been rendered almost useless by reason of the injunction of the court of chancery, and was now restored to efficiency by the new sewer; and the property not drained into the old sewer, but for which drainage was provided by the new one. The commissioners whose assessment is before us seem to have dealt with these two conditions equitably. So far as we have been able to discover the principle of their assessment, it is that, with regard to the first class of property, the old and the new sewers should be deemed a unit, the value of the benefit afforded by this unit should be estimated, and then, after making due allowance for what had been charged upon the property for the old sewer in excess of the benefit received from it, the residue should be levied in the present assessment. With regard to the second class of property, they considered simply the value of efficient sewerage now furnished, and assessed that value. We cannot suggest any fairer principle.

On behalf of one of the parties objecting to the assessment, it is claimed that, because the new sewer had to be large enough to carry off the output of the old sewer, his property has been charged much in excess of the reasonable cost of constructing a sewer which would have been adequate for his neighborhood. On examining the evidence, we think this claim is not sustained. The assessment is far below the cost of the sewer, and, of the two engineers testifying as to the probable cost of a sewer sufficient for that neighborhood only, one figures out a cost equal to the present assessment. The assessment should be confirmed. It appears that some of the property owners paid the former assessment against them before it was set aside, and that the city has not refunded the money, nor have the owners demanded it. We think such payment satisfied the claim which the city could lawfully make upon that property for this improvement, so long as the city retained the money, and that a further incumbrance should not now be sanctioned. It is therefore ordered that the present assessment against the lands so discharged shall be marked satisfied and canceled upon the record before the assessment is transmitted to the city for collection.

(61 N. J. L. 78)

ASTOR v. HELLER, Sheriff.

(Supreme Court of New Jersey. Nov. 8, 1897.)
ACTION FOR FALSE RETURN OF SUMMONS—SUFFICIENCY OF DECLARATION.

1. The sheriff returned a summons duly served personally on the defendant. The declaration in the first count alleges such return, that thereupon the plaintiff entered judgment in the suit, and that the return of the sheriff was a false return. The second count is like the first, except that it is alleged that the sheriff, although he returned the summons served, failed and neglect-

ed to make any service thereof upon the defendant, and that defendant did not appear to the suit. The first count is faulty. The service may have been false in the respect that it was not a personal service, yet a legal service which would support the judgment, so that no damage resulted.

2. The allegation in the second count, that no service was made, shows a legal cause of action.

3. The demurrer being general to both counts, it must be overruled.

(Syllabus by the Court.)

Action by William Astor against William Heller, sheriff of Hudson county. Heard on demurrer to the declaration. Demurrer overruled.

Argued June term, 1897, before the CHIEF JUSTICE, and DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Bentley & Gedney, for plaintiff. McDermott & Fisk, for defendant.

VAN SYCKEL, J. The first count of the declaration sets out that a writ of summons in tort was issued out of the supreme court of this state at the suit of William A. Astor, the plaintiff, against Herman Brede, and delivered to the defendant, Heller, sheriff of the county of Hudson, for service; that the sheriff deputized one Peter Wedin to serve it, and that the said summons was returned by said sheriff, by his special deputy, "Served personally Nov. 14, 1896, on Herman Brede personally, by reading the same to him, and giving to him a copy thereof;" that the said Peter Wedin returned with the said summons an affidavit made by him that he served said Brede on the 14th day of November, 1896, with a true copy of the summons and declaration in the cause; that such further proceedings were taken in the cause that final judgment in favor of said Astor and against said Brede was entered on the 4th of February, 1897; that the said sheriff made a false return to the said writ of summons, and that by reason thereof the said Brede did not appear in the supreme court to answer to the said writ, by means whereof the said Astor was greatly injured. This count in the declaration shows no legal cause of action. It does not aver in what respect the return was false, or injurious to Astor. The return may have been false in stating that the summons was served personally, and yet it may have been a legal service, and the judgment obtained thereupon may in all respects be valid and binding. This count, therefore, alleges no actionable wrong or failure on the part of the sheriff to perform his duty. The second count contains the like averments, except that it alleges that the sheriff wholly failed and neglected to serve the summons. The judgment, therefore, which Astor obtained against Brede upon the supposition that the summons had been served, is without force or validity. In this count the averments are sufficient to charge the sheriff with action-

able negligence by which Astor has been injured. The demurrer is general to both counts of the declaration, and therefore, one count being good, the demurrer must be overruled, with costs.

(61 N. J. L. 71)

PHILADELPHIA & R. R. CO. v. STATE.

(Supreme Court of New Jersey. Nov. 8, 1897.)

RAILROAD CROSSING—SIGNALS.

A railroad company can be required to give such signals only of the approach of trains as the legislature has prescribed, unless the crossing has some peculiarly dangerous feature, occasioned by the act of the company itself in constructing its road or buildings.

(Syllabus by the Court.)

Error to court of general quarter sessions, Mercer county; Woodruff, Judge.

The Philadelphia & Reading Railroad Company was convicted of maintaining a nuisance, and brings error. Reversed.

Argued February term, 1896, before the CHIEF JUSTICE and DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Samuel H. Grey, for plaintiff in error. Bayard Stockton, for the State.

VAN SYCKEL, J. The indictment in this case was for maintaining a nuisance in the township of Ewing. The nuisance complained of was a railroad crossing over a public highway, which was alleged to be more than ordinarily dangerous to the public, on account of the surroundings of the crossing itself, and the manner in which the defendant company operated its trains. The company was convicted in the Mercer quarter sessions, whereupon the case was brought by writ of error into this court for review.

On the trial below the defendant requested the court, among other things, to charge the jury as follows: "That as matter of law the defendant, in the use of its railroad, was only called upon to give such signals of the approach of trains as the legislature had prescribed, unless the crossing in question had some peculiarly dangerous feature, occasioned by the act of the company itself in constructing its road or buildings." In *Railroad Co. v. Matthews*, 36 N. J. Law, 531, Chief Justice Beasley delivered the opinion of the court of errors and appeals upon this subject, in these words: "They [railroad companies] are not called on to keep flagmen, under ordinary circumstances, at crossroads, nor to give any other notice of the approach of their trains than those signals that are prescribed by statute. If greater safeguards are requisite for the safety of the community, and those public agents are to be put under greater restrictions in the exercise of their franchises, such contrivances must proceed from the legislature, and not from the judicial power. But, while I thus say that these additional burthens cannot be imposed by the courts upon these companies, I also say at the same time, and with

quite as much emphasis, that the companies may, by their own conduct, impose such burdens on themselves. If one of them chooses to build its track in such a mode as to unnecessarily make the use of a public road which it crosses greatly dangerous, I think such company by its own action must be held to have assumed the obligation of compensating the public for the increased danger by the use of additional safeguards. The reasonable and indispensable implication is that the railway is to be constructed so as not unnecessarily to interfere with the safe use of the public ways; and if a railroad, for its own convenience, curves its tracks as it leaves a deep cut, within a few feet of a highway, and also sees fit to put up buildings close along such track, and by these means, or either of them, heightening the danger in the use of such highway, it seems to me very clear that such company must be held to have taken upon itself the duty of averting such danger by the employment of every reasonable precaution within its power. On such occasions as this, or whenever the situation is embraced within the principle stated, the presence of a flagman, or some equivalent safeguard, can be demanded of the company. The rule is, as I understand it, that when the company has created extra danger it is bound to use extra precautions." In *Railroad Co. v. Randel*, 47 N. J. Law, 145, the court of errors and appeals unanimously reaffirmed the rule "that, where a railroad company has created extra dangers, it is bound to use extra precautions." This subject was again submitted for review to the court of errors and appeals in the case of *Railroad Co. v. Leaman*, reported in 54 N. J. Law, 202, 23 Atl. 691. Mr. Justice Reed, in delivering the opinion of the court, said: "Questions touching the duty of extra statutory care have arisen in cases where a crossing has been accused of possessing unusual features of danger. In such cases it has been held that the company is under a duty to maintain flagmen or gates at the crossing. But this duty only arises when this peculiarly dangerous feature is in consequence of the acts of the company itself in constructing its road or building." In support of this declaration he quotes the language used by the court in the previous case of *Railroad Co. v. Matthews*. In the recent case of *Hackett v. Railroad Co.*, 58 N. J. Law, 4, 32 Atl. 265, the supreme court held the rule to be entirely settled by the cases before referred to. We express no opinion as to whether this rule of law should be modified in any respect, or as to whether it has been stated more broadly than the facts of the cases cited required. We are bound by previous adjudications, from which there can be a departure only through a review in the court of errors and appeals, or by legislative action. In this court the rule must be strictly adhered to and applied in reviewing the case in hand. In charging the jury on the trial below upon the request made by the defendant company as hereinbe-

fore set forth, the court used the following language: "That is true, gentlemen, with this qualification: or unless the railroad had selected as a point of crossing the highway which in itself was highly dangerous. In other words, if a railroad company, in exercising its right under the charter of the state to select a place to cross the highway which was manifestly without any dangerous, or specially dangerous, conditions or circumstances attending it, the company would not be called upon to exercise the same amount of care as they would be if they had selected a place where it was manifestly more dangerous. The degree of care and prudence would be regulated by the particular locality which the railroad company had selected to cross the road. I think the jury will understand what I mean by that,—that different localities require a different amount of care and prudence. A crossing in a thickly-settled city would certainly require more care, and its approaches, than one in the country, where there wasn't so much travel. That, as matter of law, the company which constructed the railroad had the right to locate railroad tracks, and to select the methods of constructing and fix the grade, and make passage for the highway over and across the railroad at that grade, and the defendant had the right to occupy and use that railroad crossing so located and constructed for railroad purposes. The legislature gave that power to the company, and they had a right to exercise it." The defendant company had a right to have this request charged in the language, substantially, in which it was made, without having any qualification ingrafted upon it. The charge of the court was calculated to mislead the jury, to break the force of the rule, and to some extent to deprive the defendant of the benefit of it. No other error is found in the trial below, but in this respect there was error, for which the judgment should be reversed.

(61 N. J. L. 121)

STATE (LIPPINCOTT, Prosecutor) v. FELTON.

(Supreme Court of New Jersey. Nov. 9, 1897.)

ELECTIONS—RECOUNT—CERTIFICATE.

1. In a recount of ballots under section 13 of the act of March 25, 1895 (2 Gen. St. p. 1367, par. 369), the board of election should count as many ballots as there are names of apparent voters on the poll book, even though the certificate of the whole number of votes received has not been made by the election officers, as required by section 42 of the election act.

2. In case of a partial recount under the above section, the justice ordering the same should at the conclusion thereof make a certificate showing the whole number of votes for each person for the office in dispute, as exhibited by the original certificate of the canvassers corrected by the recount, so that his certificate may take the place of the original certificate as *prima facie* title to the office in dispute.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of *Freedo C. Lippincott*, against *George C.*

Felton, to review a statement of the result of an election. Affirmed.

Argued June term, 1897, before LUDLOW, COLLINS, and DIXON, JJ.

Lindlay M. Garrison and William J. Kraft, for prosecutor. Henry M. Snyder, for defendant.

DIXON, J. This certiorari brings up for review the statement of the result of a recount of the ballots for treasurer of the city of Camden cast in the Fifth, Sixth, Seventh, and Eighth wards of that city, which recount was ordered by one of the justices of this court under section 13 of a supplement to the election act, approved March 25, 1895 (2 Gen. St. p. 1867, par. 369). The objection urged is that in the Fifth precinct of the Sixth ward the board of election counted 185 ballots, instead of stopping when 150 had been counted. The circumstances giving rise to this objection are that on the poll book of that precinct, after the name of the 150th voter, the following is written: "Number of votes polled, 150. William P. Clark, Judge. Jos. S. Davis. Harry F. Redding. H. I. Hoovey." Then are entered the names of 85 other persons as voters, numbered from 151 to 185, but no further certificate. The prosecutor claims that, under section 42 of the election act (2 Gen. St. p. 1301), the writing above mentioned showed that "the whole number of the names of the persons whose votes had been received during the election" was one hundred and fifty; and that under section 45 the board of election, after canvassing and estimating that number of ballots, was bound to deem the ballots remaining in the box null and of no effect. This claim is unfounded. The writing did not purport to certify the whole number of votes received during the election, but only the number received when that entry was made. The poll book contained the names of 185 persons who seemed to have voted at the election, and did not exhibit any legal evidence that the whole number of voters was less. It was therefore the plain duty of the board to count that number of ballots. The testimony taken in this cause shows that the writing in question was made at the noon recess, and that afterwards, before the polls closed, 85 other ballots were legally cast, so that there is no doubt of the substantial propriety of counting the full number of ballots. The absence of the certificate prescribed by section 42 is not made by the statute a ground for rejecting the ballots lawfully cast, and of course will not be adjudged so by the courts. The statement of the recount is affirmed, with costs to the defendant.

In view of the certificate made in this case by the justice who ordered the recount, it may not be out of place to call attention to the requirement of the statute with regard to such certificates. Paragraph 369, above mentioned, directs that "on the conclusion of such recount the said justice shall certify the result

thereof, which certificate shall take the place of the certificate originally issued by the canvassing board." The certificate of the canvassing board, as indicated by section 65 of the election act, is to exhibit the whole number of votes given for each person for each office at the election, and thus shows the persons elected by the plurality of votes. The certificate of a justice cannot take the place of this certificate, unless, with regard to the office for which the recount was made, it be equally full and explicit. Of course, when, as in the present case, the recount is in only part of the precincts, the justice cannot, from the recount alone, gather the information needed for such a certificate, but the other necessary information can be obtained from the original certificate of the canvassing board, which is on file in the proper public office. From the data there contained, and the result of the recount, the justice should make a certificate capable of taking the place of the original certificate, as *prima facie* evidence of title to the office in dispute.

(61 N. J. L. 135)

STATE (MULLINS et al., Prosecutors) v.
MAYOR, ETC., OF CITY OF
JERSEY CITY.

(Supreme Court of New Jersey. Nov. 15, 1897.)

PLACE OF TAXATION — COLLECTOR — TAX WARRANTS — LEVY.

1. Under the act of March 1, 1888 (3 Gen. St. p. 3425), and section 6 of the act of March 19, 1891 (3 Gen. St. p. 3345), a tax for personal property may be levied against a person at his residence, and another tax may be assessed against him for tangible personal property used by him in connection with his business at the place where his business is carried on, although the place of business and the residence are in the same taxing district.

2. In Jersey City the city collector is "the officer for the collection of taxes," within the meaning of the act of February 26, 1895 (3 Gen. St. p. 3451).

3. Tax warrants may be executed on goods and chattels other than those for which the tax was assessed.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of John Mullins and Patrick McArdle, against the mayor and aldermen of city of Jersey City, to review proceedings levying taxes for personal property against the prosecutors, and the warrants issued for the collection of the same. Proceedings affirmed.

Argued November term, 1897, before VAN SYCKEL, COLLINS, and DIXON, JJ.

J. B. Vredenburg, for prosecutors.

DIXON, J. The certiorari in this case brings up the taxes for personal property levied against the prosecutors severally, and the warrants issued for the collection of the same. The joining of these prosecutors in one writ is irregular, as neither has the least interest in the proceedings against the other. But, waiving that, we find no ille-

gality in the proceedings under review. The case shows that a tax on personal property was levied against each prosecutor at his residence, and another tax was assessed against him for tangible personal property used by him in connection with his business at the place where his business was carried on. This is in accordance with the act of March 1, 1888 (3 Gen. St. p. 3425), and section 6 of the act of March 19, 1891 (3 Gen. St. p. 3345). The fact that the residence and place of business are in the same taxing district does not interfere with the operation of these laws. In such a case a single assessment might not be invalid, but clearly it is not enjoined. The tax warrants were issued agreeably to the directions of the act of February 26, 1895 (3 Gen. St. p. 3451), viz. by the city comptroller to the city collector, who, in Jersey City, is "the officer for the collection of taxes." In executing such a warrant the city collector is not confined to the property for which the tax is assessed. The warrant commands him to make the tax "of the goods and chattels of the person named therein" as owing the tax, and the necessary implication is that he must obey that order. The proceedings are affirmed, with costs.

(61 N. J. L. 133)

KEY v. PAUL (two cases).

(Supreme Court of New Jersey. Nov. 22, 1897.)

JUDGE—ORDERS IN CHAMBERS—REVIEW BY COURT.

1. Orders made by a single judge at chambers, even though made under the express authority of a statute, are generally subject to review by the court itself.

2. But such orders, made in matters of discretion, not involving the substantial rights of parties, will not generally be reviewed by the court.

3. The court will not review an order made by a single judge refusing to strike out a plea as frivolous.

(Syllabus by the Court.)

Actions by John Cooper Key against Sarah E. Paul, and by Charles Key against Sarah E. Paul. On motion for an order vacating an order of a justice to strike out pleas as frivolous. Denied.

Argued November term, 1897, before VAN SYCKEL, COLLINS, and DIXON, JJ.

John J. Crandall, for the motion. David O. Watkins, opposed.

DIXON, J. During vacation the plaintiffs moved before Mr. Justice Ludlow for an order striking out the defendant's pleas as frivolous, under section 314 of the Practice Act (Gen. St. p. 2585). This motion being denied, a rule to that effect was entered, and the plaintiffs now move before the court for an order vacating the order of Mr. Justice Ludlow, and striking out the pleas as frivolous. The practice of moving in vacation before a single judge for orders incident to the progress of a cause is quite ancient, and is

supported at common law because of the convenience thus afforded to suitors, and of the relief to the court. *Rex v. Almon*, Wilms. Op. 264. In New Jersey it has, besides, the sanction of the legislature. Such orders are, however, generally subject to review by the court itself (*Peterson v. Davis*, 6 C. B. 235; *Darrington v. Price*, Id. 309; *Thompson v. Becke*, 4 Q. B. 759; *In re Stretton*, 14 Mees. & W. 806; *Pike v. Davis*, 6 Mees. & W. 546), even though the judge acts by the express authority of a statute (*Robinson v. Burbridge*, 9 C. B. 289; *Chilton v. Carrington*, 15 C. B. 730; *Owens v. Whosman*, L. R. 3 Q. B. 469). But when the motion appeals merely to the discretion of the judge, and does not involve the substantial rights of the parties, the court will usually not review his action. *Rex v. Archbishop of York*, 1 Adol. & E. 394. The application to strike out a plea as frivolous is of this discretionary character. There are certain legal rules, according to which it can be decided whether a plea is bad or not; but whether a plea is so bad as to be frivolous is a question which often cannot be brought to the test of any definite rule of law, but must be determined by the judge in each case according to his view of the degree in which the plea lacks conformity to rule. Nor is any substantial right of the plaintiff prejudiced by a refusal to strike out a plea as frivolous. He may still have the legal validity of the plea adjudged on demurrer. Our conclusion is that the motions should be denied.

(61 N. J. L. 124)

STATE (POOLE, Prosecutor) v. ENGELKE.

(Supreme Court of New Jersey. Nov. 8, 1897.)

TENANT AT SUFFERANCE—USE AND OCCUPATION—BUILDINGS BURNED.

1. A tenant for a term certain, holding over after the expiration of his term without the assent of his landlord, becomes a tenant at sufferance.

2. By force of the statute (2 Gen. St. p. 1915, § 3), a landlord may recover from a tenant at sufferance a reasonable satisfaction for the use and occupation of the premises.

3. The rent stipulated for the term expired is not the exclusive measure of the reasonable satisfaction which the landlord is to recover from such a tenant at sufferance.

4. The supplement to the act concerning landlords and tenants (2 Gen. St. p. 1923, par. 35), which relates to buildings on leased premises damaged by fire, does not apply to a tenancy at sufferance.

(Syllabus by the Court.)

Certiorari to court of common pleas, Union county; McCormick, Judge.

Certiorari by the state, on the prosecution of Henry D. Poole, against Minnie C. Engelke, to renew judgment for plaintiff. Judgment reversed.

The following facts were found by the court of common pleas:

"The respondent, Henry D. Poole, leased to the appellant, Minnie C. Engelke, the store and premises No. 95 Broad street, in Eliza-

beth. The lease expired on the 1st of April, 1896. The appellant then rented the store and premises from Poole for the month of April, and towards the end of April rented it for the month of May, 1896. The facts are that it was agreed between them that the tenant would vacate the premises on the 1st day of June, 1896. The circumstances of the letting plainly show that it was a parol lease for the month of May, 1896. On the 30th day of May, and during the period of the lease, a fire occurred in the store, by which it was rendered partially unfit for the carrying on of the business in which the defendant was then and there engaged. Her stock was badly damaged, and she was compelled to suspend. She held over on the premises until the 15th day of June, 1896, without making any new, express agreement in reference to the hiring or rental of the premises. It was possible for the tenant to have vacated and removed her goods, damaged though they were, before the 2d of June. After the fire the insurance adjusters came to the store, and estimated the loss on her stock; and after they had completed their work, for a few days during the middle of the month of June, she sold goods over the counter, to the value of ten dollars, or thereabouts. The rent agreed upon between the landlord and tenant for the letting for May was sixty dollars. This was paid during May. The appellant remained in the store until the 15th day of June, 1896, when she vacated, without paying anything more. Poole brought an action against the appellant in the district court of the city of Elizabeth for the sum of sixty dollars. Trial was had in it, and the district court rendered judgment in favor of Poole, and against the appellant, for thirty dollars and costs. From this judgment the appellant appealed to the court of common pleas. The court of common pleas, on the facts above stated, rendered judgment against the respondent, and in favor of the appellant. I hereby certify that the foregoing is a true state of the facts found by me in the above-entitled cause. Dated February 15, 1897. T. F. McCormick, Judge of Union County Common Pleas."

Argued June term, 1897, before LUDLOW, COLLINS, and DIXON, JJ.

Frank H. Dunn, for plaintiff. John F. Brown, for defendant.

DIXON, J. Upon the facts stated in the certificate of the court of common pleas, it is evident that on the expiration of the tenant's May term she became a tenant at sufferance; and, as the landlord did not assent to the continuance of her possession while it lasted, she remained a tenant at sufferance until she left the premises on June 15th. *Jackson v. Parkhurst*, 5 Johns. 128; *Den v. Adams*, 12 N. J. Law, 99; *Moore v. Moore*, 41 N. J. Law, 515; *Condon v. Barr*, 47 N. J. Law, 113. It seems that, by the common law, while such a tenant was bound to ac-

count for the profits of the land (2 Bl. Comm. 151), he was not liable to an action for rent (*Flood v. Flood*, 1 Allen, 217; *Condon v. Barr*, 47 N. J. Law, 113, 115; 1 Washb. Real Prop. 408). But, by the third section of our act concerning landlords and tenants (2 Gen. St. p. 1915), a landlord may, in such a case (*Lanning v. Howell*, 2 N. J. Law, 256; *Chambers v. Ross*, 25 N. J. Law, 293), recover from the tenant "a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by defendant." When, in an action for use and occupation, it appears that there was any parol demise or any agreement (not being by deed) whereon a certain rent was reserved, that rent becomes the exclusive measure of the "reasonable satisfaction" to be recovered. *Perrine v. Hankinson*, 11 N. J. Law, 181, 184; *Holmes v. Stockton*, 26 N. J. Law, 93. But of course this rule cannot be applied unless the demise or agreement covers the period of occupation. When the tenant's possession is outside of the demise or agreement of the parties, the rent fixed for a previous term can be only a circumstance worthy of more or less consideration in arriving at the reasonable satisfaction which the statute gives; and if, as in the present case, the premises have been materially damaged in comparison with the condition for which the rent was stipulated, that rent is of slight value as a criterion. Our conclusion, therefore, is that the court of common pleas should have found for the plaintiff such sum as would be a reasonable satisfaction to him for the tenant's use and occupation of the premises as they were between the 1st and 15th days of June.

In the brief of counsel this case is discussed as if it were affected by the supplement to the act concerning landlords and tenants, approved March 5, 1874 (2 Gen. St. p. 1923). But this statute is applicable only when the premises are leased. Neither in letter nor in spirit does it extend to a tenancy which is not in any respect subject to the agreement of the parties. Whether, if the landlord had assented to the tenant's holding over, so as to convert her into a tenant from month to month at the previous rent, the rent would, by force of the statute, have ceased upon the landlord's failure to repair as speedily as possible the damage done by fire in the prior term, we need not now decide. The judgment below is reversed, and the cause remitted to the common pleas for a new trial.

(61 N. J. L. 57)

WELCH v. HUBSCHMITT BUILDING & WOODWORKING CO. et al.

(Supreme Court of New Jersey. Nov. 8, 1897.)

BUILDING CONTRACT — CONSTRUCTION — ARCHITECT'S CERTIFICATE — PERFORMANCE — QUESTION FOR JURY — SURETY OF CONTRACTOR — LIABILITY — DISCHARGE.

1. The parties to a building contract are legally bound by a provision that the decision of

the architect shall be final and conclusive, subject, however, to the implied condition that the decision shall be an honest one.

2. Construing the contract clause and the specification clause together in this case, the conclusiveness of the architect's certificate extends only to the plans, the style, the measurements, and the way in which the building shall be constructed. The workmanship and materials with respect to their character and quality must, under the specification clause, have the approval and acceptance of the owner and architect.

3. Whether, in the exercise of a fair and reasonable judgment, the owner and architect should approve and accept, is a question for the jury.

4. By paying a part of the second installment before it was due under the contract, the owner discharged the surety of the contractor from all obligation.

5. Under the contract set forth in the certified case, if, on account of the default of the contractor, the owner completed the contract work, he had a right of recourse to the surety for any excess of reasonable cost over the contract price.

(Syllabus by the Court.)

Case certified from circuit court, Passaic county, for advisory opinion; before Justice Dixon.

Action by George T. Welch against the Hubschmitt Building & Woodworking Company and Aaron Klevitt on a contractor's bond, in which a nonsuit was ordered, and a rule was allowed that defendant show cause why a new trial should not be granted. Case certified to the supreme court.

The following is the certificate of the trial judge:

"The above-stated cause came on to be tried on Tuesday, the 12th day of January, 1897, before his honor, Jonathan Dixon, judge of said circuit court, and a jury impaneled and sworn for that purpose. The suit was brought upon a bond, a copy of which is found hereto attached in Schedule A. The condition of said bond is that the said Hubschmitt Building and Woodworking Company shall well and truly perform all and every of the covenants and agreements mentioned in a certain building contract, according to the true intent and meaning thereof, made on the same day by said company with the plaintiff, a copy of which contract is hereto attached, and is found in Schedule B. A part of the specifications put in evidence in said trial, and pertinent to the question herein certified, read as follows: 'The entire work to be done and furnished in every part in a good, substantial, and workmanlike manner, according to the accompanying drawings and these specifications, to the full extent and meaning of the same, and the entire satisfaction, approval, and acceptance of the owner and architect.' This quotation from the specifications is repeated in Schedule C.

"Schedule A.

"Know all men by these presents that Hubschmitt's Building and Woodworking Co., a corporation incorporated under the laws of the state of New Jersey, and Aaron

Klevitt, of the city of Passaic, in the county of Passaic, and state of New Jersey, are held and firmly bound unto George T. Welch, of the city of Passaic, in the county of Passaic and state of New Jersey, in the sum of thousand dollars lawful money of the United States of America, to be paid to the said George T. Welch, or to his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made they bind themselves, their heirs, executors, and administrators, and successors, jointly and severally, firmly by these presents. Sealed with their seals, and dated the thirtieth day of April, in the year of our Lord one thousand eight hundred and ninety-five. Whereas, the above-bounden Hubschmitt Building and Woodworking Co. has entered into an agreement of even date with these presents with the said George T. Welch, to do all the carpenter work in a dwelling house, and furnish materials for same: Now, therefore, the condition of this obligation is such that, if the said Hubschmitt's Building and Woodworking Co. shall well and truly perform all and every of the covenants and agreements mentioned in said agreement according to the true intent and meaning thereof, then this obligation to be and remain in full force and virtue and effect. Hubschmitt B. & W. W. Co., Adam Hubschmitt, Treas. [L. S.] Aaron Klevitt. [L. S.]

"Signed, sealed, and delivered in the presence of A. D. Sullivan."

"Schedule B.

"Articles of agreement, made the thirtieth day of April, one thousand eight hundred and ninety-five, between George T. Welch, of the city of Passaic, county of Passaic, and state of New Jersey, of the first part, and Hubschmitt's Building and Woodworking Company, a corporation incorporated under the laws of the state of New Jersey, of the city of Passaic, county of Passaic, and state of New Jersey, of the second part, witnesseth: First. The said party of the second part does hereby for itself, its successors, covenant, promise, and agree, to and with the said party of the first part, his executors, administrators, or assigns, that it, said party of the second part, its successors, shall and will, for the consideration hereinafter mentioned, on or before the first day of September, 1895, well and sufficiently erect and finish the new building, all the carpenter work of every kind and description in the dwelling house to be erected by the said party of the first part at the corner of Passaic and Paulison avenues in the city of Passaic, agreeably to the drawings and specifications made by Herman Fritz, architect, and signed by the said parties within the time aforesaid, in a good, workmanlike, and substantial manner, under the direction of the said Herman Fritz, to be testified by a writing or certificate under the hand of the said Herman Fritz, and also shall and will find and provide such good, proper, and sufficient materials of all kinds

whatsoever as shall be proper and sufficient for the completing and finishing all the said carpenter work and other works of the said building mentioned in the carpenters' specification, for the sum of thirty-two hundred and twenty dollars. And the said party of the first part does hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said party of the second part, its successors, that he, the said party of the first part, his executors or administrators, shall and will, in consideration of the covenants and agreements being strictly performed and kept by the said party of the second part as specified, well and truly pay or cause to be paid unto the said party of the second part, its successors or assigns, the sum of thirty-two hundred and twenty dollars, lawful money of the United States of America, in manner following: First payment (\$550) to be paid when the house is framed, raised, sheathed, and rafters put up. Second payment (\$785) to be paid when the house is inclosed, verandas finished, excepting outside steps, and the blinds hung. Third payment (\$400) to be paid when the house is ready for mason. Fourth payment (\$800) to be paid when the standing trim is on, doors and sash hung, stairs completed, cellar work finished, and floors laid, excepting the floors to receive wax finish. Fifth and last payment (\$685) to be paid when the house is all completed, and accepted by the owner and architect: provided, that in each of the said cases a certificate shall be obtained and signed by the said Herman Fritz. And it is hereby further agreed by and between the said parties: First. The specifications and the drawings are intended to co-operate, so that any works exhibited in the drawings and not mentioned in the specifications, or vice versa, are to be executed the same as if it were mentioned in the specifications and set forth in the drawings, to the true meaning and intentions of the said drawings and specifications, without any extra charge whatsoever. Secondly. The contractor, at its own proper costs and charges, to provide all manner of materials and labor, scaffolding, implements, molds, models, and cartage of every description for the due performance of the several erections. Third. Should the owner at any time during the progress of said building request any alterations, deviations, additions, or omissions from the said contract, he shall be at liberty to do so, and the same shall in no way affect or make void the contract, but will be added or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation. Fourth. Should the contractor, at any time during the progress of said works, refuse or neglect to supply a sufficiency of materials or workmen, the owner shall have power to provide materials and workmen, after three days' notice, in writing, being given, to finish the said works, and the expense shall be deducted

from the amount of the contract. Fifth. Should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by the said Herman Fritz, and his decision shall be final and conclusive; but, should any dispute arise respecting the true value of the extra work, or of the works omitted, the same shall be valued by two competent persons, one employed by the owner, and the other by the contractor, and those two shall have power to name an umpire, whose decision shall be binding on all parties. Sixth. The owner shall not in any manner be answerable or accountable for any loss or damage that shall or may happen to the said works, or any part or parts thereof, respectively, or for any of the materials or other things used and employed in finishing and completing the same. Seventh. No alterations or extra work shall be done without a written order from the architects, and an express agreement in writing as to the cost. In witness whereof, the said parties to these presents have hereunto set their hands and seals the day and year above written. Geo. T. Welch. [L. S.] Hubschmitt B. & W. W. Co., Adam Hubschmitt, Treas. [L. S.]

"Signed, sealed, and delivered in the presence of Herman Fritz."

"Schedule C.

"Extracts from Specifications. The following specifications apply to each individual contractor that may contract in any branch of the work: 'The specifications are intended to embrace all of the labor and materials necessary in the construction and completion of the building in all its parts, the whole to be comprised within any contract or contracts that may be made for the same. The entire work to be constructed and finished in a good, substantial, and workmanlike manner, according to the accompanying drawings and these specifications, to the full intent and meaning of the same, and to the entire approval and acceptance of the architect. Each contractor is to provide all materials and labor necessary for the completion and substantial execution of everything described. Work shown in part on drawings to be extended and completed, same as if it were drawn out in full.'

"On the trial a nonsuit was ordered, and afterwards a rule was allowed that the defendant show cause why a new trial should not be granted. For the proper determination of that rule a legal response to the questions hereinafter stated is necessary. The questions of law arising in the foregoing cause, and reserved for review, are the following, viz.: (1) Whether the decisions of the architect made during the progress of the work, that any portions of the workmanship or materials were not according to the drawings and specifications, are final and conclusive. (2) Whether, by paying part of the second installment before it was due,

the owner discharged the surety from all obligation, or only from obligation with respect to the work which the contract required to be finished in order to render the installment due. (3) Whether, if the contractor refused or neglected to supply, etc., and on that account the owner, after three days' notice, prevented the contractor from proceeding with the work, and himself completed the building, he can recover from the surety the reasonable expense of completion above the unpaid part of the contract price, in view of the express provision that he may deduct the expense from the price. (4) Whether, this being a suit on the bond, the contractor can legally claim a judgment against the owner for damages occasioned by the owner's wrongfully preventing the contractor from completing the work. Being in doubt as to the foregoing questions of law, the circuit court has caused the foregoing case to be made and stated, and does hereby certify the same to be argued before the bar of the supreme court for its advisory opinion on said questions. January 25th, 1897."

Argued February term, 1897, before the CHIEF JUSTICE, and DEPUE, VAN SYCKEL, and LIPPINCOTT, JJ.

Wm. W. Welch and Francis Scott, for plaintiff. John B. Humphreys and George P. Rust, for defendants.

VAN SYCKEL, J. This is a case certified by Mr. Justice Dixon under section 247 of the Practice Act (Revision, p. 887). The questions certified, and all the facts which are before this court relating to said case, are contained in the certificate hereto annexed.

The first question submitted to this court is whether the decisions of the architect, made during the progress of the work, that any portions of the workmanship or materials were not according to the drawings and specifications, are final and conclusive. The fifth clause of the contract reads as follows: "Should any dispute arise respecting the construction or meaning of the drawings or specifications, the same shall be decided by the said architect, and his decision shall be final and conclusive." Part only of the specifications are contained in the certificate before us, and in that part is the following language: "The entire work to be done and finished in every part in a good, substantial, workmanlike manner, according to the accompanying drawings and these specifications, to the full extent and meaning of the same, and the entire satisfaction, approval, and acceptance of the owner and architect." In *Chism v. Schipper*, 51 N. J. Law, 1, 16 Atl. 316, it was conceded that parties to a building contract are legally bound by a provision that the decision of the architect shall be final and conclusive on questions whether work done in the course of the erection of

the building is within the specifications or not, subject, however, to the implied condition that the decision shall be an honest one. The case, as certified, does not advise us whether the architect's certificate relates to matters within the contract clause, or to those within the specification clause, above recited. These clauses must be construed together, proper effect being given to each clause. The contract clause applies, by its terms, to disputes respecting the true construction and meaning of the drawings and specifications. It limits the finality of the architect's certificate to the construction of the drawings and specifications. The utmost effect that can be given to his certificate under this language is that it shall be conclusive as to the plans, the style, the measurements, and the way in which the building shall be constructed. But the workmanship and materials, with respect to the character and quality, must, according to the specification clause, have the approval and acceptance of the owner and the architect. The defendant cannot be concluded as to these matters by a certificate of the architect. Whether, in the exercise of a fair and reasonable judgment, the owner and architect should approve and accept the work and materials, is a question which the defendant has a right to submit to a jury. In answer, therefore, to the first question, the circuit court is advised that, if the certificate of the architect relates to matters within the contract clause as above interpreted, it is final and conclusive; otherwise it is not final.

The second question to be answered is "whether, by paying part of the second installment before it was due, the owner discharged the surety from all obligation, or only from obligation with respect to the work which the contract required to be finished in order to render the installment due." It is well-settled law that a surety, on paying a debt, is entitled to stand in the place of the creditor, and be subrogated to his rights; and he is entitled to the benefit of the securities received by the creditor from the principal debtor. *King v. Baldwin*, 2 Am. Lead. Cas. 4; *De Col. Guar. & Sur.* 36, 438, 439, and cases cited. In *Calvert v. Dock Co.*, 2 Keen, 638, the court, after stating the rule to be that, if the surety pays the debt, he is entitled to all the securities possessed by the creditor, says the question always is whether what has been done lessens that security. The second payment, as appears by the contract, was to be \$785, to be paid when the house was inclosed, verandas finished excepting outside steps, and the blinds hung. So far as appears in the certificate, the work to be done before the second payment was earned never was done by the contractor. The owner held in his hands a sum representing the value of that work so far as it had been completed by the contractor, which sum was, in effect, a security in

the hands of the owner that the contract work could be completed for the price agreed upon. The owner could have held and applied it to paying for the completion of the building. The payment of it to the contractor when he had no legal claim to it under his contract operated to the direct prejudice of the surety. It diminished the security which the owner had, and which he should have availed himself of, as in the case of a surety, and thereby the surety was discharged from all obligation. Any material alteration in the terms of the contract will release the surety, without regard to the extent of the injury to the surety. He has a right to stand upon the very terms of the contract. *Warden v. Ryan*, 37 Mo. App. 466; *Judah v. Zimmerman*, 22 Ind. 388; *Mayhew v. Boyd*, 5 Md. 102; *Johnston v. May*, 76 Ind. 293; *Brandt, Sur.* § 397. A surety on a building contract, where the principal is to be paid by installments, is discharged if the principal is paid faster than the contract provides. *Navigation Co. v. Rolt*, 95 E. C. L. 550. *Calvert v. Dock Co.*, 2 Keen, 638. And a discharge will be created by a departure from the terms of the contract respecting payments, though no injury is shown. *Simonson v. Grant*, 36 Minn. 439, 31 N. W. 861; *Ryan v. Morton*, 65 Tex. 258. In this state it is held that a valid agreement between the holder of the note and the maker to extend the time of payment will discharge the surety who is not a party to such agreement, and this rule in no wise depends upon the extent to which the surety may be prejudiced. *Nightingale v. Meginnis*, 34 N. J. Law, 461.

The third question submitted is "whether, if the contractor refused or neglected to supply," etc., "and on that account the owner, after three days' notice, prevented the contractor from proceeding with the work, and himself completed the building, he can recover from the surety the reasonable expense of completion above the unpaid part of the contract price, in view of the express provision that he may deduct the expense from the price." The provision to which reference is made in this question was manifestly inserted to permit the owner, in case he could complete the building for a sum equal to or less than the contract price, to deduct the cost from the contract price. It was not intended to deprive the owner of the right of recourse to the surety for any excess of reasonable cost over the contract price.

The remaining question certified is "whether, this being a suit on the bond, the contractor can legally claim a judgment against the owner for damages occasioned by the owner's wrongfully preventing the contractor from completing the work." The right of the defendant contractor to set up such a claim in the same suit is given by the act of 1896 (page 185) in cases where that act applies, provided a notice of the particulars of such claim be annexed to the plea, and filed therewith. The pleadings are not con-

tained in the certificate, and, as it does not appear that the required notice was filed by the defendant, this question must be answered in the negative. The Passaic circuit court should be advised in accordance with the views hereinbefore expressed.

(60 N. J. L. 335)

NEW YORK, L. E. & W. R. CO. v. NEW JERSEY ELECTRIC RY. CO.

(Supreme Court of New Jersey. Nov. 3, 1897.)

INJURIES TO PERSONAL PROPERTY—ACTION—BAILMENT—NEGLIGENCE—LIABILITY OF BAILOR.

1. One who has a fixed reversionary interest in personal property has the right to sue one who is not in possession thereof for such an injury by him thereto as will depreciate its value when it comes to his hands.

2. A bailor when he makes a bailment for hire *locatio rei* parts with the possession to the chattels to the bailee; but, if any permanent injury be done to a chattel by a third party during the continuance of the bailment, he may maintain an action against such third party, whether an action might or might not be maintained against such party by the bailee for trover, trespass, or replevin to control the immediate possession.

3. A bailor need not look alone to his bailee for a wrong by a third party in connection with the bailee done to the chattel which is the subject of the bailment for hire. If the bailee assumes to pledge or sell the bailed goods as his own, such an act amounts to a conversion, and the bailor may at once bring his action against the third party in whose possession the property is found. While a mere misuse may not terminate the bailment, yet when, by the negligence of the bailee, either alone or in conjunction with the negligence of a third party, the chattel bailed is no longer fit and suitable for, and cannot be devoted to, the use for which it was hired, the bailment is at an end, and bailor can maintain his action for the injury done to it.

4. The servants of the bailee in a bailment for hire are not the servants of the bailor, and he is not responsible to a third party for the negligence of the servants of the bailee in respect to the bailment. The bailee does not stand in the place of the bailor, nor represent him in such relation as to render the bailor liable for the negligent acts of the bailee or his servants or agents; and while, in an action by the bailee for injuries against a third party, occasioned by his negligence, the contributory negligence of the bailee or his servants or agents will constitute a defense to the action, yet in an action by the bailor, who is the owner, against a third party, for injury to the bailment, the negligence of the bailee or his servants or agents is not imputable to such bailor, and will not prevent a recovery.

5. A bailment for hire for use distinguished from a bailment for the carriage of goods by a common carrier.

(Syllabus by the Court.)

Action by the New York, Lake Erie & Western Railroad Company, by its receiver, against the New Jersey Electric Railway Company, in which there was a special verdict directed by the court. Heard on rule to show cause why a judgment should not be entered in favor of plaintiff on the verdict. Judgment for plaintiff.

Argued November term, 1896, before BEASLEY, C. J., and VAN SYCKEL, GARRISON, and LIPPINCOTT, JJ.

Mr. Cortlandt and R. Wayne Parker, for plaintiff. William B. Gourley, for defendant.

LIPPINCOTT, J. In this case the action is brought by the New York, Lake Erie & Western Railroad Company, by its receiver, against the defendant, to recover damages sustained by the locomotive engine and cars of the plaintiff, in a collision between the locomotive engine and an electric car of the defendant company, at a crossing, over a public highway, at Singac, in Passaic county, on September 2, 1895. The locomotive and some of the cars of the train belonged to the plaintiff company, and by it had been hired by the day, and from day to day for use, to the New York & Greenwood Lake Railway Company, which latter company was, with its own engineer, fireman, and employes, running the same over and upon its own roadbed and rails, at such highway crossing, at the time and place of collision. The defendant was a street electric railway company, running along and upon the Little Falls road, which is a public highway from Paterson to Passaic and Rutherford. The tracks of the New York & Greenwood Lake Railway cross this highway at Singac. At the same point, the electric car tracks of the defendant company cross the tracks of the plaintiff railroad company; and the collision between the electric car and the locomotive, while both were in the act of making this crossing, caused the damage to the locomotive and cars of the plaintiff. The cause was tried at the Passaic circuit, together with the case of the New York & Greenwood Lake Railway Company against the defendant, for damage to the tracks of the railroad, and to other cars owned by it, before the same jury, and the evidence is the same as to both cases except as to damages. Both cases were argued in this court at the November term, 1896,—the former case upon a rule to show cause why the verdict, which was for the defendant in that case, should not be set aside, which rule was discharged at the February term, 1897, upon an opinion of the court rendered at that term. 37 Atl. 628. In that case, this court, in its opinion, held that there existed no error of the trial court in the admission or rejection of evidence, or in its instruction to the jury, nor was the verdict against the evidence or the weight thereof, nor contrary to the charge of the court. In the cause now in hand the trial justice directed the jury to return a special verdict. The jury were directed to find by their verdict—First, whether the collision or accident occurred by reason of the negligence of the employes of the defendant in charge of and operating the electric car of the defendant company; secondly, whether the negligence of the employes of the New York & Greenwood Lake Railway Company, the bailee of the plaintiff company of the locomotive and some of the cars of the train, contributed to the collision or accident; and,

thirdly, what amount of damages had the plaintiff suffered. The jury, by their special verdict, found negligence of the employes of the defendant company causing the accident; also that the negligence of the employes of the New York & Greenwood Lake Railway Company contributed thereto; and also that the plaintiff company had suffered damage to the amount of \$1,445. On this verdict the postea was framed, and the motion now is for judgment thereon.

The right of the plaintiff to recover against the defendant is denied on the ground, first, that, under the verdict finding that the contributory negligence of the New York & Greenwood Lake Railway Company concurred and co-operated with the negligence of the defendant in causing the injury, therefore the action should be alone against that company, and that for such injury action only can be had against the New York & Greenwood Lake Railroad Company, which was the bailee of the plaintiff of the locomotive and cars, and that it cannot be maintained against the defendant, although its negligence contributed to the injury. This contention involves the question of the right of the bailor against a third party as wrongdoer in relation to the subject-matter of a bailment for hire for use. There is no question but that, for the injury to the actual possession of the bailee, action against a third party will lie only at the suit of the bailee; and the general current of authority appears to be that the bailee can include in such suit damages for the entire injury to the subject of the bailment, but no case is found which denies the right of the bailor to sue and recover for the permanent injury to the property even before the expiration of the bailment. One who has a fixed reversionary interest in property has a right to sue one who is not in possession thereof for an injury to such property which will depreciate its value when it comes to his hands, and is entitled to recover damages to the extent of such depreciation. The owner of a reversionary interest in personal property has the same right of action for an injury thereto as in the case of real property. *Shear. & R. Neg.* § 119. The bailor, when he makes a bailment for hire, parts with the right of possession to the chattel; and it has been held that he cannot during the existence of the bailment maintain an action of trespass for its asportation, or trover for its mere conversion, or replevin to recover back its possession against any third person; but it seems to be the accepted doctrine at present that, if any permanent injury be done to the chattel, he may maintain a special action on the case against a third party for injury done by such third party to the reversionary interest, and this seems to be both by reason and authority the rule, whether an action might or might not be maintained by the bailee against such party for trover, trespass, or replevin, to control

the immediate possession. Pol. Torts, p. 432. A person who has let a chattel out to hire may, nevertheless, sue a third party for damages in respect to the permanent injury to the reversionary interest. Add. Torts, p. 410. In *Mears v. Railway Co.*, 11 C. B. (N. S.) 850, the case was that a barge was let to hire. The defendant, who was not the bailee, was engaged in raising a boiler out of the barge, when the boiler was negligently allowed to fall, destroying the barge. The court held that the plaintiff, who was the owner of the barge, had the right to sue a third party whose negligence caused the injury, and laid down the rule that, although the owner could not bring an action when there had been no permanent injury to the chattel, where there is such permanent injury the owner might maintain an action against the person whose wrongful act had caused the injury. The general rule appears to be that the owner of a chattel which is out on hire for an unexpired term may maintain an action against a third person for a permanent injury thereto. This seems to be the rule whether the bailment has expired or not. *Howard v. Farr*, 18 N. H. 457; *White v. Griffin*, 49 N. C. 139; *Railroad Co. v. Kidd*, 7 Dana, 245; *Hawkins v. Phythian*, 8 B. Mon. 515. A bailor need not look alone to his bailee for a wrong by a third party in connection with the bailee, as respects the contract of bailment. If a bailee assumes to pledge or sell the bailed goods as his own, such an act amounts to a conversion, and the bailor may immediately bring an action of trover or replevin against the third party in whose possession the property is found. Story, Bailm. (9th Ed.) § 413. In *Enos v. Cole*, 53 Wis. 235, 10 N. W. 377, the right of the action of trespass against a third party to whom the bailee had improperly sold the goods bailed was distinctly recognized. Whether the bailment in the case in hand had expired or not, it seems, can make very little difference. This bailment or hire of this locomotive and cars was presumably by the bailor at its will. A bailment may be determined by the mere efflux of time, as where the chattel is bailed for a stated period. Here the bailment was not for any stated period. It may be determined by the accomplishment of the object for which the thing was bailed, as where the chattel is hired for a particular purpose, or is pledged until the loan is repaid. It may be dissolved by mutual agreement at any time. And either party, as has been said, where the bailment is not for any particular time, may terminate it at will. It may be determined by the total or partial destruction of the subject-matter of the bailment, as where a chattel is lost or is destroyed. It may be also terminated where the bailee disposes of it contrary to the terms of the bailment. In this case the bailment was terminated at the time of the injury, for then it was no longer, under the evidence, fit and suitable for the use which

the contract of bailment contemplated. While a mere misuse might not terminate the bailment, yet, when, by the negligence of the bailee either alone or in conjunction with the negligence of a third party, it is no longer fit and suitable for the uses for which it was hired, both by reason and all the authorities, the contract of bailment is at an end. It would seem to be clear that, under general principles, a bailor can maintain an action for injury to the property bailed, at the hands of a third party, who is a wrongdoer in relation thereto, especially wherever the injury is of a permanent character. Therefore the contention of the defendant that the right of action was alone against the bailee must fall.

But the right to recover is secondly denied upon the ground that the contributory negligence of the New York & Greenwood Lake Railroad Company, the bailee of the locomotive and cars, is a bar to recovery by the plaintiff company, which was the bailor of the same, and that the contributory negligence of the bailee is imputable to the plaintiff as bailor, and therefore prevents a recovery. It is contended that, in law, the bailee could have included the injuries to the locomotive and cars in his action against the defendant, and that its contributory negligence would have been a complete defense to the action, and, this being so, that this same contributory negligence can be successfully set up against the plaintiff, who is the owner of the property; or, in other words, that the possession by the bailee involves the bailor in all the consequences of the default of the bailee, however much the act of wrongdoing by the third party might be the joint cause of injury to the chattels in the possession of the bailee. The reason of this contention, as it appears to the court, is not apparent or well founded. It need only be said that a bailment is a contract which is interpreted by the same rules as other contracts. The bailor and bailee are just as independent of each other in regard to the subject-matter as the contract by its terms permits them to be. It is the delivery of a thing in trust for some special object or purpose, upon a contract, express or implied, to conform to the object of purpose of the trust. Story, Bailm. (8th Ed.) p. 4. This is evidently true as to a bailment for hire to use *locatio rei*. If not a part of the express contract, the law impliedly engages to allow the full use and enjoyment of the chattel by the bailee, to the extent of the use and enjoyment of the object of the hiring, and for the time hired. This right of the bailee is quite independent of any control by the bailor, but there is also the right of the bailee to have the thing used with care and moderation; to have it applied to the use for which it is hired, and no other; to have it used with reasonable care for its preservation; and to have redelivery when the use to which it is to be devoted is completed or

performed, or the bailment has otherwise expired. The bailee is responsible to the bailor for injuries to the subject of the bailment by reason of the negligence of the bailee, and of his servants in the course of his employment, occasioning injury to the property. The general property remains in the bailor, and the bailee only has a special interest for the express or implied objects of the bailment. Under these general principles, now well established as governing the contract of bailment, it would be entirely too artificial to say that no right of action existed by the bailor against a third party as a wrongdoer for injury, by negligence or otherwise, to the chattel which was the subject of the bailment. It is not an answer that the bailee has his right of action for the full injury against the wrongdoer, for the bailee may never choose to seek such a remedy, nor can he be compelled to do so, nor can it be said with any greater reason that the bailor must resort alone to the bailee for redress for the injury, for it may have occurred in spite of the exercise of the full degree of care required of the bailee, as in case of theft, by the servants of the hirer, for which he is not, generally speaking, liable, unless there are some circumstances which impute to him a want of due diligence. *Vere v. Smith*, 1 Vent. 121, 2 Lev. 5; *Story, Bailm.* (8th Ed.) §§ 38, 407. The servants of the bailee are responsible to the bailor for their malfeasance, not because they are the servants of the bailee, but because they are active wrongdoers to the bailment. *Lane v. Cotton*, 12 Mod. 488; *Story, Bailm.* (8th Ed.) § 405; *Story, Ag.* §§ 309-320. The care or diligence required to be exercised depends upon the nature of the subject and it rises in proportion to the demand for it; and, when the required care is exercised, the bailee is no longer responsible to the bailor. Therefore, there is nothing on the relation of the bailor and bailee which of itself can prevent the bailor from seeking out the third party as the wrongdoer, and imposing upon him the liability for the results of his conduct to the subject of the bailment. It would seem, upon reason, that there could exist no objection to the joint liability of the wrongdoer and the bailee when the joint negligent act of both caused the injury.

But the defendant distinctly contends that the negligence of the bailee or its servants in the operation of this locomotive and train of cars by reason of this bailment, contributing to the injury, is imputable to the bailor, and prevents a recovery on the part of the bailor against the defendant as a third party, who is a joint wrongdoer with the bailee. This joint negligence by the special verdict is found to have been the cause of the collision and injury, and therefore the case must be considered with the fact of the contributing negligence of the bailee established. In a contract of bailment of things

for hire, the bailor is not responsible to a third party for injuries occurring to such third party by reason of the negligent use of the thing hired by the bailee, nor for the negligence of the servants of the bailee in respect thereto. The bailee does not stand in the place of the bailor, nor represent him in such relation as to render the bailor liable for such injuries; nor are the servants of the bailee the servants of the bailor, or in any sense acting for him; and the contract of bailment is in so far entirely an independent one, and the liabilities of the bailor and bailee to third parties are essentially independent of each other. In this case it cannot be contended that the plaintiff company would have been responsible to the defendant if the negligent use of the locomotive by the servants of the New York & Greenwood Lake Railroad had occasioned an injury to the defendant's car at this crossing. This negligence, however much it might be the occasion of the injury to the defendant, could not have rendered the plaintiff company responsible, so long as in this case no act or conduct of the plaintiff company was in question. It did not in fact advise, encourage, or permit in the hands of its bailee the negligent use of this locomotive. The contributory negligence of a third person can only be set up in defense when it is legally imputed to the plaintiff, and its existence must depend upon some connection or relation between the plaintiff and the third person from which such legal responsibility may arise. It is a general rule that it is no justification of the misconduct of the defendant that some third person, a stranger, was also in the wrong. The negligence of the servant in the course of his master's employment is imputable to the master, and so as between agent and principal. But the negligence of one passenger in a car standing alone, inflicting injury upon another passenger, is not imputable to the railroad company, a common carrier of passengers. There must exist concurring negligence in some respect in the railroad company. *Sheridan v. Railroad Co.*, 36 N. Y. 39; *Cannon v. Railroad Co.*, 6 L. R. Ir. 199. If the defendant be negligent, the fact that the negligence of others co-operated or concurred with it in effecting the wrong does not affect the question or measure of liability. *Mott v. Railroad Co.*, 8 Bosw. 345; *Atkinson v. Transportation Co.*, 60 Wis. 141, 18 N. W. 764.

It may be deemed to be settled in this state that the employees of servants of a bailee are not the servants of the bailor in any such relation as to make the bailor liable to third parties for their negligence or misconduct in relation to the thing bailed; as where A. hired a coach and horses with a driver from B., to take his family on a particular journey, and in the course of the journey, in crossing the track of a railroad, the coach was struck by a passing train, and A. was injured. In an action by A. against the rail-

road company for damages, it was held that the relation of master and servant did not exist between the plaintiff and the driver, and that the negligence of the driver, co-operating with that of the persons in charge of the train which caused the accident, was not imputable to the plaintiff as contributory negligence to bar his action. It was further held that for whatever purpose the negligence was invoked, whether as an action for injury done by the driver, or as contributory negligence to bar the action by the passenger against the third person for an injury sustained, the negligence to be imputed to the passenger must be such as arises in some manner from his own conduct. The negligence of the driver without some co-operating negligence cannot be imputed to the passenger in virtue of the simple act of hiring. *Railroad Co. v. Steinbrenner*, 47 N. J. Law, 161; *Bennett v. Transportation Co.*, 36 N. J. Law, 225. There is no perceptible distinction between the case in hand and the cases last cited. Both rest upon a contract of bailment for the hire of a thing for use, and, although a contract mutually beneficial to each of the parties, they are so independent of each other that the negligence of one cannot be imputable to the other. It is only when the contributory negligence is of such a character, and the third person is so connected with the plaintiff, that an action might be maintained against the plaintiff for damages for the consequences of such negligence, and when the plaintiff brings the action, that the negligence is, in contemplation of law, the plaintiff's negligence, and it is justly imputed to him. This relation does not exist between the bailor and bailee under the ordinary contract of bailment. The case of *Hawkins v. Pythian*, 8 B. Mon. 515, is a case very similar in the application of the principles of law to the one in hand. In this case the plaintiff hired a slave to A., who allowed him to go with B. While B. had the slave, he put him on a restive horse, which threw the slave, and killed him. The plaintiff sued A. and B. together. The verdict was allowed to stand against B., although it was set aside as to A., by reason of an erroneous instruction of the court to the jury. The cases cited by the defendant in his argument are mainly based on the doctrine laid down in *Thorogood v. Bryan*, 8 C. B. 114, in which the deceased intestate, while alighting from the omnibus in which he was a passenger, was knocked down by the defendant's omnibus, and received injuries from which death ensued. The court held in that case that, if the want of care on the part of the driver of the omnibus in which the deceased was riding in not driving up to the curb to put the deceased down had been conducive to the injury, the plaintiff could not recover, although the defendant's driver had been guilty of negligence. It is sufficient to say that this doctrine has been thoroughly disapproved in this state in the case of *Railroad Co. v. Stein-*

brenner, 47 N. J. Law, 161. Before the *Steinbrenner* Case had been decided, Chief Justice Beasley, in the case of *Bennett v. Transportation Co.*, 36 N. J. Law, 225, had repudiated the doctrine. It has now been overruled in England in the *Bernina Case*, 12 Prob. Div. 58. The supreme court of the United States, in the case of *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, also repudiates it. There is a line of cases in which the peculiar relation of the shipper of goods, and the common carrier thereof, exists, *locatio operis mercium vehendarum*, where the common carrier only can be held responsible for an injury to the goods. In this relation the common carrier, and not a third party as a wrongdoer to the goods, is alone responsible for all injuries, save those caused by the act of God or the public enemy, or for the natural wear and tear; and for injuries arising from these latter causes no one can be made liable. The shipper, according to such authorities, cannot recover against a third party for negligence in the care of such goods or injuries to them. The distinction between the relation which exists in law between the shipper and the common carrier of goods and the bailment for hire of a chattel for use is so obvious as not to need discussion. The carriage of goods is by all legal writers classed as a different contract of bailment, having peculiarities and governed by principles characteristic of the relation quite apart from the contract of bailment of chattels for hire. The cases cited by the defendant are *Vanderplank v. Miller*, 1 Moody & M. 169; *Simpson v. Hand*, 6 Whart. 311; *Transfer Co. v. Kelly*, 36 Ohio St. 86; and *Insurance Co. v. Austin*, 69 N. Y. 470. These cases are all cases which arise under the contract of bailment for the carriage of goods and chattels, not by a special, but by a common, carrier. He is treated as an insurer against all but the excepted perils (*Jones, Bailm.* 101), and the shipper cannot look beyond him for liability; and this rule is said to be grounded upon public policy.

I cannot perceive that whether, in respect to this action, the duty of the defendant and the bailee were joint or separate can make any difference. If the same duty of care was due and owing to the plaintiff, then a common neglect of that duty would render them both liable as joint tortfeasors. If the duty to plaintiff was a separate one, which was neglected to be performed by each of them, although the duties were diverse and disconnected, and the negligence of each was without concert, if such neglects concurred and united in causing the injury, the tort still is equally joint, and the tortfeasors are subject to a like liability. *Matthews v. Railroad Co.*, 56 N. J. Law, 34, 27 Atl. 919. The bailee was bound to use reasonable care and diligence in the preservation of the property from injury. The defendant, in the operation of the electric car, was bound to exercise reasonable care in avoiding injury to the property of which the plaintiff was the own-

er. It would seem that the intervention of the negligence of the bailee could not shield the defendant from injury caused by its own negligence. Both might have been selected as joint tort feorsors, or the action could be maintained against either. The conclusion reached is that the plaintiff had the right to sue either or both these companies for the injuries arising from their negligence to the locomotive and cars of the plaintiff, and it is not a defense to the action that the accident was contributed to by the negligence of the other. Each is liable upon its own negligence, and the negligence of the bailee is not imputable to the plaintiff as a shield to the defendant against recovery. Judgment must be entered on *postea* for the damages found by the jury.

(61 N. J. L. 478)

STATE (FOLEY, Prosecutor) v. MAYOR,
ETC., OF CITY OF HOBOKEN.

(Supreme Court of New Jersey. Dec. 1, 1897.)

CONSTITUTIONAL LAW — CONSTRUCTION — STATUTES
— CLASSIFICATION OF CITIES.

1. "An act to enable cities of the second class of this state to repave streets and to issue bonds in payment thereof" (P. L. 1896, p. 94) is unconstitutional, for the reason that the localities in which it operates are specified by means of population not classified with reference to it.

2. The meaning of the constitutional interdict, and its application to legislation, are judicial questions.

3. The legislature may, without infringing upon this interdict, subdivide cities for the purposes of legislation, either by creating the subdivision in the same law that declares the legislative will with respect to it, or by referring for that purpose to a general legislative classification previously made. Whether, in either case, the legislation presents a subject for judicial control, depends upon whether the classification be substantial or illusive. "Substantial," in this sense, means that the limitation is incidentally consequent upon the character of the legislative provision; "illusive," that the selection is extraneous from it. Such illusiveness results equally when a classification is created with "a view to escaping the constitutional restriction," and when one is adopted that has a like result.

4. Legislation for municipalities may deal with the municipal apparatus as such, or it may affect the citizen in other respects.

Where the governmental apparatus alone is the subject of legislation, population ordinarily so fully connotes all the essential conditions that the general subject is, in the absence of palpable evasion, a question for legislative judgment. But, where the legislation affects the citizen or taxpayer in other respects, classification by mere population is substantial or illusive according to the criterion above indicated, and hence presents a question for judicial examination, and, if necessary, for judicial control.

Quære: Whether the inequality imposed by this act under color of classification brings it within the fourteenth amendment of the federal constitution.

(Syllabus by the Court.)

Certiorari by the state, on the prosecution of Michael Foley, against the mayor and common council of the city of Hoboken, to review a resolution of said city to repave streets, and to issue bonds in payment there-

of, under the authority of P. L. 1896, p. 94. Resolution set aside.

Argued November term, 1897, before GARRISON and LIPPINCOTT, JJ.

W. D. Edwards, for prosecutor. J. F. Minturn, for defendant.

GARRISON, J. Under the title, "An act to enable cities of the second class of this state to repave streets and to issue bonds in payment thereof" (P. L. 1896, p. 94), the legislature enacted that in such cities the cost of repaving streets, when ordered by the governing body thereof, might be met by the issue and sale of bonds, the principal and interest of which should be paid by general taxation, through the instrumentality of a sinking fund.

Inasmuch as this legislation does not lay down a rule for all cities, the judicial inquiry is whether it rests upon such a subdivision of them as to be, in a constitutional sense, a general law. If, for the formula "cities of the second class," there be substituted that which is its real and only meaning, viz. "cities having a population of not less than twelve thousand nor more than one hundred thousand" (1 Gen. St. p. 458), and the question be then stated in the terms that have been adopted by the courts of this state, the inquiry presented is whether there is anything in the fabric, character, situation, or circumstances of the cities affected by this act, not shared by cities of other classes, that renders the rule suitable to the class selected, and to it alone. To state the question is, in effect, to answer that part of it that rests in matter of fact; for the only distinguishing feature of the class of cities selected is that they have more population than some of the cities of this state, and less than others. So that the legal inquiry is whether the mere fact of this intermediate position in point of population is consistent with the selection of the cities so situated for the exclusive imposition of the proposed powers.

Before entering upon this inquiry a preliminary contention is raised, viz. whether the subject be at all one for judicial interference, in view of the fact that the statute in question is based upon a general act classifying the cities of this state for the purposes of legislation.

Whatever doubts may have been entertained or expressed upon this point are, in my judgment, entirely set at rest by two recent decisions in the court of errors and appeals. I refer to *Mortland v. Christian*, 52 N. J. Law, 538, 20 Atl. 673, and *Wanser v. Hoos*, 38 Atl. 449.

Placing these two cases side by side, and reading each decision in the light of the other, the state of the law upon this subject is:

That the meaning of the constitutional interdict, and its application to specified legislation, are judicial questions.

That the legislature may, without infringing upon this interdict, subdivide cities for the

purposes of legislation, either by creating the subdivision in the same law that declares the legislative will with respect to it, or by referring for this purpose to a general legislative classification already ordained.

Whether in either case the legislation presents a subject for judicial control depends upon whether the classification be substantial or illusive,—“substantial,” in this sense, meaning that the limitation is incidentally consequent upon the character of the legislation; “illusive,” that the selection is extraneous from it.

Such illusiveness results equally when a classification is created with a view of escaping the constitutional restriction, and when one is adopted with a like result.

Legislation for municipalities may deal with the municipal apparatus as such, or it may affect the citizen in other respects.

Where the governmental apparatus alone is the subject of legislation, population ordinarily so fully connotes all the essential considerations that the general subject is, in the absence of palpable evasion, a question for legislative judgment. But, where the legislation affects the citizen or taxpayer in other respects, classification by mere population is substantial or illusive according to the criterion already indicated, and hence may present a question for judicial control.

All that was really decided by *Mortland v. Christian* was that the specified legislation solely concerned governmental apparatus. All that was decided by *Wanser v. Hoos* was that the proposed legislation affected the municipality and its citizens in other respects; the dissenting opinions being in the main expressive of the view that voting for local officers upon the same ticket with state and county officials was a mere change in machinery, while the majority opinion held that “it in no sense affected the machinery, powers, or structure of the city government,” but that it inaugurated a new policy, the limited operation of which could not be rested upon the basis of mere population.

Carrying these authoritative announcements of the law into the discussion immediately in hand, the pertinent inquiry is whether the act under consideration is one that affects the structure or machinery of municipal government, or whether it operates upon the inhabitants or taxpayers in other respects. About this there cannot be two views. The object the legislature had in mind was to provide for the repaving of streets, and the sole novelty introduced by the legislation is that it throws the expense thereof wholly upon the general taxpayer, to the relief of the abutting property owner, to the extent of the special benefit derived. To this situation the distinction made by Mr. Justice Depue in *Wanser v. Hoos* is entirely apposite, viz. that the result is not to alter or effect the structure or machinery of government, but to change an existing policy.

The subject is therefore clearly one for judicial examination, and, if necessary, for judicial control.

If cities of the second class exhibit special fitness for the imposition of the legislative scheme in question, it must be in respect either to the provision for the repaving of streets, or in respect to the method of paying therefor. That neither of these objects can be attained by legislation based upon population, merely, appears to have been repeatedly and expressly decided. In *Dobbins v. Northampton Tp.*, 50 N. J. Law, 496, 14 Atl. 587, it was held that legislation with respect to roads and highways must rest upon some substantial difference between the class selected and the classes excluded. In *Dobbins v. Board*, 59 N. J. Law, 146, 36 Atl. 482, it was decided that an act to pave and improve streets and highways in a borough commission fell under the constitutional inhibition for the like reason. The same result is indirectly but surely indicated in every adjudication upon the difference between special and general laws. After the adoption of the amendments of 1875, when this general question came before this court, as one of first impression, in the case of *Van Riper v. Parsons*, 40 N. J. Law, 1, Chief Justice Beasley, in the elaboration of his exposition of the meaning and tests of a special law, took as his illustration of vicious lawmaking an attempt to legislate with respect to systems for laying out streets upon no other classification than that of mere population; and nothing that has been since decided has indicated that this dictum was not in accord with the judicial standard to be applied to such cases. If a yet more extreme illustration were sought, it would be furnished by the present case, in which the burden of paying for the improvement of highways is shifted from the property owner benefited to the general taxpayer, for no other reason than that such highways were in cities holding an intermediate place in point of population.

That the power to issue bonds and to provide for the funding of special debts may not be conferred by legislation based upon nothing more pertinent than population seems to have been expressly decided in *Anderson v. City of Trenton*, 42 N. J. Law, 486.

In the opinion delivered in that case, Mr. Justice Dixon says: “The basis of classification is a minimum of population. The powers to be conferred by the statute concern the issue of bonds for the purpose of funding floating debts. I am unable to see any natural connection between the number of people in a city, and its right to fund its floating debt.” This case was decided upon this point alone, and has been followed and cited in a long line of causes. *Hightstown v. Glenn*, 47 N. J. Law, 106; *Randolph v. Wood*, 49 N. J. Law, 88, 7 Atl. 286; *Dobbins v. Northampton Tp.*, 50 N. J. Law, 498, 14 Atl. 587; *Clark v. Cape May*, 50 N. J. Law, 560, 14 Atl. 581; *Freeholders v. Buck*, 51 N. J. Law, 160, 16

Atl. 698; *Wanser v. Heos* (N. J. Err. & App.) 38 Atl. 449.

The question, even in concrete form, appears to be entirely settled.

The result reached is that the statute under review, by its terms, operates upon localities that are specified, but not classified, by reference to the classification act. Hence it is unconstitutional and void.

If there exist any reasons for excluding this act from the constitutional prohibition against local laws, they have not been brought to my notice, nor have I been able to discover them. It was said upon the argument, and is repeated in the brief of counsel, that cities of the first class are authorized, in certain cases, to create a fund to be applied to somewhat similar purposes, although not a single statute is cited to that effect. If counsel had in mind the legislation to be found in the General Statutes (volume 1) pp. 469, 470, 477, 479, or on page 239, P. L. 1897, it utterly fails to support his contention.

These provisions all relate to license fees, and to the creation of a fund for the temporary payment of debts contracted for street improvements, the ultimate assessment for which falls upon the abutting property owner. There is nothing in these provisions to bring the present law within the case of *Bumsted v. Govern*, 47 N. J. Law, 368, 1 Atl. 835; *Id.* 48 N. J. Law, 612, 9 Atl. 577.

Whether the inequality imposed by this act under color of classification brings it within the fourteenth amendment of the federal constitution, was not raised by any reason filed, and hence is not decided. The recent case of *Railroad Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, deals extensively with this general subject.

The resolution brought up by this certiorari is set aside.

(60 N. J. L. 323)

BELLEVILLE STONE CO. OF NEW JERSEY v. MOONEY.

(Supreme Court of New Jersey. Nov. 12, 1897.)

MASTER AND SERVANT—ACTION FOR INJURIES TO EMPLOYE—EVIDENCE—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY—PLACES FOR WORK—ASSUMPTION OF RISK—DELEGATION OF MASTER'S DUTY.

1. When the declaration, in an action by a servant against his master for personal injuries by reason of the negligence of the master, avers that the business was a dangerous one, and that the master neglected to exercise reasonable care to provide a safe system for the conduct of the work, and also neglected to exercise reasonable care to provide a safe place in which the servant could perform his work, evidence to show that the master, or the general superintendent of the business, had promised the servant to adopt a safer system, or provide a safer place, or remedy the defect or danger which existed, is admissible in proof for the servant, although no averment of such promise is contained in the declaration.

2. Such evidence is admissible on the ground that it bears upon the question whether such reasonable care as is required by law has been exercised by the master during the continuance

of the employment of the servant, in providing a safe system or a safe place, and also as tending to show what the dangers were to which the servant was exposed, and with which the service was attended, and whether they were incidental, obvious, or such as the servant might perceive by the exercise of ordinary care.

3. Such evidence is also admissible on the part of the plaintiff to show that the servant was free from contributory negligence.

4. Whether the master has exercised reasonable care to provide a safe place for the servant to do his work in, or a safe system by which to do it, or whether the injury to the servant arose from incidental or obvious dangers, or from risks arising from his own want of ordinary care, or from his contributory negligence, when the facts are in dispute, or where, from the evidence, opposite conclusions can be reasonably drawn, are questions which by the trial court must be submitted to the jury.

5. It is the duty of the master to exercise reasonable care to provide a safe place for his servant to work in, for his protection from all but the assumed and excepted dangers, and this duty remains the same where the dangers arise to the servant by reason of the adoption or use of a system by which the business of the master is performed or conducted.

6. If this general duty is intrusted by the master to his agent, superintendent, or co-servant of the servant injured, the negligence of such agent or superintendent in the performance of this duty is imputable to the master.

7. Where the system of the working of a stone quarry was one whereby no protection was afforded to the workmen engaged in another portion of the quarry, apart from the blasting, from injury from flying stones, caused by the explosions of the blasts in the rock, except the warning word "Fire!" given at the time the fuse was communicated to the explosives of the blast, and one of the rules of the master was that no employé should leave his work to seek safety from the dangers of the blast until the warning, "Fire!" was given by the foreman, whose duty it was to light the fuse, it became and was the duty of the master, in the exercise of reasonable care, to have such warning announced sufficiently long enough before the explosion for such workmen or employés, in the exercise of ordinary care, to reach a place of safety; and this duty's being delegated to such boss or foreman does not relieve the master from the liability to answer for the neglect of the boss or foreman to perform that duty. This neglect is not an incidental act of the co-service.

8. Where the master, or one representing the master, as general superintendent of the work, promises a servant engaged in such work to remedy and obviate a certain danger to which the servant has called his attention, this promise does not relieve the servant from the further assumption of the risks of danger if the risks or dangers be obvious or incidental to his employment, or risks the danger of which he in the exercise of ordinary care could discover or know, and the master will not be liable for an injury resulting from such risks; but if the employment of the servant be in such a place or under such circumstances that he cannot know of the danger, or it is not obvious to him, he can continue in the employment under the assumption that the promise will be performed for his protection, and the master will be liable for injury to him resulting from the danger arising from the default of the master in the nonperformance of the promise.

9. Where an injury arises to a workman by reason of the united negligence of a master and a fellow servant, the master is liable to respond for such injuries.

(Syllabus by the Court.)

Error to circuit court, Essex county; Child, Judge.

Action by Henry Mooney against the Belleville Stone Company of New Jersey for personal injuries caused by defendant's negligence. There was a judgment in favor of plaintiff, and defendant brings error. Affirmed.

Argued February term, 1897, before DEPUE, VAN SYCKEL, and LIPPINCOTT, JJ.

Joseph Coult and Hayes & Lambert, for plaintiff in error. Samuel Kalisch, for defendant in error.

LIPPINCOTT, J. The defendant in error, plaintiff below, was a quarryman in the employment of the Belleville Stone Company of New Jersey, plaintiff in error, defendant below, in its stone quarry at Avondale. It will be more convenient to denominate the parties as plaintiff and defendant, as in the action in the circuit court. On March 24, 1897, the plaintiff was injured by being struck by a stone from a blast of rocks in the quarry. At the time of the accident he was working at the foot of a derrick some distance from where the blasting was going on, and some distance from the blast which occasioned his injury. Another workman, by the name of Kerr, was up on the derrick, painting it, and the plaintiff's work was to remain and be at the foot of the derrick, with his hold on the rope by which Kerr was being raised and lowered as the work of painting progressed, and by which Kerr was lowered in order to alight and reach a place of safety when the explosions of the blasts took place in the quarry. The plaintiff's duty at the foot of the derrick was to hold the rope continuously, to raise and lower Kerr according to his directions, and, when a blast was about to take place, to lower him and assist him to alight from the board or chair to which the rope was attached, in order that Kerr could avoid the danger of the blasts. The plaintiff had been in the employment of the company about two years as a laborer and quarryman. He had worked in other quarries before this employment. One Andrew Barr was superintendent of the quarry, having the power to employ and discharge workmen, and the general charge and supervision of the work in the quarry. Subordinate to him was one Perkins, who had the immediate charge of the workmen, and was called the foreman or boss. The fuse communicating with the explosive was lighted by Perkins, and the warning of "Fire!" was also given by Perkins. The plaintiff, on this occasion, when the warning of "Fire!" was given, proceeded to lower Kerr from the derrick, in order that he might reach a place of safety from the danger of the exploding blasts. Kerr was at work about 60 feet up this derrick. The plaintiff proceeded to lower Kerr, and help him from the board or chair which was attached to the rope by which he was raised and lowered. Both the plaintiff and Kerr then ran away from the blast, and, as

they neared the engine house or shed which stood in the quarry, the blast exploded, and the stones and earth began flying around them. They both ran into the engine house, and just as the plaintiff had fairly entered a stone came through the roof, and struck him on the head. He received serious and permanent injuries, for which this action was brought. The blasts in the quarry were never covered, and the only precaution for the safety of the workmen was the warning of "Fire!" which was given in order that they could seek a place of safety from flying stones and earth caused by the explosion of the blast.

The first position taken by the defendant is that the trial court should have directed a nonsuit on the following grounds: First, that the plaintiff had not proved the negligence alleged in the declaration as a cause of action, and that no actionable negligence had been established against the defendant; and, second that the negligence, if any had been established, was the negligence of Perkins, the foreman, as a co-servant; and, third, that the plaintiff himself was negligent in going inside the engine house instead of staying outside, where he could see the stones and dirt; and, fourth, that the accident and injury to the plaintiff arose from risks and dangers which were incidental to his employment, open and obvious to him, and which were perceivable by him in the exercise of ordinary care.

An examination of the declaration, in answer to the first point, reveals the averments that the business of blasting in this quarry was one attended with great dangers, and that the employes were required to remain at their respective work until the order to fire the blast was given, at which time the fuse which communicated with the explosives used for the blasts would be lighted, and that between the time of the lighting of the fuse and the time of the explosion the employes were required to seek a place of safety. The further averments of the declaration, so far as the question presented is concerned, are that it was the duty of the defendant to use due and proper care that a timely warning should be given to its employes when such blasts were being made, and to use due and proper care that its employes should have reasonable time to seek a place of safety before such explosions resulting from the blasts should take place, and, again, to use due and proper care to provide and maintain a place of shelter and safety for the use of their employes while said blasting was being made and had; and that the defendant had not regarded its duties in this behalf, and had not exercised the due care required in these respects, whereby, and by reason of which negligence, the injuries complained of had accrued to the plaintiff. The averments of the declaration, in themselves, of the negligence, are manifestly sufficient. In the plaintiff's case much evidence was admitted, without objection, to show the situation and

condition of the quarry, the system according to which the work of quarrying stone was carried on, the character of the work, and the dangers connected with it, and the precautions afforded, and the degree of care exercised to protect the workmen from the danger which occasioned the injury to the plaintiff. It is not contended at all that this class of evidence was inadmissible under the averments of negligence contained in the declaration, and it is a fair question whether the plaintiff under his evidence had not established such facts as required the submission of the case to the jury. But early in the trial of the cause a question arose as to the admissibility, under the averments of the declaration, of evidence of a promise made by Barr, the general superintendent, before the accident, to give a longer time between the warning of "Fire!" and the explosion of the blast to enable the quarrymen to get out of the way of danger from the blasts. The evidence, in substance, which was admitted against objection and exception, was that the plaintiff and other workmen, a few days before the accident, made complaint to Barr that a sufficient time was not given after the warning, "Fire!" for them to escape the dangers of the blasts, and that upon such complaints to him he promised to remedy the defect or danger complained of. The defendant company contends that this evidence was not admissible under the averments of the declaration, and that it forms an element of negligence not declared upon, and that for this reason a nonsuit should have been granted.

That this evidence was admissible under the allegations of the declaration cannot be questioned. If for any purpose it was admissible the court would not exclude it. Whether it was such as created a new element of negligence may very well be questioned, but, if admissible for any legal purpose, it could not be rejected by the trial court. The duties of the defendant, as the master of the plaintiff, were set out in the declaration, and certain neglects were charged, having relation to the time given between the signal of warning, as a precaution for the safety of the plaintiff, and the explosion, which was the danger from which the workmen were to seek refuge, and during the course of and continuance of the employment of the plaintiff the conduct of the defendant, as the master of the plaintiff or those representing the master in the management and control of the workmen and in the performance of the duties of the master, has a direct relevancy to the question whether the due care required by law in behalf of the workmen was exercised. It exhibited, not only the dangerous character of the work, its lurking or secret dangers and defects, but also tended to show the system under which, and by which, the work was conducted, and bearing directly upon the establishment of the known or unknown dangers of that system, and as to the care required of the master un-

der all circumstances. As the averment of the declaration stood at the time of the admission of the evidence, it was pertinent upon the subject, to go to the jury, whether this risk of danger was fairly within the contract of hiring or not. The evidence in no respect changed the character of the contract of employment, in any of its terms or implications, nor furnished any distinctly new element of negligence upon which a recovery was sought. It tended directly to prove the dangers or the defects of the system by which the work was being operated, or the dangers and defects of the work as conducted there by the defendant, and indicated, considering it to be true, the character of care required to be exercised at that time for the safety of the workmen. It was, as it seems to me, pertinent to the issues presented, of whether the care required by the contract subsisting between the plaintiff and defendant had been or would be in the future exercised on the part of the defendant. The assertion of the counsel of the plaintiff was that it was to be used as a substantive fact bearing upon the question whether the accident was the result of negligence on the part of the vice principal of the defendant while the plaintiff was engaged in his employment, and as such a fact it seems to me that this evidence was plainly admissible. It was applicable to existent dangers, and tended to show that they were not such as the plaintiff could guard against himself, unless by the exercise of a certain character of care required of the master. The assurance of removal was given, and without making the assurance good the danger could not be removed. The care to be exercised required the promise to be made good, and without it the care required was not exercised. Upon the evidence of a promise to remedy the defect, the plaintiff continued in his employment, and without its performance the question would arise whether the care required had been exercised. The nonperformance was a fact pertinent to the question. The plaintiff is not bound to aver in his declaration any change in the risk and dangers of the work which affects the question of care required. That is a matter of evidence, as determining whether due care had been exercised or not, and as applicable to the averments of the declaration that such care has not been exercised. The duty of the master continues throughout the entire work, and the care to be exercised in the performance of that duty is often regulated and modified by facts and circumstances which occur during the progress of the work. This evidence was admissible under the averments of the declaration, if not bearing upon the question of the negligence of the master, yet for the purpose of rebutting any insistent of contributory negligence of the plaintiff. It certainly was evidence to rebut any presumption of contributory negligence on the part of the workmen raised by reason of continuing in the employment in the

presence of obvious dangers. It is admissible as bearing upon the question of what is necessary, at different stages of the service, for the master to do in order to discharge the duty of the exercise of reasonable care. *Laning v. Railroad Co.*, 49 N. Y. 521. As I understand, the plaintiff does not claim recovery on the ground of a breach of the promises by the superintendent standing in the place of his principal. It was only offered and admitted in aid of his case, and founded upon the contention of the want of due care in the respects to which it was alleged in the declaration. For this purpose it was admissible, if for no other. *Hough v. Railway Co.*, 100 U. S. 213.

No objection is or can be alleged on the part of the defendant to the admission of this evidence on the ground of surprise. When the evidence was admitted early in the trial of the case, leave was given by the learned trial justice to the plaintiff to amend if desired. The plaintiff made no motion to amend, nor expressed any desire to do so, and I do not now understand that it is desired. 1 Gen. St. p. 29, § 12; 2 Gen. St. p. 2555, §§ 136-138. The existence of this promise as a question of fact was litigated throughout the entire case. Its existence was denied on the part of the defendant by the denial of the superintendent and other evidence as to the character of the conversations out of which this alleged promise arose. There was no error by the trial court in the admission of this evidence, and no ground of nonsuit exists because of the existence of this evidence.

It is also alleged in support of the motion to nonsuit that there existed no proof in the case of the negligence of the defendant, neither in the manner of blasting, nor in the system under which it was conducted. The general rule is that the master is bound to exercise reasonable care to provide a safe place for his servant to perform his work, and to furnish and adopt such means that he may be assured reasonable safety and protection in his work, and to exercise reasonable care to keep and maintain the place and means reasonably safe. The qualifications of the rule are that the workman takes upon himself during the continuance of his employment all the risks and dangers incident to his employment which are obvious or can be perceived by him in the exercise of his senses and the use of ordinary care and circumspection. *Van Steenburgh v. Thornton*, 58 N. J. Law, 160, 33 Atl. 380; *Comben v. Stone Co.*, 59 N. J. Law, 226, 36 Atl. 473; *Steamship Co. v. Ingbergsten*, 57 N. J. Law, 400, 31 Atl. 619. Under these rules, the learned trial court left to the jury the questions of whether this accident was due to the negligence of the defendant in failing to provide a reasonably safe and proper place for the plaintiff to work, and also whether it was due to the negligence of the defendant in providing a system by which the work was done, which included dangers to

the plaintiff, which were unknown to him, and not discoverable by him in the exercise of ordinary care, but which were known to the defendant, and under its control, in the management of the work of the quarry; and also the questions whether the accident was one due to obvious risks or dangers, or risks and dangers which he could or should have perceived in the use of his senses or by ordinary care on his part. These questions must be determined now, on this motion to nonsuit, upon all the evidence in the cause. It was in evidence that one of the rules of the defendant company was that no employé should leave his work to seek safety from the explosion of a blast until the warning, "Fire!" was given, under the penalty of being discharged, and it was proved that this rule was one which was inflexibly enforced in the work in this quarry. The evidence was also that the surface of the quarry was rough and uneven, making it a matter of some difficulty to escape danger. The circumstance must be taken as proved that the plaintiff here was not one of the workmen engaged in preparing or working at the blast, nor near to it. He was at some distance from it, and it is, on this motion, fair to conclude, in a position where he could not see what was going on at the place of blasting and explosion. He could not see when the blast was ready for the lighting of the fuse, nor when it was to be or was lighted. His attention was entirely diverted from the means of any such knowledge by the character of his duties, which were to hold the rope, to keep his eyes on Kerr up in the derrick, and, according to his direction, to raise and lower him, and listen for the warning, and then lower Kerr, aid him to alight, and then both seek a place of safety. Barr was the general superintendent. Perkins was the foreman, and it was the duty of Perkins to give warning to the workmen to get out of the way of danger from the blast. No place of shelter was provided, and the workmen were obliged to go, in order to be safe, so far away from the blast that there could exist no danger of flying stones or missiles reaching so far, or that their approach could be seen and avoided. Perkins, the foreman, was vested with the general power to supervise and direct the workmen engaged in the quarry. Among his other duties, as it appears in the evidence, and one which he invariably performed, he was to see the fuse lighted and give the warning, "Fire!" No other employé or servant at work in the quarry was empowered to perform, or ever did perform, this duty. The danger was that time sufficient would not be given after the warning, "Fire!" and before the explosion, for the plaintiff to reach a place of safety. So far as this system of performing the work was concerned, the plaintiff could not know whether the care required was exercised or not. So far as anything could be, the control of this warning was not within his perception or knowl-

edge, and it was one of the concealed dangers of the work, of which he could know nothing. Under these circumstances, the rule of law held the defendant to the exercise of reasonable care that there should be a space of time reasonably long enough for the workman to reach a place of safety. This was the defendant's duty in the actual conduct of the work going on then and there in that quarry. And this was his duty under the system by which the work was being conducted, and it was a duty the neglect of which would be imputable to the defendant. *Steamship Co. v. Ingabregsten*, supra. This degree of care must be exercised there with regard to the workmen engaged on different parts of the work, and with special application to the work in which each workman was engaged. *Comben v. Stone Co.*, supra; *Van Steenburgh v. Thornton*, supra.

The facts show that before the time of this accident the plaintiff had been engaged in drilling holes in the rock at the places of the blast; that he had been taken from such work, and placed to perform the work at the foot of the derrick; and it was concededly his duty to remain there, and at all times to maintain his hold of the rope, in order to elevate and lower Kerr in his work of painting, and to lower him to escape the danger arising from the blasts. The evidence on the part of the plaintiff is very clear to my mind that the time between the warning "Fire!" and the explosion of the blast was entirely too short to give the plaintiff a reasonable opportunity to assist Kerr down and out of his chair, as he was bound to do, and as it was necessary for him to do, and seek a place of safety. On this motion it may be said that he did not nor could he reach a place where it was reasonably safe for him to remain. Upon the determination of these questions the evidence of the promise of Barr, the superintendent, to give a longer space of time, is to be considered. Besides this, it must be assumed, and the actual evidence is, that Perkins, in giving the time which he did give, was obeying the orders of Barr, the superintendent, representing the defendant. It was the duty of the defendant company, as a part of this system, if it worked by any system, or if any system was adopted there by it according to which the work was to be performed, or as a part of the actual performance of the work in the quarry, to exercise reasonable care in order to give a reasonably sufficient time in order that the workmen could seasonably escape the dangers of the blast. Perkins, in giving the signal of warning, was in the performance of the duty of the defendant. To him, through the directions of Barr, was delegated the performance of the duty of the master. In an ordinary sense, he was a mere foreman and a co-servant, but under the direction of his master he was performing that master's duty, and the neglect was imputable to the master. His act in giving this signal was quite apart from the duties of the other workmen,

and was not an incident of co-service. This signaling was a duty which neither the plaintiff nor any other workmen there in that quarry could perform, as a matter of service incident to the employment. If negligence be established on the part of the defendant, contributing to the injury, it is not ground of non-suit, or for a direction of a verdict for the defendant, or a defense, that the negligence of a fellow servant co-operated to produce the injury. The danger which existed was in the neglect to give reasonable opportunity to the plaintiff to reach a reasonably safe place. By the manner of conducting this work, or the system by which the quarry was being operated, the plaintiff was subjected to a risk not obvious or perceivable to him, or of which he could know anything by the exercise of his senses or ordinary care. His duty was at the rope at the foot of the derrick, to keep it in hand, to keep his hand upon the rope, and his eye upon the derrick, and listen for the warning signal, and to lower Kerr from the derrick. He had the right to assume that his employer had exercised due care in furnishing him with reasonable opportunity to avoid the risk from the blast. *Railroad Co. v. Branyan* (Ind. App.) 37 N. E. 190; *Steamship Co. v. Ingabregsten*, 57 N. J. Law, 400, 31 Atl. 619. The danger was not obvious, for he did not and could not observe but that reasonable time would be given. He could not know beforehand that the time would be too short, and he could not discover it. It was a matter beyond his control or observation, and not an incidental risk, because it was a danger entirely secreted from his knowledge, and beyond his knowledge and discovery, and only known by the master or one selected by the master to perform the duty of giving the warning.

Mr. Justice Dixon in *Steamship Co. v. Ingabregsten*, supra, after speaking of the rule of care required by the master, said: "Almost as unanimous are the authorities in favor of the proposition that if a master selects an agent to perform this duty for him, and the agent fails to exercise reasonable care and skill in its performance, the master is responsible for the fault." Whether in the system which was adopted to perform the work in this quarry, or in the actual conduct of it, the fault lies, would appear immaterial. As a part of these rested the duty on the master to exercise reasonable care to give a reasonably sufficient time for the plaintiff to reach a place of safety, as a part of the duty to provide a reasonably safe place for the plaintiff to work in, and to exercise reasonable care to maintain it as a reasonably safe place. If that duty was cast upon an employé, the defendant was chargeable with the employé's fault. *Steamship Co. v. Ingabregsten*, supra, and cases cited therein. For cases in which similar accidents have happened, and consequent liability, both in conduct of the work and because of the system from which accident arose, reference may be had to the cases of *Sword v. Cameron*, 1

Dun. B. & M. 493; Coal Co. v. Reid, 3 Macq. 206-200; Smith v. Baker, 1 Beven, Neg. p. 748. Neither upon the ground that no negligence had been established on the part of the defendant as the cause of the injury, nor upon the ground that the risks were such as were incidental or obvious, or such as the plaintiff should have discovered or known of in the exercise of ordinary care on his part, could a nonsuit have been directed. The trial court properly submitted these questions to the jury.

Another ground was and still is urged for nonsuit, and it is that the plaintiff was contributorily negligent; that is, that he did not at once, upon the signal being given that a blast was to be fired, abandon Kerr, and fly to a place of safety. It need only be said that it was his duty to his employer to lower Kerr to the ground. It was a part of his employment to do this upon the signal being given, and he had the right to assume that sufficient time would be given him to do it. I do not think, under the circumstances, that it could be called error of judgment in any sense. It was an act in the line of duty, and there was existing the most powerful incitement to perform it, even in the face of danger. But in this case it was not for the trial judge on this point to determine that there existed a want of ordinary care. Booth, St. Ry. Law, § 382; Railroad Co. v. Langendorf, 48 Ohio St. 316, 28 N. E. 172; Eckert v. Railroad Co., 43 N. Y. 502; Donahoe v. Railroad Co., 83 Mo. 560; Linnehan v. Sampson, 126 Mass. 506.

Another reason urged for a nonsuit is that the plaintiff was guilty of contributory negligence because he sought refuge in the engine house. The contention is that he should have stayed outside. The facts show that he was deceived in his reliance upon a reasonable time being given him to fly to a place of safety, and he was confronted with imminent peril. With much more show of reason it could be contended, if he had stayed outside, that he should have sought refuge inside, in the exercise of due care to avoid injury. I cannot perceive the reason of this contention. It is not even shown, and it cannot be presumed, that he would not have been stricken if he had stayed outside. It would appear to me, as matter of fact, he adopted the safer alternative. But, if he had adopted the more dangerous one, it would still remain for the jury, under the circumstances, to determine whether he was in the exercise of ordinary care. The conclusion reached is that the learned trial judge properly refused to order a nonsuit.

There existed some dispute of the evidence of the plaintiff, on the part of the defendant, but no different grounds appeared for a direction of a verdict for the defendant, and such direction was correctly refused.

The answers of the court to the requests to charge as to the effect of the alleged promise of the superintendent to give a longer time between the signal and the explosion, and the

charge of the court on that subject has been examined, and no error is found against the plaintiff.

The requests to charge made at the conclusion of the evidence in the cause, what the court said in answer to them, and the charge of the court, have been examined, and, so far as the assignments of error as presented in the argument and briefs of counsel are revealed, no erroneous submission by the court is discovered. The judgment of the circuit court must be affirmed, with costs.

(61 N. J. L. 1)

WHITAKER v. MELEY.

(Supreme Court of New Jersey. Nov. 26, 1897.)

MUTUAL INSURANCE COMPANY—INSOLVENCY—ASSESSMENTS.

Upon the insolvency of a mutual insurance company holding notes of its members which are assessable to pay losses on policies and expenses, etc., and after a determination by the chancellor that its assets (exclusive of such notes) are insufficient to satisfy its indebtedness for such losses, etc., an assessment may be made by the chancellor by reference to a master, in the usual course of chancery practice, upon such notes; and a maker of such notes, having notice of the proceeding to make such an assessment before a master, becomes a party to the suit to the extent that the adjudication of the court fixing the amount of his indebtedness to the company upon such notes is conclusive in an action at law, and can only be reviewed by appeal.

(Syllabus by the Court.)

Action by Thomas Whitaker, receiver of the Millville Mutual Marine & Fire Insurance Company, against George Meley. Motion to enter judgment on special finding of facts. Granted.

Argued June term, 1897, before MAGIE, C. J., and DEPUE, VAN SYCKEL, and GUMMERE, JJ.

Thomas E. French, for plaintiff. David J. Pancoast, for defendant.

MAGIE, C. J. The issue in this cause was tried before Mr. Justice Garrison without a jury, and he has sent up by the postea a special finding of facts in the nature of a special verdict, and the question before us is whether the plaintiff is entitled to enter judgment thereon. By the finding the following material facts appear: The Millville Mutual Marine & Fire Insurance Company was incorporated by an act approved March 8, 1859. P. L. 1859, p. 144. By section 2 of that act, persons insuring in the company became members thereof, but by section 14 special insurance might be taken without the insured becoming members of the company. Defendant procured certain of his property to be insured by that company by two policies,—No. 1,171 and No. 2,507,—which policies recognize him as having thereby become a member of the company. For the first of these policies he gave his promissory note to the company for \$600, to be paid in such proportions and at such time or times as the directors of the com-

pany might, agreeably to their charter, require. By the by-laws of the company the directors were empowered to assess upon such notes what was required to pay losses on policies, and a reasonable amount for expenses and uncollectible claims. For the other policy he gave a similar note for \$825. Afterwards defendant insured other property with said company by policy No. 12,901. This policy differed from the others in that (1) they were expressed to be upon the consideration of his promise to pay what should be assessed on the respective notes above described, while this policy was upon a consideration of \$60, acknowledged to have been paid; and (2) this policy did not recognize him as becoming a member of the company. But defendant, at the time this policy was issued, gave to the company his note for \$600, to be paid in the same manner as the other notes previously given. The company became insolvent, and upon a bill filed September 21, 1885, the chancellor, on September 28, 1885, enjoined it from continuing its business, and appointed the plaintiff its receiver. The term of insurance under policies Nos. 1,171 and 2,507 had expired when the bill was filed, but the company had not surrendered the premium notes given thereon. The term of insurance under policy No. 12,901 was running and unexpired when the bill was filed. By various proceedings in the court of chancery the outstanding indebtedness of the company was ascertained and determined, and it was adjudged that the assets, exclusive of premium notes, were insufficient to satisfy such indebtedness. It was referred to a master to proceed to determine what assessment should be made upon such notes to make up the deficiency and the costs of the proceeding. The master, after notice to the parties (including defendant), reported, among other things, the amount which defendant should be assessed upon his three notes, and the report was duly confirmed. It appears that the losses for which defendant has been assessed on each note are such as were incurred during the life of the respective policies. The assessments, after confirmation, were published in the manner required by the by-laws of the company, and the receiver was directed by the chancellor to proceed to collect the same. This action was brought in pursuance of such direction. It is contended that the making of assessments upon such promissory notes is a function which can be exercised only by the directors of the company, and cannot be committed by the court of chancery to a receiver or to a master. We have reached the following conclusions:

1. We think that the notes of defendant given for policies No. 1,171 and 2,507 are assessable for the losses for which they have been assessed. This was determined by the court of errors in *Doane v. Insurance Co.*, 45 N. J. Eq. 274, 17 Atl. 625.

2. Upon the same principle, these notes were assessable for the expenses of the company in-

curred during the life of the policies and unpaid.

3. That in case of insolvency of a company of this character the court of chancery may take such proceedings to enforce the collection of its assets, and therefore incidentally to determine what its assets are, as the company might take. If insolvency paralyzes the company, it is absurd to suppose that by such paralysis the creditors of the company are debarred of recourse to the obligations of the company.

4. Defendant was a party to the proceeding in the court of chancery to the extent that its adjudication upon the amount of his indebtedness to the company upon those notes will bind him, and can only be reviewed by appeal.

5. In respect to the note given on taking out policy No. 12,901, this court cannot consider whether the assessment thereon could lawfully be made. The court of chancery had jurisdiction to determine defendant's indebtedness to the insolvent company, and, if error has been committed in such determination, it must be corrected by an appeal therefrom.

The result is that plaintiff is entitled to judgment upon the special finding.

(51 N. J. L. 115)

STATE v. BROOME.

(Supreme Court of New Jersey. Nov. 8, 1897.)

PUBLIC OFFICER—SUPERVISING ARCHITECT.

An architect, employed by commissioners for the construction of a public building, to supervise the erection of the building, does not thereby become the incumbent of an office.

(Syllabus by the Court.)

Lewis H. Broome was indicted for a misdemeanor in office. Motion to quash indictment. Sustained.

Argued June term, 1897, before LUDLOW, COLLINS, and DIXON, JJ.

Mr. Winfield, Pros. of the Pleas, for the State. J. B. Vredenburg, for defendant.

DIXON, J. The defendant was indicted in the Hudson county oyer and terminer for misdemeanor in office, and, the indictment having been removed into this court, he now moves to quash it. "The state claims," to quote from the brief of the learned prosecutor of the pleas, "that the defendant was at the time the holder of an office, and that he was guilty of misconduct in that office. If the facts do not constitute this offense, then no offense was committed by him." The office which the indictment avers he held was that of "architect to supervise the erection of a new city hall in Jersey City," and the misdemeanor charged is the giving of a false certificate as to the materials used in the building. The only ground for the state's contention that this constituted a misdemeanor in office is that, by the act of April 15, 1887 (P. L. 1887, p. 196), the commissioners

for the construction of a city hall were expressly empowered "to have plans and specifications prepared" for the erection of the building, that they accordingly chose the defendant as the architect to supervise the erection, and that as such it was his official duty to give true certificates. The defendant's motion to quash is based upon the claim that he did not hold an office. We think the defendant's position lacked the essentials of an office, and was merely that of a contractor. In order to ascertain the nature of his duties, their duration and his compensation, recourse must be had, not to any law, nor to any regulation adopted by authority of law, but only to his contract with the commissioners. In such circumstances an office does not exist. *U. S. v. Germaine*, 99 U. S. 508; *Lewis v. Jersey City*, 51 N. J. Law, 240, 17 Atl. 112; *Town of Salem v. McClintock* (Ind. Sup.) 46 N. E. 39; *Moses v. U. S.* (1897) 17 Sup. Ct. 682; *Cramer v. Water Comrs of New Brunswick*, 57 N. J. Law, 478, 31 Atl. 384. The indictment should be quashed.

(61 N. J. L. 117)

**STATE ex rel. STEWART v. BOARD OF
CHOSEN FREEHOLDERS OF
HUDSON COUNTY.**

(Supreme Court of New Jersey. Nov. 8, 1897.)

**OFFICE—WHAT CONSTITUTES—WARDEN OF COUNTY
ALMSHOUSE—TENURE.**

1. The post of deputy warden of the Hudson County Alms house is not an office, but is a position, within the meaning of Veteran Act March 14, 1895 (3 Gen. St. p. 3702).

2. The position above mentioned is not one the term of which is fixed by law, except that, when held by an honorably discharged Union soldier, sailor, or marine, the statute of March 14, 1895, fixes the term as lasting during good behavior.

3. The provision of said act that the incumbents therein described shall hold their offices or positions during good behavior cannot be thwarted by the appointing power by making the appointment for a specified period.

(Syllabus by the Court.)

Application by the state, on the relation of John W. Stewart, for a writ of mandamus to the board of chosen freeholders of Hudson county, to compel defendants to restore relator to the position of deputy warden of the Hudson County Alms house. Writ granted.

Argued June term, 1897, before LUDLOW, COLLINS, and DIXON, JJ.

John A. Dennin, for relator. John Griffen, for respondent.

DIXON, J. The relator complains that, being deputy warden of the Hudson County Alms house, he was, on December 17, 1896, dismissed from that place by resolution of the board of chosen freeholders, without good cause shown, after a fair and impartial hearing, although he is an honorably discharged Union soldier, who served in the war of the Rebellion; and he prays a man-

damus directing the board to restore him. His claim depends upon the act of March 14, 1895 (3 Gen. St. p. 3702), which enacts that no honorably discharged Union soldier, sailor, or marine, having served in the war of the Rebellion, who holds a position or office under the government of this state or of any city or county in the state, whose term of office is not fixed by law, and also receives a salary from such city, county, or the state, shall be removed from such position or office, except for good cause shown, after a fair and impartial hearing; but such soldier, sailor, or marine shall hold his position or office during good behavior, and shall not be removed for political reasons.

It is admitted that the relator received a salary from the county, and the first question to be considered is whether his place was "a position or office," within the meaning of this statute. We think it was not "an office," but was "a position." "An office" is a place created, or at least recognized, by the law of the state, and to which certain permanent public duties are assigned, either by the law itself or by regulations adopted under authority of law. *Bownes v. Meehan*, 45 N. J. Law, 189; *Lewis v. Jersey City*, 51 N. J. Law, 240, 17 Atl. 112; *State v. Broome* (N. J. Sup.; Nov. Term, 1897) 38 Atl. 841. So far as we have discovered, the relator's place does not possess these characteristics. "A position," within the purview of this act, is defined to be a place the duties of which are continuous and permanent, analogous to those of an office, and which pertain to the position as such. *Lewis v. Jersey City*, ubi supra. The place of deputy warden of the alms house comes within this description. The duties of a deputy warden are indicated by the title of his position, and consist in rendering assistance to the warden in the discharge of his functions, and hence are continuous and permanent, as are those of his superior.

The next question is, was the term of his position "fixed by law"? The respondent insists that it was, on two grounds: First, the eighth section of the act of May 16, 1894 (1 Gen. St. p. 422); second, the resolution of the board passed December 5, 1895, by which the relator received his last appointment. The act cited fixes the term of "offices" only, and, for reasons just stated, we think it does not apply to the position held by the relator. We also think that the resolution mentioned goes beyond the authority of the board in its attempt to limit the relator's appointment to one year. The act of March 14, 1895, defines the tenure by which all such positions are to be held, when the incumbents are persons of the character therein described, and the term is not otherwise fixed by the laws of the state. It not only forbids the removal of such persons except for good cause shown, after a fair and impartial trial, and declares that

political reasons shall not constitute good cause; but it affirmatively ordains that they shall hold their positions during good behavior, and so prevents the appointing power from setting any other bound to the duration of the incumbency. Thus, every office or position under the government of the state, or of any county or city, when occupied by one of these favored citizens, is held either for a term fixed by the law of the state, or during the good behavior of the incumbent. This clause of the statute we regard as establishing a legislative policy which cannot be thwarted by the simple device of making appointments for a specified term. The various bodies and officers empowered to fill these places may fill them or not, as they choose, with honorably discharged Union soldiers, sailors, or marines; but, if they do so fill them, they can exact from their appointees no stipulation which will defeat the legislative design that the incumbency shall continue during good behavior. As well might they attempt to provide that the posts should become vacant when the political complexion of the appointing power should change. In our judgment, the relator's term was not fixed by law, except as the act of 1895 fixed it during good behavior. *Adams v. Haines*, 48 N. J. Law, 25, 8 Atl. 723; *Townsend v. Boughner*, 55 N. J. Law, 380, 26 Atl. 808. The case of *Horan v. Board*, 58 N. J. Law, 533, 33 Atl. 944, is cited in opposition to this view. But the decision of that case appears to have rested on the idea that the relations between Horan and the board of education depended wholly on a special contract, to which the act in question had no application, and no reference was made to the clause of the statute defining the tenure of all positions within its scope. We cannot extend it to the case in hand.

Finally, the relator's status as an honorably discharged Union soldier, who served in the war of the Rebellion, is questioned by the respondent. But on this point we deem the proof satisfactory. The formal discharge issued by the government of the United States at the time of mustering out is not essential as evidence to establish the fact of honorable discharge. A peremptory mandamus should issue, commanding the board to restore the relator to his position as deputy warden of the county almshouse.

SCHMIDT v. HEDDEN et al.

(Court of Chancery of New Jersey. Nov. 8, 1897.)

MORTGAGE FOR FUTURE ADVANCES — PRIORITY OVER SUBSEQUENT JUDGMENT—NOTICE.

1. A mortgage to secure future advances is, as against a subsequent judgment, a valid security for all advances made before actual notice of such judgment.

2. Such mortgage is a prior lien in respect to notes given after notice, in renewal of notes given before notice.

3. A verbal communication of the fact that such judgment exists is sufficient to charge the mortgagee with notice thereof.

4. About a year after the giving of a second mortgage to secure future advances, a judgment for \$11,000 was rendered against the mortgagor. Four years later the mortgagee was notified of such judgment. Ten years later the property was sold for \$100, on execution, to an assignee of the judgment. *Held*, in a suit brought about a year later to foreclose the first mortgage, that the assignee of the judgment was not precluded by laches from asserting that the judgment was entitled to priority over the lien of the second mortgage.

Action by Fred W. Schmidt against George Hedden and others to foreclose a mortgage. Heard on pleadings and proofs.

John E. Fennell, for complainant. J. O. H. Pitney and Richard B. Moriarty, for defendant National Iron Bank. Theodore Little and W. W. Cutler, for defendant Jones.

EMERY, V. C. The bill in this case is filed to foreclose a mortgage given by George Hedden and wife to the Morristown Savings Institution, on lands in Morristown, on June 15, 1871, to secure the payment of \$6,000, with interest, in one year, and which was assigned to complainant in April, 1892. There is no dispute as to the validity of this mortgage, and it is admitted that there is due upon the mortgage \$5,500, with interest from January 1, 1894, for which complainant is entitled to a decree. The dispute in the case arises between the defendants the National Iron Bank, who hold a second mortgage on the premises, given by Hedden and wife on November 23, 1876, and the defendant Jones, who claims title to the mortgaged premises, under a sale made by virtue of an execution issued on a judgment obtained by one Peter Van Ness against George Hedden, in the supreme court on October 31, 1877. Van Ness died in 1881, and this judgment was on July 22, 1887, assigned to Jones. Execution thereon was issued on February 17, 1891, under which levy was made on the premises in question, which were sold on November 23, 1891, to the defendant Jones, for \$100. The mortgage to the bank was given to secure Hedden's notes and negotiable paper then held or discounted, or thereafter to be held or discounted, by the bank, or notes indorsed by him then held or thereafter to be held by the bank. The full proviso of the mortgage is as follows: "Provided always, and it is hereby agreed by and between the parties to these presents, that the said George Hedden, his heirs, executors, or administrators, do and shall well and truly pay or cause to be paid at maturity every promissory note and every negotiable paper of every kind which the said the National Iron Bank now holds or hereafter may hold of him, said Hedden, or which they now have discounted or hereafter may discount of said Hedden, or any

promissory note or negotiable paper which said bank now holds or hereafter may hold, on which said Hedden is indorser or security, and shall at all times hereafter indemnify and save harmless said bank from all payments, costs, charges, and expenses sustained or incurred by reason or on account of any such negotiable paper, as aforesaid, without any deduction or defalcation for taxes, assessments, or any other imposition whatsoever; then and from thenceforth these presents and said obligation, etc., shall be void." The defendant Jones, by his cross bill against the bank, sets up that, at the time of receiving its mortgage, the bank held between two and three thousand dollars of notes made by Hedden, or on which he was indorser, but that all these notes and all renewals thereof were paid, and that at the time of the sale all the indebtedness of Hedden was paid, and the bank had no liability secured by the mortgage. He further alleges that he has been unable to obtain from the bank a statement of the amount which they claimed to be due under the mortgage, and that, if the bank has discounted any notes indorsed by Hedden, they were discounted with full knowledge of the existence of defendant's judgment, and that the property would be sold under it, and were not discounted upon the security of the mortgage, and that the bank has no claim under its mortgage, and it should be surrendered. The defendant bank, by its answer to the cross bill, claims that there is due to it about \$5,000 upon notes of Hedden secured by the mortgage, and denies that all indebtedness of Hedden to the bank at the time the mortgage was given has been paid, and by a further answer, put in after exceptions, states that notes of Hedden amounting to \$1,750 now held by it are some of the notes or renewals of the notes held by it at the time the mortgage was given, and intended to be secured thereby.

Mortgages to secure future advances are now, by the settled law of this state, valid securities as against subsequent incumbrances for all advances made before actual notice of the subsequent incumbrance. *Central Trust Co. v. Continental Iron Works* (Err. & App.; 1894) 51 N. J. Eq. 605, 607, 28 Atl. 595, and cases cited. This rule was not questioned at the hearing, and the dispute on the facts is as to when actual notice was received by the bank. And, on the facts proved, further questions were raised as to the character of the actual notice which the prior mortgagee must have, and whether, on the facts proved in this case, notice of the character contemplated by law was proved. The notice relied on was given in the year 1881 by John D. Bartine, Esq., the attorney of Van Ness, the plaintiff, to the president of the bank, and perhaps to the cashier also. Both the president and cashier are dead, and Mr. Bartine's evidence is as follows: "Q. After the recovery of the judgment, did you see any of the officers at the national bank in Morristown in reference to

the same, and, if so, when? A. It is nearly twenty years ago, and as to the time I am not positive. I was up there two or three times, to Morristown, in relation to this transaction, between the time that the judgment was entered and about 1881, when Mr. Van Ness died. I was there for the purpose of ascertaining what chances there were for the collection of this judgment. I did see the officers of the bank. I saw the cashier and president, and talked with one or both of them in relation to this matter, and the purpose of my visit there. Q. Was anything said by you to them about this judgment? What did take place? A. It is not possible for me now to state the conversation that occurred between myself and either one of the officers of the bank. I was there for the purpose of knowing what their claim was. Q. Can you give the substance of the conversation? A. I can't do that, but I know that in that conversation this judgment that I represented was talked about to them, but what was said I can't state; it is too long ago. I learned from them that they had a mortgage, and my recollection is that that mortgage was intended to secure the indorsements of Mr. Hedden,—those that they already had, and those that they might have in the future. That is my recollection of what they told me, one or the other of them, but which one I cannot remember. I think I saw for the first time at one of those visits the president of the bank. He was in the back room. I was there several times; as many as three times, I am sure. Q. What was the conversation in reference to the judgment on your part, or on the part of both of you? (Question read.) A. I can't answer that question in that shape, except by saying that I talked with this officer of the bank, and perhaps with both of them, but one, I am sure, in reference to their claim; and in that conversation the judgment that I represented was spoken of, but whether by me or by them, why, of course, I can't now remember. Q. by the Court: You can't fix the time of any of these conversations any more definitely than you have? A. No; but I think my recollection is that they were a short time after the judgment was procured, but I am not certain; but they were before the death of Peter Van Ness. Q. by the Court: Which was in what year? A. 1881. Q. Did you mention the names of these officers of the bank? A. I had never met the president before, but I think his name was Marsh. I was introduced to him in the back room. Q. Dead now, you understand? A. Is he? Q. Do you know whether he is or not? A. I don't know. I think I heard he was dead, and the cashier, Mr. Craig. Q. He is dead, too, isn't he? A. Yes, sir; he lived at Basking Ridge at the time. I knew him very well, and Mr. Marsh, I think it was, was president; but I am not sure about these names,—that is, the name of the president." Redirect: "Q. What was the date of the death of Mr. Van Ness? A. It was about the 1st of November, 1881. The inventory was filed in No-

ember, 1881, about the 10th, I think. I didn't sign the assignment of judgment. I don't want to be understood as being positive of anything except that I went there and had the talks."

From this evidence of Mr. Bartine, which was given very fairly and conscientiously, it seems to me that I must conclude that the proper officers of the bank, or one of them, had notice that a judgment had been obtained by Mr. Bartine's client against Hedden, their mortgagor, and that they notified Mr. Bartine of the bank's mortgage against Hedden. In view of the death of the other witnesses and Mr. Bartine's inability to give other details, the evidence should not be considered to extend further, I think, than to establish this notice to the bank in 1881 of the existence of the judgment. The question, then, is as to the sufficiency of such notice. Counsel for the bank contend that the notice should be proved to have been given in a manner as to call the attention of the bank to the rights asserted by the subsequent incumbrance, and to have put the officers of the bank on their guard against further advances. The equity now relied on by the judgment creditor by reason of merely giving the notice is said to be one of a subtle character, not generally understood, and one with which ordinary business men would not be familiar; and it is further claimed that it was especially the duty of Mr. Bartine, a lawyer, to have given notice of such intention to claim preference over subsequent advances. No cases or authorities, however, have been referred to as to the character of the notice required to be given in such cases, and I find no cases which justify me in holding that, so far as the form of the notice is concerned, any information beyond that of the existence of the subsequent incumbrance is required in order to constitute the actual notice which will charge the prior mortgage with the legal effect of making future advances with this knowledge. In *Heintze v. Bentley* (Err. & App.; 1881) 34 N. J. Eq. 562, there was a statement of the rule in this form by Mr. Justice Dixon (page 566): "The rule in such cases is that, if a first mortgagee have knowledge of the existence of a second incumbrance upon the estate, he cannot make further loans upon his mortgage to the disadvantage of the second incumbrance when it is optional with him whether to make further advances or not." The question as to the form or sufficiency of the notice was not involved in the case, or referred to in the statement of the rule. There is, however, a class of analogous cases where the question as to the character of the notice to be given has arisen. These are the cases where notice of an assignment or other interest on a debt or fund is given or claimed to be given to a debtor, or to a trustee or other person holding a fund, and are cases where, if the notice is sufficient, the person to whom it is given acts with the fund or debt subsequently at the peril of infringing the rights which are fixed by the notice. In

these cases, the rule, as stated by Lord Cairns, in *Lloyd v. Banks*, 3 Ch. App. 488, 491, is that knowledge of the nature of the incumbrance which has come upon the property must be brought to the mind of the trustee, so that a reasonable man or an ordinary man of business would act upon the information, and would regulate his conduct by it, in the execution of his trust. Or, as it was expressed in a later case following the above (*Society v. Rayner*, 14 Ch. Div. 406, 412): "What is said should be calculated to * * * give an intelligent apprehension of the fact that there had been that kind of notice given to the trustee which they were bound to take as part of the materials in their possession to regulate their course of procedure in dealing with the trust fund." *Bramwell, L. J.*, says (page 415): "If this notice [of an assignment in a trust fund] was communicated in such a business-like way that the trustees were bound to remember it, no doubt it would be effectual;" and (page 418) that the notice should be such as would lead prudent people to make it part of their knowledge, as a thing by which they were to govern their conduct in the future. These are cases where the notice relied on, if effectual, operated to affect the right of the trustee thereafter to deal with the property as to which notice was given or information was received, so as to impair the rights which, as to the trustee, arose from the fact of giving notice. They seem to me to be strictly analogous to the present case, and the rule as stated seems to be founded on reasonable grounds, and to be applicable here. Notice of the fact of the existence of the subsequent incumbrance called to the attention of the prior mortgagee by the subsequent incumbrancer, in such a manner that the prior mortgagee, as a prudent and reasonable man of business, was bound to remember that such subsequent incumbrance on the premises had been given, and to regulate his conduct accordingly, seems to me to be all that can be required in such cases in order that the parties giving and receiving the notice may thereafter have the rights and duties which arise from notice; and such notice I find to have been given in this case.

In cases of this character the rights and duties arise out of the fact of notice of the subsequent incumbrance, and are such rights and duties as the rules of equity impose by reason of this fact. They do not arise from the knowledge or claims of the parties interested as to what these rights and duties are, and cannot, at least in ordinary cases, be qualified or impaired by such knowledge or claims of the parties of what the rights and duties are which equity imposes by reason of notice of the fact of the subsequent incumbrance. Cases might perhaps arise in which the subsequent incumbrancer might, by the manner of notice or of its effect, estop himself, in equity, from an assertion of a different right; but the evidence in this case, so far as respects the manner of notice, discloses nothing from

which it could be inferred that Mr. Bartine waived any of his client's rights arising from the notice of the judgment, or said anything to induce the bank to increase its advances or discounts to Hedden on the belief that these subsequent advances would be prior to the judgment. The bank, at the time of receiving the mortgage, held notes of Hedden to the amount of about \$8,000, and this amount does not seem to have been increased after the notice of the judgment, but, on the contrary, was diminished, so that the notes now claimed to be secured amount to about \$5,000. The sole question on this branch of the case is whether notes discounted subsequently to the notice of the judgment in 1881, and which were not renewals of the notes previously discounted, are, under this mortgage to secure future advances and discounts, to be held to be prior to the judgment. Such priority, if it is to be given to the subsequent discounts, cannot arise, as it seems to me, by reason of any supposed estoppel of the judgment creditor in this case, arising out of the manner of giving the notice; and, unless the other claims set up by the bank are valid, the priority must be denied, under the rule above stated.

A second claim made by the bank arises out of the supposed laches on the part of the judgment creditor in setting up this claim of preference over the subsequent advances. The notice of the judgment was given in 1881, and the judgment remained the property of Van Ness or his estate until 1887, when it was assigned to the defendant Jones, apparently for the nominal consideration of \$1. The judgment was for over \$11,000, and Jones held it without any proceedings for its collection until February, 1891, when execution was issued, on which the property was subsequently sold to Jones for \$100. The claim of priority of the judgment creditor is asserted by his answer in 1892, after the lapse of over 10 years from the time when notice of his judgment was given. This delay was not only very considerable, but it is also urged that one effect of it has been that in the meantime the only other witnesses to the fact of notice on the part of the bank have died. Mr. Craig, the cashier, died in 1889, and Mr. Marsh, the president, in 1894. As to the effect of laches in a court of equity, it was said by Lord Blackburn, in a late case (*Erlanger v. Phosphate Co.* [1878] 3 App. Cas. 1218, 1279), that the most distinct and definite rule laid down by the authorities was this: "The doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in

either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay (not amounting to a bar by statute of limitations), the validity of that defense must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval which might affect either party, and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy."

In this case the mere delay could not be said, under the circumstances, to be a waiver of the judgment creditor's claim, for he received notice of the bank's mortgage, and presumably of the large amount due on it (\$8,000) in 1881, and was under no obligation to the bank to take any immediate action in order to preserve his rights under the judgment and notice. The principal effect of the delay has been to deprive the bank of the testimony of Mr. Marsh and the cashier, the only other witnesses to the conversation with Mr. Bartine. It is not altogether accurate to charge Jones with the effect of delay as to Mr. Marsh's evidence, for he died in 1894, two years after the bill was filed, and more than a year after the filing of the cross bill, which set up that the notes held by the bank were all discounted after notice of the judgment. The cross bill did not specify when or to what officers the notice was given, or by whom it was given; but this omission was not objected to by the bank, and I am not prepared to say that the failure of the bank to have the benefit of Mr. Marsh's evidence can fairly be chargeable to the delay of Jones in setting up his claim, or that he should be solely charged with any supposed results of the failure to secure testimony for his adversary after his bill was filed. While the bank were not called on to disprove the notice until after Jones had proved it, yet the risk of producing their own witnesses on this point, who were living when the bill was filed and the claim was made, cannot be placed altogether on Jones as defeating his claim, as it would be if the laches on this account were held fatal. But, even on the assumption that the loss of Mr. Marsh's evidence was altogether due to the late assertion of Jones' claim, the insuperable difficulty about the effect of it as barring the remedy of Jones arises from this fact: After giving the notice of the existence of his judgment, there was, as it seems to me, no duty imposed on the judgment creditor, and in favor of the prior mortgagee, of asserting his claim by legal proceedings, either immediately or at any subsequent period short of the time fixed by the statute of limitations.

The statutes make the judgment a lien for 20 years, and provide (3 Gen. St. p. 2980. par. 7) that a sale under execution on the judgment conveys the estate in the lands vested in the judgment debtor at the date of the judgment.

Our decisions in reference to mortgages for future advances qualify this statutory right by holding that the judgment, as to them, only vests the rights of the debtor from the time of notice of the judgment; but, except for this qualification, the language of the statute must govern; and, in the absence of any evidence showing an equitable waiver or estoppel to set up the estate which is expressly conferred by the statute, I see no ground upon which, after giving notice of the judgment, the mere delay of assertion of rights under the judgment, short of the time fixed by the statute of limitations, can deprive the judgment creditor or the purchaser under execution thereon of his statutory rights. And on the question of effect of laches it is important to note, also, that in this case the judgment creditor or purchaser is not in court simply in the position of complainant asserting his rights. He is brought in as defendant to a foreclosure of the first mortgage, which is undoubtedly prior to both himself and the bank. The bank had the right at any time to foreclose their mortgage, and such foreclosure would have forced the question now raised at the time of their own selection. But the defendant, as judgment creditor, and subsequently as purchaser of the premises, and in possession, was under no such duty to the bank to assert his present claim of priority as to make his failure or delay to do so a bar to relief, when the claim has been set up in a suit to which he is the defendant, together with the bank. As to any equity in favor of the bank based upon the nominal consideration for the property apparently paid by Jones, it is only necessary to say that he stands here in the rights of the original judgment creditor and of purchaser under the statute, and the consideration now paid is not material here; nor is it entirely clear that the existence of the claim of the bank on its mortgage may not have been to some extent an explanation or cause of the low bids for the property at the sheriff's sale. My conclusion is, therefore, that as to all the notes made or indorsed by Hedden, which were discounted by the bank subsequent to November, 1881, and which were not renewals of the discounts previously made, they are cut off by the judgment of the defendant Jones and the sale thereunder. As to the notes which were renewals of notes discounted previously to November, 1881, these are secured by the mortgage of the bank. This is the rule established by the authorities in other states, and should be followed here. 2 Jones, *Mortg.* § 924, and cases cited.

I will hear counsel at the settlement of the decree as to whether further evidence or a reference should be taken on the point as to which of the notes now held by the bank, made or indorsed by Hedden, are renewals of any of such notes held by the bank in November, 1881. I am not prepared without hearing counsel to say that the evidence as it now stands is sufficiently complete to advise final decree fixing these amounts.

(51 N. J. L. 67)

CUNNINGHAM v. STATE.

(Supreme Court of New Jersey. Nov. 8, 1897.)

FALSE PRETENSES—DEFENSE—EVIDENCE—OBJECTIONS TO EVIDENCE.

1. The indictment charges that the defendant procured from one B. a large sum of money, to wit, \$1,800, by falsely pretending he had, as her attorney, commenced a suit for her, and expended that sum in its prosecution. *Held*, that it was competent to show on the part of the state that the defendant had procured several sums at different times under this false pretense, and that it was not necessary to prove that he had obtained as much as \$1,800.

2. A party cannot avail himself of an objection to an incompetent question unless he makes his objection before the question is answered. He cannot take the chance of testimony making in his favor, and object if it happens to be adverse.

3. The defendant was not entitled to set up in his defense that B. knew the suit she employed him to prosecute was for a fictitious claim. The distinction is between suits *inter partes* and indictments for breach of criminal law. In the former case, both parties participating in the illegal act, neither can ask the aid of the court. In the latter case public justice alone is concerned, and one party cannot excuse his criminal conduct because the other is equally guilty with him.

(Syllabus by the Court.)

Error to court of quarter sessions, Middlesex county; Strong, Judge.

J. Dixon Cunningham was convicted of obtaining money by false pretenses, and brings error. Affirmed.

Argued June term, 1897, before the CHIEF JUSTICE, and DEPUE, VAN SYCKEL, and GUMMERE, JJ.

A. H. & T. Strong, for plaintiff in error. John S. Voorhees, for the State.

VAN SYCKEL, J. The plaintiff in error, who is an attorney at law, was convicted in the Middlesex quarter sessions of obtaining money from one Ellen Burke by falsely pretending that he had instituted and was conducting a suit in her behalf in which he would recover for her a large amount. He obtained the money from her in various sums, from time to time, by pretending that they were necessary in the prosecution of the suit. The indictment charges, in substance, as follows: "That the defendant, being * * * an attorney at law, * * * did falsely pretend to one Ellen Burke, * * * knowing such pretenses to be false, * * * that he had instituted an action at law wherein said Ellen Burke was plaintiff, * * * for the recovery of a large sum of money, * * * and that in the institution and prosecution of such suit it was necessary for him to expend, and he * * * had expended, certain large sums of money, to wit, the sum of eighteen hundred dollars, for court costs, traveling and other expenses, by means of which false pretenses he * * * obtained from the said Ellen Burke certain moneys, * * * with intent * * *, whereas in truth and in fact he had not instituted such suit, * * * and it

was not necessary for him to expend said sum of eighteen hundred dollars," etc.

The first error relied upon is that the state was allowed to prove that the defendant obtained various sums of money between June 10 and August 24, 1895, aggregating over \$1,200. The insistence on the part of the defendant is that each time he obtained a sum of money he committed a distinct offense, and that, therefore, under this indictment, the state could legally prove but one payment to him by Mrs. Burke. The obvious answer is that each act of obtaining money was but a part of the prosecution of the defendant's criminal purpose of obtaining money from the prosecutrix by the false pretense that he had instituted and was carrying on a suit in her behalf. All the testimony produced on the part of the state tended to show that the money was procured from her on the false pretense that it was necessary to the successful prosecution of that suit. The false pretense charged in the indictment is that the defendant told Mrs. Burke that he had instituted a suit in her behalf, in which it was necessary to expend a large sum of money. That pretense was not only proven by the state, but admitted by the defendant to be utterly false. The whole conduct of the defendant, showing that this pretense was falsely made for the criminal purpose of obtaining money from Mrs. Burke, was pertinent to the issue.

Nor was it necessary to prove that the defendant pretended that he had expended the precise sum of \$1,800, and that he obtained that precise sum from Mrs. Burke. The allegation in the indictment as to the sum is not specific and definite in either case. It is laid with a *videlicet*, and the crime is charged with equal certainty whether the sum is \$100 or \$1,800. In *People v. Herrick*, 13 Wend. 87, it was held that it was not necessary to prove the amount represented to be the identical sum stated in the indictment. It is true that in that case the indictment contained an averment that the defendant had not in the hands of one J. W. S. the sum named in the indictment, nor any other sum of money belonging to the defendant. If it is necessary to prove the precise sum specified, the negative averment as to any other sum could not cure the failure to make such proof.

The defendant further assigns for error that the trial court permitted a question to be asked and answered by one Hickey, and also by one Annie Diebold, which was not competent and admissible. In both instances the objection on the part of the defendant was interposed after the question had been answered, and therefore, even if the testimony had been incompetent, the defendant could not on writ of error avail himself of the objection. "The rule is established that counsel cannot take the chance of testimony making in his favor, and, if it happens to be adverse, then interpose his objection." *Clark v. State*, 47 N. J. Law, 556, 4 Atl. 327.

It is also alleged that there was error in the refusal of the court to charge that, "if the money was advanced for the purpose of prosecuting a claim which Mrs. Burke then knew or believed to be fictitious, the transaction was contrary to public policy, and not within the statute; hence the defendant must be acquitted." The case of *McCord v. People*, 46 N. Y. 470, gives support to this contention on the part of the defendant; but I think the New York court failed to observe the distinction which exists between suits *inter partes* and an indictment for breach of the criminal law. In the former case both parties participate in the illegal act, and neither is entitled to the aid of the court. In the latter case public justice alone is concerned, and, so far as the public is interested, one party cannot excuse or defend his criminal conduct because the other is equally guilty with him. That is the view taken by the Massachusetts supreme court in *Com. v. Morrill*, 8 Cush. 571, and, in my opinion, it is a correct exposition of the law. A common instance of its application is where two persons agree to engage in a fight, and, in pursuance thereof, commit a breach of the peace. Both parties may be convicted of criminal assault. The judgment below should be affirmed.

(61 N. J. L. 100)

STATE ex rel. BOTT et al. v. BOARD OF
REGISTRY AND ELECTION IN SIXTH
PRECINCT OF FIRST WARD OF JERSEY
CITY.

(Supreme Court of New Jersey. Nov. 17, 1897.)

CONSTITUTIONAL LAW—AMENDMENTS—RECOUNT OF
VOTE—MANDAMUS.

1. Whether, after the governor of the state, in execution of the duty imposed upon him by an act of the legislature, has issued his proclamation that a proposed constitutional amendment has received a majority vote of the people, and has become a part of the state constitution, this court can order a recount of the popular vote, is a question upon which no opinion is expressed.

2. The election at which the constitutional amendment was submitted to the vote of the people did not affect any individual or private right. It concerned the government alone. Public policy, therefore, is to be primarily regarded in considering an application for a recount of the votes.

3. The legislature, by the act under which this amendment was submitted to the popular vote, having declared how that vote should be canvassed, and made it the duty of the governor, after determining that the amendment had received a majority vote, to issue a proclamation forthwith declaring that it had been adopted by the people, this was a declaration by the legislature that, so far as the government was concerned, public policy required that the question should be at rest, when the chief executive had performed the duty imposed upon him by the statute.

4. If the power inheres in this court to order the mandamus applied for, it would require a very clear case to induce the court to intervene for the purpose of reopening the count, and subjecting to litigation a subject of such paramount importance.

(Syllabus by the Court.)

Original application for mandamus by the state, on the relation of Charles Bott and oth-

ers, against the board of registry and election in the Sixth precinct of the First ward of Jersey City, in the county of Hudson, holding the special election on the constitutional amendments on September 28, 1897. Application denied.

Argued November term, 1897, before VAN SYCKEL, DIXON, and COLLINS, JJ.

Allan McDermott and William D. Edwards, for relators. Samuel H. Grey, Atty. Gen., for respondent.

VAN SYCKEL, J. This is an application for a peremptory writ of mandamus, to be directed to the board of registry and election, commanding said board to reconvene and count the ballots cast at said election for the proposed constitutional amendment against gambling. Whether, after the governor's proclamation that the said amendment has become part of the fundamental law of this state, this court can order a recount of the votes, is a question upon which we express no opinion. If we have the power to grant the application in virtue of the common-law jurisdiction inherent in the court to superintend inferior tribunals in the exercise of their functions, we decline to do so in this case. This election did not affect any individual or private right. It concerned the government alone, and in it the relators have no interest other than that which is common to all citizens of the state. Public policy, therefore, is to be primarily regarded in the discussion of this application.

The legislature, by the act of May 25, 1897, under which this same amendment was submitted to the popular vote, declared how that vote should be canvassed, and made it the duty of the governor, after determining that the amendment had received a majority vote, to issue a proclamation forthwith declaring that it had been adopted by the people. This was a declaration by the legislature that, so far as the government was concerned, public policy required that the question should be at rest when the chief executive of the state had performed the duty imposed upon him by the statute. That verification of the correctness of the result satisfied the state, and it should be held to satisfy the relators. By the mandate of the legislature, the amendment has become incorporated in the constitution of the state. It should therefore require a very clear case to induce this court to intervene for the purpose of reopening the count, and subjecting to litigation a subject of such paramount importance. This consideration presses itself upon us with especial force when we recall the fact that no safeguard has as yet been devised by which frauds upon the ballot can be prevented. The reasons for which the aid of the court is invoked in this case are far from satisfactory. The alleged facts upon which the application is based have been gathered by counsel and their clerks and agents from various sources, consisting in part of statements made to them by election officers in respect to ballots some weeks after they

had inspected such ballots in the course of making the count on the day of election. These statements as presented to us are mere hearsay, and cannot justify favorable consideration.

But, if the evidence submitted on the part of the relators was more satisfactory, there is still a cogent reason for refusing to allow another count. It became necessary to use the ballot boxes in which these ballots were sealed for the purposes of the state elections held on the 2d day of November. The ballots were therefore removed from the ballot boxes, and placed in the custody of various officials throughout the state. To some extent, at least, the safeguards against tampering with these ballots were thereby diminished; and there is now less assurance that the ballots will be found to be in the same condition in which they were when counted originally than there would be if they had not been removed from the ballot boxes. The relators have permitted the situation to change before they made their application, although the governor postponed the issuing of his proclamation to give any one who desired to do so an opportunity to contest the adoption of this amendment. The application is denied.

(56 N. J. E. 259)

INHABITANTS OF CITY OF BURLINGTON v. PENNSYLVANIA R. CO.

(Court of Chancery of New Jersey. Nov. 19, 1897.)

MUNICIPAL CORPORATIONS—CONTROL OF STREETS—RAILROADS—CHARTER—NUISANCE—SPECIAL LAWS.

1. Without statutory authority, expressly given or arising from necessary implication, a railroad placed longitudinally in a street is a nuisance.

2. A municipal government invested with the ordinary power to regulate streets is a trustee for the public, and its control over the streets is restricted to acts in furtherance of the rights of the public in them.

3. The charter of a railway company which authorizes it to lay its tracks between certain termini involves no necessity of running longitudinally along a street.

4. The legislature has the right to discriminate, and enact (P. L. 1896, p. 228) that railway tracks may be laid on streets in smaller cities if the municipal authorities deem it safe to grant such permission, while in more populated cities tracks shall be laid only by direct authority of the legislature.

5. P. L. 1896, p. 228, which authorizes cities, except of the first class, to enter into contracts with railway companies whose roads now enter or lie within their limits, or whose routes have been located therein, and ratifies such contracts, but provides that no such track shall hereafter be laid unless the right of the abutting owners shall be acquired, is unconstitutional, as being special in the regulation of the internal affairs of municipalities.

6. And such act is also unconstitutional as conferring special privileges upon one class of corporations.

Bill by the inhabitants of the city of Burlington against the Pennsylvania Railroad Company. Heard on bill and answer. Decree for complainants.

Howard Flanders and Samuel W. Beldon, for complainants. Joseph H. Gaskill and S. H. Grey, for defendant.

REED, V. C. This bill is filed by the inhabitants of the city of Burlington to restrain the Pennsylvania Railroad Company from laying an additional track through Broad street, in said city, and to compel the defendants to remove a part of such track already laid in said street. The Camden & Amboy Railroad Company laid its route through, and built a single track upon, this street in 1832 and 1833. The mayor, recorders, aldermen, and commonalty of the city of Burlington granted to the company the right to construct the railroad authorized by the act incorporating the railroad company upon, through, and along Broad street, in said city of Burlington, from the eastern to the western extremity of the city; and the city covenanted that it should be lawful for the company, their officers, engineers, agents, and workmen, to enter upon said street, and grade the same, and lay rails thereon, and to do any other acts and things necessary to be done for the proper and effectual completion of said road, and for the keeping of the same in repair; doing no unnecessary damage or injury either to the said street or property adjacent thereto. But it was agreed that the road should be constructed, as nearly as may be, in the middle of Broad street, or so nearly so as to leave an ample and sufficient carriage way along said street on each side of said railway. The query is whether this municipal consent is sufficient to legalize the proposed structure within the street.

It is entirely settled that without statutory authority, expressly given or arising from necessary implication, a railroad placed longitudinally in a street is a nuisance. A railroad so placed is regarded as practically an exclusive appropriation of that part of the street which it occupies to a use inconsistent with the legitimate use of the street by the public. Its presence in the street is as repugnant to the rights of the public as would be the presence of a church, or a market house, or any other structure devoted to private objects. *New Jersey S. R. Co. v. Long Branch Com'rs*, 39 N. J. Law, 28, 33; *Citizens' Coach Co. v. Camden Horse R. Co.*, 33 N. J. Eq. 267. A municipal government invested with the ordinary power to regulate streets is a trustee for the public. Its control over streets is restricted to acts in furtherance of the rights of the public in them. *Trustees of M. E. Church v. Council of Hoboken*, 33 N. J. Law, 14, 19. It is, of course, true that the public right, so far as it is concerned, is subject to the legislative control over streets. As to the public, the legislature can authorize the abandonment of a street in toto, or turn it in part over to a private enterprise. It may therefore legalize the operation of a steam railroad transversely or longitudinally over or along a highway. The legislative authority, however, must appear, either in express terms, or must flow as a necessary impli-

cation from powers expressly granted. *State v. Warren R. Co.*, 29 N. J. Law, 353; *City of Newark v. Delaware, L. & W. R. Co.*, 42 N. J. Eq. 196, 7 Atl. 123; *Hoboken Land & Imp. Co. v. City of Hoboken*, 35 N. J. Law, 205. The grant of power may be made directly by the legislature, or it may be delegated to the government of a municipality. It may be contained in the charter of a city, in the charter of a railroad, or in a general statute. No such delegation of a grant of power to the municipal government is to be found in the charter of the city of Burlington in existence at the time of the execution of the consent named. The city was empowered to make by-laws and ordinances relative to the laying out and regulating of streets and highways. The generality of this grant contains no authorization which empowered the city to turn over a street to purposes inconsistent with its use as a highway. Nor is any such power observable in the charter of the Camden & Amboy Railway Company. The company was empowered to lay its tracks between certain termini, which involved the necessary implication of a power to cross highways that lay between the terminal points. But it involved no necessity of running longitudinally along a road or street. *Dill. Mun. Corp.* § 707. No legislative authority in support of the consent granted by the municipality exists, unless it be found alone in the act passed in 1896 (*P. L.* 1896, p. 228). This act provides that "any city of this state, except cities of the first class, be and they are hereby authorized and empowered to enter into contracts with any of the railroad companies whose roads now enter or lie within their cities respectively or whose routes have been located therein, granting the said railroad companies or any of them the right to lay their road and construct their tracks in, through, along and upon any of the roads or streets of said cities, upon such terms," etc.; "and any such contracts heretofore or hereafter made by said cities or any of them with any railroad company or companies as aforesaid are hereby fully authorized, ratified and confirmed; provided, that thereafter no road shall be laid or track constructed in, through or upon any of said roads or streets other than such as have been authorized by any such contract heretofore made until said railroad company shall have acquired the rights of the abutting owners on said road or street, either by agreement, purchase or condemnation proceedings." It is perceived that the statute confers powers upon certain cities to grant powers to certain railroads to lay their tracks in the public streets of such cities. The counsel for the city of Burlington propounded the query whether the act is not one regulative of the internal affairs of cities, and, if so, whether it conforms to the constitutional requirements of generality in its operations. That it regulates the internal affairs of cities is too obvious for argument. It confers power upon cities to grant licenses to railroad companies to use the streets of a city, which is a matter of strictly municipal concern. The im-

portant question is whether the legislation is special. The exclusion of cities of the first class may be vindicated on the ground that population, having regard to the purposes of legislation, may be a proper basis of classification. The streets of a large city, it may be assumed, are so much more completely used for other purposes that the presence of a railroad within their limits would be more likely to interfere with traffic, and endanger life, than if such a road were placed in the streets of a city of less population. The legislature would have the right to discriminate, and enact that in the latter cities such a track may be laid, if the municipal authorities deem it safe to grant such permission; while in the more populated cities tracks should not be laid at all, or, if laid, only laid with the direct authority of the legislature. Therefore I think the criticism upon the act upon this ground is untenable.

But the other grounds upon which the statute is attacked possess more substance. It is perceived that the power to enter into contracts with railroad companies upon which the municipality grants the right to construct tracks along streets of cities is limited by the statute to cities within which railroads were already constructed, or routes were already located, at the time of the passage of the statute. The effect of the legislation is to exclude from participation in the power conferred any city in which a railroad route shall be located after the passage of the act. Now, it is impossible to conceive how a city in which a route may have been filed after April 9th differs from a city in which a route was filed before April 9th, in respect to the condition which called for the legislation. The propriety or necessity for the existence of the power to contract would be exactly the same whether the route has been or shall be filed. The legislature cannot confine the force of its enactment to the condition of affairs existing at the date of the act, if similar conditions are likely to arise thereafter. It is upon this ground that statutes which apply to cities having at the time of the approval of the act a certain population have been adjudged "special" in failing to include cities which may grow into the class. *Pavonia Horse R. Co. v. Jersey City*, 45 N. J. Law, 298; *Coutieri v. City of New Brunswick*, 44 N. J. Law, 58. The legislature could with as much propriety have fixed any other date, either before or after the approval of the act, and provided that the provisions of the statute should apply to those cities in which routes were filed before, and not apply to those cities in which routes were filed or should be filed, after the said date. Not only does the act operate specially in respect to the matter already mentioned, but it grants exclusive privileges to certain corporations. A railroad company which had filed its route before April 9, 1896, is permitted to obtain municipal consent to its occupation of city streets; while

those companies who shall have filed their route since that date are still deprived of this privilege. The principle underlying the point now mooted will be found applied in the exhaustive opinion of Justice Lippincott, delivered in the case of *Alexander v. City of Elizabeth*, 56 N. J. Law, 71, 28 Atl. 51. In that case the act under consideration was one in which the legislature empowered a municipality to license the owners of race courses, and to maintain the same for running and trotting horses. The act applied only to those in use prior to January 1, 1893. Race tracks that sprang into use subsequent to that date were excluded from the privilege of receiving a license. This act was held "special," not only in its regulation of the internal affairs of municipalities, but also as conferring special privileges upon one class of corporations. Upon both these grounds I regard the act as special and unconstitutional. This leaves it unnecessary to discuss the validity of the proviso which distinguishes between roads which have been authorized by a contract made before the passage of the act and roads authorized by contracts made after the passage of the statute, in respect to acquiring the rights of abutting owners. The conclusion therefore is that there is no legislative authority to legalize the presence of the railroad track within Broad street. I will advise a decree for an injunction restraining the construction of the additional track, and a mandatory injunction for the removal of such parts of it as have been already laid.

(56 N. J. E. 326)

MORAN v. NEVILLE et al.

(Court of Chancery of New Jersey. Nov. 26, 1897.)

GIFT TO WIFE—PRESUMPTION—BURDEN OF PROOF—MORTGAGE—PAYMENT.

1. Where a husband negotiates the purchase of lands, and procures the title to be placed in his wife's name, and mortgages his own other property, with that bought for her, to pay for the latter, and actually gives her the money raised on the mortgage, it is a complete gift to the wife, and casts upon the husband, or his heirs, who dispute it, the burden of proving an obligation on her part to pay back the money, or some agreement on her part that the whole debt should be charged primarily on her property, leaving the husband's liable only for the deficiency.

2. The relation of husband and wife, and his conduct in so dealing with the property purchased, raise a presumption that a gift or settlement is intended; and, while this presumption may be rebutted by proof, the burden is upon the party who disputes the gift.

3. In such a case the property of the husband, included in the mortgage, must contribute its ratable portion towards the payment of the mortgage debt.

(Syllabus by the Court.)

Bill by Bridget Moran against Bessie Neville and others to foreclose two mortgages. On defendants' exceptions, the master's report was confirmed.

This is a bill to foreclose two mortgages held by the complainant, Bridget Moran. Her

right to have a decree in accordance with the prayer of her bill is not disputed. The questions in issue are raised by the answer and cross bill of the defendant James N. Butterly, and by the exceptions filed in the master's report in the cause by that defendant, and affect only the equities between the defendants the heirs of Robert Neville and the defendant Bessie Neville, his widow. In 1889 Robert Neville was the owner of a lot of land on Jackson street, Jersey City; and on May 20, 1889, he mortgaged it to secure the payment of his individual bond,—his wife joining in the mortgage. This mortgage will hereafter be referred to as the "mortgage made in 1889." In 1890 one Lane conveyed to Bessie Neville, the wife of Robert Neville, another lot in Jersey City, situate on Vreeland street, or Randolph avenue. To secure the money to pay for this lot, Robert Neville and Bessie, his wife, gave their joint and several bond to the complainant, and secured its payment by a mortgage bearing the same date as the deed conveying the lot to Mrs. Neville. This mortgage covered, not only the lot on Randolph avenue conveyed to her, but also the Jackson avenue lot owned by Mr. Neville. The mortgage was in the usual form, except that it contained a special clause whereby the mortgagors had the right to pay off \$1,500 of the principal of the debt, and to receive a release of the Jackson avenue property from the lien of the mortgage. This mortgage will hereafter be referred to as the "mortgage made in 1890." It should be noted that Vreeland street and Randolph avenue are the same. Robert Neville died in 1896, intestate, seised of the Jackson avenue lot, leaving, him surviving, his widow, the defendant Bessie Neville, and his heirs at law, the defendants James N. Butterly and others, to whom the title of the Jackson avenue lot descended. Bessie Neville still continues to hold the title to the Randolph avenue lot. By their terms, both the mortgages came to be due because of the nonpayment of interest. The complainant filed her bill to foreclose in this case; making defendants the widow, Bessie Neville, and the heirs at law of Robert Neville, as owners of the Jackson street property, and Bessie Neville, in her own right, as sole owner of the Randolph avenue property. James N. Butterly is one of the heirs of Robert Neville, and he files his answer, admitting all the facts stated in the bill, but alleging that the mortgage of 1890, though given on both properties, was made to secure the purchase money of the Randolph avenue lot, to be paid by Bessie Neville, and for the purpose of obtaining money to build on it, and that the moneys so raised were so used; that the Randolph avenue lot is the separate property of Bessie Neville; that Robert Neville never had any interest in it; and that the Jackson avenue lot was included in the mortgage of 1890 solely as collateral security to secure the mortgage debt of Bessie Neville in the event only that the Randolph avenue premises should prove

to be insufficient to pay it. And by his cross bill against Bessie Neville the defendant James N. Butterly further charges that the whole proceeds of the mortgage of 1890 were used by Bessie Neville for the benefit of her separate estate; Robert receiving no benefit therefrom. He insists that the Randolph avenue property should be first sold, and out of the proceeds thence arising the whole amount due on the mortgage on that property should be paid, and, if there be a deficiency, the Jackson avenue proceeds remaining after the payment of the mortgage of 1889 should be used to pay it, but that no proceeds from the Jackson avenue property should be used to pay the mortgage of 1890 unless there be a deficiency in the proceeds from the sale of the Randolph property to pay the mortgage. The defendant Bessie Neville answers the cross bill, admitting that the mortgage of 1890 was made to secure the purchase money of that property, and to build on it, and that it was used for those purposes, and that she, and not Robert, owns it; but she denies that the Jackson avenue property was put in that mortgage solely as collateral security to secure the debt in the event only that the Vreeland street (or Randolph avenue) property should be insufficient to pay it. She then avers that Robert Neville, shortly before making the mortgage of 1890, intended to sell the Jackson avenue property and use the proceeds for the purchase and improvement of the Randolph avenue property, and to vest the title to the latter in her name; that, because he could not secure a satisfactory price, he determined to borrow the necessary money, and for the same purposes did borrow it, and gave it to her for those purposes, and it was always his intention to sell the Jackson avenue property, and out of the proceeds to pay off the mortgage of 1890. And she insists that it is inequitable to charge the whole debt of that mortgage on the Randolph avenue premises, and to free the Jackson street premises from all liability to that debt, when both are included in that mortgage. The question in dispute was referred to a master for report, who took testimony upon the disputed points, and reported that the Jackson avenue property should be first sold, to pay—First, the amount due on the mortgage of 1889 on those premises; and to pay, secondly, the sum of \$1,649.50 of the amount due on the mortgage of 1890 on both lots, with five-sevenths of the costs of suit. This sum is stated by the master without indicating the sources from which he ascertained the amount to be charged. But it corresponds with the sum of \$1,500 named in the mortgage of 1890 as sufficient to release the Jackson avenue property, and interest thereon from the time when interest is due, by the master's report, on the mortgage of 1890. The master further reports that the Randolph avenue property should be secondly sold, to pay the residue of the amount due on the mortgage of 1890, with the remaining two-sevenths of the costs. To the master's report

the defendant James N. Butterly files his exceptions as to the order of sale; the defendant insisting that the Randolph avenue property, and not the Jackson avenue property, should be first sold, and that out of the proceeds the complainant should be first paid the whole amount due her on her mortgage of 1890; that the Jackson avenue property should be secondly sold, and from the proceeds should be first paid the amount of the mortgage of 1889, and, if there should be any deficiency of the proceeds of the Randolph avenue property to pay the mortgage of 1890, the residue of the proceeds of the Jackson avenue property should pay it. The substance of the excepting defendant's claim is that the Randolph avenue property should be first sold, and that no part of the proceeds of the Jackson avenue property should be paid in satisfaction of the mortgage of 1890 on both properties, unless there should be a failure of the Randolph avenue property to pay the whole amount due on that mortgage. No exceptions were taken to the master's report on the part of the defendant Bessie Neville.

E. A. S. Man, for defendant James N. Butterly. **J. Garrick**, for defendant Bessie Neville.

GREY, V. C. (after stating the facts). The exceptions to the master's report are based upon the same grounds set up in the answer of the excepting defendant, Butterly. He contends that the Jackson avenue property was included in the mortgage of 1890, with the Randolph avenue property, solely as a collateral security, and that it should respond to the payment of that mortgage only in the event that the proceeds of the Randolph avenue property should be insufficient to pay it. The attention of the mortgagors in making the mortgage of 1890 was evidently especially called to the relation of the mortgage debt to the properties mortgaged. This appears from the clause in that mortgage providing that the mortgagors should have a right to a release of the Jackson avenue property upon paying \$1,500 of the principal due. Had they intended that the Jackson avenue property should only be secondly liable for the mortgage debt, it would naturally and reasonably have been expressed in the mortgage itself. It is not there found. By the exceptant's proofs it was shown that Robert Neville, in his lifetime, negotiated the loan which resulted in the mortgage of 1890 on both the Jackson avenue property, which he owned, and on the Randolph avenue property, which he obtained to be put in the name of his wife, coincidentally with the making of the mortgage. Sometimes he paid the interest on it, and sometimes his wife paid it. No proof was made that there was any understanding or agreement that the mortgage of 1890 on both lots should be paid in the first instance wholly out of the Randolph avenue premises. It is admitted by the answer that the wife,

Bessie Neville, holds the title to the Randolph avenue property, and that she received the money raised by the mortgage of 1890 on both properties, and used it for improving her separate estate. The exceptant appears to have assumed that this receipt of all the mortgage money by Mrs. Neville has operated somewhat as does a resulting trust, and has charged her property with an equity to answer first for the whole mortgage debt. But obviously this was not the intention of the parties. The evidence for the defendant Bessie Neville is full and uncontradicted that Robert desired to dispose of the Jackson avenue property in order to have the Randolph avenue property free from liens, with the title to stand in his wife's name, so that she should have a home clear. Failing to secure a sale on advantageous terms, he made the mortgage in question. He made this statement to a Mrs. Lane, and also to the mortgagee, before the mortgage was made, and in substance to the other witnesses afterwards. Robert Neville and Bessie, his wife, never had two purses. He furnished the money to pay the interest on the mortgage of 1890, which covered both properties. The checks given by the mortgagee in making the original loan are produced, and they are made payable, not to the husband, but to the wife; and, as he negotiated the loan and transacted the business, it is impossible to refuse to believe that he arranged and intended the Randolph avenue property to stand in his wife's name, and actually gave to her, as a gift, all the proceeds raised by the mortgage of 1890, which was not only on her property, but also upon his own. This was in the nature of a gift to her, actually executed by the making of the mortgage and the payment of the proceeds to her. The heirs of Robert, by their contention, are now seeking to dispute his executed gift. This testimony explanatory of the purpose and intent of Robert Neville in his dealings with the Randolph avenue property, and with the money raised by the mortgage of 1890, and his declaration regarding these matters, was objected to as incompetent. But testimony of like character to establish a trust in the Randolph avenue property in favor of Robert Neville, by the admissions of Bessie Neville, would have been admissible, had such proofs been offered. *Peer v. Peer*, 11 N. J. Eq. 439; *Midmer v. Midmer*, 26 N. J. Eq. 302, affirmed on appeal 27 N. J. Eq. 548. And it may be overcome by the same kind of evidence. *Peer v. Peer*, *ubi supra*; *Duvale v. Duvale*, 54 N. J. Eq. 582, 35 Atl. 750. I think the evidence above recited, of the contemporaneous declarations of Robert Neville, is within the same principle, and was, under the authorities cited, clearly admissible to show that by the mortgage of 1890 he intended to charge the Jackson avenue property, not as an ultimate resort, but primarily, at least, to the extent of paying its fair proportion of that mortgage debt. Irrespective of aiding proof, however,

the mere fact that the husband pays the consideration for the purchase of lands, and has the conveyance made to his wife, raises a presumption that a gift or settlement is intended, and, while this presumption may be rebutted by proof, the burden is upon the party who disputes the gift, and the proof must be such as would be required to establish a resulting trust. *Read v. Huff*, 40 N. J. Eq. 234. I think the principle is equally applicable where the husband obtains a title to be put in his wife's name, and mortgages his own property with hers to pay for it, actually giving to her the money raised on the mortgage. This completes the gift, and casts upon the heirs who assert an equity antagonistic to the gift the burden of proving that she was to pay back the money, by the process of charging the whole debt on her property, and making his liable only for the deficiency. This burden the heirs have not assumed, for they have offered no evidence which shows that the Jackson avenue property should respond in payment of the mortgage of 1890 only after the Randolph avenue property is exhausted. Neither the mortgage itself nor the parol testimony supports this contention in the least degree, and, as above shown, the presumption which arises from such dealings of a husband with a wife is also against the exceptant's contention.

The master has reported that the Jackson avenue property should be charged with the payment of \$1,649.50, part of the mortgage of 1890. No exception has been taken to the report on the ground that this is a charge of an undue proportion. The exceptions are made upon the single ground that the Jackson avenue property should not respond at all until after the Randolph avenue property has first been exhausted. I am of the opinion, and will advise, that the exceptions to the master's report have not been sustained, and should be overruled, and the report confirmed, with costs.

(56 N. J. EL. 686)

BURGIN v. RUTHERFORD et al.

(Court of Chancery of New Jersey. Nov. 16, 1897.)

TAXATION—SALES—RIGHTS OF PURCHASER AND MORTGAGEE—REDEMPTION.

1. A purchaser at a tax sale, under the act entitled "An act concerning the settlement and collection of arrearages of unpaid taxes, assessments and water rates or water rents, in cities of this state, and imposing and levying a tax, assessment and lien in lieu and instead of such arrearages, and to enforce the payment thereof, and to provide for the sale of lands subjected to future taxation and assessment," passed March 30, 1886, commonly called the "Martin Act" (3 Gen. St. p. 3370), does not acquire any title to the land so purchased until a deed therefor be delivered to him as provided in that act.

2. When the sale is made for taxes assessed after the date of the act, the owners, or any party interested, may redeem the lands in the manner provided by the act at any time within one year from the time of the sale.

3. During this period the interest of the purchaser remains a mere lien on the premises.

4. A mortgagee who forecloses may make the purchaser at the tax sale a party defendant as a lienholder, and, if redemption of the tax lien be effected pending the foreclosure suit, may enforce the collection of the redemption money in connection with the proceedings to foreclose the mortgage.

(Syllabus by the Court.)

Bill by William M. Burgin, trustee, against John B. Rutherford and others, to foreclose a mortgage. Decree for plaintiff advised.

The complainant in this case, William M. Burgin, trustee, under the will of Charles F. Burgin, deceased, filed his bill to foreclose a mortgage made by James E. Day and wife to Randall E. Morgan, bearing the date October 14, 1886, recorded in the Camden county clerk's office October 23, 1886, on a lot of land in the city of Camden. The only question in controversy arises touching the interest of the defendant Joseph Kaighn in the mortgaged premises. The bill states that on August 27, 1896, J. Willard Morgan, city solicitor of the city of Camden, under the act of March 30, 1886, concerning the settlement and collection of arrearages of taxes, etc., and its supplements and amendments, commonly called the "Martin Act" (3 Gen. St. p. 3370), caused the mortgaged premises to be sold to the defendant Joseph Kaighn for the sum of \$40, to satisfy the taxes and assessments, with interest and costs, for the years 1893, 1894, and 1895, with costs, etc. The complainant alleges that Kaighn claims to have a first lien on the premises paramount to and ahead of the complainant's mortgage by virtue of this tax sale. The defendant Kaighn answers the bill, admits the mortgage of the complainant, and admits the tax sale, and his purchase for the taxes assessed on the premises for the year 1893, and remaining unpaid thereon, under the provisions of the Martin act, and claims that by reason of the tax sale, and his purchase for \$40, he (Kaighn) is the owner in fee simple of the premises, and has title paramount to and ahead of the complainant and those through whom the complainant claims. The defendant Kaighn further says that the defendant Rourke, who is in possession of the premises, holds the same under his lease, and not otherwise, and he denies that the possession of the defendant Rourke is subject to the complainant's mortgage, and denies that the complainant's mortgage is a prior lien thereto, and alleges that Rourke's title under him (Kaighn) is paramount to and ahead of the complainant's mortgage.

M. V. Bergen, Jr., and M. V. Bergen, for complainant. S. H. Richards, for defendant Joseph Kaighn.

GREY, V. C. (after stating the facts). Neither the bill nor the proofs raise any question as to the authority of the board having control of the finances of the city to order a sale for the taxes and assessments named in the bill at the time when it is stated to have

been made. The validity of the tax sale is not disputed by the pleadings, proofs, or in argument, and I shall consider the case as it has been presented. Upon the hearing it appeared that the mortgaged premises had been sold for taxes under the provisions of the Martin act on August 27, 1896, to the answering defendant, Joseph Kaighn. He was made a defendant upon the averment that he claimed by reason of this purchase to have a first lien on the premises for the amount of the purchase money paid, with interest and costs. Had the defendant answered the bill, setting up his purchase at the tax sale, and claiming that by it he had acquired a lien to the amount of his purchase money, with interest and costs, as provided by the act, which was superior to the mortgage, he would have been entitled either to have been dismissed, allowing his lien to remain upon the premises to be redeemed as provided for in the Martin act, or to have had the amount of his lien ascertained and decreed to be first paid out of the proceeds of sale of the mortgaged premises. The defendant Kaighn admits by his answer that his interest in the premises has been acquired by purchase at a tax sale under the "Act concerning the settlement and collection of arrearages of unpaid taxes," etc., commonly called the "Martin Act" (3 Gen. St. p. 3370), but he avers that by reason of this sale he has become the owner in fee of the mortgaged premises, and has a title superior to the admittedly prior mortgage of the complainant. He makes no allegation that any of the incidents subsequent to the sale, such as notice to owners and mortgagees, expiration of a year after the sale, receipt of a deed, etc., which the act prescribes as prerequisites to the vesting of a fee, have happened. See 3 Gen. St. p. 3384, par. 453, and Id. p. 3374, par. 422. Nor was there any proof that any such circumstances had come to pass, nor could there be, as sufficient time had not elapsed before redemption was effected. The defendant Kaighn insists that this claim shows a legal title adverse to the complainant's mortgage, and that this court has no jurisdiction to pass upon the issue thus raised, and can only dismiss the defendant with costs, etc.

The allegations of the bill and the admissions of the answer, when considered in connection with provisions of the Martin act, under which the defendant purchased, show that he has no title whatever in the mortgaged premises. His right depends entirely upon the provisions of the act, which nowhere gives the purchaser at the tax sale any title until he shall not only have paid the price, but shall have also proved that he has served notice of the sale upon the owners and mortgagees, and that, after the expiration of one year from the time of sale, he has received a deed. When these things have been efficiently done, and not till then, the purchaser at the tax sale takes a "fee simple absolute, free of all encumbrances." 3 Gen. St. p. 3384, par. 453. The mere claim that he has a legal title, when

all the facts are admitted, and before the court, which show that he has not, cannot give this defendant a status to challenge the jurisdiction of this court to pass upon his rights in the mortgaged premises. Until this title actually vests by the delivery of the deed, the interest of a purchaser at a tax sale under the Martin act remains a mere lien; the right of redemption is outstanding in the owner and mortgagee. 3 Gen. St. p. 3372, par. 415; Id. p. 3374, par. 422. It is the peculiar province of this court to adjust and enforce the equities attendant upon the redemption of a title from the incumbrance of liens. I have no doubt that such a jurisdiction may be exercised under the general equity powers of this court. But, if there were any question about it, the supplement to the Martin act, approved May 23, 1890 (3 Gen. St. p. 3383, par. 449), in express terms recognizes not only the right of the mortgagee to redeem the lien under the tax sale, but, having redeemed it, to hold and enforce it against the lands "by any appropriate proceeding at law or in equity"; and the steps taken to enforce this redeemed lien "may be independently of and before, or in connection with, proceedings to enforce payment of the mortgage."

It remains to be considered whether the lien under his purchase which the defendant Kaighn had acquired has been redeemed by the complainant. The counsel of the defendant objected to the proof of this discharge by redemption, because it was not alleged in the bill of complaint. When the bill was filed, the payment which is claimed to have effected the redemption had not been made. There was no obligation upon the complainant mortgagee to make his payment of redemption before the bill was filed, nor is there any reason why this court should not, in a foreclosure suit on final hearing, ascertain whether a lien existing when the bill was filed has meanwhile been discharged. When the defendant was brought into court on the allegation in the bill, which showed his claim of lien, he filed his answer substantially admitting the facts set up in the bill as to his purchase at the tax sale, but claiming that the legal operation of that sale was to vest in him a title in fee in the mortgaged premises. When issue was joined on this answer, the question to be determined was that tendered by the answer, namely, had the defendant any status as an owner in fee, as he alleged, or was his interest merely a lien? If it appeared that he held a legal title which was adverse to that of the mortgagee, he might fairly claim to have disclosed his title, and thus to have complied with the rule declared in *Chadwick v. Island Beach Co.*, 43 N. J. Eq. 616, 12 Atl. 380, by the court of errors, and he might ask to be dismissed, so that his legal title might be tested in a court of law. When, however, the pleadings and the provisions of the public statute show that the defendant has no title, but only a lien, which the complainant claims to have redeemed since the

bill was filed, there is no occasion to dismiss the defendant, as the whole matter is one which is within the ordinary jurisdiction of this court, and its consideration in this suit is also in accordance with the statutory provisions of paragraph 449, above cited; for how can the complainant mortgagee, who claims to have redeemed the defendant's lien, enforce it against the mortgaged premises, to recover his money in this foreclosure proceeding, unless he be permitted to show that he has actually redeemed in the mode prescribed by the statute?

Proceeding to inquire into the fact of redemption by the complainant mortgagee, the statute provides for the sale not only of lands in arrears of payment of taxes at the time the act was passed, in 1886, but also for sales because of future taxes which may be in arrears. Paragraph 415, p. 3372, and paragraph 453, p. 3384, 3 Gen. St., direct the mode of selling for taxes in arrears when the act was passed, and paragraph 422, p. 3374, directs the mode in cases of taxes levied after the passage of the act (as in the case now under consideration), and declares that the deed shall have the same effect as in cases of proceedings where taxes were in arrears when the act was passed, but the deed shall not be given for one year after the time of the sale, during which the owner may redeem on the same terms as are provided in the act. By paragraph 415, p. 3372, 3 Gen. St., the mortgagee who redeems must pay to the city treasurer, for the use of the purchaser, the sum paid by him at the sale. This sum was \$40. By the same paragraph he must also pay the interest at 10 per cent. from the date of the sale. Interest should therefore be added from August 27, 1896, to October 22, 1896, the day of the claimed redemption, at 10 per cent. per annum: \$0.63. By the same paragraph, the mortgagee who redeems must pay for each notice served \$1.00, and the affidavit proving such service is required to be filed in the office of the city clerk, and is made "evidence in all courts and places of the facts therein stated." The affidavit so filed shows three notices served: \$3.00. Total, \$43.63. These are all the payments which, in my view of the provisions of the statute, were needed to be deposited with the city treasurer in order to redeem the mortgaged premises.

The statute further declares that "the certificate of the city treasurer stating the payment and showing what property such payment is intended to redeem, shall be evidence of such redemption and payment." 3 Gen. St. p. 3381, par. 442. Such a certificate is produced showing the deposit on October 22, 1896, for redemption of the mortgaged premises by the complainant, to have been \$53.67. This sum is more than sufficient to make the full amount necessary to redeem the defendant Kaighn's lien. He claims, however, that additional items should be paid before redemption can be effected by the deposit made with the city treasurer. There are four addi-

tional notices which the defendant Kaighn claims were served. Of these services there is no proof by affidavit, in compliance with the statutory requirements. This whole proceeding is a purely statutory creation. The statutory gift of the right to be paid for serving the notices is accompanied by a prescription of the mode in which the fact of the service shall be proved, and I think the observance of the mode of proof is a necessary part of the exercise of the power to collect payment for the services. Such proof is safe and proper as a verification of the fact of service of notice, and is also essential to bind the purchaser at the tax sale to a statement with certainty of the amount he may rightfully claim from the owner or mortgagee who seeks to redeem. If fees may be claimed for notices served of which no proof is made by affidavit, the very precise requirements of paragraph 415 as to verification and filing of affidavit would seem to be of no force whatever. Because not proved as required by paragraph 415, above cited, no fees should be allowed for the four additional notices.

The defendant Kaighn also claims an item of fees paid the city for deed,—five dollars. The only deed mentioned in the sections in the statutes applicable to the sale made of the mortgaged premises is that referred to in paragraph 422, p. 3374, 3 Gen. St., to be given to the purchaser at the tax sale, one year after the time of the sale. In this case no such deed was given, nor was any due to Mr. Kaighn, as the redemption money was deposited within less than three months after he purchased, and less than two months after he gave notice. I think this fee for a deed cannot be sustained. The party redeeming the lands must pay to the purchaser "all the costs and expenses necessarily incurred in proceedings taken for the purpose of perfecting title thereto, including fees for searching at the rate allowed by law to the county clerk, or registrar of deeds, for his services, but not including counsel fees." See section 1 of Supplement approved April 5, 1892, as amended by Supplement approved March 16, 1893 (3 Gen. St. p. 3389, par. 477). Under this section it is claimed by Mr. Kaighn that searching fees, to the amount of \$10, should be allowed him, and that the costs of Mr. Kaighn's defense in this suit must also be awarded as necessarily incurred in proceedings taken to perfect the title. But section 5 of the act of April 5, 1892 (paragraph 462, p. 3386, 3 Gen. St.), expressly declares that no such costs and expenses shall be allowed "unless the mayor of the city, * * * shall approve of the amount," etc. Neither the item of \$10 for searching fees, nor any other which could be claimed under this head, has been approved by the mayor, and therefore they cannot be awarded.

It is objected by the defendant Kaighn that, although paragraph 442, p. 3381, 3 Gen. St., obliges the mortgagee to pay "any other tax or assessment chargeable thereon, which the purchaser or his legal representative or as-

signs may have paid since the sale," with interest, etc., it has not been shown that there are no such taxes, and therefore redemption is not complete. As the purchase was made on August 27, 1896, and the redemption by deposit was accomplished October 22, 1896, and there has been no proof nor any claim of any assessment between those dates, the court will not presume that a special or additional tax, which the defendant neither alleges nor proves, was not only imposed on the premises, but also paid by the defendant during this eight weeks that he held his lien unsatisfied. I will advise a decree of foreclosure according to the prayer of the bill, notwithstanding the answer of the defendant Kaighn, enforcing also the payment of the \$43.63, with interest according to the statute.

(60 N. J. L. 413)

STATE (RAFFETTO, Prosecutor) v. MOTT, Judge, et al.

(Supreme Court of New Jersey. Nov. 24, 1897.)

CITY ORDINANCE—VALIDITY.

A city ordinance, passed under legislative power which is granted in definite and precise terms, will not be set aside as unreasonable.

(Syllabus by the Court.)

Certiorari by the state, on the relation of Luigi Raffetto, against Wilbur S. Mott, judge of the First criminal court of the city of Newark and others, to review a conviction for a violation of a city ordinance. Judgment affirmed.

Argued February term, 1897, before GUMMERE, J., by consent of counsel.

James M. Trimble, for prosecutor. Herbert Boggs, for defendants.

GUMMERE, J. The writ in this case brings up for review the conviction of the prosecutor for violating the ninth section of an ordinance of the city of Newark, approved January 8, 1895, entitled "An ordinance relating to weights and measures," etc. The section violated reads as follows: "No merchant, retailer, trader, dealer, hawker or peddler, shall sell in the city of Newark any fruit, vegetable or nut, from cups, cans or other receptacles, other than sealed dry measures, sealed by the city sealer, except when such fruit, vegetable or nut is sold in its original receptacle, under a penalty of five dollars for the first offence and twenty dollars for each subsequent offence." The prosecutor contests the legality of this conviction, on the ground that the provision of the ordinance under which it was had is invalid. Three reasons are relied upon as supporting this contention, viz.: That the city of Newark was without power to pass such an ordinance; that the ordinance is unreasonable; that it is uncertain. None of these reasons, however, seem to me to have any substance. The power of the city to pass the ordinance is ample. Section 2 of the act of March 17, 1881 (3 Gen. St. p. 3751),

provides what the standard of dry measure shall be. Section 31 of the charter of the city of Newark, subd. 27 (Pamph. Laws 1857, p. 134), authorizes the common council to pass ordinances "to regulate weights and measures in conformity with the weights and measures established by law, to require every merchant, retailer, trader and dealer in merchandise or property of any description, which is sold by measure or weight, to cause his or her weights and measures to be sealed by the city sealer, and to be subject to his inspection." That this charter provision empowers the city of Newark to prohibit the sale of fruit, vegetables, or nuts from any measure which is not standard is too plain for argument. And this is what the ordinance in question does. Its manifest intention is to prevent the use of varying capacities as measures in the sale of merchandise, when sold by measure instead of by weight. And not only is the city authorized by its charter to pass ordinances to regulate weights and measures, and to require every dealer in merchandise which is sold by measure or weight to cause his weights and measures to be sealed by the city sealer, but it is also empowered by the thirty-third section of its charter to impose a penalty for the violation of such ordinance, by a fine not exceeding \$50. What has been said with regard to the power of the city to pass the ordinance which has been challenged also disposes of the objection that it is unreasonable; for when an ordinance has been passed by a municipal body, under legislative power, which is granted in definite and precise terms, such ordinance cannot be set aside as unreasonable. *Haynes v. Cape May*, 50 N. J. Law, 55, 13 Atl. 231. But even if it had been considered that the legislative power under which this ordinance was passed was general and indefinite, and that its reasonableness could therefore be inquired into by the court, the result would have been the same; for it was plainly passed for the protection of the public, and is a proper exercise of the police power. The alleged uncertainty in the ordinance is said to exist in its failure to define what is meant by the expression "original receptacle." In my opinion, this expression, taken in connection with the context in which it appears, defines itself. The original receptacle is the box, can, or other receptacle in which the merchandise originally came to the hands of the dealer. The judgment brought up by the certiorari should be affirmed, with costs to the defendants.

GRAHAM v. DONOHUE et al.

(Court of Chancery of New Jersey. Nov. 8, 1897.)

MORTGAGE — FORECLOSURE — OPENING DECREE — LACHES.

One who was made a party to a foreclosure suit merely because he was in possession of the

premises at the time the bill was filed, and who was in laches long before the hearing, is not entitled to an order opening the decree, to afford him an opportunity to prove that the mortgage was without consideration, where his petition sets up no facts showing his alleged interest in the property at the time the mortgage was executed.

Suit by Cordelia Graham against James Donohue and others to foreclose a mortgage. On motion of defendant John Sullivan to open the decree and grant a rehearing. Rule refused.

William T. Hoffman, for the motion. Leon Abbett, opposed.

REED, V. C. The application is made on behalf of John Sullivan, who was in possession of the mortgaged premises at the time this bill for foreclosure was filed, and on that account was made a party to the suit. The only defendant who filed an answer is James Donohue, who held the legal title to the mortgaged premises, and who was the mortgagor. So far as appears upon the record, John Sullivan had no interest in the property at the time of the execution of the mortgage, and is a party to the suit because he had a naked possession of the premises when the bill was filed. He now wishes an opportunity to prove that the mortgage was made without consideration. He also says in his petition that he had some equitable interest in the property at the time the mortgage was executed. Under the circumstances, I cannot make even a rule to show cause upon the present petition. The defendant was in laches long before the hearing of the want of adequate notice of which he complains. He had no answer on file when the hearing occurred. Although his counsel were notified of the hearing, and did not appear, they never afterwards inquired whether the hearing had taken place, or had been adjourned, although several weeks elapsed between the time of the hearing and the signing of the decree. He seems to have relied upon the answer of Donohue as a ground for making a defense; but Donohue's answer sets up that the mortgage was paid, and does not hint at any want of original consideration. The petition sets up no facts to show his interest in the property originally, nor how it happened that, after 16 years has elapsed, and after interest has been paid upon it,—a part by the petitioner himself,—the defense of no consideration for the mortgage is now set up for the first time. The rule is refused.

(56 N. J. H. 300)

AMES v. TRENTON BREWING CO. et al.
(Court of Chancery of New Jersey. Nov. 23, 1897.)

LIEN OF LANDLORD — PURCHASE-MONEY MORTGAGE—PRIORITIES—IMPROVEMENTS—FIXTURES.

1. Goods were bought upon an agreement that a mortgage should be given to secure the purchase money advanced by the mortgagee, and such a mortgage was given. Subsequently the goods were placed on premises demised to the

mortgagor by a lease containing a covenant that "improvements made upon the said premises" the lessee should leave undisturbed, for the benefit of the premises, without charge. *Held*, the title of the mortgagor to the goods was in the nature of a transitory seisin, and the purchase-money mortgage preceded any right of the lessor under the covenant in the lease.

2. Under such a covenant, the improvements to be left must be improvements of the realty itself.

3. To become such an improvement, the personality must be converted into realty; and, to be so converted, it must have been actually annexed to the realty, with an intention to make it a part of the demised premises.

4. An attachment of ornamental bars, complete in themselves when they were brought on the premises, to the floor and wall of a saloon, by adjustable screws and angle and stay irons, for the sole purpose of retaining them in their places, and of a beer pump and accompanying pipes to pump beer from a cellar, is not such an annexation as will convert this personality into realty, so as to become an improvement of the demised premises.

5. The fact that the lessee, before and at the time of the purchase of these articles, and when he brought them on the demised premises, always treated them as personality, and, to obtain the purchase money, had agreed to mortgage them as chattels, and did so mortgage them, is an indication that he did not intend the articles named to become part of the realty.

(Syllabus by the Court.)

Bill by Helen Ames against the Trenton Brewing Company and another for an injunction. Injunction allowed.

This is a bill filed by the complainant, the owner of a beer saloon at the northwest corner of Fourth and Market streets, in Camden, against the Trenton Brewing Company, a chattel mortgagee claiming a lien upon certain equipments of that saloon, and August Weber, the lessee of the saloon, and mortgagor in the chattel mortgage, and seeks to enforce a covenant not to remove improvements, etc., from the saloon, and to obtain an injunction to restrain such removal, or any sale or other disposition of them. On the bill and affidavits annexed, a rule to show cause was allowed, why an injunction should not issue, restraining removal, etc.; and further depositions were taken, upon notice and cross-examination. As the bill only seeks an injunction, the parties have, by stipulation, agreed that it should be heard as on final hearing upon the affidavits and depositions already submitted. The whole controversy turns upon the operation of a covenant contained in a lease made on the 18th day of August, 1894, by the complainant to the defendant August Weber, demising the saloon, its cellar, and a part of the yard attached, for the term of one year, at the yearly rental of \$480. The lessee covenants that he will not underlet, nor permit any one to occupy, nor use the premises for any other purpose than that of a saloon, nor "make or suffer to be made any alteration therein, without the written consent of the said party of the first part," and also covenants that, if the rent be unpaid, the lease shall be void, and that the lessor may enter, etc. It was further agreed by the lessee "that in case of any alterations, repairs, or improvements made upon the said premises, he shall

leave the same undisturbed at the expiration of his said term, for the benefit of the said premises, and without charge therefor." Under this lease from the complainant, Weber went into possession of the demised premises. He shortly afterwards took a partner, Mr. Abendroth, and they did business under the name of Weber & Abendroth. About the 1st day of August, 1893, this firm leased from Lewis & Bro., manufacturers of bar fixtures and furniture, of Philadelphia, a complete set of bar furniture, consisting of a back bar, with mirrors and marble trimmings, and a front bar or counter, also with mirrors and marble trimmings, shelvings, a screen, partitions, and swinging doors; fixing a purchasing price of the goods at \$1,000. In the lease between Lewis & Bro. and the saloon keepers was inserted this clause: "The lessee agrees that the said furniture shall not be attached or nailed to the building in which they are to be used, but shall be so placed and arranged as in no wise to be connected with the freehold." Mr. Weber afterwards called on Lewis & Bro., and stated that he would prefer to purchase the furniture for cash; that the Trenton Brewing Company had agreed to advance them \$1,000, and to take as security a chattel mortgage on the bar furniture. The articles named were delivered on the 5th day of September, 1894, at the saloon. Payment was made in part on that day, and on the 10th of October, 1894, the balance of the full price of the purchase money was paid to Lewis & Bro., who gave to the manager of the Trenton Brewing Company, at the time when the company advanced the \$1,000 to Weber & Abendroth, a full description of the bar furniture. The character of the articles furnished is described by their manufacturers to have been entirely finished and complete in their wareroom in Philadelphia; and their manager, and the carpenter who put them in, support this statement, and explain that they were cut into sections, and refitted together, because of the inconvenience of moving them in the whole pieces, as they stood in the wareroom. The only portion of the cabinet work which appears to have been specially adjusted to the building was some panel work, which extended from the Market street side, back to the end of the bar. Both the front and back bar and their equipment were complete and finished without this end, which was put in on the premises, at the request of Mr. Weber, to close that end. The bars were equipped for the drawing and selling of beer by a beer pump, with pipe and spigots. The other articles in dispute consist of two chandeliers, gas fixtures, and electric light globes. These were attached to the gas pipes on the premises by Weber & Abendroth in the ordinary manner, for the purpose of lighting the saloon. The saloon keepers had not the funds to pay for the two bars and their appurtenances. The Trenton Brewing Company agreed to lend \$1,000 to enable the lessees to purchase them, and it was agreed that they should secure its payment by a chattel mortgage on the articles,

when purchased. The attorney of that company came to Camden, examined the front and back bar and partition screens, and found them all movable, and unattached to the realty. He also examined the records to ascertain whether any previous liens had been fixed upon them, and, finding none, the chattel mortgage under which the Trenton Brewing Company claims was on the 10th day of October, 1894, made and recorded, and the \$1,000 paid over by the Trenton Brewing Company to the mortgagors, and used by them in paying for the furniture. The articles included in the chattel mortgage were 1 cherry back bar, with marble trimmings and mirrors; shelving; door; fancy bottles, stock bottles, and bar appurtenances; beer pumps, pipes, and spigots; 1 front bar (cherry), with marble trimmings and mirrors; 1 cherry partition, with mirrors and swinging doors; 4 tables; 12 chairs; spittoons; 1 lunch table; 2 chandeliers; gas and electric light globes; 1 clock; oil cloth and matting; 1 statue, entitled "After the Bath." In 1896 the saloon keepers had defaulted in the payment of their rent and in payment of the mortgage debt, and in December of that year the Trenton Brewing Company took possession of the various articles named in the chattel mortgage, and advertised them for sale. The complainant then filed this bill to restrain this sale, alleging that the articles named were alterations, repairs, and improvements upon the demised premises, and that they "belonged to and became part of the said premises, by virtue of the terms of the covenant herein set forth and mentioned." After the lease was made, Mr. Weber, the lessee, papered the saloon room, put in a urinal, mended some places in the floor, and asked for consent (under the provisions in the lease that no alterations should be made without consent) to build an additional room for a pool room in that portion of the yard demised to him. No response was made by the lessor, and the tenant erected this additional room without any consent. These items would hardly be deemed alterations, as they left the original premises unchanged as they found them; but they were added to those premises in a permanent manner, and were therefore more in the nature of improvements. No question has been raised as to these, and they have no other relation to the dispute than the claim that the conduct of the tenant in permanently attaching these things to the realty was in recognition and satisfaction of the agreement to leave the improvements upon the premises, and in contrast with his action relative to the articles in dispute, which he mortgaged as chattels, and which, it is insisted, never were attached to, nor intended to be part of, the demised premises.

Gilbert & Atkinson, for complainant. John G. Horner and John T. Van Cleef, for defendant Trenton Brewing Co.

GREY, V. C. (after stating the facts). It appears to be undisputed that, coincidentally with the change from an agreement to lease

the bars and cabinet work to the mortgagors to the making of an absolute sale to them for cash, there was also an arrangement that the whole or a considerable part of the purchase money should be advanced by the defendant the Trenton Brewing Company, which it was agreed should be secured by a mortgage upon the articles sold to the mortgagors. This proposition was, indeed, the occasion of the change from the plan to lease to that finally adopted,—of an absolute sale; and the Trenton Brewing Company's money was so obtained and used without any knowledge on its part that the lease from the complainant contained the provision on which she based her claim. The money of the Trenton Brewing Company was thus made the means whereby the title to those articles was obtained to be put in the mortgagors, and the first object in putting this title in them seems to have been to enable them to secure the payment of the Trenton Brewing Company's money by making the chattel mortgage in question. The mortgagors were substantially in the position of those to whom a title is given upon an understanding that it shall be disposed of in a certain manner. Their interest is, as to the thing agreed to be done, merely a transitory holding, and is not subject to the charges which ordinarily attend upon the vesting of title to property. Even in the law courts a transitory selsin will not support a right to dower in the wife of the grantee. Where the grantee takes a conveyance in fee, and at the same time mortgages the land to secure the purchase money, in whole or in part, to the grantor, or to some other person, dower cannot be claimed against the mortgage. *Griggs v. Smith*, 2 N. J. Law, 23. So, where a mechanic erects a building on land by contract with a person having a covenant for its conveyance, and the covenantee afterwards receives a deed, but at the same time mortgages it to a third person, who advanced the purchase money, it is held that no mechanic's lien attaches. *Thaxter v. Williams*, 14 Pick. 54; *Macintosh v. Thurston*, 25 N. J. Eq. 242. There appears to have been in the case under consideration a delay of several weeks between the time when the goods were delivered on the premises and the actual making of the chattel mortgage. But previous to that delivery the brewing company had agreed to make the advancement upon the security of the chattel mortgage, and this agreement and advancement were the means whereby the goods were obtained to be delivered. The principle under which, in a court of equity, a purchase-money mortgage is given precedence, is not dependent upon the instant carrying into effect of the agreement to give the mortgage, provided no superior equities have intervened during the period of delay. The saloon keepers were for a time in possession of the articles named, with an apparently uncharged title, but this fact was not acted upon by the complainant in any way. She did nothing whereby she changed her relation to the property during the period that

the making of the mortgage was delayed. She was in the same position at the end of that period that she occupied at the beginning of it. The mortgagee parted with its money for the purpose of enabling the purchase to be made, and on the assurance that it should have the mortgage as security for its payment. The mortgagors received the title upon this agreement, and their holding was in the nature of a trust to carry the agreement into effect; and, had they refused, they could have been compelled in equity to make the mortgage.

The brewing company's mortgage is a chattel mortgage. When it was given, the goods named had been brought upon the demised premises. To be effectual as a chattel mortgage, it must appear that the articles named in it were chattels at the time the mortgage was given, and had not become a part of the demised premises. The testimony of the witness Van Cleef, who prepared the chattel mortgage, is that at the time it was executed he "examined the front and back bar and partition screen, and found them all movable, and in no wise attached to the realty; resting upon the floor of the saloon as any other piece of furniture would, and as did the tables and chairs in the said saloon." No other witness testified as to the relation of these articles to the realty at the time the mortgage was executed, nor do any define with precision the time when the attachments were applied. If it were the actual condition, at the time the chattel mortgage was given, that there was no attachment whatsoever of the articles in dispute to the realty, for any purpose, their subsequent attachment by the mortgagor tenant could, at most, only add to the realty the interest which the mortgagor tenant had in them; that is, his equity of redemption. *Campbell v. Roddy*, 44 N. J. Eq. 251, 14 Atl. 279. And, even where the chattel mortgagee took his mortgage knowing the goods were to be annexed to the realty, if the detachment of the annexed articles will occasion no substantial damage he will be protected, as against a previous real-estate mortgagee, so far as his protection will not diminish the security held by the real-estate mortgagee before the goods were annexed. *Id.*, 44 N. J. Eq. 253, 14 Atl. 279. In cases of this character the courts are less favorable to a construction that there has been a conversion of the chattel into realty, than when it is made by a mortgagee. *Blanche v. Rogers*, 26 N. J. Eq. 566. In this case there is no pretense that the chattel mortgagee knew that there was any intention to annex the articles to the realty, so that its equity is even stronger than that in the *Campbell Case*, above cited.

I prefer not to rest the case upon this limited view, and will consider all the points presented by the pleadings and proofs, and discussed in the arguments of counsel.

The complainant, by her bill, states her equity to be that the articles constituting the bars and beer-supplying apparatus be

came and were in fact part of the demised premises, under the term of that provision in the lease which declares that in case any alterations, repairs, or improvements were made upon the premises, they should be left undisturbed at the expiration of the term. It becomes a question of the first importance, in the further consideration of this case, to ascertain the construction of this contract as applied to the circumstances of this case. It is not contended by the lessor complainant that the articles claimed to have become part of the realty are either alterations or repairs of the premises. The lessee did not change or alter the premises by taking away anything that was there when the lease was made, and putting in its place any of the articles in question. Nor were the latter supplied as repairs of any worn-out or injured part of the demised premises. The complainant contends that the bars and beer apparatus were improvements, within the meaning of the clause referred to, and that under its operation they have become part of the real estate demised. I think there is a clear distinction between an improvement upon lands, which from its very nature becomes a part of the realty, as a house built by a trespasser upon the lands of another, and an apparent addition to realty, which retains some of the essential incidents of a chattel, though annexed to realty. Fixtures are all within this latter class, and, as to such articles, inquiry is permitted to ascertain whether the particular thing in question remains a chattel, or has become real estate. The word "improvements," used in the lease, is undoubtedly one of wide signification. I have read with interest the cases to which the counsel of the complainant has referred me, as to the various structures which have been held to be included in this term. There is, I observe, one characteristic which attends upon all of them,—from the paint put upon a house to the reconstruction of a wharf. The thing done which is held to be an improvement is done to the realty. The word itself conveys this meaning. In order that there might be an improvement, there must previously have been something to be improved. In the case before me, this was the demised premises. The improvement consisted in the amelioration or bettering of those premises. The provision in the lease which the complainant relies upon expressly defines the word to have this characteristic, for it declares that it is "improvements made upon the premises" which shall be left. The improvements, to be within the provision, must, when made, savor of the realty. The association of the words in the clause of the covenant shows this to be the true meaning. It was "alterations, repairs, or improvements made upon the premises" which should be left,—that is, if the premises should be altered, as by opening the wall and placing a window, the window should remain; if they

should be repaired, as by hanging a new door in place of a broken one, the new door should be left. I think the improvements must also have been improvements of the demised premises, so that the condition and value of the premises as realty was improved, and that the word did not include articles which were in their nature chattels, which had not been subjected by the parties to any action which converted them into realty. The covenant did not refer to improvements brought upon or placed in the demised premises. It was improvements made of the premises themselves which were agreed to be left. The complainant's counsel asked several witnesses whether the disputed articles were not improvements of the premises, and whether, if they were taken away, the premises would not be less valuable, and has advanced some argument upon the theory indicated by these questions. The true inquiry is not whether the presence of these things is an improvement of the place, in the general sense of the questions asked. The presence in the saloon of the bars and their equipment is an improvement, in the same sense that the room is improved by the presence of the chairs, tables, and carpets, etc., which are in the chattel mortgage, but are not claimed under the covenant. Such things are improvements to the appearance of the place, but none of them can properly be deemed to be of that fixed character which is necessary in order to make them improvements of the real estate or its appurtenances. I think it must be held that the essence of the covenant is that the improvements shall be of the demised premises. Whether they were or were not improvements, in the sense that they were betterings of the realty, must depend upon their essential nature, and the action and intention of the lessee in relating them to the demised premises, and the opinions of the witnesses as to the result are of little weight in the matter. The latest exposition of the law by the court of errors upon the kindred subject of the lien of a real-estate mortgage upon articles having some of the characteristics of chattels is to be found in the case of *Feder v. Van Winkle*, 53 N. J. Eq. 372, 33 Atl. 399. The three rules of guidance to determine what, in such a case, the lien of a real-estate mortgage covered, are there restated thus: First, that the articles must be actually annexed to the realty; second, they must be applied to the purpose for which that part of the realty to which they were annexed was appropriated; third, they must be annexed with the intention to make them a permanent accession to the freehold. I think the first and third of these rules are aids, in this case, in seeking to ascertain the operation of the covenant in the lease upon the disputed articles. To constitute an improvement made upon the premises, under the terms of this lease, it must have been actually annexed to the

realty, and intended to be a permanent accession to the freehold. The second rule is not, in my view, applicable to the case under consideration, because, if there was any actual annexation to the premises, which was intended to become part of the realty, it must, under the agreement, be left, whether it was applied to the uses of the realty to which it was attached, or not. Accepting this construction of the terms of the lease, the questions to be determined are: First, were the articles in question actually annexed to the realty? Second, was that annexation intended to be a permanent accession to the freehold?

First, as to the annexation to the freehold. There must have been some sort of actual annexation. The manner of attachment may of itself be of so permanent a nature as to be almost conclusive evidence of a purpose permanently to incorporate the chattel with the realty, or it may be of such an adjustable character as to rebut that conclusion, and support other evidence of the intention of the party not to incorporate the chattel with the realty. In this case the bars and their equipment, the partitions, doors, and mirrors, and the beer pump and its attendant pipes, were each and all perfect and complete in themselves, for the uses to which they were adapted, before they were brought upon the demised premises. The length of one partition, at the back end of the bars, and the length of the beer pipes, seem to be the only things which required adjustment to fit them into the demised premises. They were all stock articles, capable of being put into any saloon large enough to hold them. None were brought upon the premises as material to be used for the construction of an improvement of the demised premises. When they came thus complete and ready for use, it was found that the front bar, which, in its use, was likely to be jostled by men leaning on it, and the back bar, which ran up to so considerable a height that it might readily topple over, needed to be stayed in their places. It was also found that the pipes to and from the beer pump, and to supply water and carry off waste water, required holes to be cut in the floor, corresponding to the position in which they were placed. For the purpose of preventing the front bar from being shaken or pushed out of its place, it was made firm by the use of several angle irons, one member of which was screwed to the bar, and the other to the floor. The back bar was also prevented from falling over by screwing it to stay irons which were driven into the wall. Pipe holes, which were from seven-eighths of an inch to an inch and a half in diameter, were cut into the floor, to let the pipes through. All these pipes were attached to the bars, and, except the waste-water pipe, were coupled by adjustable joints. When the bars had been put up, they were held in their places by the screws in the angle irons and stay irons. If the screws were drawn, the angle irons would have no attachment to anything, and the stay irons would

remain sticking in the wall. If the beer pipes were uncoupled, the pump and pipes would be removable, leaving only the small pipe holes as an evidence that the pipes had ever been there. When thus disconnected, the bars and their equipment and the beer pump and its accompanying pipes would be in substantially the same condition that they were when brought upon the premises, and capable of being placed in any other saloon large enough to hold them. This last characteristic is not conclusive as to the quality of the article in question, but was held in the case of *Feder v. Van Winkle* to be a circumstance worthy of consideration. The demised premises would also have indicated no change from that shown before the disputed articles were placed there, save the several small pipe holes in the floor, and the presence of the stay irons sticking in the wall. The stopping of these small holes and the tapping and drawing of these stay irons would absolutely restore the premises to their original condition, so far as any fastenings of the disputed articles changed them; and these restorations are, in my view, matters of so trifling a character that the necessity to make them cannot be appealed to as evidence of a purpose permanently to annex these articles to the premises. There was proof that, in making a trapdoor way into the cellar, several joists had been cut, but the cellar way has no relation to the disputed articles. The complainant's contention is that the character of the annexation of the articles in dispute is of itself sufficient to show their actual incorporation into the realty, as effectually as the additional pool room built by the lessee, or the painting or papering of the walls done by him, have become part of the demised premises. The impression I have received from the proofs is that the actual fastening of these articles has been shown to have been made solely because, without support, the front bar might be jostled out of place, and the back bar toppled over. If such an annexation should be held to be sufficient to convert them from chattels into realty, their proper classification would seem to depend upon the breadth of the base, or the height of the structure. If the base of the article were so broad that it did not need screwing to the floor, or the height were so low that it did not require to be stayed by the wall, it would never be so fastened, and would remain a chattel; but if it had a narrow base, or were high enough to overset easily, then it must be fastened, and would become realty. Whether it should be personalty or realty would thus depend, not upon the intention of the party that it should become realty, and his acts in accordance therewith, but upon the casual necessities attendant upon keeping a structure, complete in itself, in place. I think this case is fairly within the principles expounded by the unanimous vote of the court of errors in *Blancke v. Rogers*, 26 N. J. Eq. 563, where the dispute was between a real-estate and a chattel mortgagee. This decision was approved by the same court

in *Feder v. Van Winkle*, 53 N. J. Eq. 372, 33 Atl. 399. An annexation simply incidental to the staying of the articles, and not constructive or incorporative of those articles into the realty, was held ineffective to bring them under the lien of the real-estate mortgage. I think the method of annexation of these completed stock articles was of such a temporary and adjustable character, under the circumstances proven, that it was not effective as an incident to make them part of the realty.

Upon the second question, of the intention of the lessee to make the chattels a part of the realty, the conduct of the parties interested at the time they acted seems to be wholly irreconcilable with any intent to improve the real estate. It might be that the acts of annexation and conversion were of such a clear and definite character that no room would be left to consider evidence of intention not to convert. The complainant contends that the fact of annexation in this case was of this character. I think the case shows no such physical attachment as of itself works a conversion, and that evidence of the existence of a purpose not to attach the articles in dispute, as improvements of the demised premises, is forceful in support of the claim of the brewing company, that they never were so attached as to be improvements. If there was always a clear purpose that the articles should remain chattels, and they were always dealt with as chattels, then they never became improvements of the realty. The cases on fixtures, and others involving the question of sufficient conversion of chattels into realty, all hold that the facts and circumstances of the particular case which may be indicative of the purpose of the lessee or mortgagor or owner must be considered. The same rule may fairly be applied in ascertaining whether the articles in dispute in this case were improvements of the demised premises. In the later cases much more weight is given to the point of the intention to make the chattel a part of the realty than to the actual mode of annexation. In *Erdman v. Moore*, 58 N. J. Law, 461, 33 Atl. 958, the late Chief Justice Beasley held that the articles in dispute in that case could not, by reason of their physical connection, be deemed to be fixtures; yet, when it appeared aliunde that there was an intention to make them fixtures, this element was held to be controlling. In the case of *Feder v. Van Winkle*, above cited, the court of errors declared that, to effect a conversion, the intention must exist to incorporate the chattels with the real estate for the uses to which the real estate is appropriated, and there must be the presence of such facts as do not lead to, but repel, the inference that it is intended to be a temporary annexation. It will be thus seen that the element of intention is the controlling factor in determining whether additions to real estate, which retain apparent indications that they are still personalty, have become incorporated into the realty. Each case must be controlled by the evidence

of annexation and intention exhibited in that particular instance. The difficulty arises, as the court in the last-cited case declared, in applying the rule. In this case there are several undisputed facts which I think show conclusively that the lessee never intended to incorporate any of the articles claimed by the chattel mortgagee as part of, or an improvement upon, the realty. The original purchase of these articles was effected by means of the loan made to the lessee by the brewing company upon an assurance given it that it should have the chattel mortgage here in question. This agreement to give the chattel mortgage, and its subsequent performance, show that the lessee deemed the goods mortgaged to be, and intended them to continue to be, personal property. These acts were done by the lessee before, and at the time when, he brought the articles in question on the premises, before any dispute had arisen, and before any default in the payment of the rent might have tempted him to deny an intention to annex these things to the freehold. So the mode of annexation of the articles was adjustable, and capable of easy disconnection. This mode of attachment required the purchase of special irons and stays, which, had there been a purpose permanently to annex, would not have been necessary, and would probably have been avoided on the ground of expense and additional labor. The testimony of the lessee mortgagor supports his previous action in giving the chattel mortgage. He testifies that the articles mortgaged never were intended by him to be alterations, repairs, or improvements of the demised premises; that, on the contrary, they were regarded by him as furniture, and intended to be taken away when the lessee decided to remove them. Nothing in the case contradicted these proofs, save only the inference sought to be drawn from the mode in which the articles in question are fixed in their places. Had they rested unstayed by their fastenings, there would be no evidence whatever of an intention to make them part of the realty. When all the proofs indicate a positive purpose not to convert these articles into realty, and this one incident is capable of an explanation not inconsistent with the intention not to convert, I think I am bound to hold that the complainant has failed to support his allegation that under the operation of the covenant recited the articles named have become part of the demised premises. I do not consider that this view conflicts with the principles of the decision of the court of errors in *Feder v. Van Winkle*, or of this court in *Lee v. Wood-Working Co.* (June, 1897) 37 Atl. 769. Each of those cases was determined by the special circumstances exhibited in the particular case. Vice Chancellor Pitney, in *Lee v. Wood-Working Co.*, was of the opinion that the case of *Blancke v. Rogers* had been limited by the court of errors in the case of *Feder v. Van Winkle*. The court of errors did not overrule, or in terms modify, *Blancke v. Rogers*;

and whatever limitation it made of the rules laid down in that case is to be ascertained by an examination of the application of those rules to the circumstances of the later case. In the *Blancke* Case the facts showed that the attachment of the machine in question was made simply to steady it in its place, and I understand the spirit of the decision to be that such an attachment indicated no purpose to make the machine a part of the realty; and this view was not disapproved of in the *Feder* Case. In the latter decision the articles consisted of heavy machines, weighing from 400 to 8,000 pounds, resting on and fastened to large timbers laid in the earth, some of them on a subfoundation of concrete, and others fastened by bolts and rods let down from the beams and rafters of the building. The court said, "The machinery employed, the mode of its annexation, and the manner of its use in connection with the realty, as an entirety, indicated, not a temporary, but a permanent, accession." The machines were shown by the proofs to have become by their attachment a part of the construction of the realty. In the *Lee* Case the facts as to the character of the machinery and its annexation to the realty were substantially the same as in the *Feder* Case, and the vice chancellor accepted the latter case as controlling the question. In my view, neither the *Feder* Case nor the *Lee* Case differ from the essential principle declared in the *Blancke* Case. Where the annexation is of such a character as to indicate a purpose to make the chattels part of the realty, as in the *Feder* and *Lee* Cases, they will be held to have become realty. Where the annexation does not indicate such an intent, and is proven to have been made for a different purpose, as in the *Blancke* Case and that now under consideration, the chattels do not become part of the realty. In *Parker v. Wulstein*, 48 N. J. Eq. 94, 21 Atl. 623, a lease provided "that all improvements of the building shall belong to the landlord at the expiration of the term." Vice Chancellor Bird defined the word "improvement" to comprehend everything that tends to add to the value or convenience of a building or place of business. The question in that case arose between landlord and subtenant, and affected the right to remove shelves, counters, a heater, awnings, etc. In that case the counters and shelves were substantially nailed to the walls, and became part of the construction of the building, and were within the covenant, because they had clearly become part of the realty. In *Blancke v. Rogers*, *ubi supra*, the attachments of the machines were not structural, in any sense; nor are the fastenings of the bars and their equipment, in this case, of that character. When such connections are made solely as a means of staying the chattels in their places, and not as incorporative of them into the realty, they are not, in my view, improvements of the demised premises.

I have heretofore considered the status as chattels of the articles in dispute, other than

the two chandeliers, the brass gas fixtures, and the electric light globes. These latter articles, I think, differ from the bars and their equipment, in their relation to the realty, in all the respects noted. They were not within the articles which were obtained to be sold to the mortgagors, upon the agreement to give the chattel mortgage. I do not understand that they were unattached when Van Cleef examined the premises, and had the chattel mortgage executed. Their attachment to the realty was not casual, and for a purpose consistent with their continued use as chattels. They were as solidly and permanently connected with the gas pipes (which were a part of the realty) as the nature of their use would permit. This part of the realty (the gas pipes) was not usable without these gas fixtures, nor could the gas fixtures be used without the gas pipes. They became, on their attachment, so entirely an improvement of the realty that they were within the operation of the covenant, and were, when the chattel mortgage was given, real estate, and as to them the chattel mortgage was inoperative. I will advise that an injunction be allowed, to restrain only the sale of the two chandeliers, the brass gas fixtures, and the electric light globes.

(56 N. J. E. 138)

FLEMMING v. LAWLESS et al.

(Court of Chancery of New Jersey. Nov. 18, 1897.)

ORDER TO PRODUCE RECEIPTS — NONCOMPLIANCE.

Defendant pleaded payments, alleging, "For which he has vouchers ready to be produced and proved," whereupon complainant, ignorant of the existence of such vouchers, procured an order requiring defendant to produce "the receipts, vouchers, and other evidence in writing of the payment" of the sums as set forth in the answer. Defendant produced a consolidated receipt, purporting to be for four separate payments, covered by separate receipts, but did not produce a certain separate receipt that he then had. *Held*, that he could not afterwards use the separate receipt as evidence, in view of the common-law practice act (section 157), providing that a paper shall not be given in evidence where a party has refused to comply with the order to produce it.

Bill by Sara L. Flemming against Peter Lawless and others. Defendants move to open a decree of foreclosure and sale. Denied.

W. B. Williams, for complainant. H. M. Barrett, for defendants.

PITNEY, V. C. This is a motion on behalf of the defendants to open a final decree in this cause, made on the 25th day of January, 1897, fixing the amount due (\$5,507) upon the mortgage set out in the bill, and \$1,553.85 for taxes on the mortgaged premises paid by complainant, and decreeing a sale to pay the same. From that decree an appeal was taken to the court of errors and appeals, and the cause was argued at the last June term thereof. Before the decision thereof by that court, upon application of the defendants the court sent the record back to this court, in order to enable

this court to deal with the application upon its merits. The application, made by petition, is based upon the discovery by the defendants of a piece of documentary evidence, to wit, a receipt for a payment on account of the taxes included in the decree, alleged to have been made to the complainant's agent by the defendants, and which receipt was not in the possession or control of the defendants when the cause was tried in this court.

The opening of a decree fairly obtained after a hearing, in which both parties have been fully heard, is a matter resting in the discretion of the court, to be exercised with care and caution, and in such manner as to promote justice. Two things must, of course, be proven by the defendants, in order to entitle them to the ear of the court: First, that the alleged receipt is genuine; and, second, that it was not within their possession or control at the time of the hearing in this court, and that such want of possession and control was without fault on their part.

Counsel for the complainant makes a preliminary objection to the granting of the petition, based in part upon the terms of the 157th section of the common-law practice act, and in part upon the misconduct of the defendants, and contends that the defendants are absolutely debarred, by the terms of the last clause of said act, from now offering said receipt in evidence, even if its genuineness were proven, and it were also proven to the satisfaction of the court that it was not in their possession or control at the time of the hearing before this court; and, as an additional and supporting ground, he contends that, without the aid of that act, the defendants are not entitled to the ear of the court, because they have disobeyed an order of the court with respect to the very receipt in question, and are in contempt therefor. The consideration of this question renders it necessary to recur to some of the facts and circumstances which preceded the hearing in this cause.

The bill alleges that the owner of the mortgaged premises failed to pay the taxes, water rents, and other municipal charges levied by the city of Jersey City upon the premises, and permitted them to fall in arrear to a large amount; that the arrears were finally adjusted by a commission under what is called the "Martin Act," and that the complainant, as mortgagee, was obliged to pay several large sums for the taxes so adjusted, in order to save the premises from being sold, for which she claims a first lien upon the premises. The amount so paid was alleged in the bill to be \$3,272.70, in three separate payments, in the months of April and May, 1890, and the further sum of \$1,512.56 on the 13th of October, 1891; making in all \$4,785.26. The defendant Lawless set up in his answer that the complainant had received the sum of \$1,200 from one Vorrath in payment of a part of the mortgaged premises conveyed by the defendant and released by the complainant, and that that sum should be applied either to the mortgage

or arrears of taxes, without indicating which. That payment of \$1,200 was admitted by the complainant at the hearing. The defendant Lawless set up further payments, especially on account of the taxes, as follows: "The defendant Peter Lawless admits the payment of three thousand two hundred and seventy-two dollars and seventy cents for taxes, water rents, and other municipal charges by Jersey City, as set forth in said bill, as having been made by the complainant [ignoring the alleged payment of \$1,512.56, October 13, 1891], but avers and insists that he paid and reimbursed said complainant for such payment made by her, and paid, in excess of said sum, to her or her attorney, James Flemming, now deceased, for said taxes, water rents, and municipal charges, the sum of three thousand two hundred and twelve dollars and thirty cents, for which he has vouchers ready to be produced and proved. The said defendant Peter Lawless admits that there is due on the mortgage of the said complainant the sum of nine hundred and forty-nine dollars and fifty cents, without interest, which interest is to be added, and which sum he is ready to pay to the complainant in satisfaction of her said mortgage." It thus appears that Lawless, in his answer, alleged payments on account of taxes, etc., of \$3,272.70, plus \$3,212.30, making \$6,485.

On the 23d of November, 1895, and before the cause had been referred for trial, the complainant presented her petition to the chancellor, setting out a brief résumé of the proceedings, and then follows this allegation: "That in the answer of Peter Lawless, Julia Rathe, and Catharine O'Neill, the said defendants allege that they paid to James Flemming certain sums of money for taxes, and on the mortgage in question, and that there is now due on said mortgage and taxes the sum of nine hundred and forty-nine dollars and fifty cents, with interest, and that they have certain receipts, vouchers, and other evidences in writing of the payment of the said sums; that she is ignorant of any such receipts for the amounts above set forth." The petition further alleges that the petitioner had requested the defendants to permit her to inspect and examine any receipts or other evidences in writing of such payments, but that the defendants had refused. It prayed that an order might be made directing the defendants "to produce the said receipts, vouchers, or other evidences in writing of the payments" of the said sums of money, and leave the same for inspection and examination in such a manner as the court might think fit. Upon that petition an order was made on the 2d of December, 1895, reciting the petition, and directing "that said defendants do, within five days from the date of service upon them of a copy of this order, which need not be certified, produce receipts, vouchers, or other evidences in writing for all the payments claimed to have been made in their answer, on the mortgage in question, and also the receipts, vouchers, and other evidence in writing of the payment

by them, or any of them, to James Flemming, of three thousand two hundred and seventy-two dollars and seventy cents, and the sum of three thousand two hundred and twelve dollars and thirty cents, as set forth in said answer, and leave them with Isaac Romaine, Esquire, one of the masters of this court, for the space of ten days, subject to the examination of said petitioner." This order was served upon the defendants' solicitors on the 7th of December, 1895. At that time the defendant Lawless alleges, and now admits, that he had in his possession, or in that of his counsel (a Mr. O'Sullivan of New York), four separate receipts (one of which is the one lately discovered, and is the foundation of the petition), purporting to be signed by James Flemming, the deceased husband of the complainant, for four several payments on account of moneys paid by the complainant for arrears of taxes on the mortgaged premises, which receipts were known and called at the hearing of the cause the "separate receipts"; and also, in addition to those papers, a single paper, purporting to be signed by Mr. Flemming, which was a consolidated receipt, purporting to be for the four separate payments covered by the separate receipts, stating them all in detail, with their dates, which consolidated receipt was known at the hearing as the "omnibus" or "suspect." On the 11th of December, 1895, the defendants, by their solicitors, in obedience to the order of December 2d, deposited with Master Romaine this consolidated receipt or suspect, but withheld from such deposit the four separate receipts. At that time, however, the solicitors of the defendants were aware of the alleged existence of the four separate receipts. In the latter part of December the complainant presented another petition to the chancellor, in which she set forth that in pursuance of the order of December 2d the defendants had deposited with Master Romaine the consolidated receipt, and that the petitioner's solicitors had examined it, and were not satisfied with the authenticity of the signature, and desired to have the same photographed, and examined by an expert in penmanship. The petition set out that the petitioner had requested the defendants' solicitors to consent to have the same photographed, and that they had not granted the request, and prayed that the petitioner be permitted to have the document photographed, and that the paper itself be impounded and left in the possession of the master. On the filing of that petition an order was made on the 23d of December on the defendants to show cause why the prayer of the petition should not be granted. This petition and order to show cause were served upon the defendants' solicitors, and on the return day, to wit, the 30th of December, 1895, the chancellor made an order (which was served on defendants' solicitors on the next day) that the receipt be impounded in the hands of the master till the further order of the court, and complainant be permitted to cause the same to be photographed.

Shortly after this, and early in January, 1896, Mr. O'Sullivan brought the four separate receipts to the office of the solicitors of defendants, and had a consultation with them as to whether those, as well as the consolidated receipt, should not be delivered to the master. The solicitors of the defendants advised and urged the lodging of the separate receipts in the hands of the master, and Mr. O'Sullivan opposed it. They went together to the master's office, with the receipts in their hands; and, after talking together, Mr. O'Sullivan declined to leave the receipts with the master, saying he would hold them to be used as a reserve to surprise the complainant, and took them with him to New York. He swears that he subsequently changed his mind, and started with the receipts to Jersey City, for the purpose of lodging them with the master, and lost them under the circumstances stated in the opinion heretofore filed in this cause. 36 Atl. 502. At the hearing the defendants called upon the complainant to produce all papers, writings, and books of account, checks, check stubs, etc., in her possession, belonging to James Flemming, the deceased husband of the complainant, which might bear upon the questions involved, and in pursuance thereof the complainant did produce all such papers; and from them it abundantly appeared that two of the payments claimed in the four separate receipts, and mentioned in the consolidated receipt, viz. the first and fourth payments, were actually made to Mr. Flemming. The receipt by Mr. Flemming of these two payments was shown by entries of the amounts on the obverse side of the stubs in his check books, and by entries in his bank pass book; also, by copies of the corresponding receipts, to wit, the first and fourth receipts, found among his papers; and such payments were promptly admitted by the complainant. This confined the dispute at the hearing to two payments claimed by the defendants, to wit, one of May 6, 1890, for \$1,085, and the other of September 15, 1891, for \$2,600. The proof of these payments rested upon the "suspect receipt," and the direct evidence of payment in the testimony of Peter Lawless. The opinion of the court upon this evidence was that the suspect was, in effect, a forged receipt, and that the evidence of Mr. Lawless was not reliable. 36 Atl. 502.

The petition of the defendants now under consideration states that in the month of September last, after the argument of the appeal, one of the two receipts which cover the disputed payments, to wit, that of September 15, 1891, for \$2,600, was received by the solicitors of the defendants by mail, inclosed in an envelope with an anonymous letter; and the application is to open the decree, and be permitted to prove this receipt, which, as we have seen, is one of the four receipts which were in defendants' possession at the time the suspect was lodged with the master. The ground now taken by the complainant is the same as that urged in the court below against the receipt of second-

dary evidence of the contents of these receipts, and is twofold, viz. that the defendants, having been ordered by the chancellor to deliver the receipt in question to Mr. Romaine, when it was in their possession, and having refused to do so, are in contempt of the court in that respect, and cannot now be heard to ask to be relieved from the decree of January 25, 1897, in order to be permitted to put the paper in evidence, and, further, are now debarred by the act of the legislature before referred to from offering the same in evidence. The language of the act is: "The court may order either party to give to the other, within a specified time, and under such terms as may be imposed, an inspection and copy, or permission to take a copy, of any books, papers, or documents in his possession or under his control, containing evidence relating to the merits of the action or proceeding, or of the defense thereto, and if compliance with the order be refused, such books, papers, or documents shall not be given in evidence in such action or proceeding, and the court may punish the party so refusing as for a contempt of the court." No question is or can be raised but that the act in question applies to the court of chancery. The language of that and the following section clearly shows that it does apply to the court of chancery. The power of the court to make the order of December 2, 1895, and the propriety of making it in this case, and that it was made in due course of practice, was not, and indeed cannot be, questioned. Such power was a part of the original jurisdiction of the court. 2 Daniell, Ch. Prac. p. 1817; Hare, Disc. p. 239 et seq., §§ 7, 8; 2 Madd. Ch. Prac. pp. 391, 392; Gres. Eq. Ev. p. 26 et seq., where it is shown that wherever a defendant, in his answer, makes profert of documents, it is a matter of course for the complainant to have an order on the defendant to produce the same for inspection by complainant, and, if defendant shall fail so to do, he will be in contempt of the court, and debarred from making any further motion in the cause. The doctrine was applied in *Apthorpe v. Comstock*, 1 Hopk. Ch. 143, where the bill prayed an injunction against an action of ejectment based upon a deed which complainant alleged to be forged or fraudulent, or otherwise invalid; and a motion was made that the deed might be deposited with an officer of the court, for the inspection of the complainant, his witnesses, etc. An elaborate examination of the authorities was had, and the motion to deposit the deed for inspection was granted, and a motion to dissolve the injunction restraining the action at law was refused, and both orders were affirmed on appeal. *Comstock v. Apthorpe*, 8 Cow. 386. And in this court Vice Chancellor Van Fleet, in *Brown v. Farley*, 38 N. J. Eq. 186,—a suit for partition,—ordered the production by the defendant, for inspection by the complainant, of a deed under which the defendant claimed title to the whole of the premises, and, on failure to obey the order, debarred defendant, by an order, from offering the same in evidence on the

trial of a feigned issue to determine the title. The power was also declared to be inherent in a court of law by the supreme court in *Hilyard v. Harrison Tp.*, 37 N. J. Law, 170, at page 173. It will thus be seen that the statute in question is a mere declaration of a power which already existed in the court, and, in addition, provided a peremptory penalty for disobedience, which the court might or might not have enforced in a particular case without the mandate of the statute, viz. debarring a party who had disobeyed the order from offering the evidence which he had refused to produce at the time and place designated by the court. It is to be here observed that the defendant, by his answer, makes profert of the vouchers in question, using this language: "For which he has vouchers, ready to be produced and proved." I understand the rule to be that a party who makes such profert must produce the documents at such time and place as the court shall direct. He cannot choose his own time and place.

Upon this state of the law and the facts, the single question is whether or not the order to produce herein included the voucher here in question. It is to be observed that the complainant was, *prima facie*, without knowledge of these papers. They do not purport to be signed by her, but by her agent, who was dead. There is no proof, or reason to suppose, that she ever saw the voucher here in question, or any copy of it, or had any reason to believe that it was in existence. No description of the vouchers was given in the answer; so that she was entirely in the dark as to their description. She was not only unable to describe them, but there was no occasion for her to attempt to describe them, in her petition. It is to be observed that the petition of complainant set out the allegation of the answer that the defendants have in their possession "certain receipts, vouchers, and other evidences in writing of the payment of the said sums," and that the petitioner is ignorant of them. And it further appears that it was proven on the trial that the petitioner's solicitor had applied to the solicitors of the defendants for the inspection of these papers before this petition was presented, and had been refused such inspection. The prayer of the petition is, "to produce the said receipts, vouchers, or other evidences in writing of the payments of the sum of \$3,272.70 and the sum of \$3,212.30," as set up in the answer. The order is, first, generally, to "produce receipts, vouchers, or other evidences in writing for all the payments claimed to have been made in their answer on the mortgage," and "also the receipts, vouchers, and other evidences in writing of the payment by them, or any of them, to James Flemming, of the sum of \$3,272.70 and the sum of \$3,212.30, as set forth in said answer." It was, in effect, this: "You say in your answer that you have vouchers to prove the payment of two certain sums of money to James Flemming. Now you are ordered to produce those vouchers." There can be no doubt, then, that the order was to produce the

very vouchers which the defendant, in his answer, said he had in his possession, ready to be produced and proved. And the effect of it, in my judgment, was plainly the same as if the order had read, "all the receipts, vouchers, and other evidences in writing." I am unable to adopt the ingenious argument of the learned counsel of the defendants, that the order was only to produce receipts and vouchers generally, and not all the receipts and vouchers. For reasons just stated, I hold the contrary. There can be no doubt that the receipt now proposed to be offered and proven was one of those covered by the order. That being so, it follows that there was a distinct and direct refusal to obey the order of the court of December 2d. Moreover, it was a refusal which it was impossible for the petitioner to deal with at the time by punitive proceedings. As I have observed, she had no knowledge of the existence of the other individual receipts. She did not know how many receipts the defendants had. It was, indeed, testified by the defendants that they were shown to Mr. Romaine on the occasion when the discussion occurred in his presence as to the propriety of lodging them with him. But Mr. Romaine swears that he did not see them. He certainly was furnished with no description or copy of them, and the interview was in the absence of the complainant's solicitor, and without notice to him, and it does not appear that Mr. Romaine informed complainant's solicitor of the occurrence. This leaves the complainant entirely blameless for not proceeding and obtaining, as was done in Farley's Case, an adjudication of contempt for disobeying the order of the court. She was fully justified in proceeding to prepare her case to meet the alleged payments upon the basis that the consolidated or suspected receipt was the only voucher the defendants had for these alleged payments. She did proceed in that respect at great expense, and succeeded. It seems to me, for these reasons, that the case is brought directly within, not only the letter, but the equity and spirit, of the statute, and that the decree should not be opened, and defendants permitted to produce and offer proof in support of the genuineness of the receipt, and that in the absence of the statutory prohibition the court ought, in the exercise of a sound discretion, to refuse to open the decree. In the Farley Case the defendant was prohibited by the order of this court from offering the deed in evidence before the trial judge and jury on the trial of the feigned issue, and was therefore defeated. He was afterwards indicted for forgery and acquitted, and then applied to the court for an order vacating the order adjudging him guilty of contempt of court, and dissolving the injunction against the production of the deed; also, directing the setting aside of the verdict on the feigned issue, and directing a new trial of the issue; and his application was denied, simply on the ground of his disobedience of the order of production. The only difference between Farley's Case and this is that in Farley's Case there was a direct adjudication

of contempt, and a direct order that he should be debarred from offering the deed in evidence on the trial of the issue. This last order was necessary, because the trial of the cause was before a judge of a different court. But I apprehend that if the hearing of the cause on the merits had been in this court, before the same judge who made the order to produce and deposit the deed, he would have been at liberty to exclude evidence, either original or secondary, of the deed, without any adjudication of contempt. For these reasons I shall advise that the prayer of the petition of the defendants herein be denied, and the petition be dismissed, with costs.

(89 Conn. 720)

STATE v. THOMPSON et al.

(Supreme Court of Errors of Connecticut. Nov. 30, 1897.)

CONSPIRACY—DECLARATIONS OF CO-CONSPIRATORS —ORDER OF PROOF—DISCRETION OF COURT.

1. Conspiracy is a misdemeanor at common law, and as such is punishable under Gen. St. § 1642, fixing the penalties for common-law offenses.

2. The essence of a conspiracy is the unlawful combination, and not the accomplishment of the ultimate purpose; the combination becoming an offense because of the unlawful object to be effected, or the unlawful means to be employed.

3. When the existence of a conspiracy is *prima facie* established, evidence of the declarations and acts of one of the defendants in furtherance of the common purpose, made in the absence of the others, are admissible against all.

4. It is the province of the court to determine whether the existence of the conspiracy has been sufficiently established to admit such evidence.

5. The order in which the proof shall be received is within the discretion of the court.

Appeal from superior court, Litchfield county; Samuel O. Prentice, Judge.

Franklin D. Thompson and Edward C. Thompson were convicted of conspiracy to defraud, and appeal. Affirmed.

The information contained two counts charging the defendants with having, in July, 1896, at Colebrook, in said county, conspired between themselves to cheat and defraud, in the first count, William F. Byrd and Catherine Byrd, his wife, of Brooklyn, N. Y., out of a certain mortgage of \$3,000, owned by said William Byrd upon land in New York state, and out of land in Brooklyn, N. Y., of the value of \$2,000, belonging to Catherine Byrd; and in the second count, with having at said Colebrook, in September, 1896, so conspired to cheat and defraud the said Catherine Byrd out of certain land in Brooklyn, N. Y., of the value of \$2,000, owned by said Catherine Byrd. The information charged that such conspiracy and agreement between the defendants was to so cheat and defraud the said persons, by inducing them to exchange their said property in the first count for certain land in said Colebrook belonging to said Edward C. Thompson and certain personal property of said Franklin D. Thompson, and in the second count for land in said Colebrook belonging to said Edward C. Thompson, "by the following false,

fraudulent, and wicked representations, pretenses, devices, and unlawful means," fully set forth in each count, which were to be made to said Byrds, and to said William F. Byrd as agent of said Catherine Byrd. Said alleged false representations, pretenses, etc., consisted chiefly in false representations to be made by said F. D. Thompson relative to the value of the property of the defendants to be given in exchange for that of the said Byrds, as to its character and the profitable uses to which it had been and could be put, the amount of personal property to be included in the exchange, the sums which the defendants had been offered for said property, and in showing to said Byrds certain false photographs of said property. The second count alleged the accomplishment of the design of the conspiracy set forth in that count. The first count contained no such averment. The defendants pleaded severally not guilty. The jury found the defendants not guilty upon the first count, and guilty upon the second count, as charged in the information. The punishment by fine and imprisonment in jail was not greater than that imposed by section 1581 of the General Statutes for obtaining property by false pretenses. Upon the trial said William F. Byrd testified to interviews and conversations with said F. D. Thompson in the absence of E. C. Thompson, in Connecticut and in New York; to conversations at an interview in Connecticut in the early part of the negotiations between himself and E. C. and F. D. Thompson together; to a conversation with E. C. and F. D. together after the exchange of property had been made; and to the false representations made and the means employed on said occasions as alleged in the information to accomplish the purpose of the conspiracy; and to admissions made by E. C. in the presence of F. D. Thompson, and in his absence, after the sale had been completed, as to his (E. C. Thompson's) connection with F. D. Thompson and with said transaction. To proof of the representations so made by F. D. Thompson, in the absence of E. C. Thompson, counsel for the accused objected, upon the ground that the evidence should first be offered of the existence of the alleged combination. The attorney for the state having stated that to establish the alleged conspiracy he should rely mainly upon proof of the separate acts of the two defendants, the court admitted said evidence, with the provision that, after the state should present its proof of the conspiracy, counsel for the accused might move to strike out the evidence of such admissions, and that the court should thereupon rule whether the state had presented such prima facie proof of the conspiracy as would render the declarations of one conspirator in furtherance of the conspiracy, made in the absence of the other, admissible against both. Counsel for the defendants excepted to said ruling. The state having thereafter offered evidence of interviews between said Byrd and E. C. Thompson and F. D. Thompson together, at which,

among other things, the following statements were made, as appears by the record: "Mr. Franklin Thompson said: 'Oh, I am sorry I made this trade.' I [Mr. Byrd] said: 'Mr. Thompson, hold on, now; I am willing to trade back. I want my property back. I will give you \$250 if you will trade back.' Mr. E. C. Thompson said: 'Mr. Byrd, he can't do it; it belongs to me. He is my agent. Frank is doing business for me. I gave Frank the money to settle with you, and he can't do anything with it; it is mine'; and "the state having," as the record shows, "offered further testimony tending to show the existence of the conspiracy alleged and E. C. Thompson's participation in it, including deed and record evidence showing that the property transferred and conveyed by the Byrds in the transaction between the parties was all transferred and conveyed to said E. C. Thompson; that all the property conveyed to the Byrds in exchange therefor stood upon the land records in the name of said E. C. Thompson, and that he had a beneficial interest in it, together with his brother Franklin D.; that on September 27, 1896, said E. C. Thompson transferred said Mt. Vernon mortgage assigned to him by the Byrds to Henry Gay, of Winchester, and that on October 3, 1896, he conveyed the major portion of said Brooklyn property deeded to him by the Byrds to one John T. Connelly; and also tending to show that said transaction and exchange was fraudulent, and that as the result of it the said Byrds parted with property of considerable value in exchange for property of very little value,—the court announced that it was prepared to dispose of the objections which had been or might be made to the effect that the state had not prima facie established the existence of the alleged conspiracy, and therefore was not entitled to have evidence of the acts or declarations of one of the accused, claimed to have been done and made in the absence of the other, but pending and in the furtherance of the conspiracy admitted against the other, and ruled that such prima facie proof had been made, and that evidence of such acts and declarations already received or to be proffered would be admitted, to go to the jury against both the accused." Counsel for the defendants excepted to said ruling. The court excluded from the said last ruling, as against F. D. Thompson, the statements of E. C. Thompson made after the purpose of the conspiracy had been accomplished, such admissions having been received as against E. C. Thompson only, and the jury having been so expressly instructed. To the ruling of the court admitting proof of such declarations of E. C. Thompson against himself only, counsel for the accused excepted.

William C. Case and Wellington B. Smith, for appellants. Donald T. Warner, State's Atty., and James Huntington, for the State.

HALL, J. (after stating the facts). The information charges the accused with the of-

fense of conspiracy. This is a misdemeanor at common law (2 Whart. Cr. Law, § 1342; 2 Swift, Dig. p. 357; State v. Setter, 67 Conn. 461, 18 Atl. 782), and as such is punishable under section 1642 of the General Statutes fixing the penalties for offenses at common law. The essence of the offense charged is the unlawful combination between the defendants, and not the accomplishment of the ultimate design of their agreement. 3 Greenl. Ev. § 91; State v. Wilson, 30 Conn. 500, 507; State v. Bradley, 48 Conn. 535, 549. The confederation becomes an offense either because of the unlawful object to be effected or the unlawful means to be employed. State v. Glidden, 55 Conn. 46, 8 Atl. 890. The agreement to act in concert for the attainment of the fraudulent purpose is susceptible of proof in different ways. There may be direct evidence of the actual meeting, and agreement to pursue the common object. The joint participation of all the persons charged, in the acts by which the common purpose is to be accomplished, may be shown by direct evidence. The combination may be established by proof of the admissions of each of the accused conspirators, who are parties to the action, made either during or after the accomplishment of the common purpose, proof of each admission being received in evidence only against the person making it. It may be proved by circumstantial evidence, by proof of the separate acts of the individuals, and of circumstances from which the illegal confederation may be inferred. From the nature of the offense itself, such corrupt agreement of the parties, entered into in secret, can only in exceptional cases be established in any other manner. 3 Greenl. Ev. § 93; 1 Tayl. Ev. (8th Ed.) pt. 2, § 591; 2 Whart. Cr. Law, §§ 1398, note, 1401; 2 Bish. Cr. Proc. § 227; Reg. v. Brittain, 3 Cox, Cr. Cas. 76; State v. Spalding, 19 Conn. 233, 237. It is undoubtedly the rule that evidence which, in the opinion of the court, is sufficient to establish *prima facie* the existence of the conspiracy, should be first presented before proof is received of the acts and declarations of the individual conspirators as affecting others than those whose acts and declarations are proved. But the order in which such proof should be presented is a question within the discretion of the trial court. 1 Greenl. Ev. § 111; 3 Greenl. Ev. § 92.

Of the questions raised by the reasons of appeal but two are discussed in the brief of defendants' counsel. These are—First, the ruling of the court admitting, against the defendants' objection, proof of the acts and declarations of F. D. Thompson, in pursuance of the purpose of the alleged conspiracy, and in the absence of E. C. Thompson; and, second, the ruling, at a later stage of the trial, that the state had presented such *prima facie* proof of a combination between the defendants as rendered such acts and declarations of each, made in the absence of the other, admissible against both.

The defendants contend that when the first ruling was made no evidence of the alleged conspiracy had been adduced; that there was no urgent occasion for reversing the usual order of proof, inasmuch as the state's attorney had said that he had other evidence of the conspiracy, which he proposed to introduce later, and that the court in making said ruling held that the declarations of one conspirator were competent evidence to establish the conspiracy. What evidence had been offered prior to this ruling, what the precise ruling of the court was, and upon what grounds it was made, we are left to gather from what is apparently a part of the stenographer's record of the proceedings in the trial, incorporated in the finding, including questions and answers of the witness Byrd, remarks of the judge, and objections and arguments of counsel. A direct finding upon these points would have been much more satisfactory. But, as we interpret the record before us, evidence had been introduced, before the ruling under consideration was made, of an interview in Connecticut between Byrd and F. D. and E. C. Thompson, and of statements made by E. C. Thompson in the presence of his brother F. D. Thompson, which clearly tended to prove the combination between them. Again, as we understand the record, the attorney for the state did not inform the court that he was in the possession of evidence, independent of the acts of the parties, to establish the conspiracy, but that he should rely in proof of the combination upon a narration by the witness of the entire transaction as it occurred, showing the separate acts of the two defendants, and should claim that from the acts of each, and the circumstances surrounding such acts, the combination of the accused persons should be inferred. Nor do we think it can fairly be said that the court held that the declarations of one of the conspirators was competent evidence to establish a combination between the two, in the sense that such acts and declarations of one could be sufficient *prima facie* evidence of the combination of the two. The extent of the ruling, as we read the finding, was that the state might prove the separate acts, not of one alone, but of each of the two defendants, including the false representations made by each in carrying out the alleged common design (and such representations are themselves acts), as furnishing facts from which it could be inferred that they were acting in concert to defraud the Byrds. The state proposed, by the evidence offered, to show that F. D. Thompson exchanged the land of his brother E. C. Thompson, which was of very little value, for land of the Byrds, which was of very considerable value; that to effect such exchange he, in the absence of his brother, made the false representations described in the information; to further prove separate acts of E. C. Thompson, and declarations made by him to Byrd, showing his knowledge

and approval of the acts of his brother and his participation in the fraud; and to ask the jury to find from such facts and circumstances that the defendants had conspired together to accomplish the fraud, as charged in the information. This was a legitimate way of proving the existence of a conspiracy. Authorities cited above. Proof of the acts and representations of F. D. Thompson was one step in establishing the conspiracy. As the acts and declarations of E. C. Thompson, showing his knowledge and approval of the acts of his brother, were necessarily subsequent in point of time, they might properly be made so in the order of proof; but this, as we have said, was wholly discretionary with the court.

The second ruling complained of, namely, that the state at the time this ruling was made had so far established the existence of the conspiracy as to render admissible, as against both defendants, acts and declarations of one, in the absence of the other, made in furtherance of the object of the conspiracy, was proper. The question is always one within the province of the court to decide. 3 Greenl. Ev. § 92; Cowles v. Coe, 21 Conn. 220, 234; Knower v. Clothing Co., 57 Conn. 202, 17 Atl. 580; Burke v. Miller, 7 Cush. 547. The court in making such a ruling does not assume to pass upon the adequacy of the evidence to establish the conspiracy. That question is left for the jury to decide. Proof of facts which conduce to show the conspiracy will justify the admission of evidence of the acts and declarations of the several conspirators. State v. Spalding, 19 Conn. 233; Gardner v. Preston, 2 Day, 205. We think the evidence detailed in the finding not only conduced to establish the alleged conspiracy, but was quite sufficient to warrant the jury in finding the fact proved. We refrain from discussing several of the reasons of appeal which have not been referred to by defendants' counsel in their argument or brief. There is no error. The other judges concurred.

(70 Conn. 1)

FOX v. HARTFORD & W. H. H. R. CO.

(Supreme Court of Errors of Connecticut. Nov. 30, 1897.)

CORPORATE BONDS—TRANSFER—TITLE TO INTEREST
COUPONS—ACTION AGAINST CORPORATION—BONA
FIDE PURCHASER—NEGOTIABILITY OF COUPON—
RIGHT TO INTEREST.

1. Where the owner of corporate stock and bonds, with coupons attached, which he had previously pledged to plaintiff, transferred to plaintiff absolute title to the stock and bonds by contract which bound plaintiff to redeliver them on payment of a certain sum, but which did not mention the coupons, and no mention thereof was made by either party when the contract was made, and no demand was made for their surrender or intimation given that title thereto was not to pass, and plaintiff was allowed to retain possession thereof, the title to such coupons passed with title to the bonds.

2. In an action against a corporation on coupons which had been attached to its bonds, and

which, together with such bonds and stock of another corporation, had been transferred absolutely to plaintiff by the owner thereof, evidence as to the amount realized by plaintiff on a sale of the stock was irrelevant, there being no issue as to whether the stock was transferred merely as collateral, and uncontradicted evidence that it was not so transferred.

3. Where a written contract conveying absolute title to corporate bonds and the conduct of the parties at the time of the transfer showed an intention to transfer title to coupons attached to the bonds, testimony of the transferor as to his secret intention at the time was inadmissible.

4. A transferee of overdue negotiable coupons does not take them subject to an "arrangement" between the transferor, who was president of the corporation, and the corporation, that he was "not to present the coupons for payment until it was convenient for it to pay them," where it is not shown that the "arrangement" was in force at the date of the transfer, or that it was based on any consideration passing from such president, or that there was an actual contract not to present the coupons for payment.

5. A coupon, accompanying a corporate bond, which contains an express promise that the corporation will pay the bearer a stated sum as interest at a stated bank on a certain day, and is signed by the treasurer of the corporation, is a negotiable instrument.

6. Interest is recoverable on overdue negotiable interest coupons, issued with corporate bonds, from the time of demand of payment.

Appeal from court of common pleas, Hartford county; E. Peck, Judge.

Action by Horace W. Fox against the Hartford & West Hartford Horse-Railroad Company to recover on 18 coupons, of \$25 each, attached to certain bonds of the defendant company. Facts found and judgment rendered for the plaintiff, and appeal by the defendant for alleged errors in the rulings of the court. No error.

The coupons in suit were attached to six bonds, three coupons to each bond, one of the three coupons upon each bond maturing February 1, 1895, one August 1, 1895, and one on February 1, 1896, and the form of each coupon was as follows: "Coupon. The Hartford & West Hartford Horse-Railroad Company will pay the bearer twenty-five dollars (\$25) at the City Bank, in the city of Hartford, Connecticut, on the first day of — for semiannual interest on bond No. —. Dated August, 1894. 25 dollars. W. E. Goodwin, Treas." Prior to January 4, 1896, the bonds and coupons in question were the property of David Henney, who, being indebted to the plaintiff on two stock notes of the face value of \$4,500, to secure said notes had given the plaintiff the bonds in question, with the coupons attached thereto, and also the stock mentioned in the contract hereinafter set forth, and on the 4th of January, 1896, these securities were in the plaintiff's possession. Said stocks and bonds were of the par value of \$14,500, but were of uncertain market value, and not readily salable. On the 4th day of January, 1896, Henney and the plaintiff signed the following contract: "Whereas, David Henney has this day conveyed to me, for a valuable consideration by him received, certain stocks and bonds, namely, (340) three hundred and forty shares of

Hartford Light and Power Co. capital stock, represented by certificate No. 229, and (6) of the first mortgage bonds of the Hartford & West Hartford Horse R. R. Co., for (\$1,000) one thousand dollars each, the same being my absolute property: Now, therefore, I hereby agree to sell and deliver to the said David Henney the aforesaid shares of stock and the bonds aforesaid, upon the payment to me in hand of the sum of (\$5,000) five thousand dollars on or before January 10, 1896. David Henney. H. W. Fox. Hartford, Conn., January 4, 1896." Upon the signing of this contract the plaintiff delivered up to Henney the notes in his possession, and retained possession of the bonds, with the coupons thereto attached. Nothing was said between the contracting parties as to whether or not the coupons passed with the bonds.

The plaintiff or his bookkeeper, on or before the date of said contract, figured in pencil on said stock notes the accrued interest to January 1, 1896, which made the entire indebtedness \$4,875.80. This was done in the expectation that said notes would be paid about January 1, 1896, and to determine the amount due. As they were not paid, the arrangement expressed by the contract aforesaid was made. Henney has never paid said notes, except by the transfer of said securities, nor the \$5,000 mentioned in the contract. He never asked the plaintiff for the coupons, but about February 1, 1896, he notified the bank not to pay them, and notified the plaintiff that he had done so. Henney was president of the defendant company, and had had an arrangement with the company not to present the coupons for payment until it was convenient for it to pay them. The plaintiff had no knowledge of such arrangement. It was not questioned that the plaintiff was the owner of the bonds by virtue of the contract aforesaid and the transaction connected therewith; and it was admitted that he had such title to the coupons, if any, as was given by said contract and said transaction. The plaintiff duly presented the coupons for payment, and they had not been paid. Upon these facts the defendant claimed that the coupons in question did not pass to the plaintiff with the bonds, but remained the property of Henney. The court did not so hold, but held that the coupons passed to the plaintiff with the bonds. The defendant also claimed that, as two of the coupons on each bond were overdue at the time of said transaction, the plaintiff took them subject to the arrangement between Henney and the defendant company, but the court did not so hold. On the trial the defendant asked the plaintiff on cross-examination the following question: "Have you sold, since taking this document, the light and power stock, whose par value is \$25, at \$20 a share?" This evidence was offered for the purpose of showing that the debt to Fox represented by the notes was fully paid, and more than paid, by the sale of light and power stock, and for the purpose of prov-

ing that the coupons are not the property of the plaintiff, in connection with evidence hereafter to be offered to show that, notwithstanding Exhibit A, he still held at the time of said sale both stock and bonds simply as collateral for the notes. The court excluded the question, and the defendant took an exception. No such testimony as was proposed to be offered in connection with the above question was afterwards introduced or offered by the defendant. The plaintiff afterwards having testified that he had traded said stock with Olmstead, the defendant asked him: "At what price did the stock go into the trade with Olmstead?" The court excluded the question, and the defendant took an exception. The defendant offered said Henney as a witness, and during his examination asked him, "Was it your intention to convey the coupons?" The court excluded the question, and the defendant took an exception. The court finds that said coupons were conveyed to the plaintiff as incident to the bonds in payment of said stock notes. The court also held that the possessory title of the plaintiff was sufficient to entitle him to recover in this action, and rendered judgment in his favor for the amount of the coupons, with interest from the 1st day of February, 1896, when they were presented for payment. No claims were made by either party during the trial as to whether interest should or should not be allowed.

William F. Henney, for appellant. Sidney E. Clark, for appellee.

TORRANCE, J. In his reasons of appeal the defendant in substance claims that the trial court erred (1) in holding that the title to the coupons passed to the plaintiff with the bonds; (2) in excluding certain testimony; (3) in holding that the plaintiff did not take the overdue coupons subject to the "arrangement" between Henney and the defendant; (4) in allowing any interest upon the coupons. These claims will be considered in the order stated.

We are of opinion that there was no error in holding, upon the facts found, that the plaintiff, as the undisputed owner of the bonds, also owned the coupons. The bonds, with the coupons attached to them, were voluntarily delivered to the plaintiff by the defendant, at some time prior to the making of the contract, by way of pledge for a debt. The plaintiff, from the time this pledge was made to the time the contract was made, with the full knowledge and assent of the defendant, held both the bonds and the coupons as security for his debt. The bonds were of uncertain market value, and not readily salable. Just before the making of the contract, then, Henney owned the bonds and the coupons, and both were in the possession of the plaintiff by way of pledge. It was under these circumstances that the transaction of January 4, 1896, took

place. By that transaction it is conceded that the plaintiff became the absolute owner of the bonds which were then in his hands, subject only to Henney's right to repurchase as provided for in the contract, and by it also Henney's debt to the plaintiff was paid and the stock notes were surrendered to Henney. At the time Henney thus transfers the title to the bonds to the plaintiff he does not ask to have the coupons surrendered to him, nor does he in any way intimate that they are not to pass with the bonds, and the plaintiff, with Henney's full consent, retains possession of them. Upon these facts the inference is well nigh irresistible that the parties intended that the coupons should pass with the bonds. About the only fact claimed to be adverse to this conclusion is the fact that nothing was said one way or the other about the coupons; but this fact is only one of evidential value, and as such is of comparatively slight importance; certainly by itself it is by no means conclusive. Suppose the bonds, with the coupons attached, had been in Henney's hands when the contract was made, and pursuant to its provisions he had passed the bonds with the coupons attached over to the plaintiff, could there be any reasonable doubt that he intended to transfer the coupons as well as the bonds, even if nothing had been said about the coupons? We think not. Upon the facts found, and with reference to the point now under consideration, the present case does not essentially differ from the case supposed. The trial court was fully justified in holding that the coupons passed to the plaintiff with the bonds.

The court excluded evidence of the amount realized by the plaintiff from the disposition of the light and power company stock, and of this the defendant complains. Upon the conceded facts in the case, it is difficult to see how the defendant had any interest in this matter. Henney might have had such an interest, but he was not a party. That evidence was admissible only on the theory that the stock when disposed of was held merely as collateral for Henney's debt, and that this point was in issue in the case. But the uncontradicted evidence in the case showed that the stock was the plaintiff's absolute property, and no evidence was offered to show that it was not; and, furthermore, the point was not in issue. The evidence, for all the purposes for which it was offered, was irrelevant and was rightly excluded. Henney, as a witness, was asked, "Was it your intention to convey the coupons?" This question really called for evidence of the actual, secret, unmanifested intention of Henney; which, under the circumstances, was of no legal significance. The real question was as to his manifested intention, and this could be ascertained only from the contract, read in the light of the circumstances under which it was made. The evidence

was properly excluded. *Hotchkiss v. Higgins*, 52 Conn. 206.

The next question is whether the court erred in holding that the plaintiff did not take the two overdue coupons subject to the arrangement between Henney and the defendant company. It must be conceded that these two coupons are negotiable instruments, and that the plaintiff took them when they were overdue. The fact that these two coupons were overdue would not necessarily affect the plaintiff's title to the bonds, nor to the coupons not overdue (2 Daniel, Neg. Inst. [3d Ed.] par. 1506a; Tied. Com. Paper, § 473), nor is it claimed that it would do so; the only claim made is that it affected the title of these two coupons. It may be conceded, also, as claimed by the defendant, that in taking these two overdue coupons the plaintiff took them subject to all defenses and equities which would have been available to the defendant against Henney. 2 Daniel, Neg. Inst. par. 1505; Tied. Com. Paper, par. 473. The defenses and equities which would have been thus available are confined to those which existed and attached to the coupons themselves in the hands of Henney at the time of the transfer, and do not include defenses and equities arising out of collateral transactions. *Simpson v. Hall*, 47 Conn. 417. In other words, the plaintiff took such title to the overdue coupons as Henney had to convey. "The indorsee of overdue paper takes it as a holder with notice that it is subject to some defense, for he takes it at a time when in due course it should have been paid. He therefore takes it subject to the defense (1) that it was affected in its inception with some inherent vice, as, for instance, fraud, illegality, or duress; or (2) that the consideration failed, or that payment had been made, or that there had been accord and satisfaction, at the time of the indorsement, or that there was some equitable defense arising out of the transaction in which the paper was given, which disabled his indorser in whole or in part. Any of these defenses is called an equity attaching to the instrument." 1 Daniel, Neg. Inst. par. 725a; Tied. Com. Paper, par. 296. The arrangement found to have existed between Henney and the defendant is that Henney "was not to present the coupons for payment until it was convenient for it to pay them." The utmost that can be claimed for this is that it was in effect an agreement not to bring suit upon the coupons until it was convenient for the company to pay them; and it admits of grave doubt whether a collateral agreement of this kind, which so directly contradicts the language of the coupon, is not a defense or an equity arising out of a collateral transaction, by which the plaintiff would not be affected. It is not, however, necessary to determine that question here, for we think, upon the facts found, it is not shown that

the company could have availed itself of this arrangement even as against Henney, and, if so, the plaintiff cannot be affected by it. It is found that Henney, who was president of the defendant company, "had had an arrangement" of the kind indicated, but it is not found that it was in existence when the coupons were transferred to the plaintiff. For aught that appears, it may have ceased to exist long before that time. Then, again, it is not shown that there was any consideration for the forbearance on Henney's part, or that he was in any way legally or equitably bound to forbear, or to continue his forbearance, for any length of time. It is not even shown that there was any contract or agreement at all, with or without consideration, on Henney's part, not to present the coupons for payment. For aught that appears, it was merely an understanding or "arrangement" to last during the pleasure of Mr. Henney, and not at all obligatory upon him, legally or equitably. Under such circumstances, Henney could have brought suit on the coupons, and the "arrangement" would be no defense as against him; and we think it is equally unavailing as against the plaintiff, standing in Henney's shoes.

The court allowed interest upon the coupons from the time they were presented for payment, and of this, also, the defendant complains. It is settled by the current of American authorities that coupon bonds, and coupons, like those in the present case, are negotiable instruments, and that the coupons may be detached and negotiated separately by simple delivery. *Society for Savings v. City of New London*, 29 Conn. 174; *New London City Bank v. Ware River R. Co.*, 41 Conn. 542; 2 Daniel, Neg. Inst. par. 1509 et seq.; Tied. Com. Paper, pars. 473-478. The coupon may be outstanding and suit brought upon it even after the bond has been paid and satisfied. *National Exchange Bank v. Hartford, P. & F. R. Co.*, 8 R. I. 375. As the coupon may be thus detached from the bond, and by negotiation may thus become an independent claim, existing as well before as after the bond is paid, the general rule, founded in good sense, and supported by the very great preponderance of authority, is that interest, at least after demand of payment, is allowable upon overdue coupons. Tied. Com. Paper, par. 477, and cases cited; 2 Daniel, Neg. Inst. par. 1513, and cases cited. "Interest is recoverable upon coupons after their maturity; for being promissory notes, generally speaking, it is just that if not paid when due they should continue to draw interest by way of compensation for the damages incurred from the detention of the money. Interest upon overdue coupons is therefore recoverable, and should be computed at the lawful rate, without semiannual or other rests." Freeman's note to *Canal Co. v. Fisher*, 64 Am. Dec. 439, citing a great number of cases; *Whitaker v.*

Railroad Co., 8 R. I. 47; *National Exch. Bank v. Hartford, P. & F. R. Co.*, Id. 375; *Beaver Co. v. Armstrong*, 44 Pa. St. 63; *Trustees v. Lewis*, 34 Fla. 424, 16 South. 325. We see no good reason why this almost universal rule as to the allowance of interest upon overdue coupons, especially after demand of payment, should not apply in a case like the one at bar. The defendant upon this point relies upon *Rose v. City of Bridgeport*, 17 Conn. 243. That case was decided at a time (1845) when coupons and coupon bonds, so common to-day in the markets of the world, were just beginning to come into use, and the coupons in that case were quite different from the coupons in the present case. In that case the coupon itself contained no promise to pay the interest mentioned in it. It simply acknowledged that, on a named date, there would be due to the bearer half a year's interest on a certain bond, and that this would be payable on that date. The coupons were signed by an agent of the city,—an agent to acknowledge, but not to pay. In the case at bar the coupons declare expressly that the company will pay the bearer the interest at a certain bank on a certain day, and they are signed by the treasurer of the company. The decision in *Rose v. City of Bridgeport* proceeds, in part at least, upon the view taken by the court concerning the nature of the coupons in that case. The coupons were not regarded as conferring any right of action at all upon the holder; they were mere certificates that a half year's interest would be due on the bond at the date specified; and, although payable to bearer, they were held to operate "only as an order or letter from the obligee, requesting the interest upon the bond to be paid to another." The only obligation to pay interest was held to arise from the bond alone, and not from the coupon, and the action was regarded as an action upon the bond. Viewing the coupons in this light, the court regarded the action as one brought upon the bond to recover interest, as such, upon interest,—that is, compound interest, as such,—and held that, as the case then before it did not fall within any of the classes of cases in which compound interest was recoverable, the plaintiff was not entitled to compound interest. The principles applied in that case have little or no application to a case like the present. The coupons in this case are regarded by the law as negotiable instruments, and, for most purposes, as being entirely independent of the bond, and as conferring a right upon the holder, whoever he may be, to the sum of money mentioned in the coupon at the very day therein specified. Cases like this seem to fall, and to have been intended by the parties to fall, within the principle of the third rule laid down by Judge Swift in *Selleck v. French*, 1 Conn. 32, 33, rather than within the rules applied in *Rose v. Bridgeport*. The rule laid down by Judge Swift is this: "(3) Where there is a written contract to pay money or other thing

on a day certain, and the contract is broken, then interest is allowed by way of damage for the breach, as in the case of notes and bills of exchange." We are not disposed to extend the doctrine applied in *Rose v. City of Bridgeport* to cases like the present. We are of opinion that the interest on the overdue coupons was properly allowed. There is no error. In this opinion the other judges concurred.

(70 Conn. 13)

CURNANE v. SCHEIDEL.

(Supreme Court of Errors of Connecticut. Nov. 30, 1897.)

SALE—RATIFICATION—EVIDENCE—DISCREDITING WITNESS.

1. In replevin for a horse which plaintiff and S., who traded it to defendant, had testified belonged to plaintiff, evidence that, with the knowledge and at the suggestion of plaintiff, S. had procured a complaint against defendant for fraud in the trade to be drawn, in which S. was described as plaintiff and owner of the horse, and that the officer who had the writ to serve read the complaint to defendant, is admissible, as tending to discredit the testimony of S. and plaintiff that the latter was the owner of the horse, or to show that plaintiff ratified the trade.

2. It is enough to show ratification by plaintiff of a trade by S., plaintiff's father-in-law, with defendant, of a horse belonging to plaintiff, but which he had for years permitted S. to keep and use, that when, on the day following, S. informed plaintiff of the circumstances thereof, plaintiff, though dissatisfied with the results thereof, expressed no disapproval of his assumption of authority to make it, but told him to "fix it up," and, in conversation with defendant, neither disaffirmed the trade, nor denied the ownership of S., but told defendant it would be all right if he would pay the "boot" money, and afterwards permitted, if he did not authorize, action, in which S. was plaintiff and alleged to be owner of the horse, against defendant, for fraud in the trade.

Appeal from court of common pleas, Hartford county; E. Peck, Judge.

Replevin by Eugene Curnane against Joseph Scheidel for a horse. The court found the facts, and rendered judgment for defendant. Plaintiff appeals. Affirmed.

The material facts are as follows: The plaintiff, who was the owner of the bay horse described in the complaint, had for several years permitted his father-in-law, Jeremiah Sullivan, who resided in Burlington, in this state, to keep and use it on his farm with his own horses. The plaintiff, during this time, made his home with said Sullivan, though he only occasionally visited Burlington, passing most of his time in Boston, where he was in business. In the early part of February, 1897, Sullivan exchanged the horse in question with the defendant for a black horse and \$35. Defendant did not know that Sullivan was not the owner of the horse he so traded. Plaintiff's horse was worth from \$100 to \$150, and the black horse about \$50. On returning home the following evening, and having learned from Sullivan of the trade, and he and Sullivan having discovered that the horse received from the defendant was blind,

the plaintiff was dissatisfied, and told Sullivan he must "fix it up" with the defendant. A few days later, plaintiff went to defendant's home, to ascertain if he still had the bay horse, and talked with the defendant about the horse, saying it was a good horse, but did not tell defendant that he (the plaintiff) owned it, nor in any manner disavow the trade. Sullivan afterwards went to defendant, and complained that he had "stuck him," and asked him to trade back, which the defendant refused to do; and on the 19th of February, at the plaintiff's suggestion, Sullivan caused a writ and complaint to be drawn against the defendant, and placed in the hands of an officer for service, in which Sullivan was described as the plaintiff and as the owner of the bay horse, and which alleged that he had been induced to trade by fraudulent representations, and demanded \$200 damages. The plaintiff, Curnane, was present at a conversation with the officer about serving the writ, and accompanied the officer part way to defendant's house. The officer did not serve the writ, but told defendant its nature, and advised him to settle the matter; and plaintiff, Curnane, was present at a conversation at Sullivan's house, where the officer and the defendant had gone, and in which conversation defendant offered to trade back the horse for \$10, but Curnane said nothing about owning the horse. The plaintiff, Curnane, and Sullivan, afterwards together demanded of the defendant the \$35 to be paid by defendant; and, on defendant's claiming that it was not to be paid until March 15th, Curnane urged defendant to pay the money at once, saying: "Give him the \$35, and it will be all right;" and that Sullivan wanted the money to buy another horse. On the 26th of February the plaintiff commenced the present action, and, at the time of service of the writ, brought back to the defendant the black horse, which defendant refused to receive. Previous to the service of the replevin writ, plaintiff made no demand upon defendant for the horse, nor had either he or Sullivan informed the defendant, nor had the defendant any knowledge, that the plaintiff owned the horse. On March 15th the defendant tendered to Sullivan the \$35, which the latter refused to receive, saying that defendant owed him nothing. During the trial the defendant offered Deputy Morse as a witness, and asked: "Did you have a writ in your possession in which Sullivan was plaintiff, and Scheidel was defendant, with which you went to Scheidel's house, and which you read to him?" To this question the plaintiff objected, on the ground that it was immaterial and irrelevant. Prior to this both Curnane and Sullivan had testified that Curnane owned the horse (which was a controverted question in the case), and also that Sullivan procured the writ in question, and that Curnane knew of the existence and intended service of the writ. The court admitted the question as tending to contradict Sullivan's testimony that the horse belonged to Curnane, and also as tending, in connec-

tion with the other evidence, to show a ratification by Curnane of Sullivan's act in trading the horse. To the admission of this question, the defendant excepted. The answer was: "I did. I read it in part, and told him what the rest was." Morse produced the writ, and the defendant offered it in evidence. The same objection and ruling were made, and the defendant excepted to the admission of the writ. This was the writ procured by Sullivan at the suggestion of the plaintiff, before referred to. Upon the above facts, the plaintiff claimed that the title and right of possession of the horse were in the plaintiff, and that he was entitled to judgment in his favor; but the court held that the acts of the plaintiff, and his failure to disavow Sullivan's trade of the horse or to assert his title, constituted a ratification by him of Sullivan's act in trading the horse, and it rendered judgment for the defendant.

Roger S. Newell, for appellant. George E. Taft, for appellee.

HALL, J. Under the answer of a general denial, the plaintiff was required to prove his title to the horse described in the complaint, or his right of immediate possession. Gen. St. § 1330. *McNamara v. Lyon*, 69 Conn. 447, 37 Atl. 918. To establish such ownership, both he and Sullivan testified that the horse belonged to the plaintiff. For the purpose of discrediting these witnesses, as well as to show a ratification by the plaintiff of the sale made by Sullivan, the evidence offered by the defendant that, with the knowledge and at the suggestion of the plaintiff, Sullivan had procured the complaint for fraud to be drawn, in which he was himself described as plaintiff and as the owner of the horse, and that the officer had read it to the defendant, was properly received. This evidence strongly indicated either that the testimony of the plaintiff and Sullivan that the former was the owner of the horse was not true, or that the plaintiff had adopted the contract of exchange made by Sullivan.

The facts found by the court were sufficient to constitute a ratification by the plaintiff of the sale made by Sullivan. The following definition of "ratification" given by Andrews, C. J., in delivering the opinion of this court in the case of *Town of Ansonia v. Cooper*, 64 Conn. 536, 544, 30 Atl. 760, is especially applicable to the case before us: "Ratification means the adoption by a person, as binding upon himself, of an act done in such relations that he may claim it as done for his benefit, although done under such circumstances as would not bind him except for his subsequent assent; as where an act was done by a stranger having at the time no authority to act as his agent, or by an agent not having adequate authority. The acceptance of the results of the act with an intent to ratify, and with full knowledge of all the material circumstances, is a ratification." The plaintiff learned from Sullivan him-

self all the circumstances of the exchange the day after it was made. He was dissatisfied with the results of Sullivan's bargain, but he expressed, even to him, no disapproval of his assumption of authority to make it. Until the commencement of this action, the plaintiff had not only failed by any act or word to disapprove Sullivan's authority or to repudiate his contract, but he had, both by language and conduct, expressed his acquiescence in Sullivan's action, and his intention to adopt the trade which Sullivan had made. When he learned that the horse which Sullivan had received was blind, he directed him to "fix it up" with the defendant. In conversation with the defendant about the horse Sullivan had sold him he neither disaffirmed the trade nor denied Sullivan's ownership, but told the defendant it would be all right if he would pay Sullivan the "boot" money. He permitted, if he did not authorize, the institution of the action for damages against the defendant, in which Sullivan was plaintiff, and in which he was alleged to be the owner of the horse sold to the defendant. The commencement of this action, at the direction of the plaintiff, or with his approval, based upon Sullivan's authority to make the exchange, was a positive affirmation of Sullivan's contract. *Shoninger v. Peabody*, 57 Conn. 42, 17 Atl. 278. There is no finding that Sullivan intended to defraud the plaintiff, nor that he did not suppose he was authorized to make the exchange. We think the relations of Sullivan and the plaintiff, as shown by the facts found, were such as permitted the plaintiff to adopt his act. There is no error. The other judges concurred.

(70 Conn. 18)

GOODWIN v. TOWN OF EAST HARTFORD et al.

(Supreme Court of Errors of Connecticut. Nov. 30, 1897.)

TOWNS—ORDERS—VALIDITY—RATIFICATION— NEGOTIABILITY—POWER OF BOARDS.

1. A town treasurer cannot bind the town by his acceptance of an illegal order.
2. The board "for the care, maintenance and control" of a highway across a river, provided for by Act May 19, 1887, to consist of the first selectmen of the towns designated as specially benefited by the highway, and authorized to apportion among the towns the expense of repairing and maintaining the same, as well as any damages resulting from its defective condition, and declared by the act to be, for the purposes thereof, a body politic and corporate, has not power, by implication, to employ agents to procure legislation whereby the act of 1887 should be repealed, and the state should assume the duty of repairing and maintaining the highway, and to issue orders binding on the towns for the expenses of such agents; and this, whether the board be considered as a municipal corporation, or simply as a device to enable the representatives of the towns to perform a municipal duty imposed on the towns jointly.
3. A town is not shown to have ratified the act of a board in employing agents to procure legislation, or the orders of the board on the town in payment for the services, by mere allegations that it intends to pay them, and that annual reports of its officers stating that said orders

were outstanding as an immediate liability were accepted by the town; it not being shown that the town had full knowledge of the facts, and an intent to ratify.

4. Municipal orders are not negotiable to the extent that the defense of illegal issuance is not available against a bona fide holder.

Appeal from superior court, Hartford county; William T. Elmer, Judge.

Action by Henry L. Goodwin against the town of East Hartford and others for injunction. Judgment for plaintiff. Defendants appeal. Affirmed.

This is a complaint praying for a permanent injunction. The complaint and answer (the amendments being placed in the proper places) are as follows:

"(1) That he [the plaintiff] is, and for many years has been, an inhabitant and elector of said town of East Hartford, and is, and for many years has been, the owner of real and personal estate situated within the limits of said town of East Hartford, and is liable to the payment of such taxes as may be legally imposed upon his said property by said town of East Hartford, and has heretofore been assessed and taxed thereon by said town.

"(2) That the general assembly of the state of Connecticut, at its January session, A. D. 1887, passed an act, which was duly approved by the governor of said state, May 19, 1887, to establish free public highways across the Connecticut river, in Hartford county, which act provided for the assessment of the damages caused by the layout and establishment of such free highways upon the several towns specially benefited by the layout and establishment of said highways as benefits accruing to said several towns; that the towns so assessed should, after the establishment of such free public highways, maintain the same in proportion to the assessment upon said towns for the establishment of said highways; constituted the first selectmen of said towns so assessed a body politic and corporate, by the name of the 'Board for the Care of Highways and Bridges across the Connecticut River in Hartford County,' for the purpose of caring for and maintaining and controlling said highways; and defined the powers and duties of said corporation. * * *

"(3) That the act of the general assembly mentioned in paragraph 2 provided that the said the board for the care of highways and bridges across the Connecticut river in Hartford county should appoint a chairman, secretary, and treasurer, and should apportion the expense of repairing and maintaining said free public highways upon the several towns benefited by their layout and establishment, in proportion to the assessment against said towns for the damages caused by the layout and establishment of said free public highways; and that the chairman of said board should draw his order on the treasurers of the said towns payable to the order of the treasurer of said board for the proportional amount payable by the said towns for such repairs and maintenance; and provided, further, that

damages resulting from the defective condition of said free public highways or the bridges thereon should be assessed in the same manner.

"(4) That pursuant to the provisions of the act of the general assembly, upon the complaint of the state's attorney for Hartford county, the superior court for said county, subsequently, to wit, at its October term, 1888, laid out and established a free public highway across the Connecticut river, in Hartford county, in the limits of the towns of Hartford and East Hartford, in said county, said free public highway being laid out where the toll bridge of the Hartford Bridge Company across the Connecticut river then was, and along the causeways and approaches appurtenant to and connected therewith.

"(5) That the said superior court for Hartford county, in its judgment or decree laying out and establishing said free public highway, assessed the expenses thereof upon the towns of Hartford, East Hartford, Glastonbury, South Windsor, and Manchester, having found said towns to be especially benefited by said layout; and the proportion of said expense imposed by said court upon the said town of East Hartford was eleven thirty-fifths of the entire expense, the sum of sixty-seven thousand dollars being by said superior court assessed upon the town of East Hartford, and the entire expense being found by said court to be two hundred and ten thousand dollars.

"(6) That, by the provisions of said act of the general assembly providing for the layout and establishment of said free public highway, the said town of East Hartford became and was liable to pay in the manner prescribed by said act eleven thirty-fifths of the expense of repairing and maintaining said free public highway, and eleven thirty-fifths of any damage resulting from the defective condition of said free public highway or the bridge thereon, and for no other expense whatever.

"(7) That on the 23d day of September, A. D. 1889, the first selectmen of said towns of Hartford, East Hartford, Glastonbury, South Windsor, and Manchester, met pursuant to the provisions of the aforesaid act of the general assembly, and organized the corporation by said act directed to be organized by the name of the 'Board for the Care of Highways and Bridges across the Connecticut River in Hartford County'; and said corporation so organized immediately assumed the care and control of said free public highway, repairing and maintaining the same from that time until June 29, 1893.

"(8) That on June 29, 1893, George W. Fowler was, and for a long time prior thereto had been, first selectman of said town of Hartford, and a member of and chairman of the said the board for the care of highways and bridges across the Connecticut river in Hartford county; and John S. Risley was, and for a long time prior thereto had been, first selectman of said town of Manchester, and a member of and the treasurer of the said corporation.

"(9) That pursuant to the provisions of the said act of the general assembly providing for the creation of said corporation, and defining its powers, the chairman of the said corporation was empowered to draw his orders in favor of the treasurer of said corporation upon the treasurer of the town of East Hartford for eleven thirty-fifths of the expense of repairing and maintaining said free public highway, and also for eleven thirty-fifths of any damages resulting from the defective condition of said free public highway, and for no other expenditure or purpose whatever.

"(10) That the state of Connecticut, by virtue of the provision of an act of the general assembly, at its January session, 1893, approved June 29, 1893, and which act, by force of another act of said general assembly, was made to take effect from its passage, assumed the duty of repairing and maintaining the said free public highway on said June 29, 1893.

"(11) That the entire expense of repairing and maintaining the said free public highway from the 5th day of October, 1892, to the 29th day of June, 1893, including all damages resulting from the defective condition of said free public highway, was the sum of five thousand three hundred and thirty-three and $\frac{90}{100}$ dollars, and, of that sum, eleven thirty-fifths, or the sum of one thousand six hundred and seventy-six and $\frac{27}{100}$ dollars, was the proportion chargeable to said town of East Hartford. * * *

"(12) That on said 29th day of June, A. D. 1893, the said George W. Fowler, as chairman of said corporation, without any authority of law, and in disregard of his official duty, wrongfully and unlawfully drew his orders in favor of said John S. Risley, as treasurer of said corporation, upon the treasurer of said town of East Hartford, for the aggregate sum of ten thousand nine hundred and sixty-two and $\frac{26}{100}$ dollars, being eleven thirty-fifths of the sum of thirty-four thousand eight hundred and seventy-nine and $\frac{94}{100}$ dollars, which said sum was falsely pretended by said Fowler and by said corporation to have been expended for legal services, and was falsely so entered in the account of said John S. Risley as treasurer of said corporation; and said sum of ten thousand nine hundred and sixty-two and $\frac{26}{100}$ dollars was in addition to the sum lawfully assessed against said town of East Hartford, as set out in paragraph 11.

"(13) That the board for the care of highways and bridges across the Connecticut river in Hartford county, between October 5, 1892, and June 29, 1893, did not expend for any legal services rendered said corporation which said corporation might lawfully contract for, pursuant to the powers granted to it by the general assembly, said sum of thirty-four thousand eight hundred and seventy-nine and $\frac{94}{100}$ dollars, or any part of said sum.

"(13a) That, at the date of said orders to the amount of ten thousand nine hundred and sixty-two and twenty-six one-hundredths dol-

lars so illegally drawn upon the treasurer of said town of East Hartford as aforesaid, nothing whatever was due and payable to the board for the care of highways and bridges across the Connecticut river in Hartford county from the said town of East Hartford, as the proportional amount payable by said town of the expenses of repairing and maintaining the free public highway aforesaid, and of any damages resulting from the defective condition of said highway or of the bridges thereon."

"(15) That on said 29th day of June, A. D. 1893, the defendant Charles Merriman was, ever since has been, and now is, treasurer of said town of East Hartford.

"(16) That on the 30th day of June, A. D. 1893, the said town of East Hartford and the said Merriman, as treasurer of said town, paid to said John S. Risley, as treasurer of the said corporation, unlawfully and in violation of the rights of the plaintiff and of the other inhabitants and taxpayers of said town of East Hartford, the sum of five thousand nine hundred and sixty-two and $\frac{26}{100}$ dollars, being part of said illegal orders so illegally drawn as aforesaid, for said sum of ten thousand nine hundred and sixty-two and $\frac{26}{100}$ dollars; and on said day the said Merriman, as treasurer of said town of East Hartford, unlawfully and in like violation of the rights of the plaintiff, undertook to accept, and so far as said illegal act had any effect did accept, in the name of said town of East Hartford, and agreed to pay from the treasury thereof, four of said illegal orders, to wit, two of said illegal orders, each for the sum of fifteen hundred dollars, and two other illegal orders, each for the sum of one thousand dollars, amounting in all to the sum of five thousand dollars, which four said orders are still outstanding and unpaid.

"(17) That on the 30th day of June, A. D. 1893, when said illegal payment was made of said illegal orders to the amount of five thousand nine hundred and sixty-two and $\frac{26}{100}$ dollars by the defendants, said town of East Hartford, and said Merriman as treasurer, there was in the hands of the defendant Merriman, as treasurer of said town, money belonging to the said town of East Hartford raised by taxation, of which the plaintiff had paid a part, or money raised upon the credit of said town of East Hartford, for which the plaintiff was liable to be taxed, and in which he was interested as an inhabitant, elector, and taxpayer of said town; and that said illegal orders of the amount last above said were unlawfully paid from said money so raised as aforesaid, and the plaintiff was thereby wrongfully injured and affected and greatly damaged.

"(18) That said defendants, the said town of East Hartford, and the said Merriman, as treasurer of said town of East Hartford, intended to pay the said four illegal orders, amounting to the sum of five thousand dollars, and now outstanding and unpaid, as

hereinbefore set forth, out of money belonging to said town of East Hartford, now in the hands of the defendant Merriman, as treasurer of said town, or hereafter to be paid into his hands, as such treasurer, raised or to be raised by taxation, of which the plaintiff has paid or will be compelled hereafter to pay a part, or out of money raised or to be raised upon the credit of said town, and now paid, or hereafter to be paid, into the hands of the defendant Merriman, as treasurer of said town, for which the plaintiff is liable to be taxed, and in which he is interested as an inhabitant, elector, and taxpayer of said town of East Hartford.

"(18a) That if the said defendants pay the amount of said four illegal orders aforesaid out of said money of said town of East Hartford, raised or to be raised as aforesaid, the plaintiff will be wrongfully affected and injured and greatly damaged.

"(19) That the plaintiff is apprehensive and believes that said defendants are about to pay said four illegal orders, amounting to said sum of five thousand dollars, at an early date, and will do so, to the great injury and damage of the plaintiff and the other inhabitants and taxpayers of said town of East Hartford, unless they are restrained by injunction, and that the plaintiff has no adequate remedy at law.

"(20) That on the — day of July, 1893, two of the illegal orders described as outstanding and unpaid in paragraph 16, each bearing the indorsement in blank of John S. Risley as treasurer, as aforesaid, one being for the sum of fifteen hundred dollars, and the other for the sum of one thousand dollars, came into possession of Benjamin Wells, of said town of East Hartford, who ever since has held, and now holds, said two illegal orders, and claims to be the owner thereof.

"(21) That on the — day of July, 1893, the remaining two of said outstanding and unpaid illegal orders described in paragraph 16, one for the sum of fifteen hundred dollars, and the other for the sum of one thousand dollars, each bearing the indorsement in blank of said John S. Risley as treasurer, as aforesaid, came into the hands of Eunice Cowles, of the town of Hartford, who ever since has held, and now holds, said two illegal orders, and claims to be the owner thereof.

"(22) That said Benjamin Wells and Eunice Cowles are interested in the determination of this action, and are made parties defendant.

"The plaintiff claims (1) an injunction restraining and enjoining the defendants, the said town of East Hartford, and the said Charles Merriman, as he is treasurer of said town of East Hartford, and his successors in office, and each of them, from paying said four illegal orders, amounting in all to the sum of five thousand dollars, and any of them, and any part of said five thousand dollars; (2) such other and further relief in the premises as may to equity appertain. Plaintiff is recognized in the sufficient sum of \$100 to prosecute," etc.

Defendants' Answer.

"Paragraph 1. The defendants admit paragraphs 1, 4, 5, 7, 8, 10, 15, and 22 of plaintiff's amended complaint.

"Par. 2. In respect to paragraphs 2 and 3 of said amended complaint, the defendants admit that the general assembly of the state of Connecticut, at its January session, 1887, passed an act duly approved by the governor, May 19, 1887, and which took effect upon its passage, which act was entitled 'The act to establish free public highways across the Connecticut river in Hartford county,' and being chapter 126 of the Public Acts of 1887, which said act is the act referred to in said paragraphs 2 and 3 of the amended complaint, and is hereby referred to and made a part of this defense as fully as if it and all its provisions were incorporated herein.

"Par. 3. In respect to paragraph 5 of the amended complaint, the defendants admit the rendition of the judgment or decree referred to in paragraph 5, and said judgment or decree, and the proceedings in said court resulting in said judgment or decree, are hereby made a part of this defense.

"Par. 4. In respect to paragraph 6 of said amended complaint, the defendants admit that, by the provisions of said act, the town of East Hartford became liable to pay eleven thirty-fifths of the expense of repairing and maintaining said free public highway, and eleven thirty-fifths of any damages resulting from the defective condition of said free public highway, or the bridges thereon, and deny the rest of said paragraph 6.

"Par. 5. In respect to paragraph 9 of the amended complaint, the defendants admit that, pursuant to the provisions of said act of the general assembly, the chairman of said corporation was empowered to draw his order in favor of the treasurer of said corporation upon the treasurer of the town of East Hartford for eleven thirty-fifths of the expense of repairing and maintaining said free public highway, and also for eleven thirty-fifths of any damages resulting from the defective condition of said free public highway, and deny the rest of said paragraph 9.

"Par. 6. Paragraph 11 of the amended complaint is denied.

"Par. 7. In respect to paragraph 12 of the amended complaint, the defendants admit that on the 29th day of June, 1893, the said George W. Fowler, as such chairman, drew orders in favor of said John S. Risley, as treasurer of said corporation, upon the treasury of the town of East Hartford, for the aggregate sum of ten thousand nine hundred and sixty-two and twenty one-hundredths dollars, which sum, mathematically considered, is admitted to be, for the purpose of this case, eleven thirty-fifths of the sum of thirty-five thousand eight hundred and seventy-nine and ninety-four one-hundredths dollars (\$35,879.94); and the defendants deny the rest of said paragraph 12 of said amended complaint.

"Par. 8. Paragraphs 13 and 13a of the amended complaint are denied.

"Par. 9. In respect to paragraph 16 of said amended complaint, defendants admit that on the 30th day of June, 1893, the said town of East Hartford, and the said Merriman, as treasurer of said town, paid to said John S. Risley, as treasurer of said corporation, the sum of five thousand nine hundred and sixty-two and twenty-five one-hundredths dollars (\$5,962.25), being part of said orders drawn as aforesaid for said sum of ten thousand nine hundred and sixty-two and twenty one-hundredths dollars; and that on said day the said Merriman, as treasurer of said town of East Hartford, undertook to, and did, accept in the name of said town of East Hartford, and agreed to pay from the treasury thereof, four of said orders, to wit, two of said orders, each for the sum of one thousand five hundred dollars (\$1,500.00), and two other of said orders, each for the sum of one thousand dollars (\$1,000.00), amounting, in all, to the sum of five thousand dollars (\$5,000.00), which four said orders are still outstanding and unpaid; and the defendants deny the rest of said paragraph 16 of said amended complaint.

"Par. 10. In respect to paragraph 17, defendants admit that on the 30th day of June, 1893, when said payment of said orders to the amount of five thousand nine hundred and sixty-two and twenty one-hundredths dollars was made by the defendants, said town of East Hartford, and said Merriman, as treasurer, there was in the hands of the defendant Merriman, as treasurer of said town, money belonging to the town of East Hartford, and raised by taxation, or money raised upon the credit of the said town of East Hartford, for which the plaintiff was liable to be taxed, and in which he was interested as an inhabitant, elector, and taxpayer of said town; and defendants deny the rest of said paragraph 17.

"Par. 11. In respect to paragraph 18 of the amended complaint, the defendants admit that the town of East Hartford, and said Merriman, as treasurer of said town, intend to pay said four orders, amounting to the sum of five thousand dollars, now outstanding and unpaid, as aforesaid, out of money belonging to said town of East Hartford, now in the hands of the treasurer of said town, or hereafter to be paid into his hands, raised or to be raised by taxation, of which the plaintiff has paid or will be compelled to pay a part, or out of money raised or to be raised upon the credit of said town, and now paid or hereafter to be paid into the hands of the defendant Merriman, as treasurer of said town, for which the plaintiff is liable to be taxed, and in which he is interested as an inhabitant, elector, and taxpayer of said town of East Hartford; and defendants deny the rest of said paragraph 18 of the amended complaint.

"Par. 12. The defendants deny paragraph 18a of the amended complaint.

"Par. 13. In respect to paragraph 19 of the amended complaint, the defendants admit that

the plaintiff believes that the defendants are about to pay said four orders, amounting to said sum of five thousand dollars, at an early date; and the defendants deny the rest of said paragraph 19 of the amended complaint.

"Par. 14. In respect to paragraph 20 of the amended complaint, the defendants admit that on or before the — day of July, 1893, two of the said orders so outstanding and unpaid, and each bearing the indorsement in blank of said John S. Risley as treasurer, as aforesaid, —one for the sum of one thousand and five hundred dollars, and the other for the sum of one thousand dollars,—came into the possession of defendant Wells, who ever since has held, and now holds, said two orders, and claims to be the owner thereof; and the defendants deny so much of paragraph 20 as alleges that said orders, or either of them, were illegal.

"Par. 15. The defendants deny so much of paragraph 21 of said amended complaint as alleges that the orders therein referred to were illegal, and admits all the rest of paragraph 21.

"Par. 16. The said orders were in the form following, the amount being omitted: 'No. 7D. Hartford, June 29, 1893. To the Treasurer of the Town of East Hartford: Pay to the order of John S. Risley, Treas., — dollars, and charge the same to the account of the board for the care of highways and bridges across the Connecticut river in Hartford county. G. W. Fowler, Chairman.' They were indorsed in blank upon the back, 'John S. Risley, Treas.' They were also indorsed by the treasurer of the defendant town across the front, 'Accepted, with 5 per cent. interest. Chas. Merriman, Treas. June 29, '93,'—and were so accepted, as per said indorsement, by said treasurer, on said date.

"Par. 17. Afterwards, on the — day of July, 1893, the defendants Benjamin Wells and Eunice Cowles purchased in open market, of the then holders thereof, for full value, in good faith, and without notice of any defect, said orders, and now hold the same, wholly unpaid and unsatisfied.

"Par. 18. In the annual report of the selectmen and treasurer and other officers of said town of East Hartford to the town of East Hartford, in the year ending September 11, 1896, and in other such reports, there was contained, as a liability, a statement that said orders were still outstanding, as an immediate liability, to the amount of five thousand dollars, bearing interest at the rate of 5 per cent.; and said report, with said statement of said orders as liabilities, was accepted by said town of East Hartford.

"Par. 19. The said orders were made, accepted, indorsed, and negotiated in payment for services of persons employed and expenses incurred by the first selectman and town agent of the defendant town, and by said board for the care of highways and bridges across the Connecticut river in Hartford county, to relieve and absolve the defendant town from obligation and liability respecting the

said highway and bridge, and the care, repair, and maintenance thereof; and said services and expenses were, in part, rendered and expended in respect to the preparation of the act of the general assembly referred to in the 10th paragraph of the amended complaint, and in respect to the proceedings before the committee of the general assembly in respect to said legislation."

Plaintiff's Demurrer to the Defendants' Amended Answer.

"The plaintiff demurs to the defendants' amended answer, and particularly to paragraphs 16, 17, 18, and 19 of the defendants' amended answer:

"First. Because the board for the care of highways and bridges across the Connecticut river in Hartford county had no power or authority to employ persons or incur expenses to relieve and absolve the defendant town from obligation and liability respecting the said highway and bridge, and the care, repair, and maintenance thereof, and no power or authority to draw orders or cause orders to be drawn upon the treasurer of the defendant town to the order of John S. Risley, treasurer of said board, in payment for the services of persons employed and expenses incurred for said purposes.

"Second. Because George W. Fowler, chairman of said board, had no power or authority to draw orders upon the treasurer of the defendant town to the order of John S. Risley, treasurer of said board, in payment of persons employed and expenses incurred to relieve and absolve the defendant town from obligation and liability respecting said highway and bridge, and the care, repair, and maintenance thereof, whether said persons were employed and said expenses were incurred by said board, or by the first selectman and town agent of the defendant town, or by said board and said first selectman and town agent acting jointly.

"Third. Because John S. Risley, the treasurer of said board, had no power or authority to indorse and negotiate any orders drawn by said George W. Fowler, as chairman of said board, in payment for services of persons employed and expenses incurred by said board, or by the first selectman and town agent of the defendant town, or by said board and said first selectman and town agent jointly, to relieve and absolve the defendant town from liability and obligation respecting said highway and bridge, and the care, repair, and maintenance thereof.

"Fourth. Because the first selectman and town agent of the defendant town had no power or authority, either alone or acting jointly with said board, to employ persons or incur expenses to relieve and absolve the defendant town from obligation and liability respecting the said highway and bridge, and the care, repair, and maintenance thereof, and it is not alleged that defendant town appointed an agent for such purpose.

"Fifth. Because the defendant Merriman, as treasurer of the defendant town, had no power or authority to accept, with five per cent. interest, in behalf of the defendant town, any orders drawn upon him, as said treasurer, by George W. Fowler, as chairman of said board, to the order of said John S. Risley, as treasurer of said board, in payment for services of persons employed or expenses incurred by said board or by the first selectman and town agent of the defendant town, to absolve and relieve the defendant town from obligation and liability respecting said highway, and the care, repair, and maintenance thereof.

"Sixth. Because the defendant Merriman, as treasurer of the defendant town, had no power or authority to accept, with five per cent. interest, in behalf of the defendant town, any orders drawn upon him as said treasurer by George W. Fowler, as chairman of said board, to the order of said John S. Risley, as treasurer of said board.

"Seventh. Because the defendants Benjamin Wells and Emma Cowles, the purchasers and holders of said orders, were bound to take notice of the scope and measure of the powers of the defendant Charles Merriman, as the treasurer of the defendant town, and to take notice of his want of power and authority to bind the defendant town by his acceptance in its behalf, with five per cent. interest, of any orders of George W. Fowler, chairman of said board, upon said defendant Merriman, as treasurer of defendant town, to the order of John S. Risley, as treasurer of said board.

"Eighth. Because the defendants Benjamin Wells and Eunice Cowles were bound to take notice of the lawful powers and duties of said board, and of the lawful powers and duties of its chairman and its treasurer, and to take notice that the chairman of said board had no power to draw orders to the order of its treasurer upon the defendant Merriman, as treasurer of the defendant, for any purposes save those specified in the act of the general assembly creating said board, and were bound, at their peril, to inquire whether the orders they purchased were or were not drawn by said George W. Fowler, as chairman, and indorsed by said John S. Risley, as treasurer, for the purposes specified in said legislative act.

"Ninth. Because the orders held by said defendants Benjamin Wells and Eunice Cowles were and are void, for want of power in the said board and in the first selectman and town agent of defendant town to employ persons and incur expenses for the purposes specified in paragraph 19 of said amended answer, and for want of power in the said George W. Fowler, as chairman of said board, to draw said orders for the purposes specified in paragraph 19 of the amended answer, and likewise for want of power in said John S. Risley, as treasurer of said board, to indorse and negotiate the same, and for want of power in the defendant Merriman, as treasurer of said

defendant town, to accept the same, with five per cent. interest, on behalf of defendant town.

"Tenth. Because it is not alleged in paragraph 18 of said amended answer that the warning of the town meeting of the defendant town which accepted the reports of the town officers mentioned in said paragraph, for the year ending September 11, 1896, or the warning of any town meeting which accepted any like reports, contained any notice that any unauthorized act or acts of the first selectman and town agent or of the town treasurer of the defendant town would be brought before such town meeting for ratification.

"Eleventh. Because there is no allegation in said paragraph 18 that any unauthorized act of the first selectman and town agent, or of the treasurer of the defendant town, was, in fact, submitted for ratification to any town meeting of the defendant town, with a statement of the material facts, so that the defendant town might take lawful action in the premises.

"Twelfth. Because the facts alleged in said paragraph 18 are wholly insufficient in the law to constitute a ratification on the part of the defendant town of the unauthorized acts of the defendant Merriman, as treasurer of the defendant town, in accepting, with five per cent. interest, the orders purchased and held by the defendants Wells and Cowles, as set out in paragraph 16 of the amended answer, and the unauthorized acts of the first selectman and town agent of defendant town in employing persons and incurring expenses for the purposes set out in paragraph 19 of the amended answer.

"Thirteenth. Because the defendant town had no power to employ persons or incur expenses to relieve and absolve it from liability and obligation respecting the said highway, and the care, repair, and maintenance thereof (a duty imposed on the defendant town by the state of Connecticut), and no power to ratify any unauthorized acts of its officers or agents in employing persons or incurring expenses for such purposes."

The court sustained the demurrer, and, there being no further pleading, rendered judgment for the plaintiff. Defendants appealed.

Henry Stoddard and William O. Case, for appellants. Francis H. Parker, for appellee.

ANDREWS, C. J. (after stating the facts). The plaintiff is a citizen and taxpayer of the town of East Hartford. The judgment of the superior court enjoined that town perpetually from paying four certain orders of like tenor with the one recited in the sixteenth paragraph of the defendants' answer. If the law is so that the town is in no event lawfully under obligations to pay those orders, then the demurrer was properly sustained, and the judgment is correct. It will simplify the discussion if we keep distinctly in mind from the outset that the town is not liable as the maker or drawer of the orders. An

inspection of the order so recited shows that no agent of the town, as such, took part in the making of it. The obligation of the town to pay those orders, if it exists at all, must arise from one of the three, or possibly four, following conditions: First, because the said highway board had authority by law to issue orders for the purpose for which it appears by the record these orders were issued, and so to make them binding on the town; or, second, assuming that the orders were invalid when issued, because the town has ratified them; or, third, because the orders were negotiable, and so their validity cannot be questioned in the hands of the present holders. The possibly fourth condition is the acceptance of the bonds by the town treasurer. But this may be wholly disregarded. A town treasurer has no authority to bind a town by his acceptance of an illegal order. Let us then first inquire as to the authority of the said board.

At its January session in the year 1887, the legislature passed an act entitled "An act to establish free public highways across the Connecticut river in Hartford county,"—by subsequent legislation made to apply only to Hartford Bridge,—by which it was provided that the state's attorney in Hartford county should bring a complaint to the superior court in that county against the proprietors of the said Hartford Bridge, then being a toll bridge; that said court, upon such complaint, should appoint commissioners who should lay out and establish a highway across the Connecticut river where the said toll bridge was, and along and across the causeway and approaches appurtenant to and connected thereto, and should appraise the damages and benefits, and that "said highway, when so laid out and established as herein provided, shall be a free public highway"; that said commissioners should find the towns specifically benefited by the said layout and establishment of said highway, and should assess to them such benefits as they should find equitable. The said act, in its seventh section, then provided that, "when said highway so established as aforesaid shall have become a free public highway as aforesaid, the same shall thereafter be maintained by the said towns so assessed in proportion to the assessment upon said towns as hereinafter provided. The first selectmen of the said several towns shall meet on the second Monday after said highways shall have become free public highways as aforesaid, at the office of the selectmen in Hartford, and annually thereafter and at such other times as they shall deem necessary, and said several first selectmen shall constitute a board for the care, maintenance and control of said highways. Said board shall appoint a chairman, secretary and treasurer, and said board shall apportion the expense of repairing and maintaining said highways upon the said several towns in proportion to the assessment against said towns as aforesaid, and said chairman shall draw his

order on the respective treasurers of said towns to the order of the treasurer of said board for the proportional amount payable by said towns as aforesaid for such repairs and maintenance. Any damages resulting from the defective condition of said highways or the bridge upon the same shall be paid by said towns in proportion to the said assessment. For the purpose embraced in this section the said board shall be a body politic and corporate by the name of 'The Board for the Care of Highways and Bridges across the Connecticut River in Hartford County,' and action may be brought against said board by service upon its secretary, and any judgment recovered thereon shall be paid by said towns in said proportions and in the same manner as herein provided for the payment of the expenses of repairs and maintenance as aforesaid. Said board shall annually report to said several towns the expenses incurred and paid by them during the preceding year."

Pursuant to the provisions of that act, the state's attorney for Hartford county brought a complaint to the superior court in that county, at its ——— term; and thereupon commissioners were appointed, and such proceedings were had that said superior court, by its decree, laid out and established a free public highway across the Connecticut river, at the place where the toll bridge of the Hartford Bridge Company then was, and along and across the causeways and approaches appurtenant to and connected therewith, and found that the towns of Hartford, East Hartford, Glastonbury, South Windsor, and Manchester were especially benefited by said layout, and assessed the benefits to each, and the proportion of said expense imposed on the town of East Hartford was $11/35$ of the entire expense; so that the said town of East Hartford became and was liable to pay, in the manner set forth in the said act, $11/35$ of the expense of repairing and maintaining said free public highway and $11/35$ of any damage resulting from the defective condition of said free public highway or the bridges thereon, and, so far as the terms of said act express, for no other expense whatever. Afterwards, in September, 1889, the first selectmen of the said towns met, as is provided in said act, and organized the corporation therein created, by the name of the "Board for the Care of Highways and Bridges across the Connecticut River in Hartford County," by electing George W. Fowler (then the first selectman of Hartford) its chairman, and John S. Risley (then the first selectman of Manchester) as its treasurer; and said corporation so organized immediately assumed the care and control of said free public highway, repairing and maintaining the same until the 29th day of June, 1893. On said last-mentioned day, as it is alleged in the tenth paragraph of the complaint, the general assembly, being then in session, passed an act which was made to take effect on its passage, by which the said act of 1887 was repealed, and the state itself assumed

and undertook the duty of repairing and maintaining thereafter the said free public highway. The purpose for which the said orders were issued is set forth in the nineteenth paragraph of the defendants' answer, as follows: "The said orders were made, accepted, indorsed, and negotiated in payment for services of persons employed and expenses incurred by said first selectman and town agent of the defendant town, and by said board for the care of highways and bridges across the Connecticut river in Hartford county, to relieve and absolve the defendant town from obligation and liability respecting the said highway and bridge, and the care, repair, and maintenance thereof; and said services and expenses were, in part, rendered and expended in respect to and in the preparation of the act of the general assembly referred to in the tenth paragraph of the amended complaint, and in respect to the proceedings before the committee of the general assembly in respect to said legislation." We have already seen that the said orders on their face indicate that the first selectman and town agent of the defendant town did not, as such, take any part in the making or drawing of the said orders. The first selectman and town agent of the defendant town was a member of said board. He took no part in the making or issuing the orders as such member. If said board might lawfully issue the said orders in the payment of such employment and expenses, and so make them a charge on the town, then the orders should be paid, but otherwise not. And this brings us directly to the question of whether or not the said board, for the care of highways and bridges across the Connecticut river in Hartford county could lawfully issue these orders for such purposes, and make them obligatory on the town of East Hartford.

It has been noticed that the terms of the act which created the said board made it the duty of said board to care for, maintain, and control the said highways, and gave it authority to apportion the expense of repairing and maintaining the same, as well as any damages resulting from the defective condition of the said highway and bridge, upon the several towns named in the decree of the superior court. The terms of the act give that board no power to impose on the towns the expenses of anything else. The terms of the act gave that board no authority to employ agents to appear before the legislature for any purpose whatever; least of all to employ agents to procure legislation which would terminate its own existence. And it seems to us that said board did not have such power by implication. If we regard the board simply as a device to enable the representatives of the five towns to perform a municipal duty imposed on the town jointly with the other towns, it is clear that the powers of such a board should not be extended by implication beyond the performance of the joint municipal duty which made some such device necessary. If, on the other

hand, we regard the board as a municipal corporation, it is one with very limited powers, created for a specified duty only, and must be judged by the rule applicable to such a corporation. Public or municipal corporations are not associations, but are subdivisions of the state. The charter of such a corporation is not a contract between the corporation and the state, nor between the corporators themselves. The effect of an act of the legislature incorporating a municipality is to invest the governing authorities of the municipality—either a majority of the voters, or such officers as are prescribed—with the power of local government over the inhabitants of that district. Such an act, strictly speaking, confers powers which did not exist before. It confers on the governing authority the power of laying taxes, and passing local laws for the purposes named in the act, without the previous consent of the people of the district. The governing authorities possess no powers or faculties not conferred upon them either expressly or by fair implication by the law which creates them, or by other statutes applicable to them. Dill. Mun. Corp. § 21; Mor. Priv. Corp. §§ 24, 649, 1046; *Coler v. Cleburne*, 131 U. S. 162, 9 Sup. Ct. 720. A municipal corporation has no power by implication, unless it is one that may be necessary to the successful carrying out of those powers which are expressly given. It is more reasonable to suppose that the legislature, in creating a corporation, intended that it should succeed rather than that it should fail. Hence the courts hold that such necessary powers were really intended to be granted. If the powers expressly given can be exercised without aid from implication, then nothing can be implied. And there can be no implication of a power existing in a corporation inconsistent with those which are expressly granted. Obviously, a power destructive of those expressly granted cannot be implied. Perpetual continuance is ordinarily an essential ingredient in the idea of a corporation. A corporation cannot put an end to its own existence. It certainly cannot unless the power to do so is expressly given to it. The said board had no power to make the orders in question obligatory on the defendant town unless it had the implied power to employ agents to appear before the legislature to procure legislation to terminate its own existence. Such an implication cannot be admitted.

A large part of the defendants' argument is devoted to the claim that the town of East Hartford might—as could any other town in the state—lawfully employ counsel or agents to appear before the legislature to procure any legislation in which the town conceives itself to be interested. They cite *Farrel v. Town of Derby*, 58 Conn. 234, 20 Atl. 460. That case, however, goes no further than to hold that a town may lawfully expend money it has raised by taxation to protect its corporate integrity, privileges, or property from adverse legislation. The doctrine of that case is one that is not to be carried further. It cannot be stretch-

ed into an authority justifying a town to embark in legislative attacks on other corporations because the town might think itself benefited thereby. In one aspect of this case, it is entirely immaterial whether the town has or has not power to employ agents to appear before the legislature. If the town of East Hartford has power to employ agents or attorneys for that purpose, it has not done so in this case. In another aspect of the case, the question of the power of the town to employ agents for such purpose is material, and that is on the claim of a ratification.

The defendants say that the town of East Hartford has ratified their orders. The averments in the pleadings from which ratification is claimed are these: In the eighteenth paragraph of the complaint it is alleged: "That the said defendants, the said town of East Hartford, and the said Merriman, as treasurer of said town of East Hartford, intend to pay the said four illegal orders, amounting to the sum of five thousand dollars, and now outstanding and unpaid, as hereinbefore set forth." And in the eighteenth paragraph of the answer it is alleged as follows: "In the annual report of the selectmen and treasurer and other officers of said town of East Hartford to the town of East Hartford, in the year ending September 11, 1889, and in other such reports, there was contained, as a liability, a statement that said orders were still outstanding, as an immediate liability, to the amount of five thousand dollars, bearing interest at the rate of 5 per cent.; and said report, with said statement of said orders as liabilities, was accepted by said town of East Hartford." The claim as stated is like this: The town itself might have employed the agents and attorneys to appear before the legislature to procure the legislation by which it was released from contributing towards the expense of the free highway. The said board did employ attorneys, who went before the legislature, and procured such legislation, and which benefited the town. In payment for the services so rendered, the board issued the orders in question, and now the town, by the action so above alleged, has ratified those orders. And, as there can be no ratification of a contract unless there was power to enter into that contract originally, the question of the power of a town to employ agents to appear before the legislature might be material. It would be material if the disposition of this case depended on it. We have no occasion, however, to pass upon that question, for the reason that the allegations of the pleadings do not show a ratification. There is no ratification unless the party has full knowledge of all the facts, nor unless there is the intent to ratify. *Dibble v. Town of New Haven*, 56 Conn. 202, 14 Atl. 210; *Stanton v. Railway Co.*, 59 Conn. 281, 22 Atl. 300; *Town of Ansonia v. Cooper*, 64 Conn. 544, 30 Atl. 760. The allegations here fail to show that the town had full knowledge, and fail to show that there was an intent to ratify. We think there was no ratification.

The orders were not negotiable, so as to estop the plaintiff or the town of East Hartford from showing their illegality in the hands of the present holders. Municipal orders or bonds are not ordinarily negotiable. The orders in this case are similar to, and in effect precisely like, the orders discussed by the supreme court of the United States in the case of *Mayor v. Ray*, 19 Wall. 477, a case in which the city of Nashville, Tenn., had issued orders for the payment of money borrowed by the city. There was no express authority in its charter for the city to borrow money for any purpose. Mr. Justice Bradley, in giving the opinion of the court, said: "Vouchers for money due, certificates of indebtedness for services rendered or for property furnished for the use of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind, used for the liquidating the amounts legitimately due to public creditors, are, of course, necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes. But to invest such documents with the character and incidents of commercial paper, so as to render them in the hands of bona fide holders absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose. It has the effect of converting a municipal organization into a trading company, and puts it into the power of corrupt officials to involve a political community in irretrievable bankruptcy. No such power ought to exist, and, in our opinion, no such power does legally exist unless conferred by legislative enactment, either express or clearly implied. * * * But, where the power has not been given, parties must take municipal orders, drafts, certificates, and other documents of the sort at their peril. Custom and usage may have so far assimilated them to regular commercial paper as to make them negotiable; that is, transferable by delivery or indorsement. This quality renders them more convenient for the purpose of the holder, and has undoubtedly led to the idea so frequently, but, as we think, erroneously, entertained, that they are invested with that other characteristic of commercial paper,—freedom from all legal and equitable defenses in the hands of a bona fide holder. But every holder of a city order or certificate knows that, to be valid and genuine at all, it must have been issued as a voucher for city indebtedness. It could not be lawfully issued for any other purpose. He must take it, therefore, subject to the risk that it has lawfully and properly issued. His claim to be a bona fide holder will always be subject to this qualification. The face of the paper itself is notice to him that its validity depends upon the regularity of its issue. The officers of the city have no authority to issue it for any illegal or improper purpose, and their acts cannot create an estoppel against the city itself, its taxpayers or people. Persons receiving it from them know whether it is issued, and whether they receive

it, for a proper purpose and a proper consideration. Of course, they are affected by the absence of these essential ingredients; and all subsequent holders take cum onere, and are affected by the same defect." It was held that the order was invalid, and that there could be no recovery against the city. These considerations exactly apply to the present case, and show that the orders enjoined against were not negotiable. 1 Daniel, Neg. Inst. p. 324, § 427; Cooley, Const. Lim. (6th Ed.) 269; Dill. Mun. Corp. §§ 122, 406, 457, 733; Beach, Pub. Corp. § 195. There is no error. The other judges concurred.

(70 Conn. 44)

RUGGLES v. RANDALL et al.

(Supreme Court of Errors of Connecticut. Nov. 30, 1897.)

WILLS—CONSTRUCTION—BEQUEST TO "HEIRS"—TAKING PER STIPES—RIGHT OF INSANE LEGATEE—RESIDUARY CLAUSE—DIVISION OF SURPLUS—BEQUESTS TO CLASSES OF PERSONS.

1. A bequest to the heirs of testator's niece, who died before testator, is a class gift, which, on his death, vests in her descendants who were then living per stirpes; the word "heirs" being used in its primary legal sense, and not to denote those who would succeed to her personal estate under the statute of distributions.

2. Where a testator bequeathed money to his niece and her husband, adding that, if he survived them, "the sum so intended for her" should go into the residuary estate, and they both survived him, the clause "the sum so intended for her" does not deprive such husband of his half of the legacy, or add it to the share of his wife.

3. Where testator bequeathed money to the heirs of a deceased woman who had died unmarried, leaving brothers and a sister, and five children and some grandchildren of a deceased brother, the share that would have fallen to such brother had he survived testator should be divided into six parts, one part going to each of his children, and the other to the grandchildren.

4. A specific sum was given to each of several persons by the same clause in a will, which further provided that, if testator survived either or all of them, the sum "so intended to be given to said deceased shall be paid to their, or each of their, heirs." Held sufficient to pass the share of a legatee dying before testator to her heirs, who should share it equally.

5. A will, after bequeathing numerous legacies to persons by name, to classes of persons, such as "heirs" and "children," and to persons occupying particular relations, as "husbands," directed the executor to convert the whole estate into money, and provided that, if there was not enough to pay all legacies, a proportionate deduction should be made from "each legacy named," and that any surplus should go equally to all legatees "named." Held, that the word "named" included all persons to whom the legacies were to be paid, though their individual names had not been given in the will.

6. Where numerous legacies are given to specific persons and to classes of persons, a class receiving any legacy should be treated as a unit in applying a residuary clause which provided that, in case of a surplus over the amount necessary to pay all legacies, it should be distributed equally among all the legatees "named."

Case reserved from superior court, New London county; Milton A. Shumway, Judge.

Action by Henry Ruggles, as executor of the estate of Thomas J. Ridgway, deceased,

against Edward E. Randall and others. Case reserved on the pleadings for the decision of the supreme court of errors.

Action for the construction of the will of Thomas J. Ridgway, brought by the executor to the superior court of New London county, and reserved for the advice of this court on the complaint and answers. The material portions of the will were as follows: "Item 1. I give and bequeath to the children of my late niece, Catherine Randall, now deceased, who was the wife of John P. Randall, of Pittston, Pennsylvania, the sum of eight hundred dollars (\$800), to be equally divided between them, to share and share alike, to them and their heirs forever. Item 2. I give and bequeath to my niece Antoinette King (widow), of Stanhope, New Jersey, the sum of eight hundred dollars (\$800), and, in case she dies before me, the said sum of eight hundred dollars I give and bequeath to her heirs, to be divided equally among them. Item 3. I give and bequeath to my niece Amanda Jewett, of Apalachine, state of New York, and, in case of her death before me, to her heirs forever, the sum of five hundred dollars (\$500)." "Item 8. I give and bequeath to the heirs of my niece Minerva Ennis, of Hoboken, New Jersey, the sum of five hundred dollars (\$500). Item 9. I give and bequeath to my niece Martha Kimball and her husband, of Lackawaxen, Pennsylvania, the sum of five hundred dollars, but, in case I survive them, said sum so intended for her shall become and remain a part of my residuary estate, to be disposed of as hereinafter directed." "Item 14. I give and bequeath to the heirs of Mary Gibbs, deceased, of Danville, Pennsylvania, the sum of five hundred dollars (\$500)." "Item 19. I give and bequeath to Mrs. Amanda Rockwell, of Milford, Pennsylvania, to Mrs. Minerva Hazen, of Rowland, Pennsylvania, and to Louis P. Hazen, of Chicago, Ill., the sum of four hundred dollars (\$400) each. In case I shall survive either or all of the persons last named, then the said sum of four hundred dollars so intended to be given to said deceased shall be paid to them, or each of their heirs, and I give and bequeath the same to them forever." "Lastly. I do hereby fully authorize and empower my executor hereinafter named to convert all my real and personal estate which I may die possessed of (except such as I shall reserve to be distributed without inventory) into money, by sale or otherwise, as he shall judge to be for the best interest of all the legatees named in this, my last will and testament, and to pay the legatees named in this will their respective sums as soon as the same can be done and comply with the laws of this state governing the settlement of estates of deceased persons; and if, after the sale of my property as above directed, and after the payment of my debts and funeral expenses, it shall be found that my estate will not pay the legacies in full, in that

case a proportional deduction is by me directed to be made by my executor from each legacy named in this will, and each legacy to be paid according to such deduction, and, in case there shall be a surplus of my estate more than sufficient to pay the several legacies herein named, said surplus shall become a part of my residuary estate. All of said surplus, and all the rest and residue of my estate, I give, bequeath, and devise to all the legatees named in this will, to be equally divided among them all; all to share and share alike, and in equal amounts of the same." The will was executed July 19, 1894, and the testator died in 1896, leaving no widow or descendants.

Minerva Ennis had died in 1891, leaving several children, one of whom, David R. Ennis, died in 1895. Her husband is still living. David R. Ennis left a widow and two married daughters. Martha Kimball and her husband both survived the testator. She died before this suit was instituted, and he is insane. Amanda Jewett had died in January, 1894, leaving descendants and a husband. Mary Gibbs had died unmarried, leaving brothers and a sister, and children and grandchildren of a deceased brother. Amanda Rockwell had died in 1893, leaving children.

The questions as to which the advice of the court was asked were as follows: (1) To whom, and in what shares, shall be paid David R. Ennis' part of the legacy given in item 8 to the heirs of Minerva Ennis? (2) To whom is payable the legacy given in item 9? (3) Have the respective surviving husbands of Amanda Jewett, the legatee named in item 3, and of Minerva Ennis, mentioned in item 8, any interest in the legacies given in those items, respectively; and, if so, what interest? (4) Regarding the legacy given in item 14 to the heirs of Mary Gibbs, what disposition is to be made of the share in said legacy of William J. Gibbs, who was an heir of Mary Gibbs at her death, but died before testator? (5) Owing to the fact that the testator survived Amanda Rockwell, but died before Louis P. Hazen and Minerva Hazen, the legatees named in item 19, what disposition shall be made of the \$400 intended to be given to said Amanda? (6) Whereas the testator, in the last section of said will, provides as follows: "All of said surplus, and all the rest and residue of my estate, I give, bequeath, and devise to all the legatees named in this will to be equally divided among them all, all to share and share alike, and in equal amounts of the same;" and whereas many of the legatees named in said will died before the testator, and the legacies which they would have taken if alive are by said will given, in case of their death, to their heirs, who are not named; and whereas in items 1, 8, and 14 no legatee whatever is mentioned by name,—what disposition shall be made of said residuum?

John T. Walt, for plaintiff. Wallace S. Ellis, for defendants Edward M. Randall and others. Gardiner Greene and Arthur B. Calkins, for defendants Eliza M. Griswold and others. Amos A. Browning, for defendants Henry B. King and others.

BALDWIN, J. The legacy to the heirs of the testator's deceased niece Minerva Ennis was a class gift, which vested, upon his decease, in her descendants who were then living, per stirpes. The will, like every other, is to be read as if executed at the moment of the testator's death. Whoever were, at that time, her heirs, in the sense in which he employed that word, are to take, without regard to whether they did or did not answer that description at her decease. *Gold v. Judson*, 21 Conn. 616, 623. The word "heirs," in its strict and primary meaning, signifies those entitled by law to inherit by descent the real estate of a deceased person. It is also popularly used to denote those entitled by the statute of distributions to succeed beneficially to the personal estate of a deceased person. The will now before us, while purporting to dispose of both real and personal estate, contemplated a conversion of the whole into money; and the provision for the heirs of Mrs. Ennis, even assuming that under the residuary clause they are to share in the proceeds of real estate, should therefore be treated as a bequest of personalty. As a general rule, its primary legal meaning should be given to every word in a will, unless the context, when read in the light of the circumstances surrounding the testator, shows clearly that it was used in a different sense. *Leake v. Watson*, 60 Conn. 498, 506, 508, 21 Atl. 1075. The fact that the word now in question occurs in a disposition of personal estate is to be given due weight, but it is not conclusive. *Mullen v. Reed*, 64 Conn. 240, 248, 29 Atl. 478. Resort will ordinarily be had to secondary meanings, in cases of testamentary construction, only when adherence to the primary meaning would make the provision under consideration ineffectual, or plainly unreasonable. No such result follows from assigning to the term "heirs of my niece Minerva Ennis" its proper legal signification. On the contrary, it is highly improbable that the testator would prefer to her lineal descendants those who might be the statutory successors to her personal estate under the laws of New Jersey, with which it is not to be presumed that he was acquainted. It is also worth remark that in item 2 his contingent bequest to the heirs of another niece living in the same state was to be equally divided between them; a fixed rule being thus imposed, without regard to any statutory mode of distribution. The word "heirs," therefore, is to be taken in its primary meaning, under the laws of Connecticut; this being the state where the testator had his domicile and executed his will. It follows that the children of David R. Ennis together take one-fourth of the legacy in question, and that

his widow takes nothing. *Morris v. Bolles*, 65 Conn. 45, 58, 31 Atl. 538.

Martha Kimball and her husband were each entitled to \$250 under item 9 of the will. The reference to "said sum so intended for her" cannot avail either to double her legacy or to deprive her insane husband of that which had been expressly given to him. While he, no doubt, was thus remembered only because of his marriage to her, the testator intended to benefit her by benefiting him.

The provision for the heirs of Minerva Ennis and Amanda Jewett, each of whom had died leaving descendants who survived the testator, inured solely to the benefit of such descendants, and the husbands of these nieces took nothing.

For the reasons already stated in discussing the legacy to the heirs of Minerva Ennis, the "heirs of Mary Gibbs, deceased," were her brothers and sister, and those of the descendants of her deceased brothers who were living when the testator died; sharing per stirpes. What would have fallen to William J. Gibbs, had he survived the testator, is to be divided into six parts, of which each of his children takes one, and that remaining goes to the children of his deceased son. *Cook v. Catlin*, 25 Conn. 387.

The death of Amanda Rockwell before the testator brought into operation the clause of the will intended to be for the benefit of her heirs. While inartificially expressed, it is sufficient to send the legacy to them, and insufficient to multiply it by their number. Each takes an equal share in \$400.

The residuary clause empowers the executor to convert the whole estate into money in such manner "as he shall judge to be for the best interest of all the legatees named," and "to pay the legatees named their respective sums" as soon as may be, and directs that, if the estate should prove insufficient to "pay the legacies in full," a proportionate deduction is to be made "from each legacy named," but that, if there be "more than sufficient to pay the several legacies herein named," the surplus shall go "to all the legatees named in this will, to be equally divided among them all, all to share and share alike, and in equal amounts of the same." This use of the word "named" as descriptive of all the legacies that were to be paid shows that he meant it, when employed to designate legatees, to have the same application, and include all to whom these legacies were to be paid. He had directed that certain sums should be paid under the 25 preceding "items" of his will, and the sums so named were the "legacies herein named." Those who were to receive them were equally "named," whether described by their proper individual names or as members of a class, like "heirs" or "children," or as occupying a certain relation to another, such as a "husband." *Bromley v. Wright*, 7 Hare, 334. It is equally evident that, while he meant that those who might suffer by an abatement in case of a deficiency of the estate should be the ones to profit by a surplus in case a re-

suum were formed, he did not intend that in that event they should have a precisely corresponding benefit. Any abatement was to be proportional, as respects each legacy; but any increase was to be the subject of equal distribution among "all the legatees named." Following the interpretation already assigned to the term "all the legatees named," by which it is to be understood to include those named by any class description, we think that the class receiving any legacy, however numerous, should be treated as a unit, as respects the division of the surplus. The right to share in it was an incident of each of these legacies, and it is more reasonable to suppose that the testator intended the number of shares to be that of the different legacies that took effect than that of the individuals between whom these legacies might, by the accident of death, and consequent substitution, happen to be divided. It was uncertain, in the testator's mind, whether there would be any residuary estate. There were, in all, 27 legacies given to as many individuals or classes, and of these 18 were subject to lapse. The number of residuary shares, therefore, under the construction of the will which we adopt, could not exceed 27, and might be only 9, while, if the division were to be made per capita, among all the individuals who share in any legacy, the portion of each might be a mere trifle. It is to be presumed that the testator intended that his residuary legatees should receive, if anything, what would be of substantial benefit. The superior court is advised to enter a decree in conformity with this opinion. The other judges concur.

(70 Conn. 54)

**BERGIN v. SOUTHERN NEW ENGLAND
TEL. CO. et al.**

(Supreme Court of Errors of Connecticut. Nov.
30, 1897.)

INJURIES TO SERVANT—PLACES FOR WORK—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE—HARMLESS ERROR.

1. Under Gen. St. § 3946, and Pub. Acts 1893, c. 169, § 3, which give to local authorities full control of the location of telephone and electric railroad wires, poles, etc., within municipal corporations, it is not unlawful for a telephone company and an electric railroad company to use the same poles in a city, where they do so at the request of the municipal authorities.

2. In an action for damages caused by negligence, the question of defendant's negligence is one of fact, which will not be reviewed where the degree of care imposed by law was apparently applied to defendant by the trial court, in testing its conduct in regard to negligence.

3. Where a telephone company and an electric railroad company used the same poles for their wires, the law did not absolutely require the telephone company, as between it and its linemen, to inspect and test guy wires and circuit breakers put in by such railroad company, to discover whether they were in a safe condition, but whether the employer or the employé should discharge such duty depended on the circumstances of the particular case.

4. In an action for death caused by negligence, where the extent of the injury is shown, plaintiff is entitled to a judgment for substantial

damages if defendant fails to show either that it was not negligent as alleged, or that the injury was the result of deceased's contributory negligence.

5. In an action for death caused by negligence, a finding by the trial court that deceased was not in the exercise of due care as alleged in the complaint, and that his negligence essentially contributed to his injury, is conclusive, where the test applied by such court was the care which a person of ordinary prudence and judgment should have exercised under similar circumstances.

6. In an action by an administrator for the death of his intestate, error, if any, in admitting evidence that plaintiff, before he was appointed administrator, discharged the cause of action against defendant, was harmless, where the court properly refused to hold that the facts proved constituted a release, and deceased was guilty of contributory negligence which precluded recovery.

7. Where plaintiff recovered nominal damages against one defendant, and his right to recover more was defeated by deceased's contributory negligence, error, if any, in admitting and excluding evidence which could not have affected the trial or decision of the question of contributory negligence, was harmless.

Appeal from superior court, New Haven county; Milton A. Shumway, Judge.

Action by John J. Bergin, administrator of the estate of Timothy Delaney, deceased, against the Southern New England Telephone Company and the Meriden Electric Railroad Company for the death of plaintiff's intestate, caused by defendants' negligence. Defendant railroad company defaulted, and a demurrer by defendant telephone company to the complaint was overruled. There was a judgment in favor of plaintiff for nominal damages against the railroad company only, and he appeals. Affirmed.

The complaint alleged that the defendants were, without authority, operating their systems jointly; that defendants were negligent in using the defective circuit breaker described below, and in permitting the deceased to work at the place in question, when they knew, or by the exercise of a reasonable supervision should have known, that the circuit breakers were defective; that plaintiff's intestate was in the exercise of due care, and did not know, and that it was not his business to know, of the dangerous condition of the span wire by reason of the defective circuit breaker. The following facts were found by the court:

The defendant the Southern New England Telephone Company in operating its telephone lines has frequent occasion to take down and build lines of wires, and frequently the municipal authorities desire the wires of the telephone company and the street-railway company and the electric company to be on the same pole. The plaintiff on November 13, 1895, was appointed administrator of the estate of Timothy Delaney, an experienced lineman of the defendant telephone company, who was killed at Meriden on August 12, 1895, while upon the ground and colling a wire of his employer, which rested on a cross arm of a pole jointly used by the defendants. The Meriden Electric Railroad Company is by its charter au-

thorized to carry on the street-railroad business in the city of Meriden, upon Main street and elsewhere, by electricity, by means of the overhead or trolley wire system. The current of electricity used by the telephone company is harmless. The current used in the electric street railway company is between 500 and 550 volts, and, while not usually fatal, is dangerous. The telephone company management at the time of the accident was as follows: A president, who was the general manager of all its departments; a general superintendent, who had general charge of all construction work throughout the state, more especially relating to the plans of such work; two division superintendents, whose duty was to carry out the orders of the general superintendent, and oversee the construction work in their departments. The western department, where the accident occurred, was in charge of one W. S. Crofut. The actual work of construction and changes was done by gangs of workmen, each being assigned to a separate job. At the time of the accident there were several gangs at work under the general superintendence of Crofut. Each gang consisted of a foreman, two or three or more linemen, and two or three or more groundmen. The groundman works mainly on the ground, digging post holes, and other such work. A lineman is frequently termed a "climber." His special duties are in climbing poles, and working at the wires, cross arms, etc., at the tops of the poles. He is frequently required to do ground work. The foreman gives orders to the men during the course of the work. He is equipped with apparatus for climbing poles, and is expected to climb poles, and work at the wires at the tops of the poles, as occasion may require. The division superintendent gives no instructions to the gang as to how the work shall be performed in detail. At the time of the accident, Delaney, the deceased, had been in the employ of the telephone company for many years,—first as a groundman, but most of the time as a lineman. He was a competent lineman, and familiar with the nature of the business in which he was employed. At the request of the city of Meriden the electric street railway company and the telephone company agreed to use a common pole through certain streets, and the work of shifting the wires from the old poles upon the new line of poles was performed by the telephone company. The trolley wire of the electric street railway company, where the accident happened, was held in position by a span wire, directly crossing the street from pole to pole, and from which the trolley wire was hung. Then from each of the two opposite poles there ran a wire towards the next two opposite poles, and in a diagonal direction, meeting at the center, between two sets of poles on the trolley wire. These wires are called "guy wires." They are connected directly with the trolley wire; the object of these wires being to keep the trolley wire from slipping lengthwise. A short distance from the junc-

tion of these guy wires with the trolley wire, the electric street railway company had inserted what is called a "circuit breaker." This is a ball made up of insulated substances, the wire connecting at one and the other side of it; and thus the current of electricity is arrested. It was the usual method of construction, so far as the guy wires are concerned. These circuit breakers ordinarily perform their work successfully. They were put in by the street-railway company in the original construction of the work, and the telephone company was not expected to overhaul the circuit breakers on these guy wires, in the work of shifting the wires of both companies to and upon the new poles. When, for any cause, a circuit breaker becomes sufficiently defective, then the electricity passes through the circuit breaker, upon the wire beyond.

Delaney had, long before the accident in question, received the printed book of the company, containing its rules, among which was the following: "The company will not be liable, any further than above, for doctors' fees and other expenses incurred by reason of accidents; and employes are cautioned against placing themselves in hazardous positions, climbing unsafe poles, handling electric light and power wires." And his attention had been specially called to this rule. He had also been personally shown by Mr. Crofut, when at work upon a job of a similar character in Ansonia, the danger arising from the possible escape of the electric current from street-railway wires upon the wires of the telephone company; and it had been pointed out to him by Mr. Crofut, at that time, how he could detect it. A common method then shown to him by Crofut is by applying to the suspected wire one end of a wire, the other end of which is in the ground, to find out by the flashes whether the electricity passes from the suspected wire into the wire reaching to the ground. Such method of inspection was also commonly and well known among linemen. Linemen are employed by the telephone company, among other things, for the purpose of doing work which is dangerous, by reason of the possible contact of the telephone wires with highly-charged wires of the street-railway or other companies. The linemen are to do their own testing in such work. The telephone company has no other men than the linemen to do the testing, as the linemen knew; and there was nothing to prevent Delaney from testing the guy wire, and the linemen on this job were furnished with all the tools, appliances, and wires with which to test wires of the electric street railway company. One Butler was foreman of the gang of men set to work upon this job of transferring both sets of wires to one pole, the upper part of which pole was to be the exclusive property of the telephone company, and the lower part of the street-railway company. He cautioned

Delaney as to the dangerous character of the work, especially the dangers which might come from the escaping of the powerful electric current in the trolley wires into some of the wires which they might be called upon to handle. In the previous progress of this Meriden job, there had been called to Delaney's knowledge two instances where the circuit breakers of the electric street railway company on guy wires were defective, and where the electric current passed through the trolley wires upon the telephone wires, and caused considerable damage, in burning out telephones, etc., although there was no damage to persons. In these cases the electric railway company furnished new circuit breakers, which the linemen of the telephone company inserted in place of the defective circuit breakers, as Delaney well knew. The work of insertion, to a lineman, is insignificant, in point of time or skill. Delaney was the next man in the gang, and, in the absence of Butler, had the charge thereof.

The accident occurred by reason of a defective circuit breaker on one of the guy wires, in the following manner: Two linemen in the gang, about three days before the accident, in the course of their work had unfastened this particular guy wire from its old pole, and lashed it upon the new pole. In so doing they felt no electric shock. They were on a wooden pole, which served as a nonconductor. Whether, being on a wooden pole, a person will receive a shock of electricity, or not, depends upon a variety of circumstances. A day or two after the guy wire had been lashed to the new pole, one Flannigan, a groundman, was sent up the new pole to its top, for a certain telephone purpose, and, on his way up, took hold of the guy wire on which was the defective circuit breaker, and felt a distinct shock of electricity. On his way down the pole, after completing his work, he carefully avoided touching that wire. At this time, Delaney, Flannigan, and another groundman were working together, and Butler, the foreman, was absent. Meeting Delaney at the foot of the pole, Flannigan said to him that he had just had a shock from that guy wire, indicating which one it was. Delaney made light of it, and did not take any steps to test the accuracy of Flannigan's information, nor did he report the same to Butler. A short time afterwards it became necessary to take down a telephone wire which had been strung up on top of the new poles. Such work is done by cutting it at various places, then taking it off poles, and coiling it. Butler assigned one Davis, a lineman, to coil the wire, and Delaney to cut it, and then went off to another part of the job, at some considerable distance; giving no other instructions as to how the work should be done. Delaney told Davis to cut the wire, and he (Delaney) would coil it up. Davis

cut the wire at the proper place, and Delaney began to coil it up. In doing so he pulled it directly from the top of the poles on which it rested, and it was perfectly obvious to him that the way in which he was doing the work would bring the telephone wire directly upon the guy wire pointed out to him by Flannigan, as above described, and which in fact contained the defective circuit breaker. He was pulling and coiling the wire but a short distance from the pole to which was lashed the guy wire containing the defective circuit breaker, and this pole was the nearest one to his place of work. Obviously, when the wire should be pulled off the pole beyond, it would drop from the last pole and strike the guy wire, which in fact was charged with the electric current from the trolley. He paid no attention to the manner in which his wire would come upon the guy wire, nor did he take any steps to prevent the telephone wire from striking the guy wire. There were two methods usually employed by gangs in taking down a telephone wire from above a dangerous electric wire. One was for a man to take a rope and fasten one end to the wire, and guy it off from any possible contact with the dangerous wire. Another was for a lineman to climb a telephone pole, and take the wire, which is not very heavy, from the telephone pole, and throw it off the arm on the side opposite the guy wire; thus getting it off upon the ground before coiling it. There were ropes in the gang team of the telephone company upon the premises, and Delaney could have had the services of one of the gang, if he had asked for them. It was also entirely easy for him alone to have taken the wire off the pole in question, by throwing it into the street, and away from the dangerous guy wire. In pulling and coiling the wire, standing at the same time on damp, moist ground, and his clothing being wet with perspiration, the telephone wire struck the dangerous guy wire; and Delaney instantly fell forward on his face, and became at once unconscious, and died in a few moments. Except as above stated, there was no knowledge or information in any officer, agent, or employé of the telephone company, or of the electric railroad company, of the defective condition of this circuit breaker.

On the trial of the case it was shown that the plaintiff, before he was appointed administrator, applied to the Southern New England Telephone Company for funds with which to properly bury Delaney. The proper officers of the telephone company, protesting that the company was not liable for the accident, declined to do so unless all claim against the company on account of the accident should be released and discharged. Thereupon it was agreed between the plaintiff and the telephone company that all claims against the company should be released and discharged, and the company would furnish funds to bury the de-

ceased. In pursuance of such agreement the telephone company did furnish funds for the suitable burial of Delaney. Subsequently the plaintiff took out letters of administration upon the estate of Delaney, and brought this suit, but has never refunded said money. The telephone company claimed upon the trial that the agreement of the plaintiff and his conduct as above described were the agreement and conduct of an administrator *de son tort*, and effectually discharged the cause of action set up in the complaint. The defendant the electric street-railway company claimed that such discharge of the telephone company operated as a discharge of the electric railroad company. To the admission of this evidence the plaintiff objected. The objection was overruled, and the plaintiff excepted, but the court did not rule that these facts constituted a release of the cause of action. The defendants also offered testimony to show that the plaintiff made application for his appointment as administrator as a creditor of the estate of Delaney, and that he was the active man in the matter, and that this, in connection with his conduct in assuming to settle all claims with the telephone company, made it admissible, especially so as said application disclosed that the persons entitled by our law of distribution to the avails of this suit were residents of Ireland, and consequently Bergin was the one who did whatever was done, both in procuring funds to bury Delaney, and in bringing this suit, and in having an administrator appointed. The court admitted this evidence, as bearing upon the question that the plaintiff, at the time he made the settlement with the telephone company, was an administrator *de son tort*, and to this ruling the plaintiff excepted.

At the time of the injuries complained of there was an instrument in use whereby, at the power house of an electric railroad, at a time when the cars are not running, any leakage by means of defective circuit breakers or otherwise could be ascertained and located; but the defendant the Meriden Electric Railroad Company had no such instrument at its power house on or prior to August 12, 1895. The construction of the lines of both defendants was of standard design, and ordinarily suitable for the purpose for which each was intended, and the appliances used by both defendants were ordinarily competent and reasonably adapted to their use. The instrument above referred to would not disclose any leakage from a circuit breaker to a pole under all circumstances, but would disclose a leakage into the ground.

In the course of the trial the defendant the Meriden Electric Railroad Company offered one Edmund C. Boynton, an electrical expert, and, among others, asked him the following question: "Q. Now, Mr. Boynton, suppose that a man is colling up wire which he is taking down from the poles,—pulling it down; pulling off the poles, not colling at this time,—and suddenly receives an electric shock from

off that wire, and is thrown to the ground, so that he falls upon the wire when the wire is about his body and his arms, more or less, and the ground is wet, and his clothes are wet with perspiration; what have you to say as to the conditions of such a case, so far as receiving the full current of electricity?" To which the plaintiff objected on the ground that some of the assumptions in the question have no foundation in fact: First, that the wire was coiled around his arm; second, that he was walking away from the pole. The question was allowed, and the plaintiff duly excepted. The evidence was conflicting as to whether the deceased was walking and facing away from or towards the pole at the time he received the shock; also, as to the exact manner in which he was holding the wire.

Also, in the progress of the trial, the defendant the Meriden Electric Railroad Company offered the notice required by law in such cases, which had been served on it, for the purpose of showing the injuries for which damage was claimed. To its introduction the plaintiff objected on the ground that, as this was a hearing in damages after a default, the sufficiency of the notice was admitted by the default, and all question of the notice was eliminated from the case. The notice was ruled in, and the plaintiff duly excepted. During the trial the plaintiff offered to prove what was said by Mr. Butler, who was the foreman in charge of the men working for the telephone company, about the said defective insulator, at the time it was taken off, some days subsequent to Delaney's death, and relating to the then condition of said insulator. The court excluded it, and the plaintiff duly excepted. The plaintiff then offered to prove the said Butler's statement about the said insulator when it was removed, to show the defective condition of the same when it left the factory, and before it had ever been used. The court ruled the statements out, on the ground that they were hearsay, to which ruling the plaintiff duly excepted. The evidence offered at the hearing against the electric railroad company was made applicable to the hearing had against the telephone company.

Upon the foregoing facts the plaintiff claimed that the defendants were liable, as joint tortfeasors, for the injuries to Delaney resulting in his death, because they were at said time and place jointly using and employing their poles and wires without legislative authority; that the Southern New England Telephone Company was guilty of the only negligence causing the injuries; that the Meriden Electric Railroad Company was guilty of the only negligence causing the injuries; that the combined negligence of the defendants caused the injuries; that the plaintiff was entitled to substantial damages. The court did not rule as claimed by the plaintiff, but assessed nominal damages only. And the court finds from the foregoing facts, if such conclusion is a question of fact, that said Timothy Delaney was guilty of negligence materially

contributing to his injury, and the Southern New England Telephone Company was free from negligence.

James P. Pigott and Cornelius J. Danaher, for appellant. John W. Alling and James T. Moran, for appellee Southern New England Tel. Co. Seymour C. Loomis, for appellee Meriden Electric R. Co.

HALL, J. It was not unlawful for both defendants to use the same poles. Such joint use was with the consent of both companies, and at the request of the municipal authorities. It has not been shown to be necessarily attended with increased danger. By reducing the number of poles, the highway is used with greater convenience. Full control of the location of such wires and structures is given to the local authorities by section 3946 of the General Statutes, and section 3 of chapter 169 of the Public Acts of 1893.

The court has found that the defendant telephone company was not negligent. This is a question of fact, which it has been repeatedly held cannot be reviewed by this court upon an appeal, unless it appears that the trial court did not apply the correct standard of duty in reaching its conclusion, or violated some rule or principle of law applicable to the facts as found. *McAdam v. Electric Co.*, 67 Conn. 445, 35 Atl. 341; *Dundon v. Railroad Co.*, 67 Conn. 266, 34 Atl. 1041; *Sprague v. Railroad Co.*, 68 Conn. 345, 36 Atl. 791. The degree of care and duty imposed by law was apparently applied to the defendant telephone company by the trial court in testing its conduct in regard to negligence. Neither its conclusion from the facts found, nor any ruling of the court during the trial, indicates that it did not charge the telephone company with its legal duty as to providing for its employes a reasonably safe place and reasonably safe tools and appliances for their work, and competent co-laborers. But it is said that this rule imposed upon the telephone company, as a matter of law, the duty of inspecting and testing the guy wires or the circuit breakers of the electric railroad company, and that it is apparent that that duty was not placed upon the telephone company by the trial court. There is no such absolute requirement of law. Whether the employer or the employe should discharge such duty must depend upon the circumstances of each particular case. In many instances either may properly perform that work, and in some cases who should perform that duty is a question of fact, to be determined by a variety of circumstances, such as the nature of the task of inspection, the skill, opportunity, and means of the workman to properly do it, and the terms of the contract of employment. *McGorty v. Telephone Co.*, 69 Conn. 635, 38 Atl. 359. The facts found in the present case clearly show, and the court held, that when, in the performance of the work in which they were engaged, it became necessary to handle a wire of the electric rail-

road company, or when a contact with such wire was likely to occur, the duty devolved upon the servant, and not upon the master, to first ascertain whether such wire was charged with electricity. As to the negligence of the electric railroad company, the trial court has not decided adversely to the plaintiff. The extent of the injury having been shown, the plaintiff was entitled to a judgment for substantial damages against the defendant who should fail to show either that it was not negligent as alleged, or that the injury was the result of the contributory negligence of the deceased. *Sprague v. Railroad Co.*, supra. In its effort to show that it was free from fault, the defendant electric railroad company failed. From the facts found, the trial court evidently, and we think justly, concluded that the electric railroad company, "in the construction and operation of the appliances" for using in the public streets an agency so dangerous to human life, did not take the required precautions for the safe treatment of such an agency, and "for providing against all dangers incident to its use." *McAdam v. Electric Co.*, supra. But, unless the court erred in holding that Delaney was guilty of contributory negligence, the plaintiff would gain nothing by a decision that both the defendants were negligent. That is the controlling question in the case, and, unless the ruling of the court below upon that point ought to be reversed, it seems unnecessary to consider the other questions raised by plaintiff's counsel.

The complaint alleges that it was not Delaney's "business" to know the unsafe condition of the guy or span wire. It is found by the court "that in doing work which is dangerous, by reason of the possible contact of the telephone wires with the highly charged wires of the street-railway or other companies [and this, the record shows, is work which the linemen of the telephone company are frequently required to perform], the linemen do their own testing," that they know that there are no others employed by the telephone company to do such testing, and that they are supplied with suitable appliances for testing such wires. Delaney was an experienced lineman, acquainted with the duties and dangers of his employment. As against the telephone company, his negligent failure to perform one of the duties of his employment must defeat a recovery for an injury caused by such failure. The relation of Delaney to the electric railroad company was different. As he was not their employe, he was under no contract duty to test their wires or circuit breakers. Under different circumstances, he might have assumed that the electric railroad company was performing its duty, and using suitable and safe appliances to prevent the escape of electricity from the main or trolley wire to the guy wires. But when the accident happened he knew, as an experienced lineman, that such was not the fact, and that it was unsafe to act upon such a belief. He

had been expressly warned of the danger of a contact with wires of this kind. Two instances upon this same work of damage caused by the escape of electricity to the telephone wires by reason of defective circuit breakers had been called to his attention, and a fellow workman, but a day or two before this accident, pointed out to him this particular guy wire as one from which he had himself just received a shock. With such knowledge, and after such warning, Delaney heedlessly pulled the wire, which he was colling, from the arm of the telephone pole, in such a manner that it would obviously fall, as it did, upon the guy wire, and when, as the court finds, it would have been easy for him to have thrown the wire from the pole so as to avoid contact with the dangerous guy wire. The defendant electric railroad company can be only liable in this action for an injury caused by its negligence to one who was himself in the exercise of ordinary care. Its negligence did not excuse Delaney from exercising such care to avoid an injury. Applying that test to the conduct of Delaney, namely, the care which a person of ordinary prudence and judgment should have exercised under similar circumstances,—and we have no reason to think that any different standard was applied,—the trial court has found he was not in the exercise of due care, as alleged in the complaint, and that his negligence essentially contributed to cause his injury. This conclusion of the court is final. *Peltier v. Bradley, Dann & Carrington Co.*, 67 Conn. 42, 34 Atl. 712. Were it reviewable, we should say it was fully sustained by the facts found.

The action of the court in receiving the evidence offered to prove a discharge by the plaintiff, before he was appointed administrator, of the cause of action against the telephone company, could not have harmed the plaintiff. The court very properly refused to hold that the facts proved constituted a release. *Camden v. Fletcher*, 4 Mees. & W. 378; *Taylor v. Moore*, 47 Conn. 278. Had the court held that such facts constituted a release of the alleged cause of action, the record shows that, by reason of the contributory negligence of Delaney, there was no cause of action which could have been discharged.

Manifestly, the plaintiff was not prejudiced by the rulings of the court in permitting the hypothetical question to Boynton. In admitting the notice which had been served upon the electric railroad company, and in excluding proof of the declarations of Butler. We think these rulings can be sustained, but assuming that they were erroneous, as the plaintiff's right to recover beyond nominal damages is defeated by Delaney's contributory negligence, and as these rulings could not have affected the trial or decision of that question, the plaintiff was not injured thereby, and we have no occasion to discuss them further.

We have considered all the questions which we think are involved in the rulings and de-

cision of the court below. At least 20 of the 27 reasons of appeal assigned seem to be unnecessary for the proper presentation of those questions in this court. There is no error. The other judges concurred.

(70 Conn. 74)

FOSKETT & BISHOP CO. v. SWAYNE et al.
(Supreme Court of Errors of Connecticut. Nov. 30, 1897.)

HUSBAND AND WIFE—NONSUIT.

1. In an action against husband and wife to foreclose a mechanic's lien, where it was shown that the land was owned by the wife, that she knew of the improvements, had helped to select material, had directed the work, and had evinced an expectation to pay for work and material, it was error to enter a nonsuit.

2. The rule that it is error to enter a nonsuit where a case is tried to a jury, and there is substantial evidence produced by plaintiff on which judgment might reasonably be given on due consideration, applies to cases tried to the court.

Appeal from superior court, New Haven county; Silas A. Robinson, Judge.

Suit by the Foskett & Bishop Company against Walter S. Swayne and others for damages, and to foreclose a mechanic's lien. The case was tried to the court, by whom a judgment of nonsuit was rendered as to the defendant Sarah Swayne, and plaintiffs appeal for alleged errors of the court in refusing to set aside said judgment. Error and nonsuit set aside.

Prentice W. Chase and James Elliott, for appellants. James Kingsley Blake, for appellee the New Milford Sav. Bank. Richard H. Tyner, for appellee Sarah Swayne.

ANDREWS, C. J. Any court is authorized by section 1109 of the General Statutes to grant a motion for a judgment as in case of a nonsuit if, in its opinion, the plaintiff has failed to make out a prima facie case. In *Booth v. Hart*, 43 Conn. 480, this court said: "In cases tried to the jury, we have established the rule that if there is substantial evidence produced by the plaintiff in support of his cause which should be weighed and considered by the jury a nonsuit ought not to be granted; and we think the same rule should be applied in cases tried by the court." This rule has been elaborated and applied in later cases. *Cook v. Morris*, 66 Conn. 210, 33 Atl. 994; *Thames Steamboat Co. v. Housatonic R. Co.*, 24 Conn. 49; *Town of Canton v. Town of Burlington*, 58 Conn. 279, 20 Atl. 602.

It appears that the land sought to be foreclosed belonged to the defendant Sarah Swayne, to her sole use, and that she is the wife of Walter S. Swayne. The plaintiffs had furnished materials and rendered services in the construction of a house which stood on that land. They were entitled to have a judgment to foreclose the lien on her land provided the materials so furnished and the services so rendered were furnished and rendered by virtue of an agreement with her, or

by her consent, or by an agreement with or the consent of some person having authority from or rightfully acting for her. Gen. St. § 3018. What constitutes consent, within the meaning of this statute, is discussed in *Huntley v. Holt*, 58 Conn. 449, 20 Atl. 469, and *Lyon v. Champlon*, 62 Conn. 75-78, 25 Atl. 392. Now, it seems to us that there was evidence given by the plaintiffs from which the court might fairly have found that the defendant Sarah had given her consent to the furnishing of the materials and the rendering of the services by the plaintiffs. The evidence should be deemed to be true; and all those reasonable presumptions which, according to the ordinary course of events or the ordinary experience of human nature, arise out of the facts proved, should be taken in its favor. Taken with these presumptions, we think the evidence might fairly be claimed to show the consent of Mrs. Swayne. She was the owner of the house, and knew the improvements were being made thereto by the plaintiffs. She knew that these improvements would largely increase its value. This fact alone might possibly authorize a jury to find that she had given her consent. *Gannon v. Shepard*, 156 Mass. 355, 31 N. E. 298. Especially might her consent be inferred when it appeared, as it did, that she had taken part in selecting the materials; that she had given directions concerning the work; that she had in some instances countermanded the orders given by her husband, as though she had the superior authority; that she decided whether certain parts of the work should be done or not done, by reason of the cost; and that at times she evinced an expectation to pay for the work and materials. We do not intend to intimate that the evidence was or was not such that, if the case had been submitted by the parties without further evidence, judgment must necessarily have been given for the plaintiffs. The only question now is whether there was evidence upon which such a judgment might reasonably have been given, on due consideration. Upon a motion for a statutory nonsuit, no opportunity for consideration is given. There is error. The nonsuit should be set aside, and the case stand for trial. The other judges concurred.

(70 Conn. 51)

BREWSTER v. ALDRICH et al.

(Supreme Court of Errors of Connecticut. Nov. 30, 1897.)

WORK AND LABOR—RECOVERY ON CONTRACT.

A recovery may be had on a contract upon a count for work and labor, unless the count is insufficient in substance, or there is a material variance.

Appeal from court of common pleas, New London county; Walter C. Noyes, Judge.

Action by Denison D. Brewster against Henry L. Aldrich and others. Plaintiff had judgment, and defendants appeal. Affirmed.

Action of assumpsit on the count for work and labor only. The bill of particulars was as follows:

H. L. Aldrich & Son, to D. D. Brewster, Dr.				
		To kalsomining rooms in mill at		
1889.		agreed price		\$400 00
Aug. 19.		To work of 6 men, 1 day each, painting		15 00
" 20.	"	" " " "		15 00
" 21.	"	" " " "		15 00
" 22.	"	" " " "		10 00
Sept. 6.	"	" " " "		7 50
" 7.	"	" " " "		7 50
" 9.	"	" " " "		7 50
" 10.	"	" " " " 1/2 "		3 75
				\$481 25

The finding of facts is this: "In the above-entitled cause the court finds the following facts: (1) The plaintiff brought his action upon the 'common counts,' with bill of particulars; the defendants filed their answer, and the plaintiffs replied,—all as on file. (2) At the commencement of the trial the plaintiff, by leave of the court, amended his complaint by striking out all the counts except the one now remaining. (3) In July, 1889, the plaintiff, who is a painter, agreed with the defendants, who are the owners of a cotton mill in Moosup, Connecticut, to do the labor of kalsomining and painting the interior of said mill one coat for \$400, and to do a good job,—one-coat work. It was agreed that the work should be done while the mill was in operation; and the plaintiff examined, and had full opportunity to examine, the premises before making the agreement. (4) The work contemplated under said contract is stated in the bill of particulars, which also includes one day's extra work painting, which was performed at the request of the defendants, and which was worth \$2.50. The other items of painting stated in the bill of particulars were contemplated and performed under said contract, and were not allowed as extra work. (5) The plaintiff did a good job,—one-coat work,—considering the nature of the work required and the circumstances under which it was required to be done, and executed his part of the agreement before the commencement of this action. (6) It was agreed upon the trial that the items in the plea of set-off should be treated as payments if the plaintiff was entitled to recover. (7) There is due the plaintiff from the defendants, after deducting such payments from the contract price, a balance of \$177.54, for which amount, with \$2.50 for said extra work, and interest, judgment was rendered as on file. Upon the trial the defendants claimed and asked the court to rule: (1) That the plaintiff could not recover on said contract, because the plaintiff had not proved the contract referred to in the first item of his bill of particulars. (2) That the plaintiff could not recover on said contract upon the count set forth in his complaint. The court did not so rule, but rendered judgment as on file."

The defendants appealed, and filed two reasons of appeal. The first, that the court erred in not sustaining their first claim; second,

that the court erred in not sustaining their second claim.

Solomon Lucas, for appellants. Frank T. Brown, for appellee.

ANDREWS, C. J. The bill of particulars was applicable only to the count for work and labor. It was the duty of the plaintiff to file his bill of particulars, and to strike out the other counts, before the defendants could be called upon to plead; and of the trial court to see that this was done, before hearing the cause. *Corporation v. Baker*, 68 Conn. 337, 342, 38 Atl. 785. Under the first assignment no error appears. The finding of facts shows that the plaintiff had proved the contract referred to in the first item of his bill of particulars. Nor under the second. The plaintiff might lawfully recover on the contract unless the count was insufficient in substance, or unless there was a material variance. Nothing appears in the finding or in the record to show either. An immaterial variance could have no effect. The most that can be claimed is that the contract alleged was for an agreed price, and that the plaintiff did not prove the price so alleged to have been agreed upon; and the court rendered judgment for the reasonable value of the work and labor performed. This was not error. Rules of Practice, rule 2, § 3, p. 12. There is no error. The other judges concur.

(20 R. I. 793)

CROWLEY v. BURKE et ux.

(Supreme Court of Rhode Island. May 21, 1894.)

RECOVERY OF STOLEN MONEY.

Under Pub. St. c. 204, § 22 (requiring that, in order to entitle a person to sue for money stolen, he should first make complaint for the crime, and have process issued), where a suit is brought to recover money stolen without compliance with such statute, a verdict for defendant will be directed.

Suit by Bridget Crowley against Richard Burke and wife. From a verdict for defendants, plaintiff petitions for new trial. Denied.

John M. Brennan, for plaintiff. George J. West, for defendants.

PER CURIAM. According to the testimony of the plaintiff, the defendant Mrs. Burke robbed her of the \$135 for which she sues. This being so, Pub. St. R. I. c. 204, § 22, requires that, in order to entitle her to sue for the money, she should have first made a complaint for the crime, and had process issued on the complaint. This she did not do. The court therefore properly directed a verdict for the defendants. The petition for a new trial is denied and dismissed, and the case remitted to the common pleas division, with direction to enter judgment on the verdict.

(20 R. I. 795)

WOOD v. WHAT CHEER LODGE, SONS OF ST. GEORGE.

(Supreme Court of Rhode Island. Dec. 1, 1896.)

ACTION AGAINST BENEVOLENT SOCIETY.

Where plaintiff did not exhaust the remedies provided by the by-laws of the defendant society before bringing suit, a nonsuit is properly granted.

Suit by John T. Wood against What Cheer Lodge, Sons of St. George. Plaintiff suffered a nonsuit, and petitions for a new trial. Denied.

George Farnell, for plaintiff. Benjamin M. Bosworth, for defendant.

PER CURIAM. The record shows that the plaintiff did not exhaust the remedies provided by the by-laws of the defendant society, as the law requires him to do, before bringing suit. See *Whitty v. McCarthy*, 36 Atl. 129. We are of the opinion, therefore, that the nonsuit was properly granted. Exception overruled, and case remitted to the common pleas division, with directions to enter judgment for the defendant for costs.

(183 Pa. St. 155)

In re MORRISON'S ESTATE.

Appeal of PEOPLE'S TRUST, SAVINGS & DEPOSIT CO.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

PRESUMPTION OF DEATH—DISTRIBUTION OF PROPERTY—DECREE—HARMLESS ERROR.

Where an administrator has been appointed for one, under Act June 24, 1885, on presumption of death from absence for seven years from his last known place of domicile, and money has been paid to the guardian of the supposed decedent's infant son, the decree in a proceeding by the son, after coming of age, to have the money paid to him without security, because of the father's absence, unheard from, for over 20 years, should include an adjudication on the effect of the father's prolonged absence, and rest thereon the order for payment of the money, but will not be reversed because, to understand the decree, and find the conclusion of the court that death is presumed from the absence, it is necessary to treat the entire opinion as part of the decree; it appearing that no harm can come therefrom.

Appeal from orphans' court, Lancaster county.

In the matter of the estate of Cassius W. Morrison, deceased. From a decree ordering money to be paid, without security, to George Morrison, son of deceased, by the People's Trust, Savings & Deposit Company, his guardian, said company appeals. Affirmed.

George Nauman and A. J. Eberly, for appellant. W. H. Roland, for appellee.

WILLIAMS, J. This appeal presents a record that is by no means a satisfactory one. Letters of administration were issued upon the estate of C. W. Morrison in November, 1891, under an order of the orphans' court of Lancaster county, which were based on an adjud-

canon by that court that a legal presumption of the death of Morrison had been established under the proceedings authorized by the act of June 24, 1885. Some of the evidence upon which the adjudication was made is furnished to us in the paper books, and it presents the following facts: The alleged decedent, C. W. Morrison, was prior to 1875 a resident of Lancaster county. During the early part of that year he removed to the state of Kansas, and settled at Ft. Dodge. His brother testifies on this subject: "I got some letters from him in Kansas prior to 1876. I received one letter from him in September, 1876. I answered that letter soon after receiving it, and have heard nothing from him since the last letter I wrote to him." This showed very clearly that the place to look for Morrison was at Ft. Dodge, and that the absence that the statute contemplated was from his last known place of residence. This was not Lancaster county. A search made in that county had no significance whatever. Francis v. Francis, 180 Pa. St. 644, 37 Atl. 120. He must have been absent from, and unheard of at, his last place of domicile, which, if this is all the evidence presented to the court below, was Ft. Dodge. It is possible, and perhaps we should presume, that other and appropriate testimony was before the court, and that its decree was made in view of it, as otherwise the decree could not be supported. But the administrator appointed under the adjudication and decree referred to has finished his work, and there is now in the hands of the defendant, the guardian of the son of the supposed decedent, a considerable sum of money. The son is now of age, and wishes to come into possession, as the heir at law of C. W. Morrison, of this money. The proper course for him to pursue was to present to the orphans' court his petition setting forth the facts we have recited, including the appointment of an administrator for his father's estate under the established presumption of his father's death, and the raising of the fund then in the hands of his guardian, and asking an order directing its payment to him without his being required to give security for its return, for the reason that his father's absence, unheard from, had continued for upwards of 20 years, and still continued. Upon the hearing on his petition these facts should have been shown, and the effect of this showing should have been passed upon by the court, and the order should thereupon have been made. In the case before us the petition contains no reference to the administration, or to the proceedings under the act of 1885, makes no averment about the length of the absence of Morrison, and sets up no right to the money based upon his presumed death. Had not the answer presented some of the facts, there would have been nothing before the court to call its attention to the question involved, or the possible effect of the decree it was asked to make. The learned judge of the orphans' court, with great patience and entire disregard of form, took notice of the question raised by the answer, and entered upon a care-

ful consideration of it. The result of this consideration is embodied in his opinion, in which he goes over the former action of the court, the continued absence of the alleged decedent, covering a period of more than 21 years, and concludes that the presumption of actual death has now arisen. He then directs the payment of the money by the guardian to its ward, without requiring security for its return. This decree rested on the right ground, but it is informal. It should include an adjudication upon the effect of the prolonged absence of Morrison, and the order for the payment of the money should rest upon that adjudication, just as the order for the appointment of the administrator rested on the adjudication upon the effect of absence from his last place of residence for seven years, unheard from. To understand the decree appealed from, it is necessary to treat the entire opinion of the learned judge as a part of it. This is not good practice, and ought not to be encouraged; but, under the special circumstances of this case, we are disposed to think that no harm can come from its affirmance on that basis. It is accordingly affirmed; the record costs to be paid from the fund.

(183 Pa. St. 195, 278.)

BONNER v. PITTSBURGH BRIDGE CO.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

INJURY TO EMPLOYE—DEFECTIVE APPLIANCES.

Whether an alleged defect in machinery causing injury to plaintiff could have been remedied by a well-known appliance in general use was a question for the jury.

Appeal from superior court, Allegheny county.

Action by Mannus Bonner against the Pittsburgh Bridge Company. Judgment for plaintiff was affirmed by the superior court, and appeal allowed by Judge Williams July 31, 1897. Affirmed.

The following is the opinion of the superior court (Orlady, J.):

"The plaintiff recovered against the defendant a verdict of six hundred dollars, as damages for injuries received in an accident which happened while he was at work for the defendant, in operating a large crane used for raising heavy articles. The machinery was so constructed as to be operated in either slow or fast gear, the change from one to the other being made by the operator of the machine by means of a handle bar, while an accidental change of the gear could be prevented only by an appliance on the crane known as a 'safety lock'; and the strain on the handle when in fast gear was about six times as much as when in slow gear. The plaintiff describes the injury as follows: 'We done as directed. The girder was raised up by three men with the crane. Two of the men were called back to the fore end of the girder after the girder was raised up. That left the crane to me. We had been directed to push the fore end in,—of the girder; and when the girder was half-

way in—or you might call it catcornered—the hind end of the girder came in contact with the handle of the crane, and threw her in fast speed. She takes action the other way, and struck me square on the breast, and doubled me up; and I have been doctoring ever since. The girder weighed ten to fourteen thousand pounds and was about forty feet long. The end swung around on the other end from where I was standing, and drove the crane along on its crank shaft from slow gear into fast gear.' The only material question at issue on the trial was whether or not the safety lock, as described in the evidence, was a usual and customary appliance on cranes of like character, to protect the employes. There was evidence that a safety lock was put on the next day by order of the superintendent. The testimony as to the general use of a safety lock on similar cranes in the neighborhood was conflicting, but all agreed that it was an inexpensive appliance, which, when put upon the machine, rendered its operation safe from risks similar to the one resulting in plaintiff's injury. In submitting the matter to the jury, they were carefully cautioned and instructed as follows: 'Now, it will be for you to say whether or not this safety lock was in general use; was well known; was such an appliance as, under the circumstances, the defendant should have had on this crane; and whether they should have reasonably anticipated that an accident like this, in moving machinery,—moving large pieces of iron,—was likely to occur; that, even with care on the part of the workmen, it might be expected to occur and injure a workman; whether or not this was a reasonable appliance, such as was reasonably required for the safety of the employes, should have been adopted.' The only assignment of error is as to the refusal of the court below to affirm the points submitted: 'First, under all the evidence in this case, the verdict should be for the defendant; second, under the pleadings and all the evidence in this case, the verdict should be for the defendant.' These were refused by the court, and the facts were properly submitted to the jury.

"Was the crane, as arranged by the employer, reasonably safe for ordinary use by the employé? This was disputed, and the evidence was not so one-sided as to warrant the court in disposing of the disputed fact by binding instructions. All the cases agree that a master is not bound to use the newest and best appliances, and that the test of liability is not whether the employé has been exposed to danger, but whether he has been so exposed through neglect to provide reasonably safe machinery. The test of reasonable safety is ordinary use. From the fact that a particular method or appliance is dangerous, it does not follow that it is negligence for an employer to use it. Some employments are essentially hazardous, and the unbending test of negligence, in methods, machinery, and appliances, is the ordinary usage of the business. 'All the cases agree that the master is not bound to use the

newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for in regard to the style of the implement, or nature of the mode of performance of any work, "reasonable care" means according to the usages, habits, and ordinary risks of the business.' Was this crane, as arranged by the employer, reasonably safe for ordinary use by a careful employé? It was not pretended that the work of the plaintiff was not done in a careful, workmanlike way. *Titus v. Railroad Co.*, 136 Pa. St. 618, 20 Atl. 517, *Ford v. Anderson*, 139 Pa. St. 261, 21 Atl. 18, and *Kehler v. Schwenk*, 144 Pa. St. 348, 22 Atl. 910, are adopted in *Keenan v. Waters*, 181 Pa. St. 247, 37 Atl. 342, and of binding authority on this court, but they do not conflict with the conclusion reached herein under the facts. The whole matter was properly left to the jury, and the judgment is affirmed."

Stone & Potter, for appellant. John F. Miller and James F. Burke, for appellee.

PER CURIAM. There appears to be no error in this record, nor is there anything in the questions involved that requires discussion. The judgment is affirmed, on the opinion of the superior court.

(188 Pa. St. 149)

BEALE v. KLINE et al.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

TRUSTS—FINDINGS.

1. Personal representatives of a son who sent money to his mother, without any hint of what he wanted done therewith, can charge her estate, on account thereof, only with the money she received and the interest it earned while under her control; whatever trust existed having grown out of her conduct, and been assumed by her when she decided to keep her son's money separate from her own, and make it earn for him whatever she might have opportunity to make it earn.

2. A finding that "accessions" must have been made to a fund which a mother was holding in trust for her son, and which originated by his sending her money, and her decision to keep it separate from her own, and make it earn for him, being merely an inference from the fact that at one time or another securities of more than the original amount sent her were spoken of by her as belonging to the fund, may be disregarded.

Appeal from court of common pleas, Union county.

Action by Erwin M. Beale, administrator c. t. a. of Dr. A. W. Eyer, deceased, against Anna E. Kline and another, administratrices of Mary Eyer, deceased, and another. Judgment for plaintiff. Defendants appeal. Reversed.

Samuel H. Orwig, J. Thompson Baker, and Philip B. Linn, for appellants. Andrew A. Leiser, for appellee.

WILLIAMS, J. Mrs. Mary Eyer, the mother of Dr. A. W. Eyer, died in November, 1888. Her son died in December, 1895. By this pro-

ceeding the administrator of the son calls upon the representatives of his mother's estate for an account, and joins Isaac A. Kline with them as their agent, transacting their business, and having, as he alleges, custody of the funds and securities belonging to the estate. The bill alleges that as early as 1882 Dr. Eyer, then living in Colorado, sent to his mother, for investment for his benefit, the sum of \$5,500; and that in 1884 he sent to her the additional sum of \$1,000, to be held and invested in the same manner. In addition to these two sums, the bill avers that Dr. Eyer sent to her, and that she received, "other large sums of money" between May, 1882, and November, 1888, all of which sums were invested by her for his benefit in interest-bearing notes. These moneys, the bill further charges, came, at the death of Mrs. Eyer, into the hands of the defendants, and are unaccounted for. The answer admits that the two sums named were received by Mrs. Eyer, were invested by her for Dr. Eyer, and alleges that they have been accounted for. It denies that any other moneys were ever received by her from her son, or have been received by her administrators on his account. The evidence on the hearing related mainly to this subject. It showed that Dr. Eyer sent the two sums aggregating \$6,500 by mail to Kline, by whom they were delivered to Mrs. Eyer, and afterwards deposited to her credit in a bank at Lewisburg, where she resided. It does not show the receipt of any other money from him whatever. When the two drafts were sent by the doctor, they were not accompanied by any instructions, explanations, or suggestions whatever. His mother was at first at a loss to know what to do with the money. She consulted friends, and decided to hold it for her son, and invest it at interest, as opportunity might offer, for his benefit. There was, as it thus appears, no express trust created, no employment of Mrs. Eyer by her son; there was not so much as a hint as to what he wished her to do. Whatever trust existed at any time grew out of the conduct of Mrs. Eyer, and was assumed by her when she decided to keep her son's money separate from her own, and make it earn for him whatever she might be able to do. She did not assume to keep it at interest otherwise than as opportunities for its investment came to her, and when her son sent for money it was obtained, if not actually at hand, by discounts, or by borrowing of some friend, and sent to him. She then so disposed of her securities or moneys received from them as to repay the loans. At one time Isaac A. Kline applied by letter to the doctor for a loan of \$1,500 for his own use. The loan was made to him, the money being taken out of his mother's hands for this purpose, and a note for the amount given by Kline to Mrs. Eyer. This sum was thereby taken out of the fund by its owner, and invested upon his own judgment. It was in no sense the loan or investment of Mrs. Eyer, and she is not responsible for it. The note given for it belonged

to the doctor when it was taken, and it now belongs to his administrator.

The trouble in this case grows out of the manner in which the account was stated in the court below. The learned judge, in his tenth finding of fact, held that "there must have been accessions to the trust fund from some source," for which the defendants were bound to account. He did not ascertain the amount of these accessions, or the time when they were made, from any evidence tending to show the sending or the receipt of money, for there was none. No witness testifies to any accession. No check or draft or letter is produced to indicate that the doctor ever made any other remittance to his mother than the two which were admitted in the answer. Neither the doctor nor his mother seems ever to have referred to any other remittance. The bank account of the mother does not show a credit to her for any remittance except the admitted ones. The finding by the learned judge seems to rest upon the fact that certain securities were spoken of as belonging to the fund. This might well have been accounted for by her mode of handling the fund and the securities. She may have had at one time a security representing some of the doctor's money which she converted in whole or in part to meet the calls upon her by him, or to adjust the securities to the balances of the fund in her hands at different times. But we do not think it justifies the charging of her estate with all the securities in which any portion of his money may at some time have been found. What she is chargeable with is the money she received and the interest it earned while it was under her control. For this she must account. She is entitled to credit against this sum for what was returned to the doctor, and for what he himself lent to Kline. She regarded her services as a gratuity to her son, and they were rendered with fidelity, and his calls for money responded to with promptness. Whatever balance was left in her hands when she died came to her personal representatives, and they are responsible for what came in this manner into their hands. The account of the administrators will be stated by charging the moneys shown to have been actually received by Mrs. Eyer, and taking therefrom the credits to which she is entitled, and payments which they have made since her death. The account against Kline will be stated by charging him with his note for \$1,500, and with any other moneys collected or received by him belonging to Dr. Eyer, and crediting him with all payments made thereon. We do not intend to disregard the rule that gives importance to findings of fact, whether made by a master or by the court below. The tenth finding, that "accessions" had been made to the fund from some source, is not a finding of a fact from the evidence, but the inference of the learned judge from Mrs. Eyer's method of dealing with her securities, about the reasons for which nothing appears in the evidence. The

basis is too narrow on which to found such a conjecture. We cannot adopt it. It is not necessary, in view of our holding as to the method of stating the accounts required in this case, that we should discuss the assignments of error separately. We have indicated briefly, but with sufficient distinctness, the principles that control the case, and determine the liabilities of the defendants. The decree is reversed, that the accounts may be stated in accordance with this opinion. The record is remitted, and a *procedendo* awarded.

(86 Md. 464)

REID v. SAFE-DEPOSIT & TRUST CO. OF BALTIMORE.

(Court of Appeals of Maryland. Dec. 2, 1897.)

TRUSTS—CONSTRUCTION—LIABILITY OF INCOME TO EXECUTION.

Where deceased bequeathed certain property in trust for his wife, who was to receive the net income thereof for life, and the estate was to be held by the trustees, so that neither the estate nor the income thereof should be liable for the debts or contracts of any future husband, or in any manner subject to his control, or be taken in execution or attachment or otherwise howsoever, "and so that she shall not pledge or anticipate said property or said net proceeds of income, or any part thereof," said net income was not subject to execution, attachment, or garnishment in the hands of the trustees, for a debt of the wife.

Appeal from superior court of Baltimore city.

Action by A. Page Reid, trading as Reid & Co., against the Safe-Deposit & Trust Company of Baltimore, trustee garnishee of Louisa Presbury. From an order quashing an attachment, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, PAGE, and BOYD, JJ.

Ralph Robinson, for appellant. Edward Duffy, for appellee.

PAGE, J. The only question in this case is whether the net income due Mrs. Louisa Presbury, of property in the hands of the trustee under the will of George G. Presbury, is attachable for the debt of the cestui que trust. The appellee, who is the garnishee, became trustee, by appointment of court, in the stead of the original trustees, with the same powers and duties as were conferred on and required of the latter by the terms of the will. The judgment on which the attachment issued was obtained on a promissory note given by Mrs. Presbury, in payment of bills for groceries and articles of necessity furnished to her by the appellant. The question involved turns upon the construction of the first item in the will. By that, the testator devises and bequeaths to Frank R. Jenkins and Charles R. Goodwin, etc., all the property, real, personal, and mixed, of which he died seised and possessed, "in trust, to hold and manage the same and collect," etc., "and to pay the net proceeds from time to time to my wife, Louisa Presbury, for the term of her

natural life, and especially so that the same shall not be liable for the debts or contracts of any future husband, or in any manner subject to his control, or to be taken in execution or attachment or otherwise howsoever, and so that she shall not pledge or anticipate said property or said net proceeds of income, or any part thereof." It appears also, by the agreed statement of facts, that the trustee has now in its hands the sum of \$271.42, net income, and that the appraised value of the estate at the time of the death of the testator was \$139,000.

On the part of the appellant it is contended that the testator did not intend to create a spendthrift trust, but for a coverture trust, with provision against alienation and anticipation only in the event of the marriage of Mrs. Presbury. It has always been settled law in England that upon the gift or grant of a fee simple or life estate, legal or equitable, restraints upon the power of the alienee to alienate the estate and to charge it with debts are repugnant to the grant, and void, unless there is also a provision operating as a cesser or limitation of the estate over. But to that there is an exception, by which restraints on alienation or anticipation are allowed in cases of married women. This exception is "purely an equity doctrine, the invention of the chancellors, * * * and was justified on the ground that it was the only way—at least the best way—of giving property to a married woman." *Buckton v. Hay*, 11 Ch. Div. 645; *Tullett v. Armstrong*, 4 Mylne & C. 377; *Gray, Restr. Allen. Prop.* § 142. In *Brandon v. Robinson*, 18 Ves. 434, the chancellor, in speaking of married women's trusts, said that Lord Thurlow "did not attempt to take any power the law gave her, as incident to property, which, being a creature of equity, she could not have at law; but as, under the words of the settlement, it would have been hers absolutely, so that she could alien, Lord Thurlow endeavored to prevent that, by imposing upon the trustees the necessity of paying to her from time to time, and not by anticipation, reasoning thus: That equity, making her the owner of it, and enabling her, as a married woman, to alien, might limit her power over it; but the case of a disposition to a man who, if he has property, has the power of aliening, is quite different." The reason for this exception to the general rule in case of a settlement upon a married woman was stated in *Buckton v. Hay*, supra, as follows: "It was considered that to give it [the estate] to her without restraint would be practically to give it to her husband; and therefore, to prevent this, a condition was allowed to be imposed, restraining her from anticipating her income, and thus fettering the free alienation." It thus appears that the exception in case of devises and settlements upon married women was deemed necessary only because of the general rule that restraints upon alienation and anticipation were always regarded as repugnant to the estate. But in Maryland

this is not the general rule. In *Smith v. Towers*, 69 Md. 85, 14 Atl. 497, and 15 Atl. 92, it is broadly laid down that "alienation is not a necessary incident to an equitable estate for life, and that an owner of property may, in the free exercise of his bounty, so dispose of it as to secure its enjoyment to his beneficiary, without making it alienable by him or liable in any manner for his debts, and that such an intention, when clearly expressed by the founders of the trust, must be respected by the courts." In this state, therefore, where the law is as just stated, it is difficult to perceive why trusts in cases of married women do not stand on the same footing as other trusts of the same nature.

We are therefore of the opinion that it is immaterial by what name this trust be called. If in the provisions of the will there is manifest an intent of the testator that his widow shall enjoy his bounty without the power of alienation or of anticipation, this court is bound to respect his purpose, and enforce it. Now, by the express terms of the will, the trustees are to pay the net proceeds to Mrs. Presbury from time to time, "so that" the same shall not be liable (1) for the debts or contracts of any future husband, or in any manner subject to his control; (2) to be taken in execution or attachment or otherwise however; and (3) "so that she shall not pledge or anticipate said property or said net proceeds of income, or any part thereof." These terms are too explicit and clear to be misunderstood. They import that the testator intended to secure to his widow the full enjoyment of the net income of his property, without conferring upon her the power of aliening it, and so that it should not be liable for any of her debts. That he had full power to do this is settled by *Smith v. Towers*, already cited. The judgment must be affirmed. Judgment affirmed.

(86 Md. 210)

HADDEN et al. v. LINVILLE.

(Court of Appeals of Maryland. Nov. 18, 1897.)

APPEAL—REVIEW—JURISDICTION—OBJECTION NOT RAISED BELOW.

The fact that affidavits for attachment were filed several months before the suit was instituted, though indicating that the process of the court was abused, was not such a want of a substantial compliance with statutory requirements as to show a want of jurisdiction, which can be first taken advantage of on appeal, as Code, art. 9, § 4, providing that "no attachment shall issue unless there be an affidavit," etc., and section 5, providing that such affidavit may be made in any state or foreign country, do not require that the affidavits be made at or near the time of instituting the suit.

On reargument. Denied.

For former opinion, see 38 Atl. 37.

PAGE, J. The motion for a reargument must be overruled. It is not desired because of error supposed to exist in the opinion already filed, but because it is contended that the court should have held that the court

below was without jurisdiction, because it is alleged that the proceedings show upon their face that the requirements of the statute have not been substantially complied with, in that the affidavit appears to have been made several months prior to the time of suing out the attachment. The counsel for the appellee insist that the statute clearly implies that the affidavit must be made either at the time of the institution of the suit, or as shortly before as conveniently may be. But while we are of opinion that this is a very proper practice, and that there may be such delay between the making of the affidavit and the suing out of the writ as may reasonably induce a presumption, when taken in connection with other facts properly proven, that the process of the court is being abused, or that the facts set forth in the affidavit may not be true when the suit is instituted, yet we do not think such divergence of dates is a jurisdictional matter, that will enable this court, on appeal, to consider the question in a case like the one at bar, where the point was not raised and considered below on appropriate motion or plea. It is only when the want of a substantial compliance with the requirements of the statute appears on the face of the proceedings that an objection to the jurisdiction can be relied on on appeal, where such objection has not been made below. *Coward v. Dillinger*, 56 Md. 62. Now, we think that it cannot properly be held that our statute requires that the affidavit shall be at or near the time of the institution of the suit. By the fourth section of article 9, Code, it is provided, "No attachment shall issue unless there be an affidavit," etc., and, by the fifth section, such affidavit may be made in the state, in the United States, or in any foreign country. The words of the eighth section, "upon making the affidavit and producing the proofs," etc., cannot be construed, therefore, as implying that the affidavit shall only be made where the suit is instituted, because it may, by the fifth section, be lawfully made in a country so remote as to make it impossible to have it within the state for days or even weeks after it was made. Nor does the statute direct that it shall be made within a reasonable time. If this construction of the statute be insisted on, it may be asked, by what facts and circumstances is the reasonableness of the time to be determined? Is it to depend on distance, facility of intercommunication, diligence, or the vicissitudes of the weather? In *Wilson v. Arnold*, 5 Mich. 104, the court very properly remarks: "We fear, if we had power to give such a construction to the statute, and should so construe it, more evil than good would be done by it. The uncertainty it would throw over the title of real estate taken on attachments would more than counterbalance its advantages. A jurisdictional question, above all others, should not be left in so much uncertainty." *McClanahan v. Brack*, 46 Miss. 258. In this

case there were three exceptions,—two of them to the admission of testimony, and one to the granting of an instruction. There was no question raised below as to whether the delay between the making of the affidavit and the bringing of the suit worked any injury to the defendant or garnishee, or whether the process of the court was being abused, or whether the facts set out in the affidavit were untrue when the proceedings began. This could have been done by proper motion or plea, and it may be, if that course had been pursued, the delay might have been an important matter, in connection with such other facts as it would have been within the power of the defendant to prove.

(86 Md. 386)

**HOME INS. CO. OF CITY OF NEW YORK
v. CAULK et al.**

(Court of Appeals of Maryland. Dec. 1, 1897.)

**BILL OF INTERPLEADER—COLLUSION—INTEREST
BRINGING FUND INTO COURT—PRACTICE—JUDG-
MENTS—EQUITABLE RELIEF.**

1. A bill of interpleader not accompanied by an affidavit that the bill was not filed in collusion with any of the defendants is demurrable.

2. Where a bill of interpleader is defective for want of an affidavit alleging no collusion between the parties, the defect can be corrected only by leave to amend, and the filing of a new bill, with the necessary affidavit, or by filing a written affidavit as a part of the bill, including the necessary statement.

3. A bill of interpleader is demurrable where the fund contended for is not brought into court, and no offer so to do is made in the bill.

4. A bill of interpleader by a garnishee, where there are several attachments, must set forth when and where the attachments were issued, the present status of each, and such further statement of the facts as will enable the court to determine as to the relief asked.

5. Where a bill of interpleader shows on its face that certain defendants have judgments of condemnation against complainant, which he seeks to avoid, and hence that complainant cannot stand in the position of a disinterested stakeholder, it is demurrable.

6. A bill seeking to enjoin the collection of a judgment alleged to be void, which alleges no reason why the judgment should not have been rendered, does not entitle complainant to an injunction.

Appeal from circuit court of Baltimore city.

Bill of interpleader by the Home Insurance Company of the City of New York against Caulk Bro. & Co. and others. From an order sustaining a demurrer to the bill, complainant appeals. Affirmed.

Argued before MCSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, PAGE, ROBERTS, RUSSUM, and BOYD, JJ.

Edwin J. Farber, for appellant. G. W. S. Musgrave, for appellees.

BOYD, J. The appellant filed a bill of interpleader against a number of creditors of Edward Seward, including the appellees, who demurred to the bill, and, the court below having sustained the demurrer, this appeal was taken. It is alleged that the appellant had issued a policy of insurance to cover loss

by fire on certain property of Edward Seward, and that, a fire having occurred, there was an ascertained loss of \$400, which the appellant was willing to pay to the proper party or parties; that, after the fire, attachments on judgments recovered in Dorchester county against Seward were "instituted in the courts, and before a certain justice of the peace of Baltimore city," and laid in the hands of the appellant, as garnishee of Seward. No copies of the judgments were filed, but the names of the parties, and the amounts of five attachments issued by a justice of the peace, were given, and also the same information as to five others "instituted" in the superior court of Baltimore city. Some other parties apparently have judgments, but no information is furnished as to them. The allegations in the bill are by no means as clear as they should be, but we understand from them that there are three sets of creditors, each claiming the fund in the hands of the appellant. Judgments had been rendered in the attachment cases before the justice of the peace against the appellant, and the plaintiffs threatened to issue executions thereon, but other creditors allege that those judgments are void. Incidentally it is stated that there are judgments of condemnation nisi on the attachments in the superior court. It is also alleged that the aggregate of the judgments and costs is more than double the amount in the hands of the appellant, and it is unable to decide between them. The bill then prays that the parties may interplead, and adjust their several demands and claims between themselves, so that the plaintiff may have proper protection, and that three of the firms named (including the appellees) may be restrained from further prosecuting the judgments or attachments, and that those so recovered before said justice of the peace be declared void.

The demurrer was necessarily sustained for technical defects in the bill. In the first place, there was no affidavit that the bill was not filed by the plaintiff in collusion with any of the defendants. The absence of said affidavit makes the bill demurrable. *Normal Inst. v. Anderson*, 71 Md. 128, 17 Atl. 1030; *Story, Eq. Pl. § 291*; 2 *Daniell, Ch. Prac.* p. 1562. It is sought to avoid the effect of this omission by proving that such affidavit was actually made in open court, after the bill was filed, but before the demurrer was passed on. A writ of diminution was obtained, but the additional record only shows that, after the appeal was taken, and the original record was in this court, certain depositions were taken, which tend to prove that before the argument of the demurrer an agent of the company appeared in open court, and made such an affidavit. It was not in writing, and there is not even a docket entry that it was made. It is perfectly manifest that the error attacked by the demurrer was not, and could not be, corrected in that way. The bill was defective because of this omission, and the only way to correct it was to obtain leave to

amend it; and, the leave being granted, the amendment should have been made either by filing a new bill, with the necessary affidavit, or by filing a written affidavit, either annexed to the original bill or separate, yet a part of it, if the court so permitted. It would be a most dangerous practice, and contrary to all precedent, to allow pleadings in chancery to be amended as attempted in this case. The question of fact whether there was any collusion was not before the court on demurrer, but only whether the bill presented such a case, or was in such form, as is required under the practice in this state. The affidavit, which the authorities agree is necessary, having been omitted, the bill was defective, and it could only be corrected in that particular by producing as a part of the bill, in such manner as the court below allowed, an affidavit in writing that did include the necessary statement. That not having been done, the demurrer was properly sustained.

The bill was also defective because the plaintiff neither brought the money into court, nor offered to do so. It does state that the plaintiff was willing to pay it to the parties entitled thereto, but it nowhere offered to bring it into court for that purpose. There is some conflict between the authorities as to whether such a defect can be reached by demurrer, but we see no reason why it cannot be under our practice. This offer is required to prevent an abuse of this proceeding, just as is the affidavit that there is no collusion, and, although a bill is not demurrable because the money is not actually brought into court, yet, when that is not done, the offer to do so must, at least, be made. Most, if not all, the authorities agree that the court should not require the defendants to interplead until the money is either in court, or subject to its order. When the decree to interplead is passed, the plaintiff is practically out of court, and the defendants are left to contend for the fund. This, then, being one of the essentials to obtain a decree, the offer should be made a part of the bill, and a bill should not be deemed sufficient unless it embraces it. The correct principle, we think, is stated in *Story, Eq. Pl. § 291*. See, also, *Hyde v. Warren*, 19 Ves. 322; *Railroad Co. v. Clute*, 4 Paige, 384; *Williams v. Walker*, 2 Rich. Eq. 291; *Parker v. Barker*, 42 N. H. 78. But, if these technical objections were out of the way, the bill would still be defective, because it does not present such a case as entitles the plaintiff to relief. There may be circumstances under which a garnishee can seek the aid of a court of equity when several attachments are laid in his hands to affect the same fund, as is stated in *Bank v. Beaton*, 7 Gill & J. 421; but, to justify it, the bill must make a full and frank disclosure of all facts necessary to enable the court to see whether he is entitled to such relief. The mere fact that a number of attachments were issued does not of itself authorize it, but the court should be informed, when they were issued and laid

in the hands of the garnishee, the present status of each of them, and other facts concerning them sufficient to show the chancellor the necessity or propriety of interfering. The very foundation of his bill is that the plaintiff is a mere stakeholder, and that he is wholly indifferent between the defendants. Yet this bill shows that at least three of the defendants have obtained judgments of condemnation against the plaintiff. After judgments have been obtained by one or more of the defendants against the plaintiff, it is impossible for him to occupy a position of strict neutrality between the parties, as he is then interested either in setting aside the judgments, as this bill asks to have done, or in having the claims established in favor of the holders of the judgments, so as to protect him against the other parties. It was held in the case of *Bank v. Kerr*, 2 Md. Ch. 460, that a bill of interpleader should be filed, if at all, before judgment is obtained by either of the parties to be made defendants; and that is manifestly just, as the parties no longer stand on an equal footing after one has obtained a judgment for the fund in dispute or a part thereof, and the plaintiff would be interested in sustaining the claim of the one against the other. In garnishee cases attaching creditors are entitled to priority in the order in which the attachments are laid, if they are valid; and, if the plaintiff has permitted judgments of condemnation to be rendered against it by reason of its own neglect in making proper defenses, it should not be permitted to require the other attaching creditors to contend with those who have thus acquired an advantage over them. In *Bank v. Lanahan*, 60 Md. 477, a trustee under a deed of trust for the benefit of creditors sought to require a number of the creditors who had issued attachments and laid them in his hands to interplead, and one of the grounds upon which it was refused was that he was entitled to commissions if the assignment was sustained, and therefore he could not be said to be an indifferent stakeholder, without any interest in the subject-matter in controversy. In this case, if the plaintiff does not succeed in having these judgments of condemnation set aside, it may be liable to loss, and therefore has an interest in defeating the claims of some of the defendants. We think it clear that a formal bill of interpleader cannot be sustained under such circumstances.

The prayers of this bill show that it was intended as a formal bill of interpleader; but, if that were not so, the facts alleged are not sufficient to sustain a bill in the nature of a bill of interpleader, which are more favored by courts of equity. Under them plaintiffs are sometimes granted relief, although they may have some interest in the result. The case of *Welkel v. Cate*, 58 Md. 105, relied on by the appellant, was a case of that character. There *Schaum* obtained a judgment against *Cate*, and *Welkel*, having a judgment against *Schaum* before a justice of the peace, issued

an attachment, laying it in the hands of Cate. By some mistake, without any fault of Cate, judgment of condemnation was rendered against him, although the attachment was void by reason of the fact that it was issued more than three years after the judgment was obtained, which was not then permitted on judgments of justices of the peace. The court held that under the circumstances the plaintiff was entitled to an injunction against the judgment of condemnation, but it was because it found that under the evidence the judgment had been improperly rendered, without any fault on the part of Cate. The court did not require the parties to interplead, but simply enjoined the execution of the judgment. The right to the fund between Welkel and Schaum was not determined, but Cate was granted relief as against Welkel. In this case the plaintiff has alleged no reason why the appellants were not entitled to judgments, and has not explained why it permitted judgments of condemnation to be recovered against it, or why it did not appeal to the Baltimore city court if they were improperly rendered against it by the justice. It is therefore not entitled to an injunction against the appellants, as it has shown no equitable ground for such relief. When the attachments were laid in its hands, it was its duty to respect them, and make any defenses it had. If the judgments were void, as alleged in the bill, the defenses should have been made before the justice, and, if the plaintiff was not satisfied with his decision, it could have appealed to the Baltimore city court. Failing to do that, it cannot now invoke the aid of a court of equity, without at least showing sufficient reasons for the interference of that court, which the bill wholly fails to do. We have many decisions on the subject, of which we will cite *Brumbaugh v. Schnebly*, 2 Md. 320; *Windwart v. Allen*, 13 Md. 196; *Lyday v. Douple*, 17 Md. 188; *Chappell v. Cox*, 18 Md. 513; *Ahern v. Fink*, 64 Md. 161, 3 Atl. 32. But, in addition to this, the order in which the attachments were served is not stated in the bill, and it may be that the appellees are entitled to priority over the other creditors. If that be so, there is no reason assigned why the plaintiff cannot fully protect itself by proper defenses in the other cases. So, if we could treat this as a bill in the nature of a bill of interpleader, there are no such equities alleged as would authorize the interposition of a court of equity against the appellants. The order sustaining the demurrer must be affirmed. Order affirmed, with costs to the appellants.

(70 Conn. 87)

LAWLOR v. HOLOHAN et al.

(Supreme Court of Errors of Connecticut. Nov. 30, 1897.)

WILLS—CONSTRUCTION—NATURE OF ESTATES CREATED.

1. A devisee surviving the testator takes a fee in land under a will devising it on the condition

that, should the devisee "die without issue," the land would go to another.

2. A will devised land subject to the condition that, should the devisee "die without issue, then [the land], with the rents and profits which may have accumulated therefrom," should vest in another. *Held*, that the words "die without issue" were not shown, by the language which followed them, to mean "die without issue" after testator's death.

Appeal from superior court, New Haven county; Frederic B. Hall, Judge.

Action by John P. Lawlor against Patrick Holohan and others for the construction of a will, brought under the provisions of the statute (chapter 66, Pub. Acts 1893), and tried to the court. Judgment construing the will in favor of the defendants, and appeal by the plaintiff. Error, and judgment reversed.

Edward F. Cole, for appellant. James E. Russell and John F. Holohan, for appellees.

TORRANCE, J. John Galvin made the will in question in 1889, and died in 1894. He left, surviving him, as his next of kin, one daughter, Catherine Holohan, a married woman, one of the defendants, certain children of said daughter, and the plaintiff, John P. Lawlor, son of a deceased daughter. John P. Lawlor, the grandson, "is and ever has been childless." The questions in the case arise under the ninth clause of the will, which reads as follows: "I give and devise to my grandson, John P. Lawlor, all my real estate on Union street; also, all the land on the south side of Ray street, on the Abregador; also, a piece of land fronting on the extension of Wall street, running west one hundred feet from the stone wall dividing the front meadow from the pasture land, said land to extend one hundred and ten feet northerly, and to be the width in rear as in front,—that is, one hundred feet; also, fifty feet on the new street now running in front of John Mulville's land, said land to extend westerly on Mulville's land to the stone wall, and to be the same width in rear as in front, namely, fifty feet, said land to have the use of a passway forty feet wide, running southerly from where the street now ends to the south side of his lot, the same to be to said John P. Lawlor subject only to this condition, viz.: Should the said John P. Lawlor die without issue, then this above real estate, hereinbefore described, with the rents and profits which may have accumulated therefrom, shall become the estate and shall vest in my daughter, Catherine Holohan, to her and her heirs, forever; but, should the said John P. Lawlor die leaving issue, then said above-described real estate shall vest in said issue absolutely." A codicil subsequently enlarged the lot given above to John P. Lawlor, "on a new street running in front of John Mulville's land," from a lot 50 feet in width, front and rear, to a lot 100 feet in width, front and rear. The will consists of 10 clauses in all. In the first, the testator merely directs that his debts shall be paid. In the second, third, and

fourth, he makes specific gifts to a granddaughter, a grandson, and a niece, of a picture, his watch and chain, and \$200 respectively; and said \$200 is, in a codicil, subsequently given to the plaintiff. In the fifth, he gives the plaintiff certain personal property, including some of his household furniture; and, in the sixth, he gives all the rest of his household furniture to Mrs. Holohan. In the seventh clause, as changed by a codicil, he gives to the plaintiff the use of the barn, with carriage house and sheds adjoining, on the homestead of the testator, rent free, for the term of two years after the decease of the testator. In the eighth, he devises to his daughter, Mrs. Holohan, his homestead, the land on Ray street, on the Abrigador, and all his land on Wall street, "fourteen and one-half acres, more or less, except three building lots, reserved and hereinafter described in my devise to my grandson, John P. Lawlor, the same to be to her and her heirs absolutely." In the tenth he appoints the executors. The grandson, John P. Lawlor, claimed that, under the ninth clause of the will, he took an estate in fee in the land therein described, while the daughter, Mrs. Holohan, claimed that he took only a life estate in said land. Thereupon the plaintiff brought this action for the construction of the will, making the executor and Mrs. Holohan defendants. The executor disclaimed all interest, and it is admitted by the pleadings that the plaintiff and Mrs. Holohan "are all the persons having any interest or claiming interest in the matters involved in this action." The court below, upon these facts, held that, under said ninth clause, "the plaintiff takes only a life estate in the land therein devised to him," and rendered judgment accordingly; and this action of the court is the only error assigned upon this appeal.

The main question in this case relates to the meaning of this phrase, in the ninth clause of the will, "should the said John P. Lawlor die without issue." Does this mean "die without issue" in the lifetime of the testator, or does it mean "die without issue" after the death of the testator? Standing alone it is susceptible of either of these meanings; and unless the will, when properly construed, shows that the testator used it with the second meaning, it should be held that he used it with the first meaning. If any rule to be applied in the construction of phrases of this kind can be settled by repeated decisions, this rule must, in this state at least, be regarded as settled. This rule, in substance, has been acted upon or recognized in the following cases: *Phelps v. Robbins*, 40 Conn. 250; *White v. White*, 52 Conn. 518; *Coe v. James*, 54 Conn. 511, 9 Atl. 392; *Phelps v. Phelps*, 55 Conn. 359, 11 Atl. 596; *Webb v. Lines*, 57 Conn. 154, 17 Atl. 90; *Stone v. McEckron*, 57 Conn. 194, 198, 17 Atl. 852; *Johnes v. Beers*, 57 Conn. 295, 18 Atl. 100; *St. John v. Dann*, 66 Conn. 401, 34 Atl. 110; *Chesebro v. Palmer*, 68 Conn. 207, 36 Atl.

42. A rule of construction applicable to the language of a will is a rule of law determining the construction which the courts are bound to put upon particular words, expressions, and forms of disposition occurring in wills, in the absence of a sufficiently declared intention to the contrary. Nothing in the will in question shows that the testator used the phrase under consideration in the second of the above meanings. The only thing that can be said to militate against this view is the provision, immediately following the phrase in question, to the effect that, if Lawlor dies, the real estate devised to him, "with the rents and profits which may have accumulated therefrom," shall vest in Mrs. Holohan, the daughter; and it is upon this that the defendant mainly relies. She claims that the rents and profits here spoken of mean the rents and profits which "may have accumulated" after the death of the testator to Lawlor, and which are uncollected by Lawlor at Lawlor's death. But this seems to be a strained interpretation. It is conceded by her that Lawlor, on the death of the testator, took, at least, a life estate in the land devised; and this is clearly so on any view of this will. If this be so, then the rents and profits accumulating after the testator's death belonged to Lawlor, whether collected by him or not. The testator could not dispose of such rents and profits because, in effect, if Lawlor took a life estate, he had already given them to Lawlor. The rents and profits upon the land described in the ninth clause of the will, "which may have accumulated" up to the time of the testator's death, he could give away, for they were his own; and it seems to us that the more reasonable construction of this part of the will is that he meant those rents and profits, and not those which would, under the will, belong to Lawlor at Lawlor's death. If this be so, it is an argument against, and not in favor of, the defendant's claim; for it shows, so far as it shows anything, that the testator was providing against Lawlor's death before, and not after, the testator. We are of opinion that, on the death of the testator, John P. Lawlor took an estate in fee in the land devised to him, and that the court below erred in holding otherwise. There is error. The judgment is set aside, and the cause remanded, to be proceeded with in accordance with this opinion. The other judges concurred.

(70 Conn. 76)

STATE BANK OF CITY OF NEW YORK v. WATERHOUSE.

(Supreme Court of Errors of Connecticut. Nov. 30, 1897.)

WAREHOUSE RECEIPTS—RIGHTS OF HOLDERS—INDORSEE—NOTICE OF LIENS—ESTOPPEL—REPLEVIN—EVIDENCE—CROSS-EXAMINATION.

1. The indorsee of a warehouse receipt for whisky in barrels was not affected by an agreement between the warehouseman and the indorser's vendor, assented to by such indorser,

that the whisky should remain in the warehouse until the warehouseman was repaid the money advanced by him to pay the revenue tax thereon, or an agreement between the indorser and his vendor that it should remain in said warehouse till the purchase price was paid, and instructions to the warehouseman by such vendor to hold the whisky until such amounts were discharged, where the indorsee had no knowledge of said agreements.

2. The indorsee of a warehouse receipt is not given constructive notice of liens on the property for revenue tax or the purchase price by recitals therein that the property was to be delivered to the indorser or his order after the payment of the tax and "all other amounts due"; the words "other amounts due" meaning storage charges.

3. Where the seller of whisky in barrels gave the buyer a bill of sale thereof, and delivered to him a warehouse receipt, the seller is estopped to claim, as against the indorsee of the receipt, that the warehouseman was to hold the whisky until payment of the purchase price, and repayment to the warehouseman of the money advanced by him for the revenue tax thereon.

4. The warehouseman was estopped to make such claim by the receipt which he had stamped with the words "Tax paid."

5. In replevin for whisky, by the indorsee of a warehouse receipt therefor, against the warehouseman, defendant claimed that it was to remain in the warehouse until money advanced by him to pay the internal revenue tax thereon was repaid, and until payment of the purchase money to the indorser's vendor. The stamp deputy for the internal revenue collector testified in chief for plaintiff that, on a specified day, defendant paid said tax. *Held*, that the court properly excluded, as not cross-examination, the question, "And, as soon as the tax was paid [defendant] removed it, didn't he?" (referring to the removal of the whisky from the bonded warehouse to the public warehouse.)

6. A witness cannot be cross-examined as to matters respecting which he has not testified in his examination in chief.

7. Evidence in relation to matters with which the adverse party is entirely unconnected is properly excluded.

8. Where the demand by plaintiff for property replevied was made by an agent whose instructions were by letter, the letter is admissible in evidence.

Appeal from superior court, New Haven county; John M. Thayer, Judge.

Replevin by the State Bank of the City of New York against Charles R. Waterhouse, Jr. Tried to the court without a jury. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This was an action of replevin for certain barrels of whisky. The finding of facts is as follows:

"(1) Upon the trial of the above-entitled cause to the court upon the pleadings on file, the following facts appeared in evidence, and are found by the court and made a part of the record: (2) On August 23, 1894, the United Growers Company, a corporation organized and existing under the laws of the state of New York, and located and doing business in the city of New York, sold to one J. Librovcz, of said city and state of New York, the twenty barrels of whisky described in the complaint, and gave him a receipted invoice or bill thereof, hereto annexed as Exhibit E, and delivered to him the three warehouse receipts, hereto annexed as Exhibits A,

B, and C, and received from him in payment for said whisky the acceptance of said Librovcz for the agreed price and full market value of said whisky. (3) Said whisky was manufactured by the Old Colony Distilleries Company, a Connecticut corporation located in New Haven, and prior to said 23d day of August, 1894, had been stored in their distillery warehouse in New Haven. (4) On said day, the time within which the United States internal revenue tax must be paid, according to the condition of said Distilleries Company's bond, having expired, the defendant, who was then the treasurer and general manager of said company, paid said government tax; and said whisky was thereupon removed from the bonded or distillery warehouse to a public warehouse which said Distilleries Company was then conducting in the same building, in compliance with the laws of this state relating to public warehouses, where it remained until this action was commenced. (5) On said 23d day of August the defendant, acting in behalf of said Distilleries Company, at the request of the United Growers Company, who had become the owners of said whisky, filled out said warehouse receipts, Exhibits A, B, and C, stamped the same with the words 'Tax paid,' and delivered the same to said Growers Company. (6) After said warehouse receipts had been delivered by said Growers Company to said Librovcz, as stated in paragraph 2 hereof, said Librovcz indorsed the same in blank, and delivered the same to the plaintiff as part collateral security for a note of \$2,000, dated August 29, 1894, which the bank on that day discounted for him, the proceeds of which he had, and no part of which has ever been paid. (7) On January 22, 1895, said Librovcz having become insolvent and having absconded, the plaintiff wrote above the indorsement of said Librovcz on said warehouse receipts the words, 'Deliver M. Zunder & Sons, or order,' and sent said certificates to said Zunder & Sons, at New Haven, with directions to withdraw said whisky from the warehouse, pay storage charges, and ship the whisky to the plaintiff, in New York. (8) Upon the receipt of said warehouse receipts and instructions, Mr. M. Zunder, of the firm of Zunder & Sons, called at said warehouse in behalf of the plaintiff, and demanded the delivery of said twenty barrels of whisky, at the same time showing the defendant the said receipts, and tendering and offering to deliver the same to him, and to pay all storage charges on said whisky. The defendant refused to deliver said whisky until he should be paid the sum of \$900, which he claimed he had paid for taxes to the U. S. government on said whisky, and until he should be paid also the amount which said Librovcz agreed to pay said Growers Company on said whisky. (9) Said Librovcz never paid said acceptances to said Growers Company, and said company, after the same became due, brought suits against said Li-

brovics in the city court of the city of New York, and in January, 1895, obtained judgments against him in said court for the full amount due on said acceptances. (10) Said Growers Company also brought an action against said Librovcz upon the common counts, returnable to the city court of the city of New Haven on the first Monday of December, 1894, in which action the Old Colony Distilleries Company was made garnishee, and service of a copy of the writ and complaint in said action was made upon this defendant. No appearance was entered in said action in behalf of defendant or garnishee, no bill of particulars, answer, or other pleadings were ever filed in said cause, and the said cause now appears upon the docket of said court as still pending therein. (11) Upon the trial the plaintiff called as a witness one J. J. Kennedy, the stamp deputy for the internal revenue collector at the city of New Haven, who testified in chief that August 23, 1894, the defendant called at said collector's office, and paid the government tax on the twenty barrels of whisky in question. Upon cross-examination he was asked the following question: 'Q. And as soon as the tax was paid, Mr. Waterhouse removed it, didn't he?' (referring to the removal of the whisky from the bonded warehouse to the public warehouse.) To this question counsel for the plaintiff objected, on the grounds that it was irrelevant, immaterial, and foreign to the examination in chief. The objection was sustained. The defendant's counsel duly excepted. (12) The plaintiff offered one Oscar L. Richard, its president, as a witness, who testified that the letter hereto annexed as Exhibit D was written with his knowledge and by his direction, by J. H. Rosenbaum, cashier of said bank, but now dead; and the plaintiff then offered said letter in evidence, stating that it would be shown by other witnesses that said warehouse receipts were inclosed with said letter, and sent to and received by M. Zunder & Sons with said letter. The defendant's counsel objected to the introduction of said letter, as irrelevant, immaterial, and *res inter alios*. The objection was overruled, and an exception duly taken to the ruling by the defendant. The plaintiff afterwards, by Allan Durand, assistant cashier of the plaintiff bank, and by M. Zunder, proved that said letter was sent to Zunder & Sons, and received by them, and that the receipts, Exhibits A, B, and C, were inclosed with the letter when so sent and received. (13) Said Richard testified in chief to the negotiations which took place between himself, as the representative of the plaintiff, and said Librovcz, concerning the loan of August 29, 1894, above referred to, and the giving of said collateral. Upon cross-examination the witness (who, it appeared, was a member of the firm of Richard & Co., doing a banking and forwarding business, which firm was a creditor of said Librovcz) was asked whether he attended a meeting of the

creditors of said Librovcz in New York, which was held October 19, 1894. The witness answered in the affirmative, when he was asked by defendant's counsel the following question: 'Q. And didn't you say at that time [referring to the creditors' meeting] that Librovcz had transferred to you property to the value of more than \$100,000 to secure the claim of Richard & Co. and the bank, and that if the creditors would give him an extension of three, six, nine, and twelve months, that you would turn the property all back?' To this question counsel for the plaintiff objected on the ground that it was irrelevant, immaterial, and outside the direct examination of the witness. The objection was sustained. Counsel for the defendant duly excepted. (14) One Herman A. Curiel, president and treasurer of said Growers Company, was called as a witness by the defendant, and having testified to certain conversations had by him with said Richard relative to the arrangement between the plaintiff and said Librovcz touching the \$2,000 loan, and the delivery of Exhibits A, B, and C to the plaintiff, he was asked by the defendant's counsel the following question: 'Q. Passing that, then, Mr. Curiel, was any statement made by Mr. Richard at that time with regard to the claim of either himself or the bank against Mr. Librovcz? I do not ask what it was, but I ask first whether any statement was made about it?' Plaintiff's counsel objected to the question. The court sustained the objection and excluded the question, so far as it called for statements made by Richard regarding his own claim or that of his firm. Defendant's counsel duly excepted to the ruling. (15) Defendant's counsel asked said witness Curiel this question: 'Q. I think I last directed your attention, Mr. Curiel, to something that was said then at the creditors' meeting, and you made a statement as to what then occurred. Now, I want to ask you in this connection whether any statement was exhibited of the liabilities and assets of Librovcz.' To this question the plaintiff's counsel objected. Defendant's counsel claimed it was admissible in connection with testimony to be offered as to what Richard had said at said meeting about his and the plaintiff's relations to said Librovcz. The court sustained the objection and excluded the question, but permitted the defendant to give testimony as to all that said Richard stated relative to the plaintiff's claim to said certificates, or its relations to and negotiations with said Librovcz, and its claims against him and his estate. Such testimony was introduced by the defendant, and said Richard was afterwards called by the plaintiff in rebuttal, and was examined and cross-examined as to his statements bearing upon said matters. (16) The defendant upon the trial claimed that the plaintiff, being at most but a pledgee of said warehouse receipts, had no such title as would enable it to maintain this action of replevin, and asked the

court so to rule. He also claimed that said warehouse receipts bore upon their face notice that there were claims upon said whisky, and that the plaintiff received said receipts with such notice that there were unsettled claims against and liens upon said whisky, and that, whatever rights the plaintiff acquired by virtue of the transfer of said warehouse receipts to it, said receipts were subject to all the equities between the parties, and that the plaintiff was not entitled to the immediate possession of said whisky until said claims were all paid and satisfied; and he asked the court to rule that at the date of the plaintiff's demand, and at the commencement of this action, the defendant still held a lien upon said whisky for the money advanced for the payment of the United States tax as aforesaid, and that the United Growers Company still had a lien upon said whisky for the purchase price thereof, and that said whisky was still subject to said attachment and the attachment lien thereof, and that until said liens were discharged and satisfied, and said attachment released, the plaintiff could not maintain this action. (17) The court did not rule as thus requested, but ruled that the defendant had no lien upon said whisky, valid as against the plaintiff, for said tax; that said Growers' Company had no liens for the purchase price of said whisky, good as against the plaintiff; that said pretended attachment of said whisky in the hands of the defendant by garnishee process was void, because neither party to the action resided in New Haven, and, if not void, constituted no lien upon said whisky, valid against the plaintiff; and that, upon the tender to the defendant of said warehouse receipts and the storage charges as aforesaid, the plaintiff was entitled to the immediate possession of said goods. Judgment was accordingly rendered for the plaintiff.

"Further Finding.

"(a) Upon the trial the defendant offered evidence tending to prove that there was an understanding between the Growers Company and the defendant, at the time said tax was paid, and said whisky removed from the bonded warehouse to the free warehouse, that the same should remain in the said free warehouse until said Growers Company should pay the amount of said tax, and that Librovicz, at the time of his purchase of said whisky from said Growers Company, had knowledge of said arrangement. (b) The defendant also offered evidence tending to prove that, at the time of said purchase of the whisky by Librovicz from said Growers Company, it was agreed between them that the same should remain in said warehouse as collateral security for the payment of the acceptances given as aforesaid in payment therefor, and that subsequently the defendant had notice of this agreement, and instructions from the Growers Company to hold the whisky until the amount should be

paid. (c) To all the evidence thus offered the plaintiff objected, but by agreement of the parties the evidence came in, subject to the objection, to be ruled upon at the close of the trial; the party ruled against to be allowed an exception. (d) The evidence so objected to was not contradicted, and from it I find the facts which said evidence, as above stated, tended to prove, to be proved. I also find from the other evidence in the case that the plaintiff had no knowledge or notice of said facts. (e) The court, pro forma, overruled the plaintiff's objection to said evidence, and his exception is granted."

Exhibit A: "The Old Colony Distilleries Company. No. ——. Bbls. 5. New Haven, August 23d, 1894. Received in our distillery bonded warehouse at New Haven, district No. 2, state of Connecticut, five bbls. Mill River Rye Why., Serial Nos. 9,547 to 9,551, which were deposited in said warehouse on the — day of May, 1891, to be delivered to J. Librovicz after the payment of the United States internal revenue tax, and all other amounts due, and the surrender to us of this warehouse receipt. Tax paid. B. H. "The property mentioned in this receipt is held by us as bailees only, and is not insured by us. This receipt is transferable or negotiable by delivery. Storage to be paid at the rate of eight cents per bbl. per month. The Old Colony Distilleries Co., per Chas. R. Waterhouse, Jr., Treas.

"[Indorsement] Deliver M. Zunder & Sons, or order. Julius Librovicz."

Exhibits B and C were precisely like Exhibit A, except they were for barrels with different numbers. Exhibit D is unimportant. Exhibit E was a receipted bill of sale of all the goods replevied from the United Growers Company to J. Librovicz. Judgment was rendered for the plaintiff to retain the goods, and for damages and costs. The defendant appealed, and has assigned various reasons of appeal.

Charles S. Hamilton, for appellant. James H. Webb and Siegwart Spier, for appellee.

ANDREWS, C. J. (after stating the facts). The plaintiff, being the indorsee and holder of the said warehouse receipts, was the owner of the goods described therein. Such a receipt is regarded as representing the goods described in it; and an assignment of the receipt by an indorsement of it is, in the eye of the law, considered as equivalent to a delivery of the property itself. These receipts transferred to the plaintiff the legal title to the property, and its constructive possession; and the defendant, as the warehouseman, from the time the plaintiff received the receipts, became its bailee, and held the property for it. The delivery to it of the evidence of title was equivalent, in the then situation of the property, to the delivery of the property itself. *Gibson v. Stevens*, 8 How. 384; *Bank v. Dean*, 137 N. Y. 110, 32 N. E. 1108;

Cushing v. Breed, 14 Allen, 880; *Jones, Pledges*, § 280; 28 Am. & Eng. Enc. Law, 673; *Burton v. Curyea*, 40 Ill. 320; *Harris v. Bradley*, 2 Dill. 284, Fed. Cas. No. 6,116; *Young v. Lambert*, L. R. 3 P. C. 142; *Barber v. Meyerstein*, L. R. 4 H. L. 317; 1 Smith, Lead. Cas. Eq. pt. 2, p. 1197. Our statutes (section 3971, Gen. St.) establish this general law to be the law of this state.

It is unnecessary to discuss whether or not our statute gives to this kind of receipts the character of full negotiability. We leave that till the case may arise. The plaintiff was, in any aspect, sufficiently the owner of the goods replevied to be entitled to the immediate possession of the same, unless there was enough in the claim made by the defendant to deprive it of such right. The defendant claimed that there was an agreement with him by the Growers Company, to which *Librovicz* assented, that the whisky should remain in the warehouse until the money he had advanced to pay the United States revenue tax thereon should be repaid to him, and that there was an agreement by *Librovicz* with the Growers Company that the whisky should remain in the warehouse till the purchase price was paid, and that he (the defendant) had been instructed by the Growers Company to hold the whisky till these amounts should be discharged. It is found as a fact that the plaintiff had no knowledge of these agreements. We think, therefore, that the plaintiff cannot be affected by them. It would violate the character of these receipts to hold otherwise. The defendant also claimed that the plaintiff had constructive notice of these liens by the language of the receipts themselves; that as the receipts provided that the whisky was to be delivered to *Librovicz* or his order "after the payment of the United States internal revenue tax, and all other amounts due," the plaintiff was informed that some amounts were due, which he was to pay, besides the revenue tax. We do not so understand this language. We think the "other amounts due" could only be held to mean proper warehouse charges,—as, for instance, the storage charges. And here, again, the character of these receipts, and the purpose for which they were intended, forbid any such claim as is made by the defendant. Besides, it seems to us that the defendant and the Growers Company are estopped to make any such claim,—the Growers Company, by its unconditional bill of sale; and the defendant, by the receipt which he had himself stamped with the words "Tax paid," and had then issued. *McNeill v. Hill*, Woolw. 96, Fed. Cas. No. 6,914; *Van Santen v. Oil Co.*, 81 N. Y. 171; *Fourth Nat. Bank v. St. Louis Cotton-Compress Co.*, 11 Mo. App. 333.

The question asked of the witness *Kennedy* was properly excluded. It was not cross-examination. The same may be said of the questions asked of the witness *Richard*, as set forth in paragraph 13 of the find-

ing. The witness had not, in chief, testified as to any such matter. The matter in respect to which the witness *Curiel* was interrogated, as described in paragraphs 14 and 15 of the finding, seems to us to have been one with which the plaintiff was not connected. It was between other parties. The letter, Exhibit D, was properly admitted. It was a part of the plaintiff's case. It was a part of the evidence to show the authority of *M. Zunder & Sons*, as agents of the plaintiff, to demand the whisky of the defendant. There is no error. The other judges concurred.

(70 Conn. 92)

BROOKS v. BENHAM et ux.

(Supreme Court of Errors of Connecticut. Nov. 30, 1897.)

MORTGAGES—SALE OF EQUITY OF REDEMPTION—APPORTIONMENT OF DEBT—PARTIAL RELEASE.

1. When several lots, covered by the same mortgage, are conveyed at the same time to different purchasers, the mortgagee, with notice of the conveyances, may not release a lot to one purchaser, without the consent of all the others, for less than the proportional part of the debt which the value of the lot released bears to the value of all the land (the security being worth more than the debt); and on giving such release he is equitably chargeable with such amount, in favor of the owners of the remaining lots.

2. An oral offer, made by a mortgagee, at the sale of the equities of redemption in several lots covered by the mortgage, to release each lot sold, for a certain sum, did not constitute an apportionment of the indebtedness, where such offer was not accepted, and made effectual by subsequent conveyances.

3. An oral offer, by a mortgagee, at a sale of the equities of redemption in several lots embraced in the mortgage, to release, for a certain sum, each lot sold, is within the statute of frauds, and its acceptance creates no actionable obligation.

4. The release by a mortgagee, for a part of the debt, of one of several lots embraced in the mortgage, to a purchaser thereof under the mortgage, without the consent of the purchasers of the other lots, who bought at the same sale, does not operate as a foreclosure of the mortgage, and satisfaction of the whole debt.

5. Where several lots, covered by one mortgage, were conveyed at the same time to different purchasers, and afterwards the equities of redemption in certain of them were conveyed to the mortgagee, the lien of the mortgage was thereby extinguished, as to them, and the mortgagee was properly charged with their market value, as against the other purchasers, though it exceeded their ratable contributory share of the total indebtedness.

Appeal from superior court, New Haven county; George W. Wheeler, Judge.

Suit by William B. Brooks against Eugene A. Benham and wife to foreclose two mortgages. After judgment in the district court, an appeal was taken by defendants to the superior court, where the case was heard on the report of a committee. Judgment was rendered for plaintiff, and defendants appeal. Affirmed.

The report of the committee, which was accepted by the court, stated the following facts: Eugene A. Benham, in 1886, to secure his note for \$4,500, mortgaged a 10-acre tract of land

in Waterbury to the plaintiff. It had been mapped out into 28 building lots, and shortly after the mortgage the map was recorded in the Waterbury land records. A street called "Benham Street" was marked on the map, on which some of the lots were bounded. This street was never accepted by vote of the town, but houses were afterwards built along it, and it was used as a highway. The plaintiff afterwards released three of the lots to the mortgagor; describing them as bounded on Benham street, or "a new street." In 1890 the defendant, to secure another note, for \$1,800, mortgaged the residue of the tract to the plaintiff. The land covered by this second mortgage was then worth \$10,220. A few months later the plaintiff released two more lots, worth \$975, to Benham, who thereupon paid him \$500, in reduction of the second mortgage. In 1892 Benham made an assignment in insolvency, and the trustee sold his equity of redemption at auction; having first endeavored, without success, to induce the plaintiff to apportion the amount due him among the several lots. The plaintiff attended the auction, at which the equity in each lot or group of lots was sold separately, and named to the auctioneer, as each lot or group of lots was put up, the amount which he was willing to allow to remain on that land, if the purchaser desired, which sums the auctioneer thereupon stated to those present. These sums amounted in all to \$6,700, which was a little more than was then due the plaintiff; his intention in fixing the amount being to make his security good, and avoid a redemption of the property. The auctioneer did not state the total amount due on the mortgages, and there was no promise, express or implied, on the part of any purchaser, to pay them, or any part of them. They were on record, and the deeds to each purchaser described his lot as subject to several mortgages, which fully appeared of record. The value of each lot is as hereinafter stated, and has remained the same from the date of the first mortgage to the present time. The sum which it was stated could remain on lot 1 was \$3,000. This lot was only worth \$2,300, and the equity was bought in for \$1 in behalf of Benham, and conveyed by the purchaser to Mrs. Benham. Lot 2 was worth \$600, and it was stated that \$500 would remain on it. The purchaser afterwards sold it to Mrs. Benham. In 1893 and 1894 the plaintiff released his lien on 16 of the lots to their respective purchasers, on their paying to him the several amounts which the auctioneer had stated could remain on them, respectively. He also took, in 1894, from the purchasers of five other lots, quitclaim deeds of their title, and several months afterwards gave to each his bond to sell and convey his lot to him for the amount which the auctioneer had stated could remain on it. From the purchaser of each of the other lots the plaintiff received either the amount which it had been so stated could remain upon it, or a conveyance of the equity as payment of said amount. The sums which it was stat-

ed by the auctioneer could remain were as follows: Lots 1, \$3,000; 2 and 3, \$500 each; 5, 7, 9, 11 to 18, inclusive, 24, and 25, \$150 each; 19, 20, 22, 26, 27, 28, together, \$500. Mr. and Mrs. Benham were the sole defendants. The complaint, after reciting the original mortgages, stated that she had received a conveyance of lots 1 and 2, and that on all the remainder of the land originally mortgaged the mortgages had been released, or the amount due thereon paid. She filed a cross complaint, alleging that both mortgages had been fully paid off before Benham's insolvency, and that the plaintiff had taken possession of all the lots, except those owned by her, and from the proceeds of sales and rents had received more than his mortgage debts. She claimed an account and a release, if the plaintiff had been thus paid in full, and, if not, a release on his paying such proportion of the remaining indebtedness as the value of her lots bore to the value of all the land mortgaged.

The report left it for the court to determine whether, upon the foregoing facts, what was said and done at the auction sale constituted an apportionment of the mortgage incumbrances, binding upon the defendants. The court held that Benham street had been released from any mortgage liens by the acts of Benham and the plaintiff in dedicating it to public use; that there was no apportionment at or before the auction sale; that each lot must bear its proportional part of the mortgage indebtedness, those released bearing their part as it might exist at the time of the release; that the several payments to the plaintiff for such release must be applied in reduction of his mortgage debt, and if less than the proportional part of that debt which they ought, in view of their real value, to have borne, that he should be charged enough more to make up the deficiency; and that, when the plaintiff secured the equity in certain of the lots without the consent of the owners of the equities in the other lots, he by his conduct released the remaining lots from the burden of the mortgages, to the extent of the then value of those lots which he himself obtained, and the remaining lots were to be charged only with the balance thereafter remaining due under the mortgages. Judgment was therefore rendered for the plaintiff, fixing the amount of his mortgage debts at \$2,087.55, ascertained as follows: The land mortgaged was worth at the date of Benham's insolvency (\$10,220—\$975) \$9,245. There was then due on the mortgages, exclusive of accrued interest (\$4,500+\$1,800—\$500), \$5,800. Lots 6 and 8 were released August 22, 1893, on receipt of \$400. They were worth \$700. At that date the mortgage debt, including interest accrued, was \$6,371.30. Therefore these lots were then equitably subject to a part of the debt ($=x$) proportioned to the ratio between their value (\$700) and the value of all the lots mortgaged. This proportion is thus stated: $x : \$6,371.30 :: \$700 : \$9,245$. The part of the debt thus ascertained (\$482.41) being charged against the plaintiff, his debt was reduced,

not simply by the \$400 which he in fact received, but by the \$82.41 additional, to which these two lots, as related to the rest of the mortgaged lands, were equitably subject. The mortgage lien existing after this transaction, on August 22, 1893, was therefore for (\$6,371.30—\$482.41) \$5,888.89, and the value of the lots on which it rested was (\$9,245—\$700) \$8,545. Lots 11 and 13 were released September 5, 1893, on receipt of \$300. They were worth \$500. The mortgage debt, including interest, was then \$5,903.63. The proportional burden of this debt resting on these lots ($=x$), ascertained by the same rule ($x: \$5,903.63:: \$500: \$8,545$), was \$345.44, or \$45.44 more than the sum paid. The plaintiff was therefore charged with \$345.44, which left his debt \$5,558.19, resting upon lots worth (\$8,545—\$500) \$8,045. Similar rests and computations were made for each successive payment and release, and the lots to which the plaintiff acquired the absolute title in 1894 were charged against him at their full value, which exceeded what would then have been their proper contributory share of the mortgage debt.

The following claims of the defendants were overruled by the court: That the plaintiff's mortgages have been apportioned among the several lot owners, and therefore nothing remained due on these mortgages; that the releasing of any of the lots was an apportionment of the mortgages, and therefore nothing remained due on these mortgages; that the release of one or more of these lots without an appraisal as provided by the statutes was equivalent to, and was in fact, a foreclosure of these mortgages upon that lot or parcel, and therefore nothing remains due on these mortgages; that the value of the lots thus foreclosed or appropriated by the plaintiff should be charged to the plaintiff in reduction of his two mortgages; that Benham street was not released from the burden of either mortgage, and its value should be taken into account in apportioning said two mortgages; that judgment ought to be rendered for the defendants.

Charles W. Gillette and John O'Neill, for appellants. Frederick M. Peasley, for appellee.

BALDWIN, J. (after stating the facts). He who takes a mortgage of several parcels of land, which together are worth more than the amount of his debt, and are subsequently sold by the owner of the equity of redemption, at the same time, to different persons, owes a certain duty to each of these. He ought not to release his security as to any parcel in such a manner as to increase the burden on the rest. He has no right, without the consent of all, to bargain with any of these purchasers for the release of his parcel on payment of less than its fair share of the whole debt. While the whole of the debt is secured by the whole of the land, each parcel of the land, as between

the different proprietors, is equitably subject only to so much of the debt as corresponds to the proportion between its value and the value of all the land; and, if its owner should be compelled to redeem the mortgage, he can resort to the others for a ratable contribution, and for that purpose is entitled to the benefit of subrogation to the mortgage title. To release any particular parcel from the mortgage incumbrance is to make, as respects that, any such subrogation impossible. The mortgagee therefore releases at his peril, if he had notice of the conveyances out of which the equities in question arise; and, if he does so without receiving from the releasee his proper contributory share of the debt, he is still equitably chargeable with the receipt of that share, in favor of the owners of the remaining parcels. *Stevens v. Cooper*, 1 Johns. Ch. 425. It was this position which the plaintiff occupied, with relation to the defendants, and the decree appealed from correctly enforces their resulting equities.

It was properly held by the superior court that what was said and done at the auction sale did not constitute an apportionment of the mortgage incumbrances. An oral offer was made to let certain sums "remain" on on each parcel sold, but such offers amounted to nothing, unless accepted, and then could only be made effectual by future conveyances between the parties. It appears that no offer was accepted at the time of the sale; nor, in view of the statute of frauds, would such an acceptance have created an actionable obligation. The dealings of the plaintiff with certain of the purchasers after the sale, and the resulting conveyances, constituted an apportionment as between him and them, but could not operate to the prejudice of the defendants, who were not consulted, and gave no consent.

The defendants claim that the plaintiff's release of certain of the lots upon payment of part of the mortgage debt was equivalent to a foreclosure, and therefore paid the whole debt. The ancient law of this state was that, when a strict foreclosure became absolute, this appropriation of the land extinguished the obligation of the mortgagor; and under our present statutes a similar result may now follow, under certain conditions. Appeal of *Ansonia Nat. Bank*, 58 Conn. 257, 18 Atl. 1030, 20 Atl. 394. But these statutes deal only with judicial foreclosures. Such proceedings afford an opportunity to settle all matters of controversy growing out of the mortgage indebtedness, and it is only when the plaintiff does not choose to avail himself of this opportunity that he is debarred from any further recovery in subsequent proceedings. Transactions between the mortgagor and mortgagee, out of court, are left to be regulated by the common law and the general principles of equity. Under these a mortgage debt is never satisfied by the mere acceptance of a conveyance of the equity of

redemption as to part of the security. The acceptance by the plaintiff in February, 1894, of conveyances of the equities of redemption in five of the lots sold by the trustee in insolvency, extinguished the lien of the mortgage upon them; and they were properly charged against him by the superior court, in stating the account between him and the defendants, at \$1,800, which was their market value, although that exceeded their ratable contributory share of the total indebtedness then existing. His agreement, made six months later, to sell them for what he had promised should "remain" upon them, amounting in all to \$1,100, cannot affect the fact that he had previously discharged them from the mortgage lien, and appropriated them fully to his own use, without obtaining the defendants' consent. There is no error in the judgment appealed from. The other judges concurred.

(70 Conn. 104)

ROOKEY v. STATE.

(Supreme Court of Errors of Connecticut. Nov. 30, 1897.)

CRIMINAL LAW—TRIAL—VERDICT—ATTEMPT AT RAPE.

1. To convict of an offense included in the accusation of a crime of a higher degree, the verdict need not find the accused not guilty of the greater crime.

2. The words "an assault with actual violence upon the body of a female with intent to commit a rape," found in Gen. St. § 1407, mean the same as the words "an attempt to commit rape," which legally designate a common-law crime.

3. A verdict finding accused "guilty of the crime of attempt at rape" is sufficiently clear and certain in designating the crime of which accused is found guilty, under an information for rape.

Error from superior court, Fairfield county; Charles B. Andrews, Judge.

Joshua Rookey was convicted of an attempt at rape, and brings error. Affirmed.

The writ recites the material parts of the information, plea, verdict of the jury, and judgment in the superior court. The information was in the usual form of an information for rape. The verdict and judgment were recorded as follows: "The prisoner appeared, and, for plea, said 'Not guilty'; and, after a full hearing, the case was committed to the jury, who returned a verdict of 'Guilty' of the crime of 'attempt at rape,' under the said information. It is therefore considered by the court that the prisoner is guilty of the crime 'attempt at rape,' under the said information. The court thereupon sentenced the said prisoner to be confined," etc. The errors specially assigned were, in substance: (1) The court erred in not holding the verdict to be a special verdict, and, as such, omitting the essential facts necessary to constitute any offense, and to warrant the rendition of any judgment. (2) The court erred in rendering judgment, and in not holding that the verdict was equivalent to a verdict

of "Not guilty," because the verdict designated no statutory or common-law offense, and did not find the defendant guilty of any offense. The answer of the state to the writ was, "Nothing erroneous."

James T. Lynch, for plaintiff in error.
Galen A. Carter, Jr., Asst. State's Atty.

HAMERSLEY, J. (after stating the facts). The verdict complained of is not a "special verdict," and so the argument of the plaintiff in error in respect to the requirements of such a verdict is not pertinent to the case. The verdict in a criminal case is either general, on the whole charge; or partial, as to a part of the charge, as when the accused is convicted on one count of an indictment, or upon one part of a count capable of division, or of an offense of inferior degree included in the accusation of a higher crime; or special, by which the facts of the case are put upon record, and the law is submitted to the court. The rule that requires a special verdict to state all the circumstances constituting the offense does not apply to either a partial or a general verdict. Both must answer the issues raised by the indictment and the plea. Both must state with certainty the general conclusion of guilt or innocence, but neither should detail the facts which support that conclusion. 2 Swift, Dig. p. 13; 1 Chit. Cr. Law, 636; 1 Bish. Cr. Proc. § 832. The only special requirement discussed in the books as to the form of a partial verdict convicting one of an offense included in the accusation of a crime of higher degree is that the verdict shall find the accused not guilty of the greater as well as guilty of the lesser crime. The failure to do so was once deemed by the English law a fatal defect; but the rule was questioned by Chitty as obsolete in his day (1 Cr. Law, 641); and when Judge Swift, in his Digest, spoke of the acquittal of the greater crime as necessary to the validity of the verdict, he doubtless had in mind the old rule, and overlooked the more recent authorities cited by Chitty. It is evident that a verdict of conviction of the lesser crime must involve an acquittal of the greater, and that this result should be directly stated; but a failure to do so is not a fatal defect. In the case before us the crime charged includes the lesser crime of attempt at rape, and the partial verdict rendered is legally equivalent to, "Not guilty of rape, but guilty of attempt at rape."

The claim is made that this partial verdict cannot support any judgment, or should be treated as an acquittal, because the crime of inferior degree of which the accused might properly have been convicted is incorrectly described, the only proper description of this crime being "an assault with actual violence upon the body of a female with intent to commit a rape," using the words of the statute (section 1407) prescribing the punishment for the crime. This claim assumes that sec-

tion 1407 of the General Statutes does not simply fix the punishment of the common-law offense of attempt at rape, but creates a statutory offense previously unknown, whose legal designation must be co-extensive with the statutory definition. Such seems to have been the ground of decision in the Ohio case cited,—*Fox v. State*, 34 Ohio St. 377. The Ohio Criminal Code defined the crime of rape. Attempt at rape was not an offense known to the law; but the statute provided that "whoever assaults another, with intent * * * to commit rape * * * upon the person so assaulted, shall be imprisoned," etc. The court held that the statute was the only provision of law making an attempt to commit rape an offense; that the words "attempt to commit rape," having no legal meaning, must have been used in the verdict in their ordinary meaning, and are not in their ordinary meaning the exact equivalent of the words "assault with intent to commit rape." Therefore, in returning a verdict of "Guilty of attempt to commit rape," the jury might have convicted the accused of an "attempt" in the ordinary meaning of the word, which was not a criminal offense. From this conclusion Boynton, J., dissented. Assuming a similar construction of our statute to be permissible, we think the verdict in the case a valid one.

The principle affecting the form of a general or partial verdict of "Guilty" is that, as finally rendered and recorded, it shall clearly and certainly designate the crime charged in the indictment for which punishment is to be inflicted. The general verdict of "Guilty," separated from its surroundings, is wholly indefinite; but, as actually rendered, it is certain. The clerk asks the jury whether the accused is "guilty of the crime whereof he stands indicted or informed against, or not guilty," and, if the foreman answers "Guilty," the clerk then says: "Gentlemen of the Jury: Harken to your verdict as the court have recorded it. You, on your oaths, do say that A. B. is guilty of the crime whereof he stands indicted or informed against; so say you all." The assent of the jury to this statement constitutes the actual rendering of the verdict. 2 Swift, Dig. 413; *Appeal of Watertown Ecclesiastical Society*, 46 Conn. 230, 233; *State v. Hoyt*, 47 Conn. 518, 533. So, in the rendition of a partial verdict, the general statement by the foreman of guilt of the inferior crime is limited by the assent of the jury to the verdict as stated by the clerk. In this case the verdict assented to by the jury was, "Guilty of the crime of attempt at rape as charged in the information against him;" and the statutory element of "assault with actual violence," being included in the charge referred to, is included in the verdict. We must assume that in every case this established procedure has been followed, unless the contrary appear from the record. The record before us recites the verdict rendered as, "Guilty of the crime of attempt at rape under the said

information." Such a verdict complies with the essential requirements of clearness and certainty. It is mere trifling to suggest that possibly the jury might have meant that the accused was guilty of some attempt which was not a crime, or which was not an attempt to commit the crime of rape, as charged against him in the information. We think, however, that our decision should be put on a broader ground, to wit, the language used by the foreman in stating the finding of the jury, "Guilty of attempt at rape," is in itself an appropriate legal form for announcing a conviction of the inferior crime charged in the information, just as truly as the single word "Guilty" is the proper form for announcing a conviction of the greater crime.

It is not true that section 1407 creates a new statutory offense. By the common law of this state, rape is a crime, and assault with intent to commit rape is a crime. Each has a well-defined meaning, which has not been altered by statute. The latter crime is properly designated either as an "attempt to commit rape" or as an "assault with intent to commit rape." Both names have received the sanction of this court, and each is a correct legal designation of the crime. The foundation of our common law in respect to crimes was laid at the establishment of our commonwealth, in 1630. The English common law as then existing was not adopted here. 1 Col. Rec. 36, 138, 509; *Laws New Haven Colony* 1606, pp. 12, 13; 2 Col. Rec. 134; 5 Conn. Hist. Soc. Col. 491; 4 Col. Rec. 412; 6 Col. Rec. 144; 8 Col. Rec. 578; 12 Col. Rec. 423; Preface to Revision of 1672; Revision 1750, p. 1; Revision 1784 (Ed. 1786) pp. 1, 2, 67; 1 Root, XIII., XIV.; *Holmes v. Williams*, 1 Root, 335, 343; Revision 1821, p. 177, note; *Fitch v. Brainerd*, 2 Day, 163, 189; *Baldwin v. Walker*, 21 Conn. 167, 180; *State v. Keena*, 64 Conn. 212, 214, 215, 29 Atl. 470.

The underlying theory of the Connecticut law and of the English law was the same: Acts in violation of the public peace and of the rules prescribing the duties of individuals to the state and to each other, as settled by universal acceptance, are offenses. Where these rules are not formulated by statute, they may be declared by courts; and a "common law" is developed in the process of so regulating the application of this theory, through legislation and judicial decisions, as to produce a reasonable and defined system of jurisprudence. The main difference lay in the fact that Connecticut referred to "Jehovah, the Great Lawgiver," to the "Word of God," to the "justice and equity held forth in that Word," as authority for those universal rules which magistrates and legislators, "being intrusted by the freemen," have power, as "ministers of God for the good of the people, to declare, publish, and establish," and made a fresh start on this basis; while the law of England, derived in theory from the same source, referred more directly to ancient statutes and customs which had already

molded the underlying rules into a code in many respects repugnant to the conception of criminal law whose evolution became noticeable early in the seventeenth century.

Our ancestors, in developing their criminal jurisprudence, adopted so much from the English common law that the law in the two countries became, for most practical purposes, the same; but they did not adopt all the sanguinary features of the English code, nor the subtleties of technical distinctions that had grown out of conditions foreign to a new country. When, therefore, our general court, in 1642, ordered that any man who shall "forcibly and without consent ravish any mayd or woman" shall be put to death, it prescribed the punishment for a definite crime at common law, as well by the Word of God referred to in the act (Deut. xxii. 25) as by the ancient statute Westm. II. c. 34, referred to by the common law of England as then existing. The crime was the same in both aspects; i. e. the successful use of physical force by a man upon a woman for the accomplishment of unlawful copulation. According to West's Symboleographic, first published in 1590, and for the following 50 years a most commonly used authority, "unlawful copulation is every carnal conjunction had out of lawful matrimony, and it is * * * either voluntary or violent. * * * Violent is termed a 'rape' or 'ravishment.'" West's Symb. pt. 2, of "Indictments," etc., § 154. All the elements of the crime—the assault with physical force, resulting in copulation against the will or consent of the victim—are signified by the word "rape," and the essential element of physical force alleged by the word "ravish." This appears from the precedents of indictments given by West, showing, in some, merely the essential allegation, and, in others, details which were afterwards deemed material: "One O., etc., against her will, feloniously did ravish, against the peace, etc." (section 172); "upon one A., etc., did make an assault, and then and there the same A., against the will of said A., feloniously did ravish and carnally know, against the peace, etc." (section 174); "with force and arms, viz. swords, staves, etc., upon F., etc., did make an assault, and the body and belly of the aforesaid F., with his hands, feloniously did wound, strike, and lacerate, and the same F., against her will, did then and there carnally know and feloniously ravish, against the peace, etc." (section 328). Archbold, in more recent times, gives the violent assault and the resulting rape, as the bones of a legal indictment. Archb. Cr. Prac. & Pl. 580. Indeed, the indictment is, in effect, an allegation that "A. B. upon the body of C. D. did make a violent assault, with intent to commit a rape and her, the said C. D., did then and there ravish." And so Archbold says in general (page 459) that every attempt to commit a crime against the person of an individual without his consent involves an assault under such circumstances that, had the attempt succeed-

ed, the defendant might have been convicted of the crime. This is especially true of rape. Violence in the assault—i. e. the use of physical force for the purpose of compelling submission—is one of the circumstances essential to make the successful attempt a rape.

The Pennsylvania supreme court, in an early case, held that "ravish" includes an averment of force and against the will. *Harman v. Com.*, 12 Serg. & R. 69. And our common-law crime of attempt at rape requires an assault with physical force both adapted to and intended to result in rape. *State v. Danforth*, 3 Conn. 112, 115. The essence of the crime of rape does not lie in the act of copulation,—that may be lawful or unlawful,—but in the use of physical force for the purpose of compelling submission. It is the great injury involved in this indignity that characterizes the offense. Perhaps the range of the crime has been extended by construction, but this is its real essence. In this respect rape differs from almost every other offense. The attempt to commit rape is not only necessarily involved in the commission of the offense, but the criminality of the completed act must be found in the nature of the attempt, which is scarcely less atrocious. Formerly we punished the crime by death, and the attempt by imprisonment for life. Our common law, in defining the crime of rape, defined the crime of attempt to commit rape. The latter is involved in the former, and an indictment for the greater crime of necessity charges the lesser. So, our common law has always permitted a conviction of the attempt upon an indictment for rape. In this it differed from the common law of England, because the symmetry of that law was broken by the technical distinction between felony and misdemeanor and the results flowing from that distinction. The "felony" of the English common law was foreign to our conditions, and was not included in our common law (*State v. Setter*, 57 Conn. 461, 466, 18 Atl. 782); and the consequent rule which forbade a conviction of attempt upon an indictment for rape, because the former was a misdemeanor and the latter a felony, was never recognized by our law. On the contrary, the accused may in such case be convicted of the attempt, because that is necessarily included in the greater crime, and the facts constituting the attempt are alleged in the indictment for rape. *State v. Shepard*, 7 Conn. 54, 56; *State v. Parmelee*, 9 Conn. 259, 260; *State v. Dowd*, 19 Conn. 388, 391; *State v. Setter*, 57 Conn. 468, 18 Atl. 782. In *State v. Shepard* the case of *Com. v. Cooper*, 15 Mass. 187, is cited as concurring in the view expressed; and it is now suggested that the latter case is modified by the decisions in *Com. v. Newell*, 7 Mass. 245, 249, and *Com. v. Roby*, 12 Pick. 496. In *Com. v. Cooper* the court seems to have held that the crime of attempt at rape is necessarily included in the crime of rape, and therefore one accused of rape can be convicted

of the attempt, unless such conviction is prevented by the rule of the English law, in force in Massachusetts, that one accused of a felony cannot be convicted of a misdemeanor, although the lesser offense is necessarily included in the greater; and also to have held that the Massachusetts statutes of 1784 and 1805 changed this rule, and permitted the conviction of a misdemeanor on a charge of felony. It was upon the construction of these statutes that *Com. v. Cooper* was modified by the other decisions; and we have never supposed that they questioned the decision that an accused could be convicted of an attempt upon a charge of rape, unless the English rule, which we have not adopted, were interposed. But if *Com. v. Cooper* must be considered as wholly overruled in Massachusetts, we think the principle of the case, aside from the question of statutory construction, is sound, and it is firmly established by our own decisions.

It follows from these considerations that section 1407 did not create a new statutory offense, but merely prescribed a new penalty for an existing common-law offense; and, in referring to that offense as an "assault with actual violence on the body of a female with intent to commit a rape," it did not alter the character of the offense, but in this respect was in affirmation of the common law. Our statutes are full of instances where, in fixing the punishment of a common-law offense, the crime is referred to, sometimes by its ordinary legal name, as rape, burglary, arson, etc., and sometimes by other descriptive words, more or less full. Such statutes, as affecting the identity of the crime, are held to be in affirmation of the common law. *State v. Gaul*, 50 Conn. 578, 580; *State v. Worden*, 46 Conn. 349, 362. This view is entirely consistent with *State v. Nichols*, 8 Conn. 496, and *State v. Wells*, 31 Conn. 210. In these cases the court was dealing only with the claim that the indictment did not follow the words of the statute, and held that to be unnecessary if the crime mentioned were sufficiently alleged. In the latter case the opinion fairly implies that the descriptive words in the statute (section 1407) indicate an attempt to commit rape at common law, although the decision did not turn on that question. In 1790 "Newgate" was established as a state prison, and the act prescribed what offenses should be punished by imprisonment in Newgate. In 1792 a supplementary "act for punishment of certain offenses in Newgate" was passed. Among these offenses was that of attempt at rape, described as: "If any person shall with force and arms and actual violence an assault make upon the body of any female with an intent to commit a rape." This act is the origin of section 1407. It prescribes imprisonment in Newgate as the punishment for an existing common-law offense, and the language of the act expresses, but does not alter, the descriptive elements of the existing offense. Before as well as after the passage

of the act, an attempt at rape was an assault with force and arms and actual violence with intent to commit a rape. The provision in section 1407 authorizing the conviction of an attempt upon an indictment charging rape was added in the Revision of 1875, and is plainly in affirmance of the common law.

Our conclusion is that, by the common law of this state, attempt to commit rape is a crime necessarily included in the crime of rape, and necessarily alleged in an indictment charging rape, and, upon such indictment, the accused may be convicted of the attempt; that in these respects section 1407 is in affirmance of the common law; that "attempt to commit rape" and "assault with intent to commit rape" are legal designations of the crime whose punishment is prescribed by section 1407, and, in meaning, the equivalent of "assault with actual violence upon the body of a female with intent to commit the crime of rape"; and that a partial verdict upon an information for rape, finding the accused "guilty of the crime of attempt at rape," complies with the essential requirements of clearness and certainty in designating the crime of which the accused is found guilty, under the information. There is no error. The other judges concurred.

(70 Conn. 68)

JACOBS, County Treasurer, v. HOLGENSEN et al.

(Supreme Court of Errors of Connecticut. Nov. 30, 1897.)

LIQUOR DEALER'S BOND — BREACH — COMPLAINT — FORMAL DEFECTS — AIDED BY VERDICT — WAIVER — JUDGMENTS — STATUTES.

1. Where a liquor dealer's bond is conditioned for compliance with certain sections of the statutes, designated in the bond by their numbers, and after the giving of the bond a statute is enacted (Acts 1895, c. 251) which defines an offense by a liquor dealer similar to one defined by one of the statutes which the bond designates (Gen. St. § 3097), but does not purport to amend it, a violation of the statute so enacted will not work a forfeiture of the bond.

2. A complaint in an action to recover the amount of a liquor license bond which alleges that defendant was charged in one criminal prosecution with two offenses, and also defines the offense of which he was convicted in language of doubtful meaning, is open to demurrer as to form, but is healed by verdict, or by a general finding of the issues in favor of plaintiff, where the cause is tried without a jury.

3. Where defendants answer, by specific admission, each allegation in a complaint, they waive their right of objection to formal defects.

4. In an action to recover the amount of a liquor license bond, the finding in a prosecution under the liquor law that the defendant "is guilty in manner and form as alleged in said complaint" is conclusive, and the legality of the sentence thereunder is immaterial.

Appeal from city court of New Haven; Edwin C. Dow, Assistant Judge.

Action by Hiram Jacobs, treasurer of the county of New Haven, against John H. Holgenson and another, to recover the amount of a liquor license bond, brought to the city court of New Haven, and tried to the court, upon

the defendants' admission of the truth of the allegations of the complaint. The court was of opinion that the defendants were liable upon the admitted facts, and rendered judgment against them, whereupon they appealed to the supreme court for alleged errors in the rulings of the trial court. No error.

The condition of the bond sued upon is as follows: "Whereas, the above-bounden Holgenson has made application to the board of county commissioners of the county of New Haven for a license to sell spirituous and intoxicating liquors in the town of New Haven, in said county: Now, if such license shall be issued to the said Holgenson, and the said Holgenson shall comply with all the provisions of sections 3087 to 3101, inclusive, of the statutes under which said license may be issued, then this bond to be void; otherwise, of full force in the law." Paragraph 3 of the complaint alleges: "Par. 3. Said Holgenson was on the 4th day of December, 1896, in the city court of New Haven, duly convicted of selling and exposing for sale on Sunday certain spirituous and intoxicating liquors, he not having a druggist's license therefor, in violation of the provisions of the Statutes, of sections 3087 to 3101, inclusive, under which the license mentioned in paragraph 2 was issued, to wit, in violation of section 3097 of said Statutes, as amended by the Public Acts of 1895. A copy of the record of said conviction will be filed in said court at its first opening, upon the return day hereof, and marked 'Exhibit B.'" Exhibit B is the record of a prosecution against Holgenson, the complaint in which contains two counts,—the first for selling and exposing for sale, dispensing, disposing of, and giving away, certain intoxicating liquors, between the hours of 12 o'clock on Saturday, the 24th of October, A. D. 1896, and 5 o'clock on the Monday morning next following; and the second for keeping open a certain place in which intoxicating liquors were sold and exposed for sale, between the hours of 12 o'clock on Saturday night, the 24th of October, A. D. 1896, and 12 o'clock on the Sunday night next following. To this complaint Holgenson pleaded guilty. The judgment recites that the court "finds that the accused is guilty in manner and form as alleged in said complaint," and imposes a fine of \$10 and costs of prosecution. From the judgment no appeal was taken. The defendants' answer to the complaint in the present case is as follows: "Paragraphs 1, 2, 3, 4, and 5 [being all the paragraphs of the complaint] are admitted." The judgment of the court below recites that the court "finds the issue for the plaintiff," and adjudges that the plaintiff recover of the defendants \$300 damages and his costs. From this judgment the appeal is taken on the ground (set forth in various forms in the reasons of appeal) that the judgment is erroneous, because it legally appears from the record of the case that the only conviction, if any, alleged and proved, is a

conviction of violating the provisions of the Public Acts of 1895, and no conviction of the violation of any provision of sections 3087 to 3101, inclusive, of the General Statutes, is alleged. Section 3064 of General Statutes provides that each person receiving a license for the sale of intoxicating liquors shall give a bond, with sufficient surety, "conditioned for the due observance of all the provisions of sections 3087 to 3101, inclusive."

Albert D. Penney and James Buchanan, for appellants. Edward G. Buckland, James D. Dewell, Jr., and Benjamin I. Spock, for appellee.

HAMERSLEY, J. (after stating the facts). If the complaint in this case alleges, and alleges only, the defendant Holgenson's conviction of the offense created by chapter 251 of the Public Acts of 1895,¹ the judgment is wrong. The obligations of the bond are determined by the statute law as it was on January 1, 1896. At that time, by force of section 3064 of the General Statutes, the bond would be forfeited if the licensee should be convicted "of a violation of any of the provisions of sections 3087 to 3101, inclusive." No one of these sections then contained a provision forbidding the giving away of intoxicating liquors between the hours of 12 o'clock on Saturday night and 5 o'clock on Monday morning next following; but chapter 251 of the Acts of 1895 creates such an offense, which is similar to one of the offenses defined in section 3097;² and it is claimed by the plaintiff that this act should be construed as if it said, "Section 3097 is amended so as to read as follows [incorporating therein the new offense in place of the similar offense defined in the section as originally enacted]." Such construction is not allowable. The act of 1895 is an independ-

¹ Pub. Acts 1895, c. 251: "Every person who, by himself, his servant, or his agent, between the hours of twelve o'clock on Saturday night and five o'clock on Monday morning next following, in any place of any kind or description in which spirituous or intoxicating liquors are at any time sold or exposed for sale, or are reputed to be sold or exposed for sale, shall dispense, dispose of, or give away any spirituous or intoxicating liquors, shall be fined not less than fifty nor more than one hundred dollars, or be imprisoned not more than six months, or both; but this act shall not apply to sales or transactions under a druggist's license."

² Gen. St. § 3097: "Every person who by himself, his servant, or his agent, between the hours of twelve o'clock on Saturday night and twelve o'clock on Sunday night next following, shall sell or expose for sale any spirituous or intoxicating liquors, or shall keep open any place of any kind or description in which spirituous and intoxicating liquors are at any time sold or exposed for sale, or are reputed to be sold or exposed for sale, or in which any sports or games of chance are at any time carried on or allowed, or are reputed to be so carried on or allowed, shall be fined not less than fifty nor more than one hundred dollars, or be imprisoned not more than six months, or both; but this section shall not apply to sales under a druggist's license."

ent act. It does not purport to be in addition to or amendment of or repeal of any prior act or part thereof. Whether the new offense is so defined as, by implication, to repeal the provision relative to the similar offense contained in section 3097, is immaterial. That section is not amended by including the new offense within its provisions, and therefore a conviction of that offense cannot work a forfeiture of the bond. The complaint, however, does allege Holgenson's conviction of a different offense, to wit, keeping open, between the hours of 12 o'clock on Saturday night and 12 o'clock on Sunday night next following, a place where intoxicating liquors are sold. This is admittedly a conviction of the violation of one of the provisions contained in section 3097, and within the condition of the bond.

The defendants urge that in paragraph 3 of the complaint this conviction is defectively alleged. The record of the conviction is a part of paragraph 3, and, by including that record in the paragraph, the pleader alleges, inferentially at least, that Holgenson was charged in one prosecution with two offenses, to wit, the offense of violating the provisions of the act of 1895 in the first count, and of violating one of the provisions of section 3097 in the second count, and that, by his plea of "Guilty," he was convicted of each of these distinct offenses. The pleader also, in general terms, defines the offense of which Holgenson was so convicted inaccurately and in language of doubtful meaning, especially in connection with the legal conclusion alleged that the act of 1895 was an amendment to section 3097. Paragraph 3 is plainly open to demurrer. We think, however, that the defects are matters of form, rather than substance, and that the paragraph as a whole does substantially allege that Holgenson was convicted of the violation of the provisions of section 3097 specified in the record of conviction, which is made a part of the paragraph. Such formal defects are healed by verdict (*Griffin v. Pratt*, 3 Conn. 513, 515; *State v. Ryan*, 68 Conn. 512, 517, 37 Atl. 377); and the finding of the court below, recited in the judgment, that "the court, having heard the parties, finds the issue for the plaintiff," must operate in the same manner. The defendants might have demurred, and in that case the defects could have been cured by amendment. In answering by a specific admission of each allegation in the complaint, they have waived their right of objection to formal defects as effectually as if they had answered by denial. They cannot now limit the effect of their admissions as evidence upon which the court may act in finding the issues for the plaintiff. *Connecticut Hospital for Insane v. Town of Brookfield*, 69 Conn. 1, 5, 36 Atl. 1017. The law requires all demurrers to distinctly specify the reasons why the pleading demurred to is insufficient, and cannot be evaded by treating an answer

admitting each allegation as a demurrer to formal defects.

The defendants further urge that the record of conviction indicates that the police court regarded the complaint before it as charging a single offense, and that the sentence is illegal if treated as a punishment for more than one offense. The formal finding of the judgment is "that the accused is guilty in manner and form as alleged in said complaint." This is conclusive. It is immaterial to the present case whether the sentence was imposed on one or both counts, or is illegal. The bond was forfeited by the conviction, unless an appeal was taken. By the terms of section 3064, the forfeiture took place after the plea of guilty was entered, when the time limited for giving notice of appeal expired. *Quintard v. Knoedler*, 53 Conn. 485, 487, 2 Atl. 752. There is no error in the judgment appealed from. The other judges concurred.

(70 Conn. 115)

CUMMINGS v. CITY OF HARTFORD.

(Supreme Court of Errors of Connecticut. Nov. 30, 1897.)

MUNICIPAL CORPORATIONS—DUTIES OF POLICEMEN—NEGLIGENCE—DEFECTIVE STREETS—NOTICE—APPEAL—HARMLESS ERROR.

1. It is competent for the city of Hartford to require policemen to remedy or report defects in streets under its charter (6 Sp. Laws, p. 749), authorizing it to prescribe in detail the duties of policemen, though its charter also provides for a board of street commissioners, who are charged with the duty of remedying defects in streets.

2. A notice to a policeman of a defect in a street is a notice to the city, where he is charged with the duty of remedying or reporting defects.

3. A policeman may presume that he who is relaying a sidewalk upon a crowded street has a permit therefor, and hence, though he is charged with the duty of reporting defects in streets, he need not report that a sidewalk is being relaid.

4. After sundown, a policeman charged with the duty of remedying or reporting defects in streets found a strip 50 feet long and 3 feet deep, where a sidewalk had been removed. He placed a feeble lantern at each end of the strip, but there were no lights or obstructions at the sides, and a pedestrian fell in. *Held*, the city was liable.

5. Where the trial court found a city liable by reason of the negligence of two policemen in not remedying or reporting defects in a street, the judgment will be sustained, though one of the policemen was free from negligence.

6. The memorandum decision of the trial court is not affected by an erroneous statement that recovery may be had for injuries resulting from a defective sidewalk, though the city had no notice thereof, where such decision in effect states there was notice in fact, by reason of notice to a proper municipal officer.

Appeal from superior court, Hartford county; William T. Elmer, Judge.

Action by Sarah Cummings against the city of Hartford to recover damages for personal injuries caused by a defective highway, and heard in damages to the court, after defendant had suffered a default. Facts found, and judgment rendered for the plaintiff for \$800 damages, and appeal by the defendant for al-

leged errors in the rulings of the court. No error.

The finding stated the following facts: The owner of a lot on Albany avenue, in the city of Hartford, without any order or authority from the city, employed a contractor to replace a flag sidewalk in front of his lot by a granolithic one. The contractor began work early on August 13th, and stopped for the night at 6 p. m., leaving an excavation in the walk, from which the old flagging had been removed, 50 feet long, 5 feet wide, and 3 feet deep, adjoining the curbstone. An inner rim of the old sidewalk was left untouched, which was 3 or 4 feet wide. At each end of the excavation, a plank, upon which a barrel was placed, was laid from this rim to the curb. The city charter and ordinances made it a misdemeanor to make any excavation in any street without a permit from the board of street commissioners, and a nuisance to make one without also protecting the public against danger "by means of fences, lights, and any other precautions expedient or necessary for such protection." No such permit was obtained for this excavation. The city ordinances authorized any police officers of the city to keep all streets free from obstruction, and to require all persons whom they might see unlawfully obstructing them to desist therefrom, and particularly provided that policemen "shall especially attend to the keeping of the streets and sidewalks of the city clear of all unlawful obstructions, and shall report to the chief of police, through the captain, all unlawful obstructions thereof, who shall take immediate steps to remove the same." There was also a standing rule of the police department as follows: "Rule Concerning the Duties of a Policeman. If he discovers any defect in the sidewalk or streets, large stone, or other obstruction upon the street, liable to produce inconvenience or injury, he shall remedy or remove the same; or, if that is not possible, he shall take such measures as the case may require to prevent injury to the public, and immediately report the same to the chief of police." Early in the morning of the day on which the excavation in question was begun, a police officer, about to go on duty near said premises, noticed that the excavation was in progress, but made no inquiry as to whether a permit had been obtained for the work from the street board, as required by law. At about 7 o'clock in the evening of that day, when going off duty, he met the officer then going on duty on the same beat, and called the attention of the latter to the excavation in question, and its apparently dangerous character as to foot passengers, and suggested to him the propriety of providing suitable protection to guard them against injury which might result from the same. Said officer then on duty proceeded to the place in question, and found the excavation as above described. He procured lanterns, which were lighted, and placed, one upon the plank at the east end, and one upon the plank at the

west end, of the excavation. No further steps were taken to guard the public from accident at this place. The officer proceeded to the discharge of his duty upon his beat, and thereafter paid no further attention to the said excavation until after the accident complained of. About 25 feet easterly from the excavation, at the time of the accident, stood two shade trees, whose foliage cast a shadow over and into the ditch at its eastern end, and to a considerable extent obstructed the light from an electric lamp situated about 225 feet east of the excavation. There was at that time no other source from which light was thrown upon the excavation, excepting a light from a store at the western extremity of the same, which was of no assistance or protection to persons approaching it from the east. The night was dark, and the small light at the corner of the eastern end of the ditch offered little, if any, protection to the pedestrians approaching this place from the east. Albany avenue at this place is a crowded street, being near Main street, and many pedestrians pass over it in the night season. At about half past 8 or 9 o'clock in the evening of the day in question, the plaintiff, Sarah Cummings, having returned to Hartford after an absence of several days, and unaware of the excavation, in company with her sister, was proceeding along said street, approached the excavation at its eastern end, and walking by this point, along the remaining portion of the flag walk, advanced a short distance by the side of the ditch, when she fell in, followed by her companion. Neither at the side of the excavation where the plaintiff fell, nor at any point on the entire length of the side, was there any railing, board, or other barrier to protect pedestrians upon the said walk. The provisions made by the police officer in question, by placing a lantern with dim lights at the ends only of the excavation, without any protection at the side, on a dark night, in a crowded street, where persons were constantly passing at that time in the evening, were inadequate properly to protect the public. The court found that this excavation, under the circumstances, constituted a dangerous defect in the said public street, and that the city of Hartford was guilty of negligence in not providing adequate protection for the public against injury from the same. The plaintiff, at the time of the accident, was in the exercise of ordinary care and prudence, and was not guilty of contributory negligence. It was the duty of the police officer who first discovered the excavation and the dangerous condition in which it would necessarily leave the walk to have prevented the further unlawful obstruction of the highway; and thus a reasonable attention to the same by the city authorities would have, by proper precautions, prevented the accident. The measures finally taken by the police officer for the safety of the public were inadequate and insufficient. The defendant city had notice of the defect in the sidewalk, with sufficient opportunity

to have avoided the accident by the use of reasonable means to protect the public.

Upon these facts, the defendant made the following claims, all of which were overruled: (1) That adequate and reasonable protection was afforded the plaintiff and the public, by the measures taken as aforesaid, and the city was not therefore liable; (2) that actual notice should have been given to the street department, or its agents, of the existence of the excavation, or that it should have been in existence a sufficient length of time to have become notorious, and thus have attracted the attention of the city, in order to make the latter liable for neglect; (3) that as the excavation in question was made without a permit from the proper authorities of the city, and completed upon the day of the accident, whatever knowledge persons in authority had of the same, the street department had not been notified, and therefore the city did not have sufficient notice to charge it with liability except for nominal damages. It was also assigned for error that the court ruled that it was the duty of the police officer who first discovered the excavation to have prevented the further obstruction of the highway, although it appears that the work which he saw going on was the laying of a new sidewalk, and there was nothing to lead him to suppose that it was being unlawfully done; that his failure to prevent it was conduct attributable to the city of Hartford, for whose results to the plaintiff the city must answer in substantial damages; and that, under the circumstances, it was the duty of the city to provide adequate protection against injury from the said excavation, made in the process of constructing a sidewalk.

Edward D. Robbins and William J. McConville, for appellant. William F. Henney, for appellee.

BALDWIN, J. Every municipal corporation which is charged with the duty of maintaining the highways within its limits in sufficient condition of repair is bound to make use of such agencies as the law may provide, or reasonable care demand, for ascertaining from time to time what their condition is, and remedying any defects that may be found to exist. By the charter of the city of Hartford, the board of street commissioners, whose duty it is to appoint a superintendent of streets, is made such an agency (6 Sp. Laws, p. 749); but it is not necessarily the only one to be employed. The common council could not withdraw the general supervision of the streets from that board, but they could aid or supplement the exercise of its powers by appropriate ordinances. City of Hartford v. Hartford Electric Light Co., 65 Conn. 324, 329, 32 Atl. 925. The charter also provides for a city police department, and leaves it to the proper municipal authorities to prescribe in detail the duties of the policemen. 6 Sp. Laws, p. 749. Their primary

duty is to guard the city by day and night, and preserve the public peace. In this they are the agents of the law, and in a certain sense officers of the state. *Farrell v. City of Bridgeport*, 45 Conn. 191, 195; *State v. Pinkerman*, 63 Conn. 176, 182, 28 Atl. 110. But, as the performance of this duty necessarily involves patrolling the streets, it is obvious that the patrolmen are in a position which gives them special opportunities for inspecting the condition of these streets, and observing any defects in them as soon as they arise. As they are appointed and paid by the city, and there is no incompatibility between the function of guarding the public against acts of criminality and that of guarding it from harm by acts of trespass or negligence, it was proper for the defendant to lay down the duties of policemen, as was done in the ordinance (chapter 13) and rule set forth in the finding. By thus commissioning an existing agency to inspect the streets, and in case of need to remedy defects, the city was relieved of a needless expense, which would have been incident to the organization of a patrol force of equal efficiency, to act under the orders of the board of street commissioners. While, therefore, that board is the immediate representative of the city in respect to whatever pertains to the repair of streets, and notice to it of any want of repair is, as matter of law, notice to the city, it is also true that every patrolman on the police force has been placed in such a position that notice to him of any such want of repair may, under certain circumstances, be notice to the city. Such circumstances the superior court held to exist in the case at bar, and there is nothing in the facts found to impugn the validity of the conclusion.

The ruling that the policeman on day duty who first discovered the excavation should have "prevented the further unlawful obstruction of the highway" was incorrect. It assumes that he knew or ought to have suspected that the work was being done without a permit. On the contrary, he had a right to presume that, before undertaking to relay a sidewalk upon a crowded street, the contractor had obtained the necessary authority from the board of street commissioners. He was therefore in no fault for not inquiring as to this point, or for not immediately reporting what he had seen to the chief of police. The policeman on night duty, however, was placed in a different position. His attention was called about sundown to the dangerous condition in which the sidewalk had been left, and the obvious insufficiency of the barriers placed for the protection of pedestrians. He procured a couple of lanterns, and set one on the plank at each end of the ditch, but left it otherwise wholly unguarded on either side for its entire length of 50 feet, proceeding upon his beat, without taking any further precautions or making any report to his superiors. In this he failed to comply with the rules of the department, which provided one

of the principal means relied on by the city for the discharge of its duty of keeping the streets in repair. The superior court was warranted in finding that, under all the attending circumstances, the city had sufficient notice of the defect to enable it to provide proper safeguards to protect those passing upon the street, and that it was negligent in not making such provision. It is true that, in arriving at these results, some weight was attached to what was held to be the default of the first policeman; but the conclusion as to actionable negligence was amply justified by the conduct of the second, and the judgment is fully supported by the finding that the measures which he took for the safety of the public were inadequate and insufficient.

In the memorandum of decision filed at the date of the judgment, and several weeks before the finding, the following language is used: "The rule that notice of a defect in the highway to any municipal officer having a duty to perform in this direction is notice to the municipality seems to cover this case. Aside, however, from the legal question of notice, the city cannot plead the same in the negligent omission of its own duty." The defendant claims that from this it appears that the court was governed in rendering the judgment by the assumption that want of notice to the city of the defect in the street was of no importance. This does not appear in the record, of which the memorandum of decision forms no part, unless made such by the finding. Such an assumption, however, was apparently made, and was probably founded on a misconception of the ruling of this court in *Boucher v. City of New Haven*, 40 Conn. 456. In that case a city was sued by a pedestrian who fell into a hole carelessly left unguarded in relaying a sidewalk in front of his lot, and notice of the existence of the defect to the municipal authorities was held unnecessary. There, however, the city had ordered the new sidewalk laid, and was therefore put upon inquiry as to the commencement of the work. Here, on the other hand, the landowner proceeded upon his own motion, and there was nothing to lead the city to suppose that any such improvement was in contemplation. It would therefore have been fatal to the plaintiff's case had she failed to prove either notice in fact, or such an omission by the city to exercise that reasonable supervision over its streets which was incident to its duty to maintain them in repair as would be of itself negligence naturally leading to her injury. But the memorandum of decision states, in effect, that there was notice in fact, by reason of notice to a proper municipal officer, and in this respect is in accord with the finding.

It is on the sufficiency of the finding to support the judgment that the case turns. If a memorandum of decision announces conclusions of law controlling the decision which a finding subsequently made does not present, resort may be had to it, under certain limita-

tions, in aid of an appeal. *Styles v. Tyler*, 64 Conn. 432, 439, 463, 30 Atl. 165. But there is no occasion for this where no such variance appears. None is shown in the present case. The memorandum of decision as to the point now in question simply amounts to a statement by the trial judge that if a condition of things existed which, in his opinion, did not exist, a certain conclusion of law would follow. This statement was incorrect, but it related to a question not raised by the facts actually found. These cover the case, and are decisive of the issue. There is no error in the judgment appealed from. The other judges concurred.

(56 N. J. E. 149)

RANSOM v. BRINKERHOFF et al.

(Court of Chancery of New Jersey. Nov. 18, 1897.)

DESCENT AND DISTRIBUTION—DEBT OF ANCESTOR—FRAUDULENT CONVEYANCES BY HEIRS—RENTS AND PROFITS—TAXES AND INCUMBRANCES—CEMETERIES—STOCK CERTIFICATES—ADMINISTRATOR'S BOND—DEFAULT—IMMEDIATE LIABILITY.

1. Testator died in 1879, survived by his wife and three children, A., E., and M. The widow took a life estate in the lands, preferred legacies were given to A. and E. (M. having received equivalent advances), and the residue was to be divided among the three children. Eighty acres of the land, bearing the improvements, had been mortgaged for \$12,000. The balance, 70 acres, was unincumbered. The widow and children, by an intermediate grantor, conveyed the lands to A. and M.'s husband, G. A mortgage for \$6,000 was executed by A. and G., payable to the widow and E. in equal shares, and was in fact the only consideration for the transactions; the instruments all being dated April 22, 1882. A. and G. organized a cemetery association in 1883, and conveyed to it 40 acres of the 80-acre tract, subject to the mortgages of \$12,000, \$6,000, and a later one for \$3,000 executed by them on 6 acres released by the other mortgagees. The proceeds of the \$3,000 mortgage had gone into the treasury of the association before the conveyance to it, and formed the consideration of the release of the 6 acres from the \$12,000 mortgage. There was no actual consideration for the conveyance to the association, all the stock being held by A. and G. The 6 acres, only, were used for cemetery purposes. In 1890 suit was commenced on a bond on which the testator had been surety, and the widow and children were personally served with summons. About the time pleas in the suit were due, the \$6,000 mortgage was canceled of record; and A. transferred his half interest in the 110 acres not conveyed to the cemetery association to G., for the expressed consideration of \$1. It appeared that the principal on the bond was called to account in the lifetime of the surety, who knew that the principal was in default; that A. and G. had been told by counsel for the beneficiaries, before the transfer to the cemetery association, that an effort would be made to enforce the bond; that the interest on the \$6,000 had been paid for two years, and in 1889 the mortgage was extended for seven years. It was claimed that the mortgage was conditioned on the cemetery venture proving a financial success, and this it had not done. In the suit, defendants pleaded that nothing was received under the will, the equity of redemption being valueless. Under the statute (Revision, 476), the lands were not liable to execution, if bona fide aliened before action brought, and the heirs and devisees were liable only to the extent of the consideration received. *Held*, that the lands were not bona fide aliened,

the whole arrangement being a family settlement.

2. The lands having been sold under execution, a bill was filed to set aside the deeds, and G. and the cemetery association were made parties with the widow and children. In the suit on the bond the only issue touching the land had been whether the devisees received any benefit from them, and the jury had found that the lands were only of the value of one dollar. *Held*, that the issue as to whether the lands were aliened in good faith was not *res judicata*, and the burden was on G. and the association to prove valuable considerations.

3. The widow and E. having surrendered their \$6,000 mortgage to escape liability as devisees, and having actually escaped it, the parties to the suit on the bond were estopped to assert that any consideration was paid, and at least the lands not conveyed to the cemetery association were left liable to execution.

4. A. and G. having been the promoters and sole proprietors of the association, it was chargeable with their knowledge of the debt against the testator.

5. The fact that stock was issued to A. and G. did not enlarge their rights, since the cemetery act did not provide for the issuance of stock; and Supp. Act March 14, 1879 (Supp. Revision, 74), recognized the right of the association to issue stock for the mere purpose of evidencing indebtedness, and allowing creditors to cast one vote for each \$400 invested by them.

6. Where the lien cast upon lands for the debt of the ancestor by the act for the relief of creditors against heirs and devisees is enforced, the creditor is not entitled to the benefit of any positive additions put upon the lands by the heir; and, other things being equal, the heir, in consideration of the rents and profits, must keep down the taxes and incumbrances.

7. Assessments for benefits caused by public improvements must be allowed to the heir.

8. Where a surety on an administrator's bond thereby admits himself to be presently indebted to the ordinary in a specific sum, for the use of certain infants, unless the administrator shall duly perform his duties as such, the surety becomes indebted as soon as the administrator makes default, so as to bind his lands, in case of his decease, though judgment on the bond has not been rendered.

Bill by Edward A. Ransom, trustee, against Andrew H. Brinkerhoff and others. Decree for plaintiff.

J. B. Vredenburg and E. A. Ransom, for complainant. Luther Shafer, for defendants.

PITNEY, V. O. This is, in effect, a bill by a purchaser of real estate at sheriff's sale to set aside a conveyance made by the defendants in execution prior to the entry of the judgment, on the ground that such conveyance was without consideration, and void as to the judgment creditor. The facts of the case are complicated. The complainant is the oldest son and heir at law of Stephen B. Ransom, deceased, who, as trustee, took a conveyance from Addison Ely, who purchased the premises at sheriff's sale in trust for the real parties in interest. The judgment under which the sale took place was in favor of the ordinary, to the use of H. F. Watson and T. P. Watson, against the heirs, who were also the devisees, of George C. Brinkerhoff, deceased, viz. Kezia Van Riper, Andrew H. Brinkerhoff, Ellen Berry, and Martha Alyea, upon a bond given by one Fred-

erick A. Watson, as principal, and George C. Brinkerhoff, as surety, conditioned for the faithful performance by Watson of the duties of administrator of James S. Watson, the father of the cestui que trust, H. F. and T. P. Watson. Watson, the testator, died in 1872; and Brinkerhoff, the surety on the bond, died in March, 1879, seised of a tract of land containing about 150 acres, 70 acres of which are meadowland, and 80 acres are upland, and upon which were a dwelling house and outbuildings. The upland was in the southerly edge of the city of Rutherford. At his death the 80 acres of upland were incumbered by a mortgage of \$12,000, held by the Mutual Life Insurance Company. The 70 acres of meadow were unincumbered. By his will, made shortly before he died, the decedent devised the use of the land in question to his widow, Kezia, for her life, if she remained single, but, if she married,—which she has done,—then the use of one-third for life. Subject to this provision in favor of his widow, he gave to his daughter Ellen \$15,000, and to his son, Andrew, \$20,000, and ordered the residue to be equally divided among the three children. He appointed his widow and Ellen and Andrew executors, with power of sale, and stated as a reason for giving Ellen and Andrew a preference over Martha that he had already advanced large sums to her. That tract of 150 acres is the one here in question, and was conveyed by the executors and devisees, namely, the children and widow of the deceased, to Thomas W. Alyea (the nephew of Garrabrant R. Alyea, husband of Martha), by deed dated April 22, 1882, for the named consideration of \$10,000; and, by deed of the same date, Thomas W. Alyea conveyed the same to Andrew H. Brinkerhoff and Garrabrant R. Alyea, the consideration named being also \$10,000. The object of the bill is to set aside these conveyances, and one made by Andrew H. Brinkerhoff and Garrabrant R. Alyea to the cemetery association, presently to be mentioned, on the ground that they were not alienations in good faith, which exempted the lands from execution upon a judgment founded on the debt of the deviser, under the second section of the act for the relief of creditors against heirs and devisees.

Andrew Brinkerhoff and Garrabrant Alyea executed a mortgage on the same premises, bearing the same date (April 22, 1882), to the widow, Kezia, and to Ellen Berry, for \$6,000, which was declared to be for a part of the consideration money of the conveyances just mentioned, and that the amount was due in equal proportions to the widow, Kezia, and to the daughter Ellen. In point of fact, no consideration, other than this mortgage, was paid for these conveyances. These papers were all executed on, or shortly after, the day they bear date, but were not recorded until the 7th day of November, 1883. About the time of the execution of these two conveyances and this mortgage, the defendants Andrew H. Brinkerhoff and

Garrabrant R. Alyea organized the Hillside Cemetery Association, defendant herein, under the general statutes, and by deed dated December 1, 1883, acknowledged on the 30th of April, 1884, by Andrew H. Brinkerhoff and wife and Garrabrant R. Alyea, and on the 10th of July, 1884, by Martha Alyea, and recorded August 28, 1884, conveyed to it about 40 acres of the whole tract,—being a piece nearly square in shape, out of the north corner, and being, in point of fact, the most valuable part of the land,—including the mansion house and buildings. This conveyance was declared to be subject to three mortgages,—one to the Mutual Life Insurance Company, for \$11,000; one to Kezia and Ellen, for \$6,000; and a third, presently to be mentioned, for \$3,000, to a Mrs. Noble,—but did not, in terms, assume the same. For a payment made on account, the Mutual Life Insurance Company, the holder of the first mortgage, released, November 12, 1883, from the effect of that mortgage, about 6 acres at the northerly corner of the 40-acre lot conveyed to the cemetery association. At the same time the holders of the \$6,000 mortgage released the same 6 acres from their mortgage. After the execution of these releases, but before the conveyance to the cemetery association, Brinkerhoff and Alyea borrowed from a Mrs. Noble \$3,000, and executed to her their bond and mortgage, dated November 8, 1883, upon the 6-acre tract above mentioned, being the mortgage mentioned in the deed to the cemetery association. The result of these conveyances and mortgages was that the cemetery association held the 6-acre tract subject only to the Noble mortgage, and held the remaining 34 acres of the 40-acre tract subject, with the remainder of the 80 acres of upland, to the payment of the \$11,000 due on the mortgage to the Mutual Life Insurance Company, and the \$6,000 mortgage to the widow and daughter. The \$3,000 borrowed from Mrs. Noble was paid into the treasury of the cemetery association prior to the execution of the deed to it, and was used to pay the arrears of interest and costs to the Mutual Life Insurance Company, and \$1,000 on the principal of their mortgage, reducing the debt to \$11,000. In consideration of this payment the insurance company released, as we have seen, the 6-acre lot covered by the Noble mortgage, which lot was subsequently actually used for cemetery purposes. Moneys were expended on that 6-acre lot, in preparing and laying it out in lots for a cemetery; and considerable sales of burial plots have been made, and moneys received therefor. The consideration expressed in the deed from Brinkerhoff and Alyea to the cemetery association was \$75,000, but in point of fact no consideration in cash was ever paid. The stock of the association to that amount (\$75,000) was issued wholly to Brinkerhoff and Alyea, and almost all of it

is held by them; a few shares, only, being held by other persons, who act as directors and officers with Brinkerhoff and Alyea. The several deeds of conveyance from the heirs to Thomas W. Alyea, and from Thomas W. Alyea to Andrew H. Brinkerhoff and Garrabrant R. Alyea, and from the latter to the Hillside Cemetery Association, all mention the mortgage to the insurance company. In the first two deeds the mortgage is merely mentioned by way of description of the premises,—that they are the same premises mortgaged to the insurance company. The deed to the cemetery association declares that the premises are conveyed “subject, nevertheless, to three mortgages now on the premises” (mentioning them). There is nowhere in the three deeds in question any clause which can be construed to be an assumption by the grantees of the mortgages, or either of them. At the hearing, however, Mr. G. R. Alyea swore that the verbal agreement between him and Brinkerhoff and the cemetery association was that the 40-acre tract conveyed to the cemetery association was to assume all those mortgages, and that the 40 acres of upland which they retained were to be free and clear, but that it was not a part of their plan to ask the insurance company to release those 40 acres upon the mere security of the 40 acres conveyed to the cemetery association, and they still remain subject to it. The meadowland, as we have seen, is free of incumbrance.

The suit upon the bond was commenced by summons returnable on the 9th of July, 1890, and served upon each of the defendants. The declaration in that suit, after alleging the making and the breach of the bond, stated that the deceased, Brinkerhoff, died seised of valuable real estate, situate in the township of Union, in the county of Bergen, of the value of \$50,000, which he by his will devised to Kezia Van Riper, Ellen Berry, Andrew H. Brinkerhoff, and Martha Alyea, which lands and tenements the said devisees still hold. The defendants all appeared, and joined in one pleading, containing several distinct pleas. The first plea was non est factum, putting in issue the making of the bond. Second. They denied the breach of the bond by the administrator, and alleged that he performed all the conditions of it. In the third plea, A. H. Brinkerhoff and his sister Mrs. Berry severed from Mrs. Van Riper and Mrs. Alyea, and set up rien pur devise, except the equity of redemption of a farm of about 140 acres, which at the time of the death of Brinkerhoff was of small value, to wit, one dollar, and no more, and which before the commencement of the suit the said defendants sold, aliened, and made over. The fourth plea was by the defendant Kezia Van Riper, likewise a plea rien pur devise, except a life estate in one-third of the equity of redemption of the farm in question, which at the time of the death of Brinkerhoff was, and now is, of small value, to wit,

one dollar, and which before the commencement of the suit the defendants sold, aliened, and made over. Fifth. Martha Alyea pleaded separately, setting out the will of Brinkerhoff in extenso, *rien pur devise* except the equity of redemption in the tract in question, which was insufficient to pay the preferential devise in favor of her brother, Andrew, and sister, Ellen, and that the defendant in fact had received no part of the real and personal estate of Brinkerhoff as devisee. Sixth. Andrew and Ellen also pleaded separately, setting out the will in full, and stating that the property devised was of small value, to wit, one dollar, and no more, and that it was insufficient to pay to Andrew and Ellen their preferential legacies, and that the defendants had never received any part of the estate of George C. Brinkerhoff as devisees under his will. The plaintiffs, in their replication, took no notice of the allegation that the defendants had aliened and made over the lands, but joined issue as to their value. In the month of August, 1890, and at about the time the pleas in this suit were due, the mortgage for \$6,000 given by Garrabrant R. Alyea and Andrew H. Brinkerhoff to Kezia Van Riper and Ellen Berry was canceled of record, and Andrew conveyed his one-half interest in the 110 acres not conveyed to the cemetery association to Alyea, for the expressed consideration of one dollar; and, after the verdict in the suit, Alyea reconveyed this one-half interest to Brinkerhoff for a like expressed consideration of one dollar.

The issues raised by the pleadings were tried in December, 1890, and judgment rendered February 17, 1891, in favor of the plaintiff, for \$50,000, the penalty of the bond, to be levied on the lands, etc., of which George C. Brinkerhoff died seised. The *postea* shows that the jury found: (1) That the bond was the deed of George C. Brinkerhoff, deceased. (2) That Frederick Watson, the administrator, did not well and truly administer, etc., the goods and chattels, etc., of James S. Watson, deceased, that came to his hands; did not make a just and true account of his administration thereof; did not in all things well and truly perform his duties as such administrator. (3) That the value of the farm that came to the two defendants Andrew H. Brinkerhoff and Ellen Ann Berry, subject to the life estate of Kezia Van Riper, was one dollar, and no more. (4) That the life estate of the defendant Kezia Van Riper in the equity of redemption was the value of one dollar, and no more. And, further, (5) that the defendant Martha Alyea did receive by devise, and have, divers lands and tenements of George C. Brinkerhoff, as devisee under his last will and testament, to the value of one dollar, and no more, in manner and form as the said plaintiff has in that behalf alleged. After the entry of this judgment the defendants applied to the ordinary to assess the damages to be levied, and the ordinary ascertained the damages at the sum of \$39,764.81, as of the 25th of Au-

gust, 1892. It further appears in the proofs made at the hearing that the defaulting administrator was called to account in the orphans' court in the lifetime of George C. Brinkerhoff, and with his knowledge, and that he was then found in default, and, further, that in the fall of the year 1883, and shortly after the cestui que trust became of age, they employed counsel to prosecute the affair, and that in the latter part of the year 1883, or in the early part of the year 1884, and before the deed from Brinkerhoff and Alyea to the cemetery association was executed, the counsel so employed called upon Brinkerhoff and Garrabrant R. Alyea, and told them that he was employed by the two young Watsons to prosecute the bond, and try and collect the money. Proceedings were had in the orphans' court of Bergen county against the defaulting administrator, and an examination had before Thomas M. Moore, as a master, in the first three months of the year 1884.

In order to explain the suspicious circumstances of the cancellation of the \$6,000 mortgage given to the widow and Mrs. Berry, and the conveyance by Andrew Brinkerhoff to his brother-in-law, Alyea, in the month of August, 1890, which was about the time that the pleas in the action on the bond were due, the defendants swore that the bond and mortgage, though expressed on the face of the mortgage to be a part of the consideration named in the deed for the conveyance to Brinkerhoff and Alyea, yet, in point of fact, were subject to a verbal agreement between the parties that the mortgage should only be enforced in case the project of a cemetery should prove to be financially successful. No written agreement to that effect was made. Interest was paid upon the mortgage for two years, and is indorsed on the bond. Then there is indorsed on the bond, and signed by the widow and Mrs. Berry, an agreement, dated October 18, 1889, 10 months before the cancellation, releasing the interest up to that date, and such as should thereafter accrue "according to an agreement of even date herewith, and made part hereof"; and the payment of the principal was extended for seven years from October 22, 1889. An agreement to the same effect was indorsed on the mortgage. When asked to produce the agreement so referred to, Mr. Alyea declared that it was a verbal agreement, and that the reason the mortgage was canceled was that it had been proven to their satisfaction that the cemetery association was not a success, and that the parties had voluntarily, and without any consideration, delivered up the mortgage to be canceled. This explanation must be considered in connection with the logic of the situation, which was that, if it appeared at the trial of any issue that could be raised in the suit on the bond that either of the devisees had received anything of value upon a sale and conveyance of the land devised, they would be liable to a judgment, to be entered against them personally, for the amount so received;

also, in connection with the written agreement of October, 1889, indorsed on the bond and mortgage, extending payment seven years. No explanation was made of the change of the minds of the parties between October, 1889, and August, 1890. With regard to the conveyance made about the same time by Brinkerhoff to Alyea of the former's half interest in the premises, in consideration of \$1, Alyea swears that the real consideration of that was to be \$1,000, but that he was unable to pay it at that time, and that he reconveyed the half interest to Brinkerhoff by deed dated February 2, 1891, but not acknowledged until August, 1891, or recorded until September, 1891, because he had been unable to raise the money to pay Mr. Brinkerhoff the \$1,000 agreed upon. Another deed is produced at the hearing, from Brinkerhoff to Alyea, dated April 6, 1893, acknowledged April 19, 1893, also in consideration of \$1, conveying the grantor's half interest in the premises, which the parties swear was actually delivered to Alyea, but not put upon record, and for which Alyea swears he actually paid Brinkerhoff \$1,000, all in pursuance of the original agreement of 1890. Now, I am unable to accept the explanation given of the cancellation of this \$6,000 mortgage, and the making of these three deeds. Mr. Garrabrant R. Alyea was sworn, on the trial of the suit on the bond, as to the value of these premises, and produced the deed that he had from Brinkerhoff in consideration of \$1, and must have sworn that the property was of no value, because the jury so found. And yet, according to his evidence on the hearing of this cause, he had already agreed to pay Mr. Brinkerhoff \$1,000 for his interest in the premises not conveyed to the cemetery association. The circumstances indicate very strongly that these conveyances were made, and the mortgage canceled, in order to show that the property was of no value, and that the verdict of the jury was based upon that showing. Another object of the conveyance from Brinkerhoff to Alyea was to show that the title to the lands had been aliened by each of the devisees; for the two conveyances of April, 1882 (one from the devisees to Thomas W. Alyea, and one by him to Andrew H. Brinkerhoff and Garrabrant R. Alyea), were palpably one transaction, and did not show any alienation by Andrew H. Brinkerhoff.

Both parties claim an estoppel, as against the other, from the postea and judgment in the suit on the bond. I am unable to perceive how the judgment record can create any estoppel as to Alyea and the cemetery association, either for or against either, for several reasons. In the first place, neither was a party to that record, nor privy to any party thereto, and therefore neither is bound by it. The familiar rule is that estoppels of that character must be mutual, and bind both parties to the record, or neither. In the second place, the issue in that suit was quite different from that in this. There (omitting, of

course, the issues which settled the responsibilities of the ancestor and devisor for the debt demanded) the issue was whether the lands which the devisees claimed to have aliened before writ purchased were of any value, so as to charge them personally with such value; and as soon as the jury determined that they were of no value the question whether or not they had been aliened at all, either in good or bad faith, became immaterial, for in either case the defendants were not personally liable. In fact, the record shows that no issue was made up or tried as to whether they were or were not aliened in good faith, so as to relieve them from execution under the latter part of the second section of the act for the relief of creditors against heirs and devisees. Such issue could not be properly injected into that record, because the alienees were not parties to it, and could not be bound by the finding of the jury and judgment thereon. At common law there can be no recovery against the heir at law, personally, upon the debt of the ancestor, by reason of lands descending to him, even if he had aliened those lands for, and had received, a valuable consideration. A judgment at common law against the heir at law was always special, to be levied upon the lands of the ancestor which had descended to him. But now, by statute, both the heir and devisee are made personally liable for the debt of the ancestor, by reason of lands descended or devised to them, so far, and no further, as they have received either rents and profits before their alienation, or consideration upon alienation. The just rule, that the heir or devisee, except when he shall plead falsely, or fail to plead and disclose assets, shall be held liable to the extent only that he has received assets, is not disturbed by the statutory scheme. *Muldoon v. Moore*, 55 N. J. Law, 410, 26 Atl. 892, and authorities there cited, viz.: *Bac. Abr. tit. "Heir" (F)*; *Com. Dig. tit. "Assets" (A)*; 2 Saund. 7, note 4; *Harbert's Case*, 3 Coke, 11; *Vln. Abr. tit. "Heir" (C)*; *Com. Dig. tit. "Pleader" (2 E, 5)*. Note 4, 2 Saund. 7, is exhaustive and particularly instructive.

At common law there was a difference of opinion, and some contrariety of decision, as to whether, if the declaration against the heir (founded upon a specialty which mentioned the heir) did not specifically allege that lands had descended to the heir, he could be held personally liable upon a judgment against him by default. But this uncertainty was settled by the statute of 3 W. & M. c. 14, and under that statute (section 3 of our act) it was held that the declaration against the heir need not allege lands by descent, but that such descent would be presumed, and the burden was in all such cases thrown on the heir to disclose by plea all lands cast upon him by descent, and, if none had descended, to plead *rien pur descent*; and so are the precedents. But in the case of actions against devisees the precedents allege that the defendant

was the devisee of certain lands, etc., without specifying them. But for this peculiar rule of pleading, I should have said that all the issues in the suit at law, except the first two, viz. non est factum, and performance of the condition of the bond, were immaterial, and that, if the defendants had allowed judgment to go against them by default, the result would have been precisely the same, namely, judgment would have been given specially, to be levied on the lands of the decedent. The finding of the jury that the bond was the debt of the devisor, and that its condition had been broken, entitled the plaintiff at once, and quite irrespective of the other issues, to a special judgment against the devisees, to be levied on the lands of which the devisor died seised, without regard to their value. The result, then, is that the jury found, in effect, that the lands that were devised to the devisees were only of the value of one dollar, and left them, so far as the parties to this record are concerned, still subject to the lien of the judgment, and liable to be levied upon and sold to pay the ancestor's debt. This finding, however, does not prevent Garrabrant R. Alyea or the cemetery association from proving, but leaves it necessary for them to prove, that they had in fact purchased these lands for a valuable consideration, in order to bring themselves within the saving clause at the end of the second section of the act for the relief of creditors against heirs and devisees, which provides that lands which were bona fide aliened before action brought shall not be liable to execution. This, however, they have failed to prove. No direct consideration has been paid, as we have seen, nor was there any valuable consideration, by way of assuming and relieving the heirs at law of the debts secured by mortgage on the premises. The whole arrangement was one made by the family, and understood by each of them, as appears by the evidence, to the effect that these lands should be conveyed in the way and for the purposes they were conveyed, and that a mortgage of \$6,000 should be given to the widow and the daughter, who each had a preferred legacy which was a lien on the lands, and that Andrew's preferred legacy was satisfied by his receipt of a one-half interest in the whole venture, subject to the mortgage to his mother and sister. Mrs. Berry and Mrs. Van Riper having delivered up their mortgage to be canceled, in order, as I infer, to escape liability as devisees, and having actually escaped such liability, all parties to the record of the suit at law are now estopped from setting up, as against the plaintiff therein, or the purchaser at sheriff's sale, that any consideration whatever was paid. This estoppel prevents the revival of that mortgage as against the cemetery association and Alyea, and, as it seems to me, leaves the 110 acres not conveyed to the cemetery association clearly liable to the execution, and results in placing the title in the complainant.

Against this position it was urged by the defendants, in the first place, that according to the doctrine advanced and adopted in the case of *Severs v. Dodson*, 53 N. J. Eq. 633, 34 Atl. 7, there was no debt against the ancestor at the time of the death of Brinkerhoff, nor, indeed, until judgment was actually rendered on the bond, in February, 1891. The proof is that the breach of the condition of the bond occurred in Mr. Brinkerhoff's lifetime, and that he had notice of it. But, in order to complete the breach, it was not necessary that he should have notice of it. Without going into any discussion of the exact point decided in *Severs v. Dodson*, I think it is sufficient to say that the liability there dealt with is decidedly different from that here in question. There the decedent was contingently liable, under the law merchant, as an accommodation indorser of a promissory note. Here the deceased had executed a bond, under his seal, by which he admitted himself to be presently indebted to the ordinary, for the use of the infants, in the sum of \$50,000, upon the condition that it should stand in full force and virtue unless the administrator, Watson, performed his duties as such. He failed in such performance in the lifetime of Brinkerhoff, and Brinkerhoff then became indebted to the ordinary in the sum of \$50,000, and died so indebted. Some of the defendants testified that the deceased testator supposed that this matter of the administration of Watson had been entirely settled before his death, and that he was very much pressed with the weight and burden of the large mortgage on his premises, and declared that "something must be done about it." The complainants allege that in that expression he referred to his liability on the Watson bond. If it were necessary to decide the question, I should say that the complainant had the better of the argument; for we find the deceased, three months before he died, making a will based on the notion that he was worth \$35,000 or \$40,000. But I do not think it necessary. That there was a debt due by him to the ordinary at the time of his death is too clear for argument. With regard to notice of that debt: The family were aware that proceedings had been taken against the administrator in the orphans' court of Bergen county. They say that the father told them that the affair had been settled. Admitting all that, still they were aware of the alleged default, and thereby put upon inquiry; and, if the matter of notice to the heirs in general of the existence at all times of this indebtedness were a material element in the decision of this cause, I should feel constrained to charge them with such notice. But, be that as it may, it is too clear for argument that both Brinkerhoff and Alyea had notice of it from the counsel of the Watsons before they had taken any irretrievable step in the cemetery enterprise. As we have seen, notice was given to each of them before the execution of the deed to the cemetery association. They were at once

the promoters of the association, and its sole proprietors and managing officers, so that the corporation, as such, is chargeable with all the knowledge which they had. When the land was conveyed to the cemetery the lien of this debt was resting upon it, within the knowledge of all parties.

I do not perceive that the fact that shares of stock have been issued to the two proprietors changes the situation. The cemetery act nowhere directly authorizes the creation or issuing of certificates of stock in such association. By the tenth section (Revision 1876, p. 102), it is declared that after paying the purchase money, if any, of the lands purchased for a cemetery, the proceeds of the sale of burial lots shall go for the care and improvement of the grounds; and, by the fifth section (page 101), the trustees are to be selected from among the owners of burial plots, and elected wholly by the holders thereof. The existence of stock or stockholders is not contemplated by the act, nor consistent with the legislative scheme. In order to remedy the manifest injustice of giving to the lot owners alone the control of the affairs of a newly-launched cemetery association, still being indebted for the purchase money of its lands, the legislature, by supplement of March 14, 1879 (Supp. Revision, p. 74), provided as follows: "And for the purpose of electing trustees at any meeting after organization of the association, every creditor of such association, in addition to his right to vote by virtue of his owning plats or lots according to section five of this act, shall be entitled to one vote for every four hundred dollars' worth at par value of bonds, stock or other duly authorized evidences of debt he or she may own and hold against such association." By implication, this language recognizes the right of the association to make use of the machinery of certificates of stock to manifest a debt owing by it; but, clearly, it left the holder a mere creditor, and no more. For it is as a creditor, only, that he is authorized to vote for the trustees. It was said at the hearing that a few shares of the stock issued to Brinkerhoff and Alyea had been assigned to some third person. It is improper to decide at this time whether or not such holder, who is not a party to this suit, can, under any circumstances, be held in any sense a bona fide purchaser, in such manner as to be, as to his share, relieved of the lien upon this land. It thus appears that the grantees whose title is impeached are not possessed of any of the elements of bona fide purchasers without notice. In the first place, they had notice of the statutory lien cast upon the lands for the debt of the ancestor; and, in the second place, they paid no consideration.

But it is further urged—First, that moneys have been spent and improvements made on these premises by the purchasers; and, second, evidence is offered to sustain the finding of the jury that they were of no value at the decease of the ancestor, or at the time of

these conveyances, that they had no value over and above the incumbrances, and in fact that they have no value now over and above the incumbrances, except what has been put upon them by the labor and expenditures of Garrabrant R. Alyea. The rule as to improvements was discussed and settled, as I think, in *Fredericks v. Isenman*, 41 N. J. Law, 212. That, indeed, was a case where the lands had been aliened by the heirs in good faith, and the question was upon the amount of the recovery against the heirs. But the principle there adopted applies here. The creditor of the ancestor or devisee is not entitled to the benefit of any positive additions put upon the lands by the heir; and, other things being equal, the heir, in consideration of the rents and profits, must keep down the taxes and incumbrances. The rule thus stated is a just one. It appears in this case that considerable arrears of taxes accrued,—mainly, as I understand the evidence, after the death of the testator,—and some assessments for street improvements were made, but whether before or after the death of the testator I think the proofs do not show. Then there were improvements made upon the cemetery grounds, mainly, as I understand the proofs, on the six-acre lot. Mr. Alyea claims that the association is largely indebted to him for money advanced by which these improvements were made, over and above what he has received in payment. I think he is entitled to those advances, if any. The heirs, or some of them, were in possession of the homestead and lands until the arrangement of 1882 was entered into; and since then, as I understand, they have been in the use and occupation of Mr. Alyea and his wife. However, on these points very little proof was made. The result is that if the defendants claim for taxes, insurance, and repairs, they must account for rents and profits. If they do not claim for those disbursements, then, as at present advised, I think there should be no account taken as to rents and profits, or insurance, taxes, and repairs, of all those lands not included in the grant to the cemetery association. Assessments for benefits caused by public improvements stand on a different footing, and, as at present advised, I think they must be allowed to the tenant. With regard to the lands granted to the cemetery association: The proofs do not show whether or not the funds of the cemetery association were applied to any of the grounds outside of the six-acre lot specially devoted to cemetery purposes, and released from the life insurance company's mortgage. If they were not, and those grounds were used for farming purposes, in connection with the mansion house, then they stand on the same footing as the other with regard to taxes, etc. There should be no difficulty in taking an account of the receipts and disbursements of the cemetery association, in which, of course, they must be charged with the mortgage given to Mrs. Noble, and credited with payments made up to

that time on account of assessments for improvements, and on account of the principal of the insurance company's mortgage. Mr. Alyea claims that he has rendered large services to the cemetery association. There was no proof, however, as to what salary he was to receive or did receive; but he is entitled, of course, to a reasonable compensation for his services. The general increase, if any, in value of the land, irrespective of these improvements, must go to the benefit of the creditors.

I will advise a decree for complainant, with an order of reference to take an account of the matters referred to, the details of which will be settled after further hearing of counsel. In order to enforce this decree, it is not necessary that the title of the cemetery association to a proper and reasonable amount of the land conveyed to it should be disturbed. The evidence is not clear as to how much has been actually devoted to cemetery purposes, or as to how much ought, under the circumstances, to be so devoted. So far as the evidence goes, I should infer that only the six acres covered by the Noble mortgage, and released from the insurance company's mortgage, were so devoted. But, if the parties cannot agree upon that, there may be a reference to a master to determine it. The decree as to the cemetery association will be enforced as follows: Brinkerhoff and Alyea must assign to the complainant all the stock of the cemetery association; a reasonable appraisalment must be made of the value of the lands so devoted to cemetery purposes at the time they were so devoted, and the amount so fixed, with interest, declared to be an indebtedness to the grantors, which will be represented by the certificates of stock so assigned; and such indebtedness, after allowing for the Noble mortgage, and subject to the account to be taken of the receipts and disbursements and general indebtedness of the cemetery association, will be held to be a debt to be paid from the sale of lots, according to the scheme of the statute.

(20 R. I. 790)

CLARKE v. TINKHAM et al., Assessors of Taxes.

(Supreme Court of Rhode Island. April 15, 1893.)

TAXATION—SUFFICIENCY OF TAXPAYER'S ACCOUNT.

1. Under Pub. St. c. 43, §§ 6, 7, requiring a true and exact account of one's ratable estate, describing and specifying the value of every parcel of personal estate, an item of "shares in railroad corporations, 1,186," is insufficient, for failure to specify the names of the corporators, the number of shares in each, and the value of the shares.

2. An item of "goods, chattels, wares, and merchandise, 3,384," is likewise insufficient, for failure to set forth the separate parcels of which the goods, etc., are composed, specifying the value of each.

Petition by George H. Clarke against Ellison Tinkham and others, assessors of taxes

of Richmond, for relief from a tax assessment. Dismissed.

Adoniram J. Cushing, for petitioner. Nathan B. Lewis and Clarence A. Aldrich, for respondents.

PER CURIAM. The account of his ratable estate carried in to the assessors by the petitioner contains an item of "shares in railroad corporations, 1,186," and states in relation thereto, "Diff. between market value and proportionate amt. at which R. E. and machinery was assessed on R. R. stock, 720." It also contains an item of "goods, chattels, wares, and merchandise, 3,384." With reference to the item of shares in railroad corporations, it will be seen that it does not specify the names of the corporations in which the shares are held, nor the number of shares in each, nor the value of the shares. Again, the item of "goods, chattels, wares, and merchandise, 3,384," does not set forth the separate parcels of which the goods, chattels, wares, and merchandise are composed, specifying the value of each. It is evident that such an account is not a compliance with the provisions of Pub. St. R. I. c. 43, §§ 6, 7, which require a true and exact account of all of a person's ratable estate, describing and specifying the value of every parcel of his personal estate. We think, therefore, without considering the other objections to the account urged at the hearing, that the account must be held insufficient, and the motion to dismiss the proceeding granted.

(20 R. I. 789)

BURNS v. NEW YORK, P. & B. R. CO.

(Supreme Court of Rhode Island. May 7, 1892.)

MASTER AND SERVANT—DEFECTIVE APPLIANCES—SUFFICIENCY OF INSPECTION.

In the absence of evidence that it is customary for railroad companies, or that it has ever been considered essential by prudent men engaged in operating trains, to remove spindles from the drawbars, for the purpose of inspecting them, failure to inspect a spindle in that manner is not negligence.

Action by George E. Burns, administrator, against the New York, Providence & Boston Railroad Company, to recover for the killing of plaintiff's intestate. Petition by defendant for new trial. Granted.

George T. Brown, for plaintiff. Walter B. Vincent, for defendant.

PER CURIAM. In this case the testimony does not show whether the deceased was thrown from the train by the breaking of the spindle, or whether he fell from the train, and the sudden strain upon the spindle, occasioned by the passing of the wheels of the train over his body, caused the breaking of the spindle. But assuming that it was the breaking of the spindle which caused the deceased to fall from the train, and which occasioned his death, the testimony fails to show negligence on the part

of the defendant. It is claimed that the defendant was negligent, in that it did not inspect the spindle at stated times by removing it from the drawbar. The testimony of the defendant shows that its freight cars are regularly inspected at each end of the route,—Providence and Worcester,—and that in such inspection the "drawbars and drawrigging" are examined, and that such inspection, so far as it relates to the spindle, is made by the inspector getting under the car and examining such portion of the spindle as is in sight, to wit, the end which projects beyond the drawbar. It is contended on the part of the plaintiff that this inspection was insufficient, because the spindle was not removed from the drawbar, and that the defect which caused it to break was within the drawbar, so that it could not be discovered without removing it from the drawbar. On the other hand, it was contended by the defendant that the only inspection that is, or ever has been, deemed necessary by railroad men, is the inspection made by its employes, since the weakest portion of the spindle is at the slot through which the key is inserted to hold it in its position, and that this portion of the spindle can be, and is, inspected in the manner stated, without removing it from the drawhead; that the breaking of the spindle in question, within the drawbar, was very unusual, if not unprecedented, and was due to a flaw in the iron, which could not have been discovered without breaking the spindle, had it been removed from the drawhead. The plaintiff, in reply, contended that the spindle, instead of having a flaw in it, was cracked, and that the surface of the iron where it was broken was rusted for a considerable distance across the break, and that, if the spindle had been removed from the drawhead, the crack could have been easily perceived. No one saw the spindle until after it had been broken. We are inclined to believe that the contention of the defendant is correct, and that the discoloration spoken of by the plaintiff's witness as rust was simply the discoloration characteristic of a flaw in iron, due to imperfect cohesion. But, however this may be, we do not think the fact material. No testimony was adduced by the plaintiff to show that it is customary for railroad companies, or that it has ever been considered essential by prudent men engaged in the operation of railroad trains, to remove spindles from the drawbars for the purpose of inspecting them; and, in the absence of such testimony, we are of the opinion that it was not negligence for the defendant to omit an inspection of the spindle in question in that manner. Defendant's petition for a new trial granted.

(20 R. I. 238)

COSTELLO v. KEELER.

(Supreme Court of Rhode Island. Dec. 2, 1897.)

CONTRACT OF SALE—INTERPRETATION.

A bill of sale, under which the stock and fixtures of a liquor saloon are conveyed, and also all "right, title, and interest in and to a license

to sell liquor," does not require the seller to pay for a license for which he had made application at the time of the sale, but which had not been granted.

Action by Annie Costello, administratrix, against James Keeler. Plaintiff petitions for a new trial. Granted.

F. P. Owen, for plaintiff. Brennan & Holland, for defendant.

MATTESON, C. J. This is an action to recover money which the plaintiff claims to be entitled to for the stock, fixtures, and furniture of a liquor saloon sold by her to the defendant. The bill of sale of the property contained a clause as follows: "And all my right, title, and interest in and to a license to sell liquor at retail, from the license commissioners of the city of Providence, in said premises." At the time of the sale, on May 11, 1897, application had been made by the plaintiff, in the name of her father, for a license to sell liquor at the saloon for the ensuing year, to date from the first day of that month, but a license had not then been granted. At the trial in the common pleas division the court ruled, subject to the plaintiff's exception, that as the application for the license was made in behalf of the plaintiff, and by her authority, she was bound, under the clause in the bill of sale which we have quoted, to pay for it, and was not entitled to recover from the defendant the \$400 which it cost, and which had been deducted, without her consent, from the purchase money agreed to be paid to her. The clause purports to be merely a sale of the plaintiff's right, title, and interest in and to a license. It does not purport to be an agreement to pay for a license, as held by the common pleas division. We think that the most the defendant could claim under it would be to have the license issued or transferred to him. We think, therefore, that the construction put on the clause by the common pleas division was unwarranted, and that a new trial should be granted. Plaintiff's petition for a new trial granted, and case remitted to the common pleas division for further proceedings.

(20 R. I. 704)

In re STATE HOUSE CONSTRUCTION LOAN.

(Supreme Court of Rhode Island. April 8, 1897.)

STATES—APPROPRIATION FOR STATE HOUSE—AUTHORITY OF COMMISSIONERS.

1. Under the proposition submitted in Pub. Laws, c. 1093, to authorize the general assembly to provide for the issue of state bonds not to exceed \$1,500,000, "so much of said sum as may be necessary to be applied to the purchase of a site for and the erection and completion of a new state house," the fund can be legally utilized in acquiring a site, and erecting thereon such portion of a state house as said fund will pay for.

2. The commissioners created by Pub. Laws, c. 1201, and intrusted with the disposition of a fund for the purchase of a site and the erection of a new state house thereon, are not, in legal intendment, trustees of the fund.

3. Pub. Laws, c. 1201, appropriated \$1,500,000 for a new state house, and authorized the commissioners created by the act to acquire a site, and to erect a state house thereon, "substantially in accordance with the plan accompanying the report" of former commissioners, which required competing architects to submit designs for a building that could be completed at a cost not exceeding \$1,000,000. *Held*, that the commissioners can legally contract for a state house which, with the site, will cost as much more than \$1,500,000 as is necessary to erect a building substantially in accordance with the plan referred to: provided, however, that all contracts made by them in excess of such fund shall stipulate that no money shall be paid thereon whenever and so long as there is no unexpended appropriation applicable to payment of bills audited by the commissioners.

Communication by the governor to the supreme court in the matter of the state house construction loan.

To His Excellency, Charles Warren Lippitt,
Governor of the State of Rhode Island and
Providence Plantations:

We have received from your excellency a communication requesting our opinion upon the following questions: "(1) Can said state house fund legally be utilized to acquire a site for a state house, and to erect thereon a portion, as one-half or three-fourths, of a state house? (2) Are the commissioners created by chapter 1201 of the Public Laws of Rhode Island trustees of said state house fund? (3) If said commissioners are trustees of said state house fund, can they legally contract for a state house on a site which, together with said state house, will cost a sum much greater than said trust fund? (4) If said commissioners are not trustees of said fund, can they legally contract as specified in question 3?"

By the term "state house fund," we understand, is meant the sum authorized to be raised by loan by a vote of the people adopting the proposition for the issue of state bonds, and which proposition contained in Pub. Laws R. I. c. 1003, passed May 19, 1892, reads as follows: "Shall the general assembly be authorized and directed to provide for the issue of state bonds in an amount not to exceed the sum of \$1,500,000, so much of said sum as may be necessary to be applied to the purchase of a site for, and the erection and completion of, a new state house?" The first question calls for a construction of the language used in said proposition only, and for a definition of the limitations and conditions applicable to the use of said state house fund by the general assembly, or by any officers or agents acting under its authority, be they called state house commissioners or otherwise howsoever. The last three questions apply solely to the state house commissioners; and their scope, briefly stated, we apprehend to be as follows: Can the state house commissioners, under their present authority, legally contract for the erection of a state house which, when completed, together with the site, will have cost more than \$1,500,000?

The first question is much broader than the other questions, inasmuch as it applies both to the general assembly (the creator, so to speak) and to the state house commissioners (its creatures). The state house commissioners can only exercise the authority given them by the general assembly which appointed them, and the general assembly can only confer such authority as it is constitutionally authorized to confer. The general assembly is constitutionally competent, through the agency of a commission by it appointed, to build a state house at such cost as it sees fit, provided it does not thereby assume to incur a state debt, without the express consent of the people, to an amount exceeding \$50,000. It could therefore build a state house out of the funds of the state raised by taxation, or however otherwise legally derived; but it could not for that purpose constitutionally incur a state debt to an amount exceeding \$50,000, without the express consent of the people (Const. R. I. art. 4, § 13); and it could be years about it, just as it might be convenient to raise the money and make successive appropriations. The general assembly has seen fit, in building a state house, to resort—in part at least—to a state loan authorized by the express consent of the people; and the amount of the loan so authorized, the object to which the proceeds thereof are to be applied, and such other conditions, if any, imposed upon the authority to borrow on the state's credit, are contained in the proposition hereinbefore referred to and set forth. We have already said, in reply to a former inquiry whether this fund could legally and properly be used to pay the general expenses of the state for a period at the termination of which it would be replaced, that it was "analogous to a trust fund, and cannot be legally applied to any other purpose than that for which it was created, except by the consent of the people by whom it was created." In re State House Fund, Index RH, 210, 219, 33 Atl. 870. What, then, is the meaning of the words, as used in said proposition, "so much of said sum as may be necessary to be applied to the purchase of a site for, and the erection and completion of, a new state house?" In our opinion, they have not such a definite and precise meaning as to operate as words of limitation upon the amount to be expended by the general assembly upon the purchase of a site and the erection thereon of a state house, but are merely indicative of the purpose for which said loan was authorized, and serve as a limitation only upon the use of the fund itself; that is to say, no part of said state house fund shall be used for any other purpose than for the purchase of a site and the erection thereon of a new state house, until, at least, said state house shall have been completed. If said state house fund is not sufficient to finish the new state house, then the general assembly can apply towards its erection such other sums as are legally available for such purpose, derived

either through taxation or authorized loans or otherwise, howsoever, as it may see fit. If the people had intended to impose as a condition upon the use of the proceeds of the state bonds by the general assembly, its officers or agents, that no portion thereof should be applied towards the erection of a state house unless said \$1,500,000 would suffice to entirely finish and complete the same, it is only reasonable to presume they would have used more definite, precise, and unambiguous terms than those employed, to express an intent so easy to be expressed in apt and meet phraseology. Our answer to the first question, therefore, is that, in our opinion, said state house fund can be legally utilized in acquiring a site, and erecting thereon such portion of a new state house as the same may be sufficient to pay for, whether it be one-half or three-fourths or any other proportion.

The question whether the state house commissioners are "trustees," in the legal sense of the word, must be answered in the negative. They are intrusted with the disposition of a fund which is devoted by law to certain purposes which we have said are "analogous" to the purposes of a trust fund; but so are other officials who could not be called trustees. The governor, for instance, has at his disposal a certain fund which he may expend in his discretion for the apprehension of criminals. This does not make him a trustee, and subject his administration of the fund to the supervision of a court of equity. In the case of a real trust, if the trustee is guilty of misconduct, he may be summoned to account, at suit of the beneficiary; and he may be removed, and a successor may be appointed, or the court may direct him how to administer the fund or assume the disposition of it through a receiver or a master in chancery. These commissioners are officials of the state, agents of the general assembly, and accountable to the legislature for their official acts. If public office is a public trust, it is so in a moral sense, not in legal intentment.

As the third question submitted to us is predicated upon an affirmative answer to the second, no further consideration of it is called for.

We now come to the last question. The authority of the state house commissioners, so far as erecting a state house is concerned, is defined in Pub. Laws R. I. c. 1201, of May 24, 1893, which provides, *inter alia*, that certain persons (naming them) shall constitute a board of state house commissioners, who shall perform the duties specified in said chapter; shall hold office for a sufficient time to accomplish the purposes of said act, and serve without compensation; shall at once proceed to select and acquire a site for a new state house in the name of the state of Rhode Island; and shall, in the exact language of section 2 of said act, "erect thereon a new state house, substantially in accordance with the plan

accompanying the report of the state house commission made to the general assembly at its January session, 1892, and recommended by said commission." Section 3 is as follows: "Said board is hereby authorized to make, on behalf of the state, all contracts for the construction of said state house and the furnishing thereof, and for the grading and putting into suitable condition the grounds surrounding the same, provided that all portions of said work exceeding in cost the sum of five hundred dollars shall be done by contract, and that proposals for all work and material exceeding one thousand dollars in value shall be advertised for." Said chapter 1201 also authorized and directed said board to employ a competent architect or architects, and authorized it, if it deemed it advisable, to employ a superintendent, a secretary, and other assistants, and to fix the compensation of all persons so employed; also to hire offices necessary for the proper carrying on of its labors. To meet the expenses incurred under said act, registered bonds to an amount not exceeding \$1,500,000, to be designated the "State House Construction Loan," were authorized to be issued from time to time, at such times and in such installments as the said board shall determine, to the highest bidder, but at not less than the par value thereof; and the amount received from the sale of said bonds, less any premium received over the par value, or so much thereof as might be necessary, was thereby, in the exact language of the act, contained in section 9, "appropriated for the payment of bills audited by said board, or by a committee thereof duly constituted for that purpose." The state house commissioners were likewise required to submit a report annually to the general assembly as to the progress of the work, and what contracts had been entered into by them since the last preceding report.

The state house commissioners must act strictly within their authority. If they were authorized to erect a building, the cost of which, together with the site, was not to exceed \$1,500,000, then their power was limited to the expenditure of the restricted sum (*Turney v. Town of Bridgeport*, 55 Conn. 412, 12 Atl. 520); and they must keep within their authority in all other respects (*Boston Electric Co. v. City of Cambridge*, 163 Mass. 64, 68, 39 N. E. 787, and cases cited). In brief, they were authorized, first, to select and acquire a site in the name of the state of Rhode Island. It will be noted that no limitation was put upon the location, nor the size of the site, nor the price to be paid. Nothing is said in chapter 1201 whether it was to be merely large enough to accommodate the building, as is practically the case in Massachusetts, or whether it was to be a park, as in the case of Connecticut and some other states, or whether it was to be located in the city

of Providence, the city of Newport, or elsewhere within the state. The site having been acquired, they were authorized, secondly, to quote the words of the act, "to erect thereon a new state house substantially in accordance with the plan accompanying the report of the state house commission made to the general assembly at its January session, 1892, and recommended by said commission." It will be observed that the state house commission last above referred to is not the present board of state house commissioners appointed in chapter 1201, though a large majority of the present board were members of the former commission. The duty of the present board, then, was to erect a state house substantially in accordance with said plan; but the report accompanying the plan nowhere fixed a limit of cost of the building, although one of the conditions prescribed for competing architects, contained in said report, stated that the designs submitted should be of a fireproof building, and one that could be completed at a cost not exceeding \$1,000,000, on a good average foundation; and three bids by one contractor for erecting a state house according to the plan recommended by the commission, and referred to in chapter 1201, were given, varying in amount, the highest from the lowest, nearly \$200,000, according to the material used, and two of said bids exceeded \$1,000,000,—one by \$83,000, and the other by \$175,000. The sum appropriated, under said chapter 1201, for the payment of bills audited by said board, amounted to \$1,500,000.

In our opinion, said references to sums of money do not operate as a limitation upon the cost of the building and its site, for we think the amounts named by the former commission, in its report, were but expressions of opinion (*Shea v. Inhabitants of Milford*, 145 Mass. 528, 529, 531, 14 N. E. 764); and the general assembly apparently so regarded them, as in chapter 1201 it appropriated a much larger sum than either of the bids given in said report, although, of course, the cost of a site was problematical, as was also the cost of furnishing the state house after it was constructed, and of grading and putting the state house grounds into suitable condition as provided for in section 3. If a limit to an exact sum was intended, it was a simple matter for the legislature to have added, to the description of or reference to the building to be constructed, the words "not exceeding in cost the sum of \$1,500,000," or any other figure it saw fit, or to have used other apt words to express its intention. Limitations upon the cost of public buildings were not unknown in this state, as the original act for building the Providence county court house provided for a commission, in the language of the act, "for the purpose of building a court house on said lot, at a cost not exceeding \$150,000"; and, by later legislation in regard to the same subject, the court house commissioners were, to

quote again, "empowered to build a new court house upon the lot in said act designated, substantially according to the plans submitted to the general assembly; and said commissioners are hereby empowered to advertise for proposals, and to make contracts for the construction of said new court house, and to superintend the same until completed: provided, however, that said commissioners shall not make contracts for the expenditure of a greater sum than \$200,000, without further authority from the general assembly." Though the court house commissioners were authorized to contract to the amount of \$200,000, yet but \$100,000 was then appropriated for carrying out the purpose of their employment, other appropriations being made later; the total of the appropriations finally authorized and made being \$225,000, the cost of the completed structure being slightly less than said last-mentioned sum. *R. I. Acts & Res. Jan. Sess. 1875*, pp. 169, 312; *Jan. Sess. 1876*, p. 236; *Jan. Sess. 1877*, p. 212. The only limitation as to cost placed upon the present state house commissioners is that the building shall be substantially in accordance with the plan hereinbefore referred to, and that is far from definite. It is evident that very broad authority was given, but that was the concern of the general assembly, as it could constitutionally confer such authority as it saw fit, provided it did not assume to incur a state debt of more than \$50,000 without the express consent of the people. In *Shea v. Inhabitants of Milford*, supra, where a contractor sued the town for work and material furnished in erecting the Memorial Hall, in Milford, the defense being that the committee intrusted with doing the work had exceeded its authority, Mr. Justice William Allen, in delivering the opinion of the supreme court of Massachusetts, used this language: "It is further argued that the committee could not make any contract which involved an expenditure in excess of the whole amount appropriated by the town,—\$22,000. The vote does not expressly prohibit the committee from incurring liabilities beyond the amount of the appropriation, and we do not think that such prohibition can be implied. While it was probably intended to make an appropriation large enough to cover the contract price and such 'extra work' as would be likely to be required, there seems to be no prohibition against contracting for 'extra work' beyond the amount of the appropriation, if circumstances should justify and require it." Should the state house commissioners make contracts for more than \$1,500,000, their action would be void in so far as it involved a violation of the constitutional restriction in regard to incurring debt; and then, too, there is an evident purpose manifested in section 9 of chapter 1201 that, whatever the cost of the state house and site may be, the state shall only be compelled to pay as fast as the general assembly shall see fit to provide funds and appropriate the money.

In reply to the last question we are of the

opinion that the state house commissioners can legally contract for a state house which, together with the site, will cost a sum as much greater than said state house fund as is necessary to enable them to erect a state house substantially in accordance with the plan referred to in said section 2 of chapter 1201, provided, however, that all contracts made by them in excess of said state house fund shall stipulate that no money shall be required to be paid thereon whenever and so long as there shall be no unexpended appropriation applicable to the payment of bills audited by said board of state house commissioners.

Owing to the absence of Mr. Chief Justice MATTESON from the state, we have been unable to confer with him.

JOHN H. STINESS.
 PARDON E. TILLINGHAST.
 GEORGE A. WILBUR.
 HORATIO ROGERS.
 WILLIAM W. DOUGLAS.

(36 Md. 486)

VALENTINE v. MAYOR, ETC., OF HAGERSTOWN et al.

(Court of Appeals of Maryland. Dec. 2, 1897.)
MUNICIPAL CORPORATIONS—OPENING STREETS—WHAT CONSTITUTES.

The new charter of Hagerstown (Acts 1884, c. 58; Code Pub. Loc. Laws, art. 22, §§ 155-221), § 194, extends its limits and provides that the land and improvements thereon situated within former boundaries and the "extended limits," as fixed by section 154, shall not be taxed for municipal purposes "until a street shall be laid out and opened through the same," and that, when a street is so laid out and opened, the land abutting thereon to a distance of 240 feet back from its line shall be so taxed. *Held*, that the mere acceptance of such charter was not an acceptance of streets laid out and dedicated, before such charter was passed, by the owner of land within said "extended limits"; but there must be a formal acceptance by the city of such streets according to law, before they are "laid out and opened," within the meaning of the charter.

Appeal from circuit court, Washington county.

Bill by Sylvester Valentine against the mayor and council of Hagerstown, and Harry K. Startzman, tax collector, for an injunction. From an order dismissing the bill, complainant appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BOYD, PAGE, ROBERTS, BRISCOE, and RUSSUM, JJ.

W. J. Witztenbacker, for appellant. A. C. Strite, for appellees.

RUSSUM, J. This is an appeal from an order of the circuit court for Washington county, in equity, dismissing the bill of complaint of the appellant, praying an injunction against the appellees, to restrain the collection of taxes levied and assessed by the appellees against the appellant. The bill alleges that prior to Act 1884, c. 58 (Code Pub. Loc. Laws, art. 22, §§ 155-221, inclusive), the complainant was the owner of certain land which

by that act became included within the corporate limits of Hagerstown; that the said land is not liable to taxation for municipal purposes, but is exempt until the happening of certain contingencies mentioned in said act of assembly; and that there has not arisen any contingency whereby the said lands have been rendered liable to taxation. The material and uncontroverted facts which we gather from the statement of facts and other papers in the record are these: Sylvester Valentine, the appellant, being the owner of a tract of agricultural land adjoining the town of Hagerstown, caused the same to be platted and laid out as "Valentine's Addition to Hagerstown"; and, on the 13th December, 1882, had said plat recorded among the land records for Washington county. Afterwards, the legislature, by Act 1884, c. 58, repealed all prior legislation creating a municipal government, provided for an entire new system of government, and enlarged the boundaries of the town so as to include "Valentine's Addition." On the 3d day of October, 1889, the appellant and his wife conveyed a portion of this land to Lewis H. Valentine, who on the same day caused it to be platted, and recorded the plat. On the 12th day of April, 1892, the appellant conveyed another parcel of this land to John W. Valentine; and on the 13th of April, 1892, still another portion was conveyed to William J. Valentine. In the deed to Lewis H. Valentine, the appellant reserved to himself and his assignees "an uninterrupted right of way" over a portion thereof, and the parcels conveyed to John W. and William J. Valentine were described as on the west side of a "proposed street." No taxes were ever paid to the municipality of Hagerstown by the appellant, nor were any ever demanded until 1895, when this suit was begun. The property proposed to be taxed is not within 240 feet of Mechanic street, the nearest street that has been accepted by the town, nor within that distance of any turnpike or public road, but is within that distance of Carrollton avenue and Carroll street as laid down on the plat.

The contention of the appellee is that the land known as "Valentine's Addition," having been laid out by the appellant into building lots, thereby ceased to be exempt as agricultural land, and became liable to taxation for municipal purposes; in other words, that the land laid out and platted by the appellant having been brought within the town limits by the new charter, the acceptance of the new charter by the town operated as an acceptance of the so-called "streets," as laid out and dedicated by the appellant to the public use, as public highways. This contention assumes that the new charter does not fix any right or duty upon the mayor and council touching the laying out and opening of streets, or impose any restriction on the taxing power of the municipality, and is clearly erroneous. Assuming, but not deciding, that the making and filing of the plat by the an-

pellant, on which certain streets were laid down, operated as a dedication, to be used as such when required by the public exigencies, it is manifest that the legislature never intended that the mere acceptance of the new charter should impose on the municipality the duty of improving or keeping in repair every thoroughfare that some individual may have laid out through his lands, or else the specific directions for laying out and opening streets and highways, within the new as well as the old limits, never would have been incorporated in the charter. The dedication may, as urged by the appellee, be complete; but to make them public streets, within the meaning of the charter, there must be an acceptance of the dedication according to law. 2 Code Pub. Loc. Laws, art. 22, § 183 et seq.; Kennedy v. Mayor, etc., 65 Md. 520, 9 Atl. 234; 2 Dill. Mun. Corp. § 636; Supervisors v. Banks, 44 Mich. 467, 7 N. W. 49; Abbott v. Cottage City, 143 Mass. 521, 10 N. E. 325. That this is the true construction of the charter as to what is meant by the word "street" is plainly established by section 194 of the charter, which provides that "the real estate and improvements thereon, situated within the former boundaries of the town, and the extended limits, as fixed by section 154, shall not be assessed and taxed for municipal purposes until a street shall be laid out and opened through the same; but, when a street shall be laid out and opened through said real estate, the land abutting on said street and improvements thereon to a distance of two hundred and forty feet back from the line of said street shall be assessed and taxed for municipal purposes." This language shows that the purpose of the legislature was to leave to the authorities of the town the discretion as to what streets shall be "laid out and opened" within the limits of the town; otherwise, the provision that, "when a street shall be laid out and opened through said real estate, the land abutting on said street, and improvements thereon," should be "assessed and taxed for municipal purposes," is meaningless. The evident purpose of the legislature was to limit the power of taxation for municipal purposes to a distance of 240 feet "back from the line" of such streets, as the corporate authorities saw fit to lay out and open, and was a recognition of the principle that property owners, in consideration of being taxed, should enjoy the benefits of the improvements made with the municipal taxes. While it may be true that Carrollton avenue and Carroll street have been, since the alleged dedication, used as streets by the owners of property on the map, and may have been generally considered streets of the town, yet there has never been any formal acceptance of either of them by the authorities of the town; and until that has been done, according to law, they have not been "laid out and opened," within the meaning of the charter; and, as the property of the appellant sought to be taxed is not within 240 feet of any street

"laid out and opened" by the municipal authorities, the contingency which renders it liable to be assessed and taxed for municipal purposes has not arisen. 2 Code Pub. Loc. Laws, art. 22, § 194; Kennedy v. Mayor, etc., 65 Md. 523, 9 Atl. 234; Beasley v. Belvidere (N. J. Sup.) 85 Atl. 797. The order of the court below dismissing the appellant's bill of complaint will therefore be reversed, and the cause remanded for further proceedings in accordance with this opinion. Order reversed and cause remanded.

(86 Md. 434)

TEXTOR v. SHIPLEY.

(Court of Appeals of Maryland. Dec. 1, 1897.)

TAXATION—TAX TITLES—LEVY—SUFFICIENCY OF EVIDENCE—DESCRIPTION—ADVERTISEMENT—NOTICE.

1. The title of one who purchases a lot from a city, which acquired title by tax sale, is based on the tax sale.

2. Prima facie, an indorsement upon a levy required in making an execution sale for taxes reciting that the levy was made, is sufficient to show that there was a seizure by entry.

3. A description in a levy and return, required in making a sale for taxes, being all that lot of ground on the northeast corner of two certain streets in a certain city, improved by a two-story brick dwelling and by a two-story brick stable, is sufficient.

4. Baltimore Local Code 1879, art. 49, § 5, requiring that property to be sold for taxes shall be advertised for sale once a week for four successive weeks, is substantially complied with where the sale took place on the day fixed by the notice, which was the next day after the expiration of the notice.

5. Under Baltimore City Code 1879, art. 49, § 4, requiring the collector of taxes to serve tax bills upon a person in arrears, and a notice that, if the bills are not paid, payment will be enforced by execution, the bills and notice are sufficient if the collector's name is printed on the bills.

6. A lessee under a lease for 99 years is the proper person upon whom service of such bills and notice should be made prior to selling the land under execution for taxes.

Appeal from superior court of Baltimore city.

Action by Anton Textor against Charles Shipley. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Frederick C. Cook, for appellant. Thomas G. Hayes, for appellee.

FOWLER, J. This is an action of ejectment. The property in controversy is situated in Baltimore city, on the northeast corner of Grindell street and Riverside avenue. The case was tried before the superior court of Baltimore city, without a jury. The learned judge ruled that, under the pleadings and evidence, the plaintiff failed to show in himself any title or right of possession to the property in question. There was a verdict and judgment thereon for the defendant, Charles Shipley. The plaintiff has appealed.

A number of questions were discussed at the hearing, but all of them—all that we think necessary to consider—are involved in the main question of the validity vel non of the proceedings in the circuit court of Baltimore, which resulted in the sale of the property mentioned, for the unpaid taxes of 1885 and 1886. The city became the purchaser at the tax sale, and subsequently sold and conveyed it to the defendant, Shipley, who is now the appellee. The title of the defendant is founded upon and derived from the tax sale (*Burroughs*, Taxn. 346; *Hussman v. Durham*, 165 U. S. 147, 17 Sup. Ct. 253; *Hefner v. Insurance Co.*, 123 U. S. 751, 8 Sup. Ct. 337); for, although he did not purchase at the tax sale, his grantor, the city, did. In *Hefner v. Insurance Co.*, supra, it is said: "If the tax deed is valid, then, from the time of its delivery, it clothes the purchaser, not merely with the title of the person who had been assessed for the taxes, and had neglected to pay them, but with a new and complete title in the land, under an independent grant from the sovereign authority, which bars or extinguishes all prior titles and incumbrances of private persons, and all equities arising out of them." This being so, the controlling question in this case is as to the regularity and validity of the proceedings which resulted in the tax sale at which the grantor of the plaintiff purchased.

During the course of the trial, there was but one exception taken, and that was to the ruling upon the prayers, which resulted in the granting of the defendant's prayer, and the rejection of the four prayers of the plaintiff. By the defendant's prayer it was declared, as we have already seen, that the plaintiff had not shown any title or right of possession. All the rejected prayers are based upon the theory of the invalidity of the tax sale. The first and fourth ask the court to declare that the plaintiff had shown a good and sufficient title and right of possession, and that, therefore, he was entitled to recover. But, as we have seen, the sufficiency of the plaintiff's title prior to the tax sale is immaterial if the tax sale be valid, and whether this sale be valid or not we will briefly inquire.

The grounds of attack, on the tax sale proceedings, as set forth in the second prayer of the plaintiff, are that no levy was made upon the property, and, in the third, that "the tax-sale proceedings show that the city collector failed to leave with the person by whom were to be paid the taxes, * * * or at his usual place of abode, a statement showing the amount of taxes due, * * * with a notice annexed thereto that, unless said taxes so due were paid within thirty days thereafter, the said city collector would proceed to collect the same by distress or execution, as provided by law." These, together with the objection that the proceedings show that more land was sold than was necessary, constitute the case of the appellant.

First, then, in regard to the sufficiency of the levy: It has been often held in this state that, when tax sales are under consideration, it is only necessary that it shall appear that there has been substantial compliance with the law in all the proceedings of which the sale is the culmination, and that the order of ratification is only *prima facie*, and not conclusive, evidence of the validity of the sale. *Guisebert v. Etchison*, 51 Md. 478; *Steuart v. Meyer*, 54 Md. 454; *Cooper v. Holmes*, 71 Md. 20, 17 Atl. 711; *Richardson v. Simpson*, 82 Md. 159, 33 Atl. 457. It was said in *Cooper v. Holmes* "that no presumption can be invoked against the regularity of the tax proceedings." We are of opinion that the levy in this case was sufficient. It appears by the return of the collector and bailiff that all the right, title, and estate of the owner were seized and taken by virtue of the laws prescribing the manner of collecting taxes in arrear. We are not to assume that these officers failed to perform their duty. If the plaintiff had any affirmative proof to show that, in point of fact, no actual entry was made, and that, therefore, no legal seizure or taking was possible, it was his duty to produce it. In the case of *Duvall v. Perkins*, 77 Md. 587, 28 Atl. 1085, relied on by the plaintiff, it affirmatively appeared that there had been no entry. There was no such evidence in this case. On the contrary, there is indorsed upon the levy the following: "Levy made in presence of J. J. Rock, this 18th May, 1887, by Charles M. Hope, bailiff." The word "levy" itself implies seizure in the ordinary way by entry. *Byer v. Etnyre*, 2 Gill, 152; *Webst. Int. Dict.*

But, in the next place, it was contended that the description of the lot as set forth in the levy or return is faulty, and not sufficient. We think, however, it is ample. It could not well have been made more definite, unless it had been described by metes and bounds, which is not necessary. The description is "all that lot of ground situate in the city of Baltimore, being on the northeast corner of Riverside avenue and Grindell street, improved by a two-story brick dwelling and a two-story brick stable." The plat filed shows this is an exact location of the premises. Nothing more is required. Land taken in execution need not be described by metes and bounds. The description in the levy is needed for location and identification of the property, and not for exact description. In other words, it need not be described with technical accuracy (*Berry v. Griffith*, 2 Har. & G. 337; *Dorsey v. Dorsey*, 28 Md. 388; *Duvall v. Perkins*, 77 Md. 586, 28 Atl. 1085; *Keely v. Sanders*, 99 U. S. 441), provided a description is given by which the property may be readily located.

Again, it was contended that the tax sale was not advertised according to the provisions of the Local Code of Baltimore City of 1879 (article 49, § 5), which provides that the property to be sold for taxes in arrear shall be advertised for sale once a week for

four successive weeks in two daily newspapers published in Baltimore. The sale was made on the 21th December, the day named in the notice, and it was published, according to the above section of the Local Code, four successive weeks before the sale, namely, on the 25th November, the 2d, 9th, and 16th of December. The objection that the sale should have been had on the 23d, instead of the 24th, December, and that, therefore, the whole proceeding is irregular and void, is sufficiently answered by the fact that the sale took place on the day fixed by the notice, and that that day was, if not the day immediately following the expiration of the notice, the next day thereafter. This, in our opinion, was sufficient to constitute a substantial compliance with the provisions of the Local Code relative to giving notice of the sale. We see no objection to the description of the lot as set forth in the advertisement.

It is further objected that there was a failure to give the preliminary notice prescribed by section 4, of article 49 of the Baltimore City Code of 1879, which provides that there shall be no distress for arrearages of taxes until the collector shall first give to the person so in arrears, or has left at his or their residence or last-known residence, or, if neither can be found, on the premises, a statement of the indebtedness, and not less than 30 days' notice of intention, if bill is not paid in that time, that payment will be enforced by distraint or execution. The tax proceedings show that the statements of indebtedness (commonly called "tax bills") were delivered to the wife of the owner or person assessed at his residence, No. 10 Riverside avenue. At the foot of these bills there was the following notice printed: "If this bill is not paid within 30 days from delivery, payment thereof will be enforced by distraint or execution." It is urged that this notice is fatally defective, because the name of the collector does not appear under it. But this objection might be urged with equal force against the statement or tax bill. It has never been supposed that a tax bill must be authenticated by the signature of any one, any more than any other bill or statement of indebtedness. It sufficiently appears that the taxes are due to the city and state, and the name of the collector upon whom the law has placed the duty of collecting them is printed on the tax bills. We are of opinion that the statement and notice, taken together, show what they are, and that the law in this respect has been complied with. When a delinquent taxpayer receives such a tax bill and notice, it is impossible to suppose that there can be any doubt in his mind as to the amount of taxes he owes, and that, if he does not pay in 30 days, the collector will proceed by way of distraint or execution. It is said, however, that this notice should have been given to or left at the residence of the plaintiff, who owes the fee. In answer to this

objection, it is sufficient to say that the notice was properly given to the owner of the leasehold interest under a lease for 99 years, he being the person who, under our tax laws, is assessed and considered as the owner. Mayor, etc., of Baltimore v. Canton Co., 63 Md. 218. The rule laid down in Dyer v. Boswell, 39 Md. 471, Margraff v. Cunningham, 57 Md. 585, and other cases, to the effect that, where a part of the land taxed is sufficient to pay the taxes in arrear, the collector can sell only such part, has no application to a small city lot having a frontage of only 20 feet and a depth of 120 feet, improved by a dwelling, stable, and sheds. Judgment affirmed.

(36 Md. 413)

GOLDSBOROUGH v. GOLDSBOROUGH et al.

(Court of Appeals of Maryland. Dec. 1, 1897.)

CONTRACTS—INTERPRETATION—TENANCY IN COMMON.

An agreement was made between six owners of land that they should own it as tenants in common, and that it should not be disposed of during the life of any one of them. Subsequently a supplemental agreement was entered into by all but one of said owners, providing that on the death of any one of the six his share should become the property of the survivors, until the last survivor, who should be owner of the whole, with power to dispose of it. By agreement of all parties interested, the property was sold when only two of the original parties and certain heirs of a third were living; one of them being the one who did not sign the supplemental agreement. Held, that the party who had signed the supplemental agreement was not entitled to five-sixths of the proceeds by virtue of that agreement, since he was not the last surviving heir, and, furthermore, it did not contemplate a sale except by the last survivor, nor under the earlier agreement, because it did not contemplate a sale; and hence the proceeds of the sale were ordered to be distributed, one-third to each of the two survivors, and the other third to said heirs.

Appeal from circuit court, Talbot county.

Bill by George R. Goldsborough against Charles Goldsborough and others. From an order ratifying an auditor's report, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, BOYD, ROBERTS, and FOWLER, JJ.

J. Frank Bateman, for appellant. Wm. R. Martin and Alonzo L. Miles, for appellees.

FOWLER, J. On the 1st of December, 1866, an agreement was made between William, Mary C., Eliza, John, George R., and Sallie E. Goldsborough, who were then the only heirs of the late Robert H. Goldsborough, of Talbot county, Md. All of the parties just mentioned were children of Robert H., except Sallie E., who is his niece. The only part of this agreement with which we are now concerned is contained in the last paragraph: "Lastly. It is hereby stipulated, agreed, and understood, and the parties hereto expressly stipulate and

agree, that the old homestead and family mansion, Myrtle Grove, shall be kept up and maintained as a joint and common home for all the said parties hereto at all times in the future, as in the past, and all parties hereto are entitled at all times to the privileges and enjoyments of said home at Myrtle Grove; and furthermore it is expressly stipulated, agreed, and understood by all the parties hereto that none of said parties shall have any exclusive or separate right of property in Myrtle Grove, except as a homestead, during the natural life of any one of the said parties (this being understood to mean that no one shall call for a division of the farm called Myrtle Grove, as hereinafter laid down, so long as it may be occupied or desired to be occupied as a home by any one of the parties to this agreement); and it is also further stipulated and agreed that said homestead and home aforesaid at Myrtle Grove shall embrace and comprise the following lands and premises," which are described by metes and bounds. It is further stipulated that Myrtle Grove, the family homestead, as thus described, "shall be and remain the common property, as tenants in common, and not as joint tenants, of said contracting parties, and subject to their future ownership and control, after the decease of all and every party hereto, as before recited, and not before." For a number of years the family homestead was used for the purpose to which it was dedicated by the foregoing agreement. But in the year 1883 another agreement was made, which upon its face shows that it was supplemental or in addition to that part of the former agreement which we have quoted. It was signed by all who joined in the first agreement, except Sallie E. Goldsborough (now Mrs. Martin), and provides as follows: "It is further understood between us, the heirs of the Myrtle Grove homestead, that it is our desire that each individual share of the old homestead, after the death of any of the brothers and sisters, shall become the property of the surviving brothers and sisters, and so on until the last heir, who, as owner of the whole, shall dispose of the old homestead as he or she may desire." With the exception of the attestation clause, this is the whole agreement. It was executed on the 3d of July, 1883. The only surviving heirs are George R. Goldsborough, the plaintiff, Mrs. Martin (formerly Sallie E. Goldsborough), and the two children and four grandchildren of William Goldsborough. The plaintiff alleges in his bill that he and Mrs. Martin are the only surviving parties to the agreement of 1866, and that neither of them has for a long time resided at Myrtle Grove, that it cannot be divided without loss or injury to the parties interested, and that a sale thereof ought to be made, and the proceeds divided between him and Mrs. Martin according to their respective rights; he claiming five-sixths, under the agreement of July, 1883, and conceding to her one-sixth, under the agreement of 1866, thus ignoring altogether the rights of the other parties defendant, namely, the children and grandchil-

dren of his brother William. The defendants have all consented to a sale, but they deny that the plaintiff is entitled to five-sixths of the proceeds of sale, and contend that they must be divided between the parties as though the contract or paper of July 3, 1883, had not been executed; that is to say, one third to the plaintiff, one third to Mrs. Martin, and the remaining third to be divided among the children and grandchildren of William.

It is evident that the distribution sought by the plaintiff would be contrary to the agreements, as well as to every rule recognized by the statute. For, if the agreement of 1883 is to control, it is apparent that his contention must fail, because, whatever else was intended by the parties who signed that agreement, it is clear that, according to the language used therein, it was their desire that each individual share of the old homestead, after the death of any of them, should become the property of the survivors, and so on until the last heir, who, as owner of the whole, should dispose of the old homestead as he or she may desire. And the same conclusion must follow if the agreement of 1866 is to be effective, for it is equally clear that under its provisions Myrtle Grove was to be the common property of all, without the power, however, of any one or more to demand a sale or partition without the consent of the others, so long as Myrtle Grove should be occupied as a home by any of the parties to the agreement. And there is also a special reservation by which the parties declare, in words not to be misunderstood, that the homestead shall remain the common property, as tenants in common, of all,—subject, of course, to its use as provided in the agreement. How the plaintiff can, under this agreement, claim five-sixths of the proceeds of sale, as he does under his exceptions to the auditor's second account; it is difficult to see. And so it is also equally difficult to maintain the proposition involved in his exception if the contract of 1883 is to govern; for by this contract it is certain, whatever else may be uncertain about it, that it is the expressed desire, and therefore the intention, of the contracting parties, that the last surviving heir should become the sole owner of the old homestead, with power to dispose of the same as he or she might desire. Therefore, even if we were disposed to give the contract of 1883 full force, the plaintiff's contention gets no more support from it than from the contract of 1866. But the simple answer to the whole contention of the plaintiff is that (without stopping to discuss the nature of the paper executed in July, 1883, and whether it be a contract or will), "to allow it to be made to confer upon a person who is not the last heir a right that was intended to be conferred by the signers of that paper upon one who should prove to be the last heir would be to defeat entirely the object and purpose of those who signed it." In addition to this, it seems to

us that another suggestion made by the defendants is conclusive. Assuming the contract of 1883 to be valid, it is clear that it has relation only to Myrtle Grove as a homestead, and it never contemplated a distribution of the proceeds of sale among the parties interested. Its object was to prevent a sale, except by the last heir, and he or she was to be the absolute owner of the whole, and therefore the owner, also, of the proceeds of sale. But all the parties having any interest in the homestead have agreed to sell it, and it has been sold. The subject-matter of the agreement, the family home, no longer exists; and there is no reason, founded either upon the intention of the parties, or the principles of equity and fairness, which require us to apply to the proceeds of sale agreements which were doubtless inspired by a love of the old family home, and a desire to make it the home of "the last heir." The distribution of the fund will therefore be made as though the contract or paper of July 3, 1883, had never been executed; and the order appealed from, having finally ratified the auditor's second account, which made a distribution according to the views here expressed, will be affirmed. Order affirmed with costs.

(86 Md. 418)

HUGHES v. DROVERS' & MECHANICS' NAT. BANK OF BALTIMORE.

(Court of Appeals of Maryland. Dec. 1, 1897.)

WILLS—CONSTRUCTION—POWERS OF LEGATEE—SALES BY TRUSTEE—APPLICATION OF PURCHASE MONEY—CORPORATIONS—TRANSFERS OF STOCK—LIABILITY.

1. A will bequeathed bank stock in the following terms: "All of which is to be transferred to her in her own name, to use the interest thereof as long as she may live, and at her death to be equally divided among her children, unless she becomes a widow. Then she is to have full control of this bequest, to do with it as she pleases." *Held* to confer upon the legatee all the rights incident to ownership, so far as the power of disposition is concerned.

2. A purchaser from a trustee is not bound to look to the application of the purchase money, where the trustee has power to sell and reinvest.

3. Where it is the duty of a corporation to protect its stockholders from unauthorized transfers of stock, it must require satisfactory evidence of authority to transfer; and when it has notice of want of authority, or is put upon inquiry, and fails to investigate, it becomes liable, by allowing an unauthorized transfer to be made.

4. But, where power to transfer appears, it is not bound to inquire whether the transferor is attempting a fraud.

Appeal from circuit court of Baltimore city.

Action by Peyton M. Hughes, trustee, against the Drovers' & Mechanics' National Bank of Baltimore, to require delivery of shares of stock. From a decree for defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Henry C. Kennard, for appellant. Jas. McColgan, for appellee.

PAGE, J. The object of this proceeding is to require the appellee corporation to deliver up to the appellant trustee the certificate of 20 shares of its stock or a new certificate for that number of shares, or the equivalent of them in money. There are but few facts in the case, and they are undisputed. John Carnes, of Baltimore city, deceased, by the second clause of his will devised and bequeathed to his married daughter, Margaret Pawley, "house No. 128 N. Eden street. I also give her twenty shares of the Nat. Drovers' and Mechanics' Bank, par value one hundred dollars each; I also give her one ground rent on the N. E. corner of Monument and Durham Sts.; and I also give her whatever may be due me from two shares of the East Balto. Permanent Land Co. and Building Society. All of which is to be transferred to her in her own name, to use the interest thereof as long as she may live, and at her death to be equally divided among her children, unless she becomes a widow. Then she is to have full control of this bequest, to do with it as she pleases. I also give her the amount, as shown on my book, due me by her husband, Finley Pawley." On the 15th of May, 1884, the orphans' court of Baltimore city "ordered and directed that the said executrices have transferred to the legatees under the will, viz.: Margaret Pawley, 20 shares of the National Drovers' and Mechanics' Bank of Baltimore; Andrew J. Carnes, five shares of the Consolidated Gas Company." Thereupon the stock of the National Drovers' & Mechanics' Bank (being the stock now in question) was transferred to Margaret Pawley, who, later on, sold it to various persons, and used the proceeds thereof for the support of herself and her family. It is not contended that the bank had other knowledge of the condition of Mrs. Pawley's ownership than that which appeared from its own records. None of the stock was purchased by the bank, or on its account; and it had nothing to do with the transactions by which the title passed from Mrs. Pawley, except to permit the transfers to the purchasers to be made on its books. Upon these facts, it is contended by the appellant that Mrs. Pawley had only a life estate in the stock, and it was the duty of the bank to see that no transfer should be made by her that did not protect the interest of the persons entitled to the fund after her death; and this notwithstanding the order of the orphans' court. This conclusion, it is argued, ensues from the fact that, by reason of the transfer of the executrices of the will of John Carnes, the bank had notice of, or was bound to know the contents of, that instrument, and such knowledge, as was said in Ehlens' Case, 72 Md. 218, 19 Atl. 651, "continued all the way down." Passing by, however, the effect of the order of the orphans'

court, and assuming, for the sake of the argument, that under all the circumstances of the case the bank must be charged with full notice of the will and its contents, let us inquire what were the rights of Mrs. Pawley in and concerning the stock. It was insisted by the appellee that "no trust whatever was created" by the second paragraph thereof; that the words, "to use the interest thereof as long as she may live, and at her death to be equally divided among her children, unless she become a widow. Then she is to have full control of this bequest, to do with it as she pleases,"—when taken in connection with the direction to "transfer to her in her own name," ought to be regarded as words of recommendation only, and insufficient to raise a trust. However that may be, it is clear that some force must be given to the words, "all of which is to be transferred to her in her own name." It should be noted that in the first paragraph the testator employs the same words in reference to the gift of real and personal property to his other daughter, on whom he unquestionably intended to bestow all the property therein named, without any limitation whatever. When he uses the same words in the second paragraph, we are not at liberty to suppose he used them without intending that they should have some significance. If he merely intended to convey a life estate to his daughter, with remainder to her children, the grant would have been as effectual without them as with them. By requiring that the full title should stand "in her own name," he did not intend that she should have the full power of disposing of it,—at least, for the purpose of a change of investment. He knew when the stock was transferred to her that she would receive a certificate, under the seal of the corporation, to the effect that she was entitled to 20 shares of stock, which would be transferred on the books of the corporation when she surrendered the certificate. *Bank v. Lanier*, 11 Wall. 309; *Kortright v. Bank*, 20 Wend. 94. It cannot be supposed that, when the testator directed that she should hold the stock in her own name, he intended to deny to her what was the consequence of such holding (that is, the power of transferring it); and granting her this power was equivalent to granting her the right to do so. The direction, therefore, that the stock should be transferred to her in her own name, would seem to confer upon her all the rights incident to full ownership,—so far, at least, as the power of disposition was concerned. It indicated that the testator reposed in her an especial confidence, and trusted to her prudence and discretion for the care and protection of the property. If he intended to raise a trust, he also intended to commit it to her hands, with plenary power to sell it whenever, in the exercise of her judgment, a change in the investment became necessary.

This, then, is the case of a person holding stock in her own name, with full power to

transfer it. Under such circumstances, it is immaterial to inquire as to what notice the bank had, or ought to have had, or what authority the orphans' court had to pass the order of the 15th May, 1884. It was undoubtedly within the express terms of the will that the stock was transferred to Mrs. Pawley. Though there might be a trust for the benefit of the children, yet, if she has power to transfer it, the bank had no power to prevent it, and no obligation to see to the application of the purchase money. Not even a purchaser from the trustee is bound to look to the application of the purchase money in a case where the trustee has power to sell and reinvest. *Van Bokkelen v. Tinges*, 58 Md. 57. Nor can a corporation, whose duty to its stockholders is to protect persons interested "from unauthorized transfers" (*Lowry's Case*, Taney, 310-317, Fed. Cas. No. 8,581), be bound to examine whether the transferor, with power to transfer, is not attempting a fraud. Corporations are the custodians of the evidence of title to their stock, and for that reason are held to the exercise of reasonable care and diligence in its preservation. They are bound to require, and are entitled to, the production of satisfactory evidence of the authority of the person who proposes to make the transfer. But when they have notice of the want of authority, or, being put upon inquiry, fail to make the proper investigations, they become responsible for allowing an unauthorized transfer to be made. *Peck v. Bank*, 16 R. I. 710, 19 Atl. 309; *Bayard v. Bank*, 52 Pa. St. 235; *Crocker v. Railroad Co.*, 137 Mass. 417; *Marbury v. Ehlen*, 72 Md. 216, 19 Atl. 648; *Grafflin v. Robb*, 84 Md. 453, 35 Atl. 971; *Stewart v. Insurance Co.*, 53 Md. 575; *Abell v. Brown*, 55 Md. 222. It may be proper to add that if the will created a trust, and the bank knew, or had reasonable ground for believing, that Mrs. Pawley intended to misapply the money, or, by the very act of transferring, was applying it, in violation of the terms of the trust, there would then arise a question that the facts of this case do not now present. The decree must be affirmed. Decree affirmed.

(36 Md. 479)

ANDERSON v. STATE.

(Court of Appeals of Maryland. Dec. 2, 1897.)

FORMER JEOPARDY.

The plea of former jeopardy is not available where there has been no verdict rendered by the jury in the former trial.

Appeal from criminal court of Baltimore city.

Caleb Anderson was convicted of violating the lottery law, and appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, PAGE, BRISCOE, and BOYD, JJ.

Thomas C. Ruddell, for appellant. Atty. Gen. Clabaugh and Henry Duffy, for the State.

BRISCOE, J. On the 12th of April, 1897, the appellant, Caleb Anderson, was indicted and tried in the criminal court of Baltimore city for violating the lottery law of the state. Upon this trial the jury was not able to agree, and was discharged. Afterwards, on the 9th of June, he was again put upon trial on the same indictment. He filed the following plea: "That the state of Maryland ought not further to prosecute the indictment against him, the said Caleb Anderson, because he saith that at the January term of the criminal court of Baltimore city, to wit, on the 12th day of April, 1897, this court ordered him to be put upon his trial on the indictment now pending against him. Thereupon a jury was duly sworn to try the issues between the state of Maryland and the defendant, and after said jury heard the testimony in the said cause they retired in charge of a bailiff sworn to attend them. That, after the jury had retired to consider their verdict, the court ordered and directed the clerk to discharge the jury from the further consideration of the case if they were not able to agree by 5 o'clock p. m. Thereupon the court adjourned until the next morning at 10 a. m. That Hance W. B. Reed, the deputy clerk, so instructed as aforesaid by the court, at the time ordered by the court, went to the jury room, and inquired if they had agreed upon a verdict, to which they replied that they had not, and said Reed then asked them if it was possible for them to agree upon a verdict, to which they replied it was not. Whereupon the said Hance W. B. Reed discharged the said jury from the further consideration of this case." The state demurred to this plea, and the demurrer was ruled good. The traverser was then tried upon the plea of not guilty, and, being convicted on the fourth and fifth counts of the indictment, has appealed from the judgment entered against him.

The principal question, then, for us to determine, is whether the discharge of the jury upon its failure to agree, in this case, constitutes a legal bar to a future trial. The law is well settled in this state, since the case of *Hoffman v. State*, 20 Md. 432, that the discharge of a jury is a matter of discretion for the court, and that when, in the exercise of a sound discretion, it takes place, it presents no impediment to a second trial. In the case of *Simmons v. U. S.*, 142 U. S. 149, 12 Sup. Ct. 171, Mr. Justice Gray, speaking for the supreme court upon this question, says that the general rule of law upon the power of the court to discharge the jury in a criminal case before verdict was laid down by this court more than 60 years ago, in a case presenting the question whether a man charged with a capital crime was entitled to be discharged because the jury, being unable to agree, had been discharged, without his consent, from giving any verdict upon the indictment. The court, speaking by Mr. Justice Story, said: "We are of opinion that the facts constitute no legal bar to a future trial. The

prisoner has not been convicted or acquitted, and may again be put upon his defense. We think that, in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject, and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes, and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner. But, after all, they have the right to order the discharge, and the security which the public have for the faithful, sound, and conscientious exercise of this discretion rests in this, as in other cases, upon the responsibility of the judges, under their oaths of office." *U. S. v. Perez*, 9 Wheat. 579. And to the like effect are the most recent cases of *Logan v. U. S.*, 144 U. S. 263, 12 Sup. Ct. 617; *Thompson v. U. S.*, 155 U. S. 274, 15 Sup. Ct. 73. And the English authorities are to the same effect. *Winsor v. Reg.*, L. R. 1 Q. B. 289, 6 Best & S. 143, and 7 Best & S. 490. But, even if it be conceded that the question raised by the plea of former jeopardy was reviewable by this court, it would not avail the traverser here, because there was no verdict by the jury, and no man is in jeopardy until verdict has been rendered. The error of which the traverser complains, if error at all, only resulted in a mistrial of the case. *Hoffman v. State*, 20 Md. 434; *Kearney v. State*, 48 Md. 27. The judgment must therefore be affirmed. Judgment affirmed, with costs.

(35 Md. 240)

WALSH v. JENVEY.

(Court of Appeals of Maryland. March 31, 1897.)

APPEAL—REVERSIBLE ERROR.

In an action for work and materials, the court correctly charged that if the work was done under a special contract, as alleged, though not as skillfully as agreed, and defendant accepted the work, plaintiff was entitled to recover such sum as the work and materials were worth. The verdict for plaintiff exceeded the rate of compensation fixed by the special contract. *Held*, that the judgment should not be reversed because the court did not charge that the amount recovered could not exceed the compensation fixed by the contract, where the verdict was for an amount not in excess of the balance due, as fixed by the prices named in the contract, and the interest thereon, since the jury had a right to allow interest. *Per Boyd, J.*, dissenting.

Dissenting opinion. For report of majority opinion, see 38 Atl. 817.

BOYD, J. I noted my dissent in this case because I was satisfied the appellant had not

been injured by the rulings of the court below, although I agree with the other judges who sat in all other respects. The difference between the balance due on the principal, according to the contract prices, and the amount of the verdict, is easily accounted for if the interest is calculated. The jury had the right to allow interest, and as the verdict was for an amount not in excess of the balance due, as fixed by the prices named in the contract, and the interest thereon, the appellant was not injured, and therefore, in my opinion, was not entitled to a reversal of the judgment.

(86 Md. 392)

TEXTOR v. ORR.

(Court of Appeals of Maryland. Dec. 1, 1897.)

ASSIGNMENT FOR CREDITORS—PRIORITY OF LIENS
—PLEDGE—CHATTEL MORTGAGE—CONSIDERATION.

1. A debtor agreed with a creditor that certain personal property should be given to the creditor as security for the payment of four notes, and, on failure to pay the notes, the property should become that of the creditor. The debtor remained in possession of the property, failed to pay the notes as agreed, and made an assignment for the benefit of his creditors. *Held*, that the creditor was entitled to have the agreement enforced in equity as against the debtor or those claiming under him, without equity superior to that of the creditor, and as against debtor's assignee, or unsecured creditors who became such prior to the execution of the agreement, but not as against subsequent creditors who contracted with debtor without notice of said lien.

2. A pledge cannot be created as security for a debt without a transfer of the thing pledged to pledgee or his agent.

3. Under Code, art. 21, § 40, a chattel mortgage or a bill of sale is not effective as against third parties, unless acknowledged and recorded, where the mortgagor or seller remained in possession.

4. A promise to execute a chattel mortgage, or a defectively executed or unrecorded mortgage, creates an equitable lien on the property, which will be enforced by a court of equity against the mortgagor.

5. A pre-existing debt is a sufficient consideration for an unrecorded mortgage to bind the parties thereto.

Appeal from circuit court, Baltimore county.

Bill by Anton Textor against Waltman L. Orr, trustee, for D. R. McCauley, insolvent. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, PAGE, ROBERTS, BOYD, and RUSSUM, JJ.

John I. Yellott and O. I. Yellott, for appellant. J. F. C. Talbott and Albert S. J. Owens, for appellee.

BRISCOE, J. In April, 1896, Daniel R. McCauley, who was then carrying on the business of barrel making, was indebted to the appellant, Textor, for materials purchased, in the sum of \$1,256.34. In order to secure this indebtedness, and to obtain further credit from Textor, the following agreement was entered into between the parties: "This agreement, made this second day of April,

1896, in Ellicott City, Baltimore county, state of Maryland, between D. R. McCauley, of said city, in Baltimore county, of the first part, and Anton Textor, of the city of Baltimore, also in state of Maryland, of the second part, witnesseth: That the said D. R. McCauley, of the first part, hereby gives the hoops which are now stored in the old stone foundry now owned by the C. A. Gambrill Mfg. Co. (said foundry is in Ellicott City, in Baltimore Co., Maryland) as security for the payment of four notes, which are all dated April 2nd, 1896, drawn by John W. McCauley, favor D. A. McCauley, say, running for 40, 60, 90 days, and four months, amounts \$300.00, \$300.00, \$300.00, and \$356.43; total, 1,256 ⁴³/₁₀₀. That said Anton Textor hereby agrees to release his claim against said hoops upon the payment of the last aforesaid note, amount 356 ⁴³/₁₀₀. That the storage of said lot of hoops is to be paid by the said McCauley. That said McCauley claims that there are about three hundred thousand hoops in the old stone foundry. That said lot of hoops to be the property of said Anton Textor in the event of any of said notes not being paid at their maturity. Witness our hands and seals, this second day of April, 1896. D. R. McCauley. [Seal.] Anton Textor. [Seal.] Witness: Geo. A. Nicholas." The hoops mentioned in this contract were stored at the time of its execution in a building under the control of McCauley, and remained in his possession, without any delivery, actual or constructive, to the appellant, until December 9, 1896, when McCauley, in his own right and as surviving partner of the firm of D. R. McCauley & Co., executed a general assignment of all his property for the benefit of creditors, to the appellee, W. L. Orr. This assignee took possession of the hoops referred to (then amounting to about 280,000), and the appellant filed a petition in the court below, which had assumed jurisdiction over the administration of the trust, asking that the agreement be enforced as creating a first lien in his favor on these hoops taken into possession by the trustee.

It is clear, we think, that the contract above set forth did not constitute a pledge of the hoops as security for the debt, because transfer of possession of the thing pledged to the pledgee or to a third party for his benefit is essential to the creation of a pledge. *Casey v. Cavaroc*, 96 U. S. 490; *Moors v. Reading*, 167 Mass. 322, 45 N. E. 760. In the case now before us the hoops remained in the possession and under the control of McCauley. Nor can the agreement be effective as a bill of sale or chattel mortgage, as against third parties, because it is not acknowledged and recorded as required by the Code in all cases when the seller or mortgagor of chattels remains in possession. Code, art. 21, § 40. It is obvious, however, that the intention of the parties in this case was that the hoops described in the contract should be held by McCauley in trust as security for pay-

ment of his indebtedness to the appellant. The evidence shows that the appellant received verbal assurances from McCauley and his agent that they would not deal with or dispose of any of the hoops without his consent. The purpose of the parties was therefore, in effect, to mortgage the property, and the way they adopted to effectuate their purpose, while invalid and insufficient in some respects, was a binding contract between them. The law is well settled in this state that a promise to execute a mortgage of certain property, or a defectively executed or unrecorded mortgage, creates an equitable lien upon the property, binding the conscience of the mortgagor, and enforceable by a court of equity against him. *Dyson v. Simmons*, 48 Md. 207; *Carson v. Phelps*, 40 Md. 73; *Triebert v. Burgess*, 11 Md. 452. An unrecorded mortgage, under our statute, is good between the parties thereto, and a pre-existing indebtedness is a sufficient consideration. Code, art. 21, § 47; *Woods v. Fulton*, 4 Har. & J. 329; *Alexander v. Ghiselin*, 5 Gill, 138.

While an equitable mortgage or lien, such as the one before us in this case, is not valid and enforceable against a bona fide purchaser or mortgagee for value without notice (*Insurance Co. v. Ross*, 2 Md. Ch. 25; *Nelson v. Bank*, 27 Md. 51), yet it is enforceable not only against the mortgagor himself, but also against parties who claim under him as volunteers, or without an equity superior to that of the creditor holding the lien. An assignee for the benefit of creditors is such a party. He is not a bona fide purchaser for value. He stands in the shoes of the assignor, and can assert no claim to the property which the assignor could not. *Luckemeyer v. Seltz*, 61 Md. 315; *Tyler v. Abergh*, 65 Md. 18, 3 Atl. 904. We are therefore of the opinion that the equitable lien in this case is enforceable, under the authorities here cited, against the assignee, and against creditors of the assignor who were such at the time the agreement was made. The assignee in this case so far represents subsequent creditors as to be entitled to contest, for their benefit, claims against the estate made to their prejudice. *Association v. Willson*, 41 Md. 506; *Mackintosh v. Corner*, 33 Md. 598. We fully concur in the views expressed by the learned court below when it says: "That, in distribution of the proceeds of the sale of said hoops, the claims secured by said agreement are entitled to priority over unsecured creditors existing at the time of the execution thereof, but, with respect to general creditors whose debts were contracted after the date of said agreement without notice thereof, are entitled to come in pari passu with the claims mentioned therein." *Pannell v. Bank*, 7 Har. & J. 202; *Association v. Willson*, 41 Md. 506; *Stanhope v. Dodge*, 52 Md. 483; *Hoffman v. Gosnell*, 75 Md. 590, 24 Atl. 28. The case of *Brown v. Deford & Co.*, 83 Md. 297, 34 Atl. 788, is relied on by the appellant to show that the

lien of this equitable mortgage is enforceable against subsequent as well as pre-existing creditors. It will be seen in that case the property upon which the equitable lien was held to exist was purchased with the money of the creditor, and also that the lien was not enforced against subsequent creditors. *Deford & Co.* advanced the money to their debtor with which to purchase the property, and it was expressly agreed that the hides so purchased were to be and remain the property of *Deford & Co.* We said in that case that the validity of the contract could not be sustained if in prejudice of subsequent creditors or purchasers in good faith without notice. This case is clearly distinguishable from *Deford's Case*, and there is nothing in that case to support the contention made here by the appellant. Finding no error in the decree appealed from, it will be affirmed, with costs. Decree affirmed, with costs.

(36 Md. 463)

APPLEGARTH et al. v. WAGNER et al.

(Court of Appeals of Maryland. Dec. 1, 1897.)

FRAUDULENT CONVEYANCES—BILL TO SET ASIDE—WHO MAY MAINTAIN—SUFFICIENCY OF EVIDENCE.

1. In an action, by a trustee in insolvency of a firm, to set aside a deed, by a member of the firm to his sister, executed the day before the firm executed a trust deed for creditors, the defense was that four years before the deed was made the grantee let the grantor have \$1,000, and took his single bill, signed by a brother as surety. It seemed that the grantee understood that the grantor's interest in the property, which was worth only \$1,000, was, in some way, to secure her; and the testimony of herself and the grantor was to the effect that it was to be conveyed to her by absolute deed, as was done. *Held*, that the deed was void, as against the grantor's creditors.

2. Under Code, art. 47, § 24, providing that any deed or lien given by certain persons when insolvent, or in contemplation of insolvency, shall be prima facie intended to defraud the grantor's creditors, a deed to the grantor's sister, to pay or secure a pre-existing debt, made the day before he made an assignment for his creditors, is void as to such creditors.

3. A trustee in insolvency may maintain a bill to vacate a deed as in fraud of the grantor's creditors.

Appeal from circuit court of Baltimore city.

Bill by Rufus W. Applegarth, permanent trustee of Most & Wells, insolvents, against Matilda D. Wagner and William E. Wagner, to set aside a deed. Pending the action, Robert L. Preston was appointed a co-trustee, and made a party plaintiff. From a decree dismissing the bill, plaintiffs appeal. Reversed.

Argued before McSHERRY, C. J., and BRYAN, FOWLER, BRISCOE, ROBERTS, and BOYD, JJ.

R. W. Applegarth and Robt. Lud. Preston, for appellants. Julian I. Alexander, for appellees.

BOYD, J. The bill was filed in this case to have a deed executed February 8, 1893, by

William H. Wells, to Matilda B. Wagner, his sister, declared null and void. The day after the execution of the deed, Wells and his partner, James L. Most, trading as Most & Wells, made a deed of trust to Rufus W. Applegarth for the benefit of their creditors; and on the 6th day of March, 1893, a petition was filed by certain creditors of that firm, alleging that they had committed acts of insolvency within 60 days preceding the filing of the petition, contrary to the insolvent laws of the state. Among other grounds relied on, it was charged that William H. Wells had fraudulently assigned the property involved in this case to Mrs. Wagner, with the intention of hindering, delaying, and fraudulently preventing the creditors from attaching or otherwise seizing it for their just debts; and she was enjoined from selling, disposing of, or in any way interfering with it, pending the determination of the application. Most & Wells were subsequently adjudicated insolvents, but the record does not show upon what specific grounds, beyond what may be inferred from the allegations in the petition. Mr. Applegarth was made permanent trustee, and filed the bill in this case on March 12, 1894. Afterwards Mr. Preston, the other appellant, was appointed a co-trustee, and made a party plaintiff. The bill having been dismissed, this appeal was taken.

The defense relied on in the answer is that on January 1, 1889, Wells gave Mrs. Wagner a single bill for \$1,000, due by him to her, payable three years after date, with interest payable quarterly, executed by him and Richard C. Wells, as surety, "and which debt he had, in addition to giving said note, promised to secure to her upon his interest in said property, by a deed of assignment thereof, and said money was loaned by her to him upon the express agreement at the time of said loan that she should be so secured by such conveyance or assignment of his interest in said property to her, but he inadvertently omitted to execute such a deed until the one above mentioned was executed." The answer also alleges that \$1,000 was the full value of Wells' interest in the property. The single bill described in the answer was offered in evidence, and the only witnesses examined were the three parties to it. William H. Wells was called by the appellants, and examined as to the execution of the two deeds, and his knowledge of his insolvency when the deed was made to Mrs. Wagner. Upon cross-examination the single bill was produced, and he was examined with reference to the loan. The important part of his testimony is embraced in the following questions and answers: "Question. Please state the circumstances under which you gave this document [the single bill] to Mrs. Wagner. Answer. I gave this to Mrs. Wagner when I borrowed the money from her, so as to secure the money. Q. Did you make any other agreement with Mrs. Wagner at the time you gave her

the note? A. Yes, sir; I told her she could have my interest in the houses,—promised to make it good to her. Q. Was the property to be conveyed to her? A. Yes, sir; I think that was the understanding at the time. Q. At the time she lent the money? A. Yes, sir." Being asked why they made a joint note, instead of having his brother Richard indorse it, he said: "I don't know why, except we went on the note together. Thought two of us on the face of the note, it would be all right." Mrs. Wagner testified that her brother agreed at the time of the loan to give her his share in the houses that the family owned,—his one-sixth,—that being the property which was conveyed by this deed. On cross-examination she testified as follows: "Question. When were you to have this interest? Answer. Well, no time was stated; but that was to secure me, and I just felt that I was to get it. Q. Do you mean to say that you then and there purchased his interest with the \$1,000 that you gave him? A. Well, I considered that that was mine. I felt secure. Q. Why did you not have it conveyed to you, if you thought it was yours? A. The thought never occurred to me to do so. Q. At no time? A. Well, I would occasionally think it had better be done, and I guess it was just negligence." Richard C. Wells was asked to state the circumstances under which he became a party to the note, and said: "I owed my brother William H. Wells, at that time, \$1,000; and I paid it back to him, and forgot to have my name taken off this note. The reason I did not indorse the note, I wanted to save protest charges in case it was not paid at maturity." His evidence also showed that the undivided sixth interest conveyed by the deed was not worth more than \$1,000. Just what did occur between these parties when the loan was made is by no means clear. Mrs. Wagner seems to have understood that her brother's interest in the property was in some way to secure her, and the testimony of herself and William H. Wells is to the effect that it was to be conveyed to her by absolute deed, as was afterwards done. But the single bill, and the conduct of the parties with reference to it, are in irreconcilable conflict with that theory. It was payable three years after date, and the interest was payable, and actually paid, quarterly. If the \$1,000 had been intended as purchase money for the property, a note, with personal security, payable three years after date, would not have been given by the vendor, and all the witnesses speak of the transaction as a "loan."

In the case of *Nicholson v. Schmucker*, 81 Md. 464, 32 Atl. 182, this court sustained the deed involved in that case, because the evidence showed that property had actually been paid for at the time of the purchase. The deed was not delivered immediately, but it was during the next month, and that delay was satisfactorily accounted for. The evidence satisfied the court that the transaction was bona fide, and such as the act of 1890

(chapter 364) expressly saves from the effect and operation of the insolvent laws, and there was nothing to justify a court of equity in setting aside the deed. But this case differs widely from that. The conduct of the parties being wholly at variance with the theory that there was a contract of sale of the interest of Mr. Wells, it only remains to determine whether there was such an agreement to secure the loan by a mortgage on the property as can now be enforced against the appellants. It is true that a trustee in insolvency takes the property subject to all valid liens against it, but his control over it, and his right to recover it, is not wholly limited to what the insolvent himself might do. As between the insolvent and the other contracting party, the former might be estopped from denying or resisting the enforcement of a contract; but the trustee is the representative of all the creditors, is chosen by or for them, and hence his powers and rights are not entirely measured by those of the insolvent. If Mrs. Wagner and Mr. Wells were the only parties concerned in this controversy, the court could hold him to a stricter accountability than it can hold the appellants. We cannot assume that he has no other separate creditors who are interested in his property. Two others were returned by him in the insolvent proceedings, and in the distribution of the insolvent estates the partnership creditors may become interested in disputing some of the claims against him personally. In *Cole v. Cole*, 41 Md. 301, the proceeding was against the party who had agreed to execute the mortgage, and his wife, to whom the property had been conveyed, with notice of the agreement. This court held that relief could be granted under the circumstances of that case, the agreement having been clearly established. It was upon the principle that equity regarded that as done which ought to have been done. Although the facts in that case established a clear case of attempted fraud, the decision approached dangerously near the line drawn by the statute of frauds, and was only sustained because there had been a performance on one side, and the refusal to perform on the other side amounted to fraud. But the case of *Nelson v. Bank*, 27 Md. 51, is more applicable to the one before us. It is said on page 70 that: "The rule that equity regards as done that which was agreed to be done, it is admitted, will authorize an agreement to execute a mortgage to be treated in equity as a mortgage, provided it can be done consistently with the rights and equities of others, and in a reasonable time after the alleged promise was made. But a court of equity will not enforce a specific performance of a contract for a mortgage on real estate unless the contract is plain, explicit, and in writing; for, where there is doubt created in the mind of the court, no relief will be granted." In passing, it may be observed that in the case

of *Six v. Shaner*, 26 Md. 415, it was said, "It was conceded, and cannot be denied, that a mere parol agreement to execute a mortgage of real estate cannot be enforced in equity, because of the statute of frauds;" but what is afterwards intimated in that case, and in 41 Md., supra, must be deemed sufficient to justify the concession, without stopping to discuss it, that there are exceptions to the general rule requiring such agreements to be in writing. But the general principles so well stated in 27 Md., supra, apply with great force to this case. The alleged agreement to execute a mortgage, or some other instrument, to secure this debt, remained unexecuted for over four years, and no attempt, or even request, was made to have it done; but, the day before the debtor made a deed of trust for the nominal benefit of his creditors, he executed this absolute deed. It can scarcely be said that was "in a reasonable time after the alleged promise was made." Nor can we see how it could then "be done consistently with the rights and equities of others." If it had been clearly and explicitly established that an agreement had been made between these parties in January, 1889, to secure this debt on the property, it would be putting the powers of a court of equity, broad as they are, to a severe test, to enforce a secret lien in favor of one thus negligent and indifferent to her own rights, as against those who have, or may have, suffered from such delay. The statutes of this state with reference to the execution and recording of mortgages may well give place to laws of more practical use, if they can be thus so easily evaded. The court, after discussing our registry laws, well said, in *Nelson v. Bank*, 27 Md. 74: "Courts of justice will not permit these laws, made for the prevention of fraud and the protection of purchasers and creditors, to be avoided by the substitution of a parol promise, or a written communication, that the party in possession of the property, and the ostensible owner of it, will at some indefinite period of time execute a mortgage on it. To sanction such an evasion of the law would be highly injurious to the public interest, in derogation of the rights of creditors, and well calculated to destroy confidence among commercial men." Whatever, then, the original agreement was between the parties, we cannot recognize it as a subsisting, equitable lien, existing before the execution of the deed, but must declare it void and nugatory, as against the creditors of William H. Wells, and the appellants, who represent them. If Mrs. Wagner were in court, asking a decree for specific performance, her suit would fail, because the proof does not show with sufficient clearness and accuracy what the contract was, and, as against third parties, because she permitted an unreasonable time to elapse before seeking relief, and it could not be granted her consistently with the rights and

equities of others. Where the insolvent laws of this state are applicable, these principles apply with even greater force. Section 24 of article 47 of the Code, in force when the deed was made, declared that any deed, conveyance, etc., made, or lien created, by any person, belonging to any of the classes mentioned in section 14 (which included Mr. Wells), when insolvent or in contemplation of insolvency, "shall be prima facie intended to hinder, delay and defraud the creditors of the person by whom the same is made, and the burden of proof shall rest upon him and the grantee to explain the same and show the bona fides thereof," provided the creditors avail themselves of the provisions of that article of the Code. All preferences, save such as are expressly excepted, are prohibited by that article, and declared to be void. The execution of the deed, under our view of the case, was an attempt to secure a pre-existing debt, and was such a preference as is prohibited by the statute, and is therefore void. As was held in *Manning v. Carruthers*, 83 Md. 1, 34 Atl. 254, the appellants are authorized to maintain a bill in equity to vacate the deed. The decree dismissing the bill must be reversed, and a decree passed granting the relief prayed for. Decree reversed and cause remanded, with costs to the appellants.

(86 Md. 432)

EMRICH v. UNION STOCK-YARD CO. OF BALTIMORE COUNTY.

(Court of Appeals of Maryland. Dec. 2, 1897.)

LANDLORD AND TENANT—LEASES—RECORD—EVIDENCE—TERMINATION OF TENANCY.

1. When evidence is offered generally, it is error to reject it, if it is admissible for any purpose under the pleadings.

2. Though an unrecorded lease was invalid as to third persons, yet, where the circumstances connected with it were such that the law implied a tenancy, the lease is admissible in evidence to show the terms of such tenancy.

3. Where defendant, with the assent of the lessor, purchased the rights of the lessee under an unrecorded lease, took possession, and continued for a time to pay the rent reserved by the lease, the law implied a tenancy independently of the written lease, which defendant could terminate only by giving proper notice.

Appeal from superior court of Baltimore city.

Action by the Union Stock-Yard Company of Baltimore County against Clayton M. Emrich for rent. From a judgment against defendant, he appeals. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Francis E. Pegram, Francis P. Curtis, and Thomas E. Brady, for appellant. John K. Cowen, El. J. D. Cross, and H. B. Preston, for appellee.

FOWLER, J. It appears that one Hafer was the owner of a mill in Baltimore city,

and that on the 23d of October, 1885, he made a lease thereof in writing to Messrs. Miester & Romoser for a term of 10 years, at an annual rent of \$400 for the first 5 years, and \$600 per annum for the remainder of the tenancy, payable quarterly. This lease, however, was not recorded, but a copy of it is before us in the record. The tenants named continued to occupy the premises and to pay the rent stipulated to the 1st of August, 1891. Mr. Rogers, as agent for the landlord, Hafer, assented at the time just named to the transfer of the lease by Miester & Romoser to the defendant, Emrich, as tenant, and he paid the rent reserved in the lease up to and including the payment which fell due May 1, 1893. Prior to this last payment of rent to Mr. Rogers, the property had been sold and conveyed to the plaintiff, the Union Stock-Yard Company, subject, of course, to the lease, and he paid to it its proportion of such rent. The plaintiff further proved by one of the tenants named in the lease, Charles J. Miester, that both the machinery and the lease were sold and assigned to the defendant. He testified that the defendant wanted the lease as well as the machinery. There can therefore be no question that there was, as matter of fact, a lease of some kind sold and transferred to the defendant, and that he took possession under it and paid the rent up to a certain time. And there is quite as little doubt what was the nature and import of the lease.

During the course of the trial two exceptions were taken to the rulings of the learned judge below,—one to the admissibility in evidence of the lease, and the other to the ruling upon the prayers. The unrecorded lease was offered generally, and, if admissible for any purpose under the pleadings, it would have been error to reject it. *Byers v. Horner*, 47 Md. 23. It was conceded that the failure to record the lease made it invalid as a lease as to third parties, but still it was admissible in evidence for the purpose of showing the terms of the tenancy implied by law, in the absence of a valid written lease. In the case of *Kinsey v. Minnick*, 43 Md. 112, it was said: "We have already said that the written lease of September 22, 1869, was invalid for the reason stated [failure of the husband to sign his wife's lease]; but Shipley and Kinsey having taken possession under it, and occupied the premises as tenants liable for a monthly rent, * * * the law in such case implies a verbal agreement of similar import as to terms to that expressed in the writing." The case just referred to shows with equal clearness that when the first tenants went out, and the defendant took their place, under the facts of this case, he went in as tenant and is liable as such. The language used is as follows: "When Shipley [one of the tenants] removed from the premises, and Haslup went into the occupancy, with Kinsey [the other tenant], and the plaintiff recognized the appellants Kinsey and Has-

lup as her tenants, by accepting rent from them, those facts were evidence of a surrender of his tenancy by Shipley, and the acceptance by the plaintiff of Haslup as tenant in his place, as was decided in *Lamar v. McNamee*, 10 Gill & J. 116." But, in addition to this, there is direct evidence in the record of an assignment of the lease, whatever may have been the nature of the holding, with the assent of the landlord's agent, Mr. Rogers. No argument is necessary, therefore, under the authority of *Kinsey v. Minnick*, to establish, not only that the lease was properly admitted in evidence to show the terms of the holding, but that, in the absence of any notice of any kind given by the tenant to the landlord to terminate the tenancy, the jury were properly instructed, under all the facts in the case, to find for the plaintiff. While the law regulating the rights of landlord and tenant has been shorn by modern legislation of some of the harsh technicalities and strictness impressed upon it by the ancient common law, it has not yet been so emasculated as to allow a tenant to escape the payment of rent merely because he chooses to abandon the property without giving the landlord any notice whatever. Judgment affirmed.

(70 Conn. 99)

ANDERSON et al. v. TOWN OF NEW CANAAN.

(Supreme Court of Errors of Connecticut. Nov. 30, 1897.)

APPEAL—ASSIGNMENTS OF ERROR—REVIEW OF EVIDENCE—HIGHWAYS—EXISTENCE.

1. An assignment of error, "that upon the evidence in the case the roads described in the complaint are not public highways, and that the superior court erred in not so holding," is bad, in failing to specify and describe any error of law.

2. Whether the evidence justified the trial court in its findings of fact will not be reviewed unless the record purports to contain all the evidence.

3. Whether a road is a public highway may be determined in a proceeding to compel a town to repair it.

Appeal from superior court, Fairfield county; Ralph Wheeler, Judge.

Complaint by Susan Anderson and others to compel the town of New Canaan to repair certain alleged highways. An order of the county commissioners requiring the defendant to repair was appealed from, and facts were found and judgment was rendered for plaintiffs. Defendant appeals for alleged errors in the rulings of the court. No error.

The complaint, signed and sworn to by Susan Anderson and 20 other citizens of this state, and indorsed and approved by the state's attorney of Fairfield county, alleged that the defendant town neglected to keep in good and sufficient repair, and the selectmen failed to remove encroachments of trees and bushes from, two public roads or highways (describing them) in said town of New Ca-

naan. County commissioners, after a hearing had, having ordered repairs to be made and encroachments to be removed from one of said highways, so that it should be suitable and safe for public travel, and having found that the convenience of the complainants and of the public did not demand so great an outlay as would be required for the proper repair and removal of encroachments, from the other, the defendant appealed to the superior court, under section 2677 of the General Statutes, alleging in said appeal that the defendant was aggrieved by the decision of the county commissioners, in that they found that the highways described in the complaint were public highways; that one of said roads had not been kept in sufficient repair, nor the encroachments removed therefrom; and the county commissioners had not sufficiently designated said roads, nor the character or extent of the repairs to be made. Upon the appeal the superior court found the following facts: "No record evidence of the lay out of any of the highways was produced. Complainants offered a number of ancient deeds of lands, in which the lands were described as bounded by those highways, evidence of use, and of repair by the town of new Canaan of portions of the ways. The court took a view of the ways. The ways have been used from time immemorial as public highways, have been repaired from time to time in certain places by the defendant town, and are ancient highways. Though not so much or so generally used as formerly, they are still much used for heavy teaming, in the moving of timber. The Cheese Spring road, southerly from the Anderson House, is now only occasionally used for any other purpose than the one mentioned, while the road running from Groupe's corner easterly to the Wilton line is used considerably for light carriage driving. The condition of all of the roads has been for years such as to discourage their use. They are much out of repair, and travel over them with carriages or vehicles of any kind is difficult and dangerous. There are deep ruts and gullies, rocks and stones project from the surface, and, in places, bushes and branches of trees overhang, and interfere with the passage of carriages. The Cheese Spring road, from the Anderson House southerly, and the road running easterly from the corner near the Anderson House to the Wilton line, as now used, are generally only of the width of an ordinary cart path. In view of the present use of the highways in question, the court finds that it will be sufficient to put them in a reasonably safe condition in the manner and to the extent ordered. The town of New Canaan has neglected and still neglects to keep said highways in good and sufficient repair, and said highways ought to be repaired. Public convenience and necessity require their repair to the extent ordered." Upon the foregoing facts, counsel for the defendant claimed, as a matter of law, that the roads described in the complaint are not public highways.

and that this is not a proper action in which to determine the question. The superior court also certified up certain evidence taken upon the trial in said court. Upon said facts the superior court, in its order, found said highways described in the complaint to be public highways in the town of New Canaan, and ordered certain described repairs to be made, and certain described encroachments to be removed from certain described portions of both said highways. The first error assigned in the defendant's appeal to this court is as follows: "The court erred in overruling the defendant's claim of law, viz. that upon the evidence in the case the ways described in the complaint are not public highways, and that this is not a proper action in which to determine the question as to whether the roads described in the complaint are public highways." The remaining reasons of appeal relate to alleged errors of the court in finding or refusing to find particular facts.

John H. Light, for appellant. Joseph A. Gray, for appellees.

HALL, J. By the first reason of appeal, we are asked to decide: First, "that upon the evidence in the case the roads described in the complaint are not public highways," and that the superior court erred in not so holding; and, second, that this is not a proper action in which to determine whether the roads described in the complaint are public highways, and that the trial court should have so held. The first part of this reason of appeal presents no question which can be reviewed by this court. It wholly fails to specifically and distinctly describe any error of law committed by the trial court. Apparently, from the record, the principal question upon the trial, and the one upon which the case turned, was whether these roads were highways. This assignment of error is equivalent to a statement that upon the evidence the judgment should have been in favor of the defendant. *Osborne v. Troup*, 60 Conn. 490, 23 Atl. 157; *Kimberly's Appeal*, 68 Conn. 428, 36 Atl. 847; *Rules of Practice*, c. 14, § 4. If it can be regarded as a sufficient assignment of either an error of fact or of law, it cannot be considered by this court, for the reason that we have not before us all the evidence upon which the superior court decided that these roads were highways. Exhibit A does not purport to be a statement of all the evidence. The record shows that the presiding judge made a personal inspection of the locus. This assignment of error is but an attempt to procure a new trial by retrying in this court the questions of fact which have been tried and decided by the superior court. This court cannot for that purpose retry such questions. *Styles v. Tyler*, 64 Conn. 432, 30 Atl. 165; *Atwater v. News Co.*, 67 Conn. 505, 34 Atl. 865; *Neilson v. Railway Co.*, 67 Conn. 496, 34 Atl. 820; *Scott v. Spiegel*, 67 Conn. 349, 35 Atl. 262. For the purpose of correcting the record, it is unne-

cessary to refer to those reasons of appeal which are based upon the finding by the court, and its refusal to find particular facts. The proper presentation of the only question of law raised by the appeal, namely, whether the county commissioners and the superior court might in this proceeding decide whether these roads were highways, will not be aided by such correction of the finding. That question is apparent upon the record as it now stands. *Hatch v. Thompson*, 67 Conn. 74, 34 Atl. 770. The purpose of this proceeding was not to establish or fix the bounds of highways, but to compel towns to repair existing public ways. If, upon the trial, for the purpose of escaping the duty of repairing a particular road, the town attempts to show that such road is not a highway, as was evidently done in the present case, it becomes the duty of the triors to hear the evidence offered, and to decide that question, as incidental to the decision of the main question, of the duty of the town to make the desired repairs. By making the claim that the way in question is not a public one, the town cannot defeat the purpose of the statute under which this proceeding was commenced, by compelling the complainants, before obtaining from the county commissioners an order for the repair of the roads, to first, by proceedings under another statute, procure them to be laid out and established as lawful highways. There is no error. In this opinion the other judges concurred.

(20 R. I. 311)

WEST et al. v. DARCY.

(Supreme Court of Rhode Island. Dec. 9, 1897.)

PLEADING—SET-OFF—AFFIDAVIT OF DEFENSE.

1. The copy of a promissory note filed with the declaration in assumpsit thereon need not be an exact copy, if sufficiently accurate to identify the claim, and not to mislead the defendant.

2. Failure to file an affidavit of defense in assumpsit on a note, as provided by Gen. Laws, c. 239, § 14, precludes the defendant from making defense to the claim, but does not preclude him from establishing a set-off, and obtaining judgment thereon.

Assumpsit by Margaret West and others, as administrators, against Edward H. Darcy. There was a judgment for plaintiffs, and defendant petitions for a new trial on exceptions. Granted.

A. B. Patton and T. F. West, for plaintiffs. J. W. Hogan, for defendant.

MATTESON, C. J. This is an action of assumpsit on a promissory note, begun in the district court of the Sixth judicial district, and certified to the common pleas division on the defendant's claim for a jury trial. A copy of the note was filed with the writ and declaration, as provided by Gen. Laws R. I. c. 239, § 14. No affidavit of defense was made, but the defendant filed a plea of the general issue, and a claim in set-off, in accordance with chapter 239, §§ 10-12, Id.

When the case was called for trial in the common pleas division, the court, on the plaintiffs' motion, entered a decision for the plaintiffs as by default, for want of an affidavit of defense. The defendant objected to the entry of the decision because the copy of the note filed by the plaintiffs was not a literal and exact copy; but the court ruled that it need not be a literal and exact copy, and that a copy which was substantially correct was a sufficient compliance with the statute. To this ruling the defendant duly excepted. The defendant then insisted that he was entitled to proceed in the trial of his claim in set-off, notwithstanding his omission to file an affidavit of defense as against the note; but the court ruled to the contrary, and to this ruling the defendant also excepted. The case is before us on the defendant's petition for a new trial, based on these exceptions.

We think that the common pleas division was correct in its first ruling, but erred in its second. The purpose of the copy is to notify the defendant of the particular claim in suit, so that he may determine whether he has a defense or not, and make or omit to make his affidavit accordingly. If it is sufficiently accurate to identify the claim, and not to mislead the defendant, its purpose is fulfilled. To insist on an exact copy would be to require a facsimile or reproduction of the original,—a degree of strictness which would render the provision of the statute well-nigh impracticable, and consequently inoperative. We think that the affidavit of defense referred to in section 14 relates only to the claim of the plaintiff on which the suit is based, and that, if it is not made, the only effect is to preclude the defendant from making a defense to the claim. The failure to file the affidavit is a conclusive admission, for the purposes of the suit, of the validity of the plaintiffs' claim. But the defendant is nevertheless entitled to have his claim in set-off adjudicated in that suit, and, if he prevails, to have it deducted from the plaintiffs' claim, or, if it exceeds the plaintiffs' claim, to a judgment for the excess. New trial granted, and case remitted to the common pleas division for further proceedings.

(20 R. I. 309)

BIRTWELL v. HOSMER.

(Supreme Court of Rhode Island. Dec. 7, 1897.)

MECHANICS' LIENS—COMMENCEMENT OF LEGAL PROCESS.

The mere filing of an account with notice of an intention to claim a lien is not a commencement of legal process to enforce a mechanic's lien, within Gen. Laws, c. 206, §§ 7, 9, which require a statement that the lodging of the account or demand is for the purpose of commencing legal process to enforce the lien.

Petition by Archibald Birtwell against Frederick H. Hosmer to enforce a mechanic's lien. Dismissed.

Frank S. Arnold, for complainant. Nathan W. Littlefield, for respondent.

PER CURIAM. The petitioner has failed to show a compliance with the statute, since the mere filing of an account, with notice of an intention to claim a lien, is not a commencement of legal process to enforce the lien, within the meaning of the statute as construed in *Tingley v. White*, 17 R. I. 533, 23 Atl. 100, and *Goff v. Hosmer*, 20 R. I. pt. 1, p. 93, 37 Atl. 533, which requires a statement that the lodging of the account or demand is for the purpose of commencing legal process to enforce the lien. As suggested by counsel for the respondent, the commencement of legal process ought not to be left to implication. The petition must therefore be dismissed.

(20 R. I. 299)

HOLMES et al. v. WASHINGTON REAL-ESTATE CO.

(Supreme Court of Rhode Island. Dec. 2, 1897.)

EVIDENCE—JOCULAR STATEMENTS.

On an issue whether a party had performed his work with diligence, statements of his workmen are not admissible as *res gestæ*, where it is evident that they were spoken jocularly, and were so understood by the witness.

Action by D. Holmes & Co. against the Washington Real-Estate Company. Judgment for plaintiff, and defendant's motion for a new trial was overruled, and he excepts. Ruling sustained.

S. S. Lapham, for plaintiff. Wilson & Jenckes, Comstock & Gardner, and Arthur Cushing, for defendant.

PER CURIAM. The record shows that the statements of the plaintiff's workmen to the witness Tillinghast, which were excluded by the court, subject to defendant's exception, were spoken jocularly, and were so understood by the witness. This being so, we do not think that they were admissible as part of the *res gestæ* to bind the plaintiffs on the issue whether or not they had performed their work with due diligence, though they might have been competent testimony for that purpose had they been uttered seriously. We think, therefore, that they were properly excluded. New trial denied, and case remitted to the common pleas division, with direction to enter judgment on the verdict.

(20 R. I. 307)

NEWELL v. LAWTON.

(Supreme Court of Rhode Island. Dec. 7, 1897.)

IMPLIED CONTRACT FOR SERVICES.

Testimony that a daughter, who nursed and partly supported her mother for several years before the mother's death, was told by the mother that she (the daughter) had to work hard, and that she (the mother) could not pay her then, is too slight to rebut the presumption that the services were prompted by affection.

Assumpsit by Harriet E. Newell against Charles H. Lawton to recover for services rendered to defendant's testatrix. A nonsuit was granted, and plaintiff excepts and moves for a new trial. Denied.

Joseph Osfield, Jr., for plaintiff. Cooke & Angell, for defendant.

MATTESON, C. J. This is an action of assumpsit. The testimony shows that the plaintiff rendered services for the testatrix, in taking care of and nursing her, for several years before her death. The testatrix was the plaintiff's mother, and the two had lived together while the services were rendered. During the same period the plaintiff had kept hens, and furnished eggs, and sold fowls, and used the proceeds in purchasing supplies for the household, but to what extent does not appear. The evidence shows no express agreement on the part of the testatrix to pay for these benefits, nor circumstances affording ground for a reasonable expectation on the part of the plaintiff that compensation was to be made. The only testimony which can be regarded as in any way tending to do so was that the testatrix had said to the plaintiff that she had to work hard, and that she (the testatrix) could not pay her then. This testimony, standing by itself, is too slight to rebut the presumption arising in such cases that services rendered or benefits conferred by members of the same household to or upon each other are prompted by affection or good will, rather than from an expectation of payment. *Fuller v. Mowry*, 18 R. I. 424, 28 Atl. 606. If the case had gone to the jury, and a verdict had been rendered for the plaintiff, it would have been insufficient to sustain the verdict. A nonsuit, therefore, was properly granted. New trial denied, and case remitted to the common pleas division, with direction to enter judgment for the defendant for costs.

(20 R. I. 285)

WILLIS v. PROVIDENCE TELEGRAM
PUB. CO.

(Supreme Court of Rhode Island. Nov. 29,
1897.)

CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE—
PROVINCE OF JURY.

1. One who seizes the bridle rein of her horse, in an attempt to prevent him from running away, when he has been frightened by a collision with another team (there being a helpless child in the wagon), and in so doing is injured by the horse she is attempting to hold, is not guilty of contributory negligence, as a matter of law.

2. Where plaintiff's horse became frightened by a collision with defendant's negligently driven team, and plaintiff seized her horse by the bridle rein in her attempt to prevent him from running away, and was injured in so doing (her baby being in the wagon to which her horse was hitched at the time), the proximate cause of the injury could not be said, as a matter of law, to be some act intervening between the collision and the injury.

Action by Emma C. Willis against the Providence Telegram Publishing Company for personal injuries. On demurrer to the declaration. Overruled.

John W. Hogan, for plaintiff. Wilson & Jenckes, for defendant.

TILLINGHAST, J. We do not think the plaintiff's declaration shows that she was guilty of contributory negligence, or that the alleged negligence of the defendant was not the proximate cause of the injury complained of. The first count of the declaration sets out that the plaintiff's team was standing on the easterly side of Weybosset street, and that the defendant so carelessly managed and controlled its horse and wagon that the same collided with the plaintiff's wagon, demolishing it, and frightening the horse attached thereto, and that the plaintiff, who took hold of the reins near the head of her horse, to prevent him from running away, was by her said horse violently hurled against the shafts of her wagon, and injured. She alleges that she was lawfully in the use of said highway, and that she was in the exercise of due care, at the time of receiving the injury. We fail to see anything in this statement of the plaintiff's case which shows that she was guilty of contributory negligence.

The second count sets out that the plaintiff left her horse and wagon standing upon the easterly side of said street, near the corner of Dunnell's Gangway, in a lawful and proper manner; that she left her infant child sitting in said wagon, and that, through the carelessness and negligence of the defendant's agent and servant in driving and managing its team, the same collided with and struck plaintiff's wagon, whereby it was broken, dragged along, and turned around; and that by reason thereof plaintiff's horse was frightened and attempted to run away, and said infant child was thrown from the seat of the wagon onto the floor thereof. And the plaintiff avers that, being apprehensive of injury to her said child by reason of the collision and of the running away of the horse, she, while in the exercise of due care, took hold of the bridle and head of said horse for the purpose of stopping and holding him, and was injured as aforesaid. The defendant's counsel contends that it appears from this count that the plaintiff was guilty of contributory negligence, and also that the negligence of the defendant was not the proximate cause of the injury. We do not think this is so. The doctrine of proximate cause, in cases of accident resulting from the frightening and consequent running away of horses on the highway, as deduced from the numerous adjudications thereon, seems to be that the negligence which causes the fright and consequent running away of the horse is the proximate cause of the injury, and that this is so although some intervening cause contributed to the injury. *Busw. Pers. Inj.* § 90. At any rate, the question of

concurring causes, as held by this court in *Yeaw v. Williams*, 15 R. I. 20, 23 Atl. 33, is a question for the jury, under proper instructions, and hence cannot be determined on demurrer, unless, indeed, it clearly appears from the declaration that the proximate cause of the injury was the plaintiff's carelessness. See, also, *Wilson v. Dock Co.*, L. R. 1 Exch. 186. Judge Cooley, in his work on Torts, states the law of proximate cause thus: "If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent." And this summary of the law is abundantly sustained by the authorities. See *Add. Torts*, § 12; *Shear. & R. Neg.* (2d Ed.) §§ 10, 33; *Campbell v. City of Stillwater*, 32 Minn. 308, 20 N. W. 320; *Wood v. Railroad Co.*, 177 Pa. St. 306, 35 Atl. 699; *Hoag v. Railroad Co.*, 85 Pa. St. 293; *Derry v. Flitner*, 118 Mass. 134; *Kennedy v. Mayor*, etc., 73 N. Y. 365; *Sturgis v. Kountz*, 165 Pa. St. 358, 30 Atl. 976; *Brown v. Railway Co.*, 20 Mo. App. 222; *Billman v. Railroad Co.*, 76 Ind. 166; 16 Am. & Eng. Enc. Law, 436, and cases cited; *Jagg. Torts*, c. 5; *Scott v. Shepherd*, 1 Smith, Lead. Cas. (Hare & W. Notes) *549; *McGrew v. Stone*, 53 Pa. St. 436; *Railroad Co. v. Snyder*, 18 Ohio St. 399; *Connell's Ex'rs v. Railway Co.*, 93 Va. 44, 24 S. E. 467. In the case of *McDonald v. Snelling*, 14 Allen, 290, where the question as to the proximate cause of an injury caused by a runaway horse through the negligence of the defendant was very fully considered, the court, in overruling the demurrer to the declaration, said, among other things: "It is clear, from numerous authorities, that the mere circumstance that there have intervened, between the wrongful cause and the injurious consequence, acts produced by the volition of animals or of human beings, does not necessarily make the result so remote that no action can be maintained. The test is to be found, not in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence, as a result which might reasonably have been foreseen as probable, the legal liability continues." In *Mahogany v. Ward*, 16 R. I. 479, 17 Atl. 860, this court recognized the same doctrine; for while it was there held that the independent act of a responsible person arrests causation, and is to be regarded as the proximate cause of the injury, the original negligence being considered merely the remote cause thereof, yet the court said that this rule "is subject to the qualification that, if the intervening act is such as might reasonably have been anticipated as the natural and probable result of the original negligence, the original negligence

will, notwithstanding such intervening act, be regarded as the proximate cause of the injury, and will render the person guilty of it chargeable." See, also, *Lee v. Railroad Co.*, 12 R. I. 383. It certainly cannot be said that a person who attempts to prevent his horse from running away when it has become frightened by a collision with another team is necessarily guilty of negligence, even though the person in charge of the horse is not in his carriage, and does not actually have hold of the reins, at the time of the collision. And this is even more clearly so when a helpless child is in the carriage, and when the first impulse of every rational person would be to prevent the horse from running away. Whether or not the act of the plaintiff in any given case is in fact a rash, or even negligent, one, and hence such as would prevent him from recovering in an action of this sort, is for the jury to determine in view of all the circumstances of the particular case. Demurrer overruled, and case remitted to the common pleas division for further proceedings.

(30 R. I. 310)

STATE v. BOWES.

(Supreme Court of Rhode Island. Dec. 7, 1897.)

INDICTMENT—TIME OF FINDING.

An indictment which alleges that defendant kept a nuisance on a certain day, and on divers other days between that day and the date of finding the indictment, need not specifically allege the date of finding the indictment, as it will be presumed to have been found on the day the grand jury was impaneled and sworn.

Josephine Bowes was indicted for maintaining a nuisance, and she demurs to the indictment. Overruled.

Willard B. Tanner, Atty. Gen., for the State.
John W. Brennan, for defendant.

PER CURIAM. Our opinion is that the allegation of time in the indictment is sufficiently certain. The allegation is that the defendant, "on the 1st day of January, in the year of our Lord one thousand eight hundred and ninety-four, and on divers other days and times between said last-mentioned date and the date of the finding of this indictment," did keep and maintain a certain common nuisance, etc. The contention in support of the demurrer is that the allegation is bad because the date of the finding of the indictment is not specifically given in the charge. In *State v. Hill*, 13 R. I. 315, it was held that a similar allegation was sufficient, the presumption of law being that the indictment was found on the first day of the term, if no other date was named. Since that decision, terms of the court have been abolished, and, instead, a continuous session is provided for, beginning on the third Monday of September in each year, and ending on the third Monday of July following. Grand jurors are summoned at stated intervals. The grand jury by

whom the present indictment was found was impaneled and sworn, as averred in the indictment, on the 4th day of March, 1895. We think the case is within the principle of the decision in *State v. Hill*, and that the presumption is that the indictment was found on the day that the grand jury was impaneled and sworn, no other date being specified. Demurrer overruled, and case remitted to the common pleas division for further proceedings.

(30 R. I. 306)

WOONSOCKET INST. FOR SAVINGS v. HEFFERNAN et al.

(Supreme Court of Rhode Island. Dec. 7, 1897.)

GIFT INTER VIVOS.

Gift to M. of a fund deposited May 16, 1895, by defendant's intestate, in her name and the name of M., and made payable to either, or the survivor of them, was not shown by the facts that soon afterwards she left the deposit book with a certain person for safe-keeping; that on January 1, 1897, she sent word to M. to come and get the book, and he could have the money at any time; that at the time of sending such word she was ill with what proved to be a fatal illness, though it did not appear that she was aware that her illness was to be fatal; and that she died a few weeks subsequently, and before M. had gone to get the book.

Action by the Woonsocket Institute for Savings against John J. Heffernan, administrator of the estate of Catherine Maroney, deceased, and others.

Edwin Alanile, for complainant. Erwin J. France and John J. Heffernan, for respondents.

PER CURIAM. The case shows that Catherine Maroney deposited the fund in suit May 16, 1895, in her name and the name of John Maloney, and made it payable to either, or the survivor of them; that shortly after that date she left the deposit book with the Reverend George T. Mahoney for safe-keeping; that on January 1, 1897, she sent word to John Maloney, by his wife, to come and get the book, and he could have the money at any time; that this was the first knowledge that John Maloney had of the deposit; that Catherine Maroney, at the time of sending word to John Maloney, was ill with what proved to be a fatal illness, though it does not appear that she was aware at that time that her illness was to be fatal; that she died a few weeks subsequently, and before John Maloney had gone to get the book. The question is whether, upon this situation of facts, John Maloney is entitled to the fund. We think not. Though the deposit was made in the joint names of Catherine and John, she retained control over the deposit book, without which the money could not be drawn; and, though she sent word to him to come and get the book, he did not do so, and the control over the deposit therefore remained with her until her decease. This being so, the gift of the deposit was not complete, and

it remained her property. A decree must therefore be entered for the payment of the fund to the administrator.

(30 R. I. 312)

STATE v. BARRETT.

(Supreme Court of Rhode Island. Dec. 9, 1897.)

INNKEEPERS—FAILURE TO OBTAIN LICENSE—INDICTMENT.

Gen. Laws, c. 101, § 1, and Id. c. 26, § 8, empower the board of aldermen of a town to regulate the keeping of taverns, etc., by granting licenses, or by refusing to grant them, but there is nothing in the statute requiring them to adopt any general regulation for that purpose. Chapter 101, § 8, makes it an offense to keep open a tavern, etc., without a license. *Held*, that an indictment charging that defendant did keep open a tavern, etc., without a license, is not bad for the want of an averment that the board of aldermen has made any regulation relating to the licensing of such places, as the statutes place upon the person desiring to open a tavern the duty of applying to the board of aldermen for a license for that purpose.

Fred J. Barrett was indicted for keeping open a victualing house, etc., without a license, and he demurs to the indictment. Demurrer overruled.

Willard B. Tanner, Atty. Gen., for the State. John W. Brennan, for defendant.

MATTESON, C. J. The indictment charges in technical form that the defendant did open and keep open in the city of Providence a victualing house, cook shop, and oyster house, without first having obtained a license for so doing. The defendant demurs to the indictment because it contains no averment that the board of aldermen of Providence has made any regulation relating to the license of such a place, and contends in support of the demurrer that until the board of aldermen has made such a regulation any person has a right to open and keep such a place. Though Gen. Laws R. I. c. 101, § 1, empowers the town council of a town, and, by construction, Id. c. 26, § 8, the board of aldermen of a city, to regulate the keeping of taverns, victualing houses, cook shops, oyster houses, and oyster cellars, in a town or city, by granting licenses for so doing, upon such compensation for the benefit of the town or city as they shall see fit, or by refusing to grant them, there is nothing in the section which requires them to adopt any general regulation for that purpose. We think that the contrary is implied, since the provision is that they are to regulate the keeping of such places by granting or refusing to grant licenses, which seems to contemplate specific action on an application for a license. This construction is confirmed, moreover, by a consideration of section 3 of the chapter, which makes it an offense punishable by fine to open or keep open a place of either of the kinds named without a license first had and obtained; thus putting on the person wishing to open or keep open such a place the duty of applying to the town

council or board of aldermen, as the case may be, for a license for that purpose. Our opinion is therefore that the indictment is not bad for want of the averment contended for, and that the demurrer should be overruled. Demurrer overruled, and case remitted to the common pleas division for further proceedings.

DAETERS v. DAETERS.

(Court of Chancery of New Jersey. Nov. 23, 1897.)

DIVORCE—DESERTION—JUSTIFICATION—EVIDENCE.

1. In a divorce suit, testimony standing solely on the specific statements of one party, contradicted by general statements of the other party, will not justify an affirmative decree.

2. A wife, on learning that she had contracted a venereal disease from her husband, denied him marital rights, which caused him to so mistreat her that she was compelled to leave him. The husband gave her no explanation of the disease, exhibited no signs of penitence, and for more than two years never solicited her to come back. *Held*, that divorce would be granted on the ground of willful and continued desertion by the husband.

Bill for divorce by Louisa H. Daeters against Frederick J. Daeters. Decree for complainant.

George A. Vroom, for complainant. Edward G. C. Bleakley, for defendant.

GREY, V. C. (orally). The husband and wife, parties to this divorce suit, have been married for many years. The testimony of the wife exhibits a most wretched condition of their married life, especially the last few years. She refers to quarrels, some of them specifically narrated. The husband goes on the stand, and, while he denies in general terms the fact of the quarrels, he does not undertake to meet the specific allegations with any decree of accuracy. He is unable to speak the language with fluency, but he makes himself understood quite well, and I saw from the character of his replies that he comprehended exactly what was asked of him. If the testimony stood solely on the statements of the wife, although specific and in detail, yet contradicted by the general statements of the husband, I would not feel that I would be justified in making a decree. But in support of the testimony of the wife is the testimony of two persons, one of whom actually lived in the family. That is the son. He appears to be interested for his mother, and his statements are to be taken with some hesitancy. They corroborate to some extent some of her specific allegations. He stated that in one case he actually saw the blow which her husband gave her, which caused the lump now on his mother's forehead. The father denies this blow. I do not think I am justified in taking his bare, unsupported denial. A daughter supports her mother's story of violent language and

threats used by the husband to the wife. Another daughter, who lived in the house for a time, a frank witness, says she saw no quarrels, but she explains that she did not know the details of the family life, because she was not her mother's confidant. It is quite probable that, if her mother did not make this daughter her confidant, she may not have known of the ill conduct of the defendant until the final quarrel. This daughter, Mrs. Burnside, and her husband, the only witnesses who testify in support of the defendant, do not seem to have known enough of the family to make testimony, even of a negative character, of any weight in denial of the quarrels, proven not only by the wife, but also by the son, to the extent of actual blows given by the husband to the wife, and, by both the son and the other daughter, of violent and terrifying threats of bodily injury. The testimony of Mr. and Mrs. Burnside amounts simply to this: that it was remotely possible that they might have heard the husband's violence if it had occurred, but in fact they did not hear it. As the complainant has produced testimony which corroborates that of the wife that there were frequent threats by the husband of bodily injury to the wife, accompanied in several instances by actual violence and blows, I think I must take her testimony, so supported, to be true.

But a far more important matter, and one which, for the consideration of this court, stands with very much more weight, is the charge that he has contracted a venereal disease, which he has communicated to his wife, and that this was one reason why she separated herself from him. The statement of the wife is that she discovered her husband in the act of treating himself or washing himself for a contagious disease of a private nature; that he himself admitted to her that he was so treating himself; and that she found he had communicated this disease to her. He denies, but only in the most general terms, the wife's extremely specific statement. He denies that he ever had any such ailment, and states that he is ready to submit himself to examination, and intimates that he was not cleansing himself because of any disease, but because his wife had for a long time locked him out of the bath room. His son contradicts this latter statement. If this phase of the case stood upon the unsupported testimony of the wife, contradicted, as it is, by that of the husband (although his statement is not so specific as hers), I should not accept her testimony as conclusive. But on the point that the wife at this period was suffering from such a disease her testimony is supported by an entirely disinterested witness, disconnected with the family, her attending physician, who comes here and swears that, shortly after the time that this woman refers to, he was called upon by her, and treated her for symptoms which indicated, upon his examination,

that she was suffering with gonorrhea. He testified that he treated her for this disease, and that he told her the nature of it. She swears that the doctor did communicate to her the nature of the disease that she was suffering from, and that she told her husband, and afterwards denied him the privileges of a husband; and she swears that the violence which the husband exhibited towards her, in its extremity, followed shortly after this disclosure and denial of marital rights. I think that corroborates the statement of the wife to such an extent that I am bound to believe her testimony. No imputation whatever in any testimony is cast upon the wife to indicate that by any possibility she could have received this disease from any other source than her husband. The uncontradicted and unexplained testimony of the doctor that this lady was suffering in the way in which he narrates makes the inference irresistible that she received the disease from her husband. This being the case, she had a perfect right to deny her husband the privileges of the marriage bed. She says she did do that, and in consequence came this series of acts of violence and quarrels and threats, which are measurably supported by the testimony of other persons. If this woman, in going away from her husband, was not justified by the extremity of the violent acts of her husband antecedent to their separation, she certainly was justified by the fact that her husband was so diseased, and had communicated it to her; and, as she made known to him that fact, he was bound to have given her reasonable cause to believe that the doctor had made a mistake, or to have obtained her forgiveness and condonation. She had a right to accept the doctor's statement as true, and, when she told it to her husband, it became his duty to show her that the doctor had made a mistake, or to have exhibited to her such a penitential condition and such a satisfactory explanation as induced her to forgive it. She must have condoned it. She never did. This condition of affairs continued up to the time of the separation, in April, 1894. After the separation, under these circumstances, of violent bodily injury and breach of his marriage vows on the part of the husband to the wife, it does not appear that he ever solicited her to come back to his home. There was a previous suit between these parties in which an effort was made on the part of the wife to present such a case as might lead to a decree of divorce on the ground of the husband's desertion. That failed because two years had not elapsed, but it certainly notified the husband that the wife felt that she might rightfully separate herself from him. After the proceedings in that suit had pointed out to him that his wife claimed that he had communicated a foul disease to her, which justified her in separating from him, he has not even yet made any application to her to live with him; never solicited her to come back

to his house; nor sought to extenuate his fault, and induce her to forgive him.

In the view I take, the original separation by the wife from her husband was entirely justified, both by his violence and by the disease which she had received from him; and, as she had communicated that fact to him, she was entirely justified in leaving him. Two years and more had elapsed when the bill in this cause was filed since she thus separated herself from him. In all that time he admits that he has made no effort to induce her to return to him, or to remove her just conviction that he had, by breaking his marriage vows, justified her action. Such a condition on his part is as effectually a willful, continued, and obstinate desertion of his wife as if he had violently thrown her out of his house, and failed for that time to invite her to return.

I will therefore advise a decree for the complainant, in accordance with the prayer of the bill.

GRAY v. TAYLOR et al.

(Court of Chancery of New Jersey. Nov. 30, 1897.)

CORPORATIONS—INSOLVENCY—PREFERENCES—SUBROGATION—EQUITY PRACTICE—CROSS BILLS.

1. A corporation in a failing condition cannot place part of its assets in the hands of a trustee to protect any of its directors as sureties on its bond.

2. Sureties on the bond of a defendant corporation in an attachment suit paid the attaching creditors' demand, and procured the discharge of the attachment lien. Afterwards the corporation became insolvent, and its property was placed in the hands of a receiver. *Held*, that the sureties could prove against the insolvent corporation as creditors, since they were subrogated to the rights of the attaching creditors in all the attached property in existence at the time of the appointment of the receiver, but that this lien could not follow property converted into money prior to the insolvency, nor the proceeds of such conversion, nor could it reach general assets.

3. In order to avoid a multiplicity of suits, an answer in a suit in equity may, by consent, be considered as a cross bill.

Bill by George R. Gray, receiver, against Jerome Taylor and others, for relief. Modified decree granted complainant.

Howard W. Hayes, for complainant. Walter J. Knight and James J. Howell, for defendants.

REED, V. C. I am of the opinion that the \$6,000 paid to the defendant Taylor in trust to cover any liabilities of the sureties on the bond given by Messrs. Untermyer and others cannot be retained by the trustee for that purpose. The condition of the company, at the time when the resolution was passed, to make such disposition, was such as prevented the directors from putting any of its assets in pledge for the special benefit of any director. So far there must be a decree for the complainant. But I am of the opinion that those who paid the claim of the plaintiffs in attach-

ment in New York, and who had secured the discharge of the company's property in New York from the lien of the attachment, are entitled to be subrogated to the position of the plaintiffs in attachment, having the lien upon this property. The value of the property so covered by the attachment lien, and so discharged from the lien, as such value was ascertained by the sale of the said property by the receiver, belongs to the paying sureties, in so far as it is necessary to repay them. This relief is prayed for in the answer, which answer can be, by consent, regarded in this particular as a cross bill, as I understand the receiver wishes to settle all equities, if possible, in this suit. I am unable to see how the doctrine of subrogation can give the sureties a lien upon such property subject to the lien of the attachment, which was not in existence at the time of the company's insolvency. The sureties, having paid the attaching creditors are, of course, subrogated to the position of those creditors, and can prove against the insolvent corporation as such, and receive their dividend. And when the question arises how far the right of the attaching creditors, to which the sureties are subrogated, is good in rem, namely, as a specific lien upon the company's property, then it is apparent that the property must have existed at the time of the insolvency, in specie. A lien could not follow property converted into money by the company previous to its insolvency, nor can it follow the money arising from such conversion, nor can it reach the general assets of the company. I will advise a decree for subrogation to the extent indicated.

(55 N. J. E. 795)

STEWART v. EXCHANGE BANK OF MANNINGTON et al.

(Court of Errors and Appeals of New Jersey.
Dec. 8, 1897.)

FRAUDULENT CONVEYANCE.

A deed which, when drawn, was intended by the grantor to operate to put his property out of the reach of his creditors, will not be set aside as fraudulent if it appears that, at the time of its delivery and acceptance by the grantee, the sole object of both the parties to the instrument was that it should be held by the grantee as a security for the payment of a debt due from the grantor to a third person.

(Syllabus by the Court.)

Appeal from court of chancery.

Action by the Exchange Bank of Mannington and others, creditors of Horace D. Baker, to have a deed made by him to Robert A. Stewart declared fraudulent as against creditors. From a judgment for complainants, defendant appeals. Reversed.

Carroll Robbins and Samuel S. Mehard, for appellant. Henry S. Alvord, for respondents.

GUMMERE, J. The bill in this case was filed by the Exchange Bank of Mannington and others, creditors of one Horace D. Baker, for the purpose of having declared fraudulent,

as against creditors, a certain deed made by Baker to the appellant, Robert A. Stewart, for lands in Cumberland county. On the final hearing of the cause, a decree was made setting aside and annulling said deed, on the ground that it had been made and executed with intent to defraud the creditors of Baker, and particularly with intent to defraud the complainants. In our opinion, the testimony in the case does not justify the conclusion reached by the vice chancellor. Shortly before the execution and delivery of the deed, and on the 19th day of February, 1894, Baker deposited with the Norfolk State Bank, of Norfolk, Neb., a draft on a New York bank for \$3,401.29. Stewart, who was his brother-in-law, was the cashier of the Norfolk Bank, and permitted him to draw against the deposit to the extent of \$1,700, without first ascertaining whether the deposited draft was good. It turned out to be a forgery, and the Norfolk Bank lost the money which it had paid out against the deposit. Shortly after this loss was incurred, Baker sent to the bank the joint note of himself and wife for \$1,700, dated February 26, 1894, to cover the amount which he had drawn against the forged draft. On the 23d day of February, 1894, the deed under consideration was executed by Baker and his wife; and, on the same day, was sent to the office of the clerk of Cumberland county for record. A few days prior to this, however, and before it was known by Stewart that the draft deposited in the Norfolk Bank was a forgery, Baker had informed him that he contemplated transferring to his wife the property which is embraced in the deed, and requested him to act as the conduit in the transfer. On the day after the execution of the deed, however, Baker wrote to Stewart, instructing him to hold the deed as security for the payment of the \$1,700 note given by the former and his wife to the Norfolk Bank, as already stated; and Stewart, when he subsequently received the deed (which was forwarded to him by mail after its record), placed it in the "collateral case" of the bank as such security. Some months after the delivery of the deed, Stewart, apparently at the request of the Norfolk Bank, personally guaranteed the payment of the Baker note, and he claims by his answer to hold the deed as trustee to secure the bank against loss on the note, and also for the purpose of protecting himself on his guaranty.

So far as his claim to hold the deed as trustee for the bank is concerned, we think it is fully supported by the evidence. Admitting that the testimony warrants the conclusion that, at the time the deed was drawn, the purpose of Baker was to put the property conveyed thereby in his wife, using Stewart as a conduit, it is manifest that, at the time of its delivery and acceptance, this purpose had been abandoned, and that the sole object for which the deed was delivered by Baker, and accepted by Stewart, was to secure the Norfolk Bank against loss on the payments which it had

made. The deed, although made to Stewart personally, is in reality held by him as trustee for the bank, and, although an absolute conveyance on its face, is in equity a mortgage securing the payment of the indebtedness of Baker to the bank. Whether Stewart would be entitled to be subrogated to the rights of the bank in case he should pay the amount due on the note in discharge of his guaranty, and hold the deed as security for the repayment of the amount, it is not necessary now to decide. That condition of affairs has not yet arisen, and it is quite possible that he may never be called upon to make good his guaranty. The decree below should be reversed, and a decree entered dismissing the bill of complaint, with costs.

INGLE v. INGLE.

(Court of Chancery of New Jersey. Dec. 2, 1897.)

SEDUCTION—MARRIAGE—ANNULMENT—GROUNDS—FRAUD—DURESS.

1. A man under arrest, charged with having seduced a woman under promise of marriage, married her, and was released from custody, as is permitted by 1 Gen. St. p. 1086, par. 204. Subsequently he filed a bill to annul the marriage, on the ground that he was not lawfully under arrest, because he had not promised to marry defendant before seducing her. *Held* that, even if there was no such promise, plaintiff would have to prove fraud of defendant in having procured his arrest upon a charge which she knew to be baseless, to entitle him to the relief prayed for.

2. Where a man has been guilty of illicit intercourse with a woman, and marries her under the constraint of either civil or criminal proceedings based thereon, such constraint does not of itself constitute a valid ground for annulling the marriage; and the man's misconception of the length of the term of imprisonment to which he might be sentenced does not change this rule.

Bill by George Ingle against Annie Ingle to annul their marriage. Dismissed.

W. Leslie Edwards and Mr. Richards, for complainant. Harry V. Osborne, for defendant.

EMERY, V. C. The bill in this cause is filed to annul a marriage, on the ground of fraud and duress; and, after considering the evidence and the arguments of the counsel and the authorities bearing upon the questions involved, I reach the conclusion that the bill must be dismissed. The marriage ceremony was performed by a justice of the peace on January 2, 1897, while the complainant was in jail, under arrest upon a warrant issued by this justice of the peace upon the complaint of the defendant, charging complainant with seduction under promise of marriage, resulting in her pregnancy. Upon the marriage he was released from custody. Two grounds are relied on for annulling the formal marriage contract:

First. That the complainant was not lawfully under arrest. The claim of illegal arrest is based upon the contention that the complainant was not, in fact, guilty of the

crime for which he was arrested. The statute (1 Gen. St. p. 1086, par. 204, "Crimes") provides that if any single man over the age of 18 years, under promise of marriage, shall have sexual intercourse with any single female of good repute for chastity, under the age of 21 years, and she shall thereby become pregnant, he shall be guilty of a misdemeanor, etc. Upon marriage with the female, the party offending is by the act released from custody. Sexual intercourse was admitted by the bill, but pregnancy and the promise to marry were both denied. At the hearing, it was admitted that the evidence established the defendant's pregnancy at the time of the marriage. The complainant denies that there was any promise of marriage, and insists that, on the whole evidence now given in the case, the court must find that there was no crime committed under the statute, and that the arrest was therefore unlawful. Defendant, on the other hand, claims that a promise of marriage was made, under which the intercourse took place; and the evidence produced on her part, if true, justifies the claim that a promise of marriage was made, and that the crime had been in fact committed. Complainant now claims that the lawfulness or unlawfulness of the arrest is to depend upon this court's decision upon the question whether, upon the evidence now produced, the crime is or is not made out. But in cases of this character, to make the arrest unlawful, not only must it be established that the charge was a false one, but that the defendant who made the charge knew it to be false, and made the charge maliciously and without probable cause. The cases establish this rule. 2 Nelson, Div. & Sep. § 612, and cases cited. To base the lawfulness or unlawfulness of the arrest solely upon the sufficiency of the evidence of the crime to be produced in a subsequent suit to annul the marriage would practically place it in the power of the accused to change the forum for the trial of the accusation. In many cases, by loss of evidence for the state or other causes, this would enable the party arrested to defeat one object of the statute by a marriage under it, to escape the imprisonment or fine, with a chance of subsequently annulling the marriage, on proof that he was not guilty of the crime. The relief in cases like the present, so far as the present point is concerned, is in reality based on the fraud of the defendant in procuring an arrest upon a charge which she knew to be baseless. Not only is there no evidence in this case sufficient to establish fraud on the part of the defendant in making the charge, but the weight of evidence as now presented is that the crime was committed. The arrest therefore cannot be considered unlawful.

The second claim is that the complainant entered into the marriage contract under duress, the particular duress relied on be-

ing a representation by the justice who issued the warrant that the punishment by imprisonment for the crime was 20 years' confinement, which would cover a long time of his life, and that this representation as to the time induced him to consent to the marriage, in order to escape this long imprisonment. The representation as to the length of the term is not claimed to have been made to the complainant directly by the justice, but by complainant's sister, who says she was so told by the justice, and was told by him to inform her brother then in jail. The justice denies this charge, and says he told her the term was five years, and read to her, from an abridgment of the statutes, the true term and the fine. Taking the sister's statement to be true, and that the justice misstated the term of imprisonment, the case as presented is not one where the marriage can be annulled in equity on the ground of duress, under our decisions. In *Frost v. Frost* (1886) 42 N. J. Eq. 55, 6 Atl. 282, Runyon, Ch., examined and applied the rule as established by the previous cases, and the same rule is applicable here. On the authority of these cases, it may be thus stated: "Where a man has been guilty of illicit intercourse with a woman, and marries her under the constraint of either civil or criminal proceedings based thereon, such constraint does not of itself constitute a valid ground for annulling the marriage." If this be the true rule, I fail to see how a misconception as to length of the term of imprisonment changes the character of the case as to the duress, or prevents the application of the rule. The rule is based on the theory that the marriage for the purpose of obtaining a release from imprisonment for a crime committed is not, in equity, to be considered a constraint, and this rule is applicable equally whether the imprisonment be for one term or another. On the authority of these cases, and in the absence of evidence justifying any conclusion of conspiracy or fraud, the bill must be dismissed.

(56 N. J. E. 265)

GARWOOD v. GARWOOD et al.

(Court of Chancery of New Jersey. Nov. 30, 1897.)

CHATTEL MORTGAGE TO WIFE—VALIDITY.

A chattel mortgage made by a husband directly to his wife, without the intervention of trustees, is good in equity.

(Syllabus by the Court.)

Action by Annie Garwood against Edmund J. Garwood and others to have certain property held by her under a chattel mortgage decreed not subject to an execution levy. Judgment for plaintiff.

William Holt and W. D. Holt, for complainant. W. P. Bainbridge, for defendants.

REED, V. O. In July, 1893, Edmund J. Garwood made a chattel mortgage upon cer-

tain of his personal property to his wife, Annie, to secure her for money loaned to him by her. A subsequent judgment creditor of the husband, who has levied his execution upon the same chattels, contests the validity of the mortgage, solely upon the ground that it was made directly by the husband to the wife, without the intervention of any trustee or third party. By the common law, such a mortgage is regarded as a nullity. For reasons, partly to secure domestic tranquillity, and partly to carry out the policy of the system of feuds, the legal existence of the wife was entirely merged into that of the husband. There was no duality of personality, and as a contract requires two or more parties, and husband and wife constituted but one, there could be no contract between them which the law would recognize or enforce. But courts of equity (following in this particular, as in most others, the doctrine of the civil law) have always recognized the wife as possessing a legal entity apart from that of her husband. The moment that the separate existence of the wife was admitted, it followed that the impossibility of recognizing any contractual relations between them at once disappeared. Therefore courts of equity have never refused to enforce such contracts merely because of any difficulty springing from the common-law doctrine of the unity of husband and wife. The courts do not enforce all contracts between husband and wife, because the power is an equitable one, and to be used for the best interests of all the parties, including their interests as husband and wife. Story, Eq. Jur. § 1368; Blsp. Eq. § 114. The following are instances of the kind of agreement which equity will enforce: If the wife, having a separate estate, should bona fide enter into a contract with her husband to make him a certain allowance out of the income of such separate estate, for a reasonable consideration, the contract, while void at law, would be enforced in equity. *More v. Freeman*, Bunb. 205. So, before the existence of any statute securing the profits of a married woman to her, a promise by the husband, for good reasons, that she should separately enjoy property bequeathed to her, would be upheld by a court of equity. *Harvey v. Harvey*, 1 P. Wms. 125; *Bradish v. Gibbs*, 3 Johns. Ch. 523, 540. If a husband should, for a bona fide consideration, agree that he would purchase land and build a house thereon for her, and she should pay him therefor out of the proceeds of her own real estate, if he should perform the contract on his side she, also, would be compelled to perform hers. *Livingston v. Livingston*, 2 Johns. Ch. 537, 539. So gifts from the husband to the wife, although void at law, were, when reasonable, upheld in equity. But a court of equity always held a restraining hand over such gifts, and the husband would not be permitted, for reasons of policy, to impoverish himself, nor to defeat

his creditors by such gifts. *Beard v. Beard*, 3 Atk. 72; *Slanning v. Style*, 3 P. Wms. 337; 2 Spence, Eq. Jur. 502. That courts of equity will aid the wife to recover her separate estate, which has come into the hands of her husband, and has been retained by him against her consent, is entirely settled. *Vreeland v. Vreeland*, 16 N. J. Eq. 512. If she loan him money, equity will enforce his expressed or implied promise to repay it. *Wood v. Chetwood*, 44 N. J. Eq. 64, 14 Atl. 21. Now, if he can enter into an enforceable contract to repay, so he can pledge his property to secure the performance of his promise. That he could make an absolute sale of his property to her is entirely settled. Said Chancellor Kent in *Livingston v. Livingston*, supra, "A husband and wife may contract, for a bona fide and valuable consideration, for the transfer of property from him to her." In *Wallingsford v. Allen*, 10 Pet. 583, Mr. Justice Swayne discusses the question of the extent to which a court of equity had gone in maintaining the transference of the property by the husband to the wife without intervention of trustees. In that case the supreme court of the United States upheld a transfer of slaves from the husband directly to the wife. A chattel mortgage is a conditional sale. The consideration of this mortgage being admittedly money loaned, the wife's title under it is, in this court, unimpeachable. In *Woodruff v. Clark*, 42 N. J. Law, 198, a chattel mortgage had been made by a husband directly to his wife. The wife brought an action of replevin against parties who seized the property. It was held that an action would not lie, because the sale at law was a nullity. But the chief justice remarked, "That this transfer was enforceable in equity, and that the title of the plaintiff would have been protected in that forum against the claims of her husband's creditors, no one will deny." I will therefore advise a decree for the complainant.

(56 N. J. B. 187)

SEYFRIED et al. v. STOLL et al.

(Court of Chancery of New Jersey. Dec. 2, 1897.)

EQUITABLE ASSIGNMENT—ORDER.

An order of S., on C., to pay G. \$1,000 "for materials furnished your [C's] building," is not an equitable assignment of any part of the fund which thereafter became due S. as contractor on said building.

Suit between Caroline Seyfried and others and Andrew Stoll and others on bill of interpleader.

McEwan & McEwan, for defendants Dorsett and others. Alex. C. Young, for defendants J. Gahagan's Sons.

EMERY, V. C. The complainant Mrs. Seyfried has paid into court, under a decree made on a bill of interpleader, the sum of \$588.98;

being the amount due from her to the defendant Andrew Stoll upon a building contract made with him for the erection of a house upon lands of Mrs. Seyfried. The contest in the case arises between the defendants claiming priorities in the payment of the fund, which is not sufficient to pay all the claims in full. Their claims are set up in their respective answers, and the cause, as between them, is brought to hearing upon these answers, pursuant to the general practice recognized in *Kirtland v. Moore*, 40 N. J. Eq. 106, 108, 2 Atl. 269. A state of facts has also been agreed on by counsel, and the principal dispute arising upon the answers and evidence relates to the priority of the defendants J. Gahagan's Sons upon a claim of \$1,109.27 (less \$194.05), which claim, if it has priority, will take the entire fund in court. These defendants (J. Gahagan's Sons) on October 31, 1894, delivered to the complainant the following order, signed by the builder, Stoll, and their claim of priority is based on the order: "Hoboken, N. J., Oct. 31st, 1894. Mrs. Caroline Seyfried: Pay to J. Gahagan's Sons one thousand and 00/100 dollars, for material furnished your building, on the west side of Monroe street, 75 feet north of 4th street. \$1,000.00. A. Stoll." At this time Stoll owed J. Gahagan's Sons \$1,109.27; but no payment was then due from Mrs. Seyfried to Stoll under the contract, and the order does not appear to have been accepted. The entire balance of the contract price then unpaid was \$1,125, the amount of the last payment; but the building was not then finished, and the contractor afterwards defaulting, the owner completed the building; and after the expense of the owner for completing the building was deducted, as provided by the contract, the balance due to Stoll was the sum paid into court. All of the other defendants are claimants under the provisions of the mechanic's lien law, by notice to the owner after demand upon the contractor, and the date of the service of their respective notices upon the owner are as follows: Timothy W. Dorsett, for \$60.35; notice served January 4, 1895. John Gardner, \$366.06; January 25, 1895. Vanderbilt & Schill, \$76.77; January 29, 1895. Upon the facts admitted, there seems to be no question that these notices operated as valid equitable assignments of the fund according to their respective dates. The question is whether the order in favor of J. Gahagan's Sons is an equitable assignment in their favor of the fund which thereafter became due. This depends, in my judgment, upon the construction which is to be given to the order itself. No equitable assignment or agreement to assign the fund, or any part of it, between Stoll and Gahagan's Sons, independent of the order, is set up in the answer or appears in the proofs; nor have any facts been proved which are entitled to control the construction of the order in this respect. Some very high authorities hold that such agreement, even by parol, independent of the written order, and collateral thereto, may be proved, in order to establish an equitable assignment by

the order; and others hold that parol evidence is admissible for the purpose of showing the intention and understanding of the parties, where the language of the order is ambiguous, and the order is not negotiable. *Bank v. Yardley* (1897) 165 U. S. 634, 17 Sup. Ct. 439, where a check was held to be an equitable assignment of a fund in bank, is a leading illustration of the former class; and *Brill v. Tuttle*, 81 N. Y. 454, of the latter. But the present case does not, either on the pleadings or proofs, fall within either of these classes; and the question whether there was an equitable assignment of the fund, due or to become due from Mrs. Seyfried, must therefore be determined by the construction and operation of the order itself. The cases decided in our own courts hold that no particular form of assignment is necessary, and that equity, disregarding form, will hold any writing which plainly appropriates the fund to be an equitable assignment. *Bower v. Stone Co.*, 30 N. J. Eq. 171, affirmed *Id.* 340. But I have not been referred to any decision of our courts, in which an equitable assignment has been held to have been made by an order, in which the order itself did not appear to designate and appropriate the fund in the owner's hands, or part of it. This is the effect of the order in *Bernz v. Marcus Sayre Co.* (Err. & App.; 1894) 52 N. J. Eq. 275, 281, 30 Atl. 21. In *Lanigan's Adm'r v. Bradley & Currier Co.*, 50 N. J. Eq. 201, 24 Atl. 506, the equitable assignment was made out altogether by parol agreement to assign, and acts thereunder. Where the assignment depends upon the construction of the order itself, a plain and sure test of construction is said to be whether the order or direction to the drawee, if assented to by him, would create an absolute indebtedness, payable by him at all events, or whether it would create an obligation only to make payment out of the particular designated fund. 3 Pom. Eq. Jur. p. 291, § 1280, and cases cited. This test seems to me to be a sound one, and to be properly applicable to the present case. A simple acceptance of this order as drawn would, I think, clearly have bound Mrs. Seyfried to an absolute payment of the entire \$1,000, and could not have been restricted or construed in her favor as obliging her to pay only out of a particular fund, and to the extent only of this fund. The order did not designate or appropriate any fund out of which it was payable, and the statement that the debt was for material, etc., cannot of itself extend further than being a statement of the consideration of the order. I hold, therefore, that the order did not operate as an equitable assignment, and that the claim of J. Gahagan's Sons under this order must be postponed to the claims of Dorsett and Gardner under their notices. The operation of these as equitable assignments has not been disputed. These claims, which together amount to \$426.41, do not absorb the whole fund; and as to the residue, a difficulty arises on the proofs, as they stand, as to the priority between *Vanderbilt & Schill* and the defendant *Leon Abbett*, who

was appointed a receiver under supplementary proceedings taken on a judgment obtained by *J. Gahagan's Sons* upon their claim against *Stoll*. The notice of *Vanderbilt & Schill* was served upon Mrs. Seyfried on January 29, 1895. The judgment of *J. Gahagan's Sons* was obtained on January 28, 1895, and the state of facts agreed on states that "thereupon an order for discovery was made, and thereafter *Leon Abbett* was appointed receiver, etc., on February 4, 1895." The statute, as to the effect of the appointment of the receiver (2 Gen. St. p. 1419, par. 26), is to vest him with the choses in action due at the time of issuing the execution; and it was held in *Coleman v. Roff*, 45 N. J. Law, 7, approved in *Willson v. Salmon*, 45 N. J. Eq. 257, 259, 17 Atl. 815, that, as to the judgment debtor and a person having notice of the proceedings, the title of the defendant relates back to the time of issuing the execution. I will hear counsel, therefore, if they wish, as to disposing of the residue of the fund, without further proofs.

(56 N. J. E. 290)

FROST v. BARNERT et al.

(Court of Chancery of New Jersey. Dec. 10, 1897.)

CORPORATIONS—INSOLVENCY—MORTGAGES.

A corporation, after becoming insolvent, cannot give a mortgage to secure a pre-existing debt, though the creditor have no notice of the insolvency; *Corporation Act* (P. L. 1896, p. 298) § 64, prohibiting a transfer by corporations, after becoming insolvent, of any of their estate or effects, except to bona fide purchasers for valuable consideration.

Bill by *Charles Frost*, receiver, against *Nathan Barnert* and others, to have a chattel mortgage declared null and void.

Eugene Stevenson, for complainant. *George S. Hilton*, for defendant *Barnert*.

STEVENS, V. C. On May 13, 1896, *Samro Takaki* and others, creditors, filed a petition to have the *Equitable Silk Company* declared insolvent. On the same day an order was made directing the company to show cause why it should not be decreed to be insolvent. On May 21st a receiver was appointed. This receiver now files his bill against *Barnert*, praying, inter alia, that a certain chattel mortgage bearing date May 11, and acknowledged May 13, 1896, given by the company to *Barnert* to secure the sum of \$875.82, may be declared null and void. The ground upon which the receiver bases his prayer for relief is that at the time the mortgage was given the company was insolvent, to the knowledge of *Barnert*, and that it was given in contemplation of its insolvency, to secure a pre-existing debt. The answer denies knowledge or notice of insolvency, but admits that all but \$250 of the money secured was pre-existing indebtedness. These averments of the answer correspond with the proofs, which also show that the mortgage was made without actual fraud, and that it was recorded before the petition to have the company declared in-

solvent was filed. The company was, however, insolvent when it was given.

The question presented by the pleadings and proofs is this: Can a corporation organized under the general corporation act, after becoming insolvent, execute a mortgage to a creditor who is not a director or officer of the company, to secure a pre-existing debt, such creditor having no notice of the insolvency? The mortgage in question was given after the re-enactment in 1895 (P. L. 1895, p. 166; P. L. 1896, p. 298, § 64) of section 2 of "An act to prevent frauds by incorporated companies," found in the Revision of 1847. Section 2 of that act, which prevents corporations from selling, conveying, assigning, or transferring any of their estate, or effects, etc., after they have become insolvent, or in contemplation of insolvency, except to bona fide purchasers for valuable consideration, was construed in *Holcomb's Ex'rs v. Bridge Co.*, 9 N. J. Eq. 457; in *Wells v. Rubber Co.*, 19 N. J. Eq. 402; and in other cases cited and approved in *Wilkinson v. Bauerle*, 41 N. J. Eq. 641, 7 Atl. 514. On the construction put upon the act in those cases the mortgage in question cannot stand except as security for the \$250 paid at the time it was given.

I was referred by defendant's counsel to *Loom Works v. Vacher*, 57 N. J. Law, 490, 31 Atl. 306. It is plain that that case has no application to the case in hand. It was there held that a chattel mortgage given to secure a pre-existing debt is entitled to priority over a prior unrecorded contract of sale of which the mortgagee had no notice. The decision was based upon the principle that one who, without notice, takes a chattel mortgage to secure an antecedent indebtedness, is a mortgagee in good faith, within the meaning of the chattel mortgage act of 1889, though he may not be a mortgagee for value; and that, as the act does not, in terms, require him to be a mortgagee for value, the cases which define the meaning of "purchaser in good faith for value" are not applicable. Besides, it was said that public policy, as asserted in the extension of the registry laws, requires that the public records shall show the ownership of personal property, and that a construction favorable to that end ought to be given. In the statute under consideration neither of the grounds upon which the decision was placed exists. The act of 1895, incorporated as section 64 of the corporation act of 1896, avoids all transfers by way of preference except those made to a bona fide purchaser for a valuable consideration. In addition to this, it has been repeatedly held that the act to prevent frauds by incorporated companies is, in the language of Chief Justice Green in *Van Wagoner v. Gaslight Co.*, 23 N. J. Law, 291, "in all its essential elements a bankrupt law," and that to allow preferences is to violate its spirit and general tendency, and to defeat its primary object. *Receivers, etc., of People's Bank v. Paterson Sav. Bank*, 10 N. J. Eq. 19. Then, again, the act under

consideration had, through a long series of years, received a settled construction. It must be assumed that when the legislature re-enacted the old provision in the old words they were satisfied with that construction, and meant that it should continue.

(60 N. J. L. 435)

PALMATEER et al. v. ROBINSON.

(Court of Errors and Appeals of New Jersey.

Dec. 9, 1897.)

FIXTURES—PERSONALTY CONDITIONALLY SOLD.

Robinson made a contract in writing to sell machinery of which he was the owner to the New Jersey Mill & Lumber Company. It was therein agreed that the title to the machinery should remain in the vendor until full payment of the purchase price, and that it should not become real estate, although affixed to land, but should remain personal property until paid for. The company affixed the machinery to land belonging to John and Amos Palmateer, which it was in possession of under a contract to purchase. The company having failed to perform that contract, the Palmateers took possession of the land to which the machinery was affixed. Robinson (the company having failed to pay for the machinery) brought an action of trover against the Palmateers therefor. *Held*: (1) That, if the machinery had been affixed to land to which the company had title, it would have retained its character of personal property, as between Robinson and the company. *Quere* as to its character if the company had mortgaged or conveyed the land to one who had no notice of the contract between Robinson and the company. (2) The Palmateers, by retaking possession of the land, acquired no right to the machinery, as against Robinson, but occupied in respect to it the same relation which the company had occupied.

(Syllabus by the Court.)

Error to supreme court.

This was an action of trover by George N. Robinson to recover damages for the conversion of certain machinery by John and Amos Palmateer. The bills of exception disclosed that Robinson, then the owner of the machinery, on October 4, 1893, contracted to sell it to the New Jersey Mill & Lumber Company, of Long Branch. The contract was in writing, and it was thereby expressly agreed between the contracting parties that the title to the machinery should remain in the vendor until the full payment of the purchase price, and that it should not become, or be taken to be, real estate, or appurtenances to real estate, although fixed to land, but should remain personal property, until fully paid for. The machinery was affixed to land by the vendee, and a building was erected over it; but it could be removed without injury to any other buildings, and with trifling injury to the building erected over it. The land to which the building was affixed belonged to the Palmateers. The New Jersey Mill & Lumber Company had no title thereto, but were in possession by virtue of an agreement in writing whereby the Palmateers agreed to sell the same to the company. The company failed to pay the stipulated price for the land, and the Palmateers, in some mode not disclosed by the bills of exception,

re-entered into possession. The company likewise failed to pay the purchase price for the machinery. Robinson made demand on the Palmateers for the machinery, and they refused to deliver it, or to permit Robinson to take it from the land. The trial court submitted the facts to the jury, who found for Robinson. The judgment upon such verdict was brought to the supreme court by writ of error, and affirmed. The judgment of the supreme court is brought here by this writ of error. Affirmed.

Hawkins & Durand, for plaintiffs in error.
Helsley & Morris, for defendant in error.

MAGIE, C. J. (after stating the facts). The single question presented by the assignments of error and the briefs in the case is whether, upon the facts set out in the bills of exception, the court below was right in holding that the machinery in question remained the property of Robinson, the vendor, and did not cease to be his personal property by its annexation to the land of the Palmateers. In view of the express provisions of the contract of sale of the machinery, made between Robinson, its owner, and the New Jersey Mill & Lumber Company, it is perfectly obvious that if that company had affixed the machinery to land belonging to it, in the same manner in which it affixed it to land of the Palmateers, which it occupied under a contract of purchase, such annexation would not necessarily have incorporated the machinery with the land, so as to change its character from personalty to realty; for, whether property personal in character becomes transformed into realty by annexation depends, among other things, upon the intent, expressed or implied, with which the annexation was made. Pope v. Skinkle, 45 N. J. Law, 39; Campbell v. Roddy, 44 N. J. Eq. 244, 14 Atl. 279. The intent of the company in making annexation of machinery which they held under such a contract must be considered to have been conditional, and the condition to have been that before its character should be thus changed, the whole purchase price should have been paid, so as to vest the title to the machinery in the company. It is too plain for discussion that under such circumstances, if the company had defaulted in paying the purchase price, Robinson might have regained possession of the machinery from the company, notwithstanding its being affixed to its land, and might have recovered damages for its conversion if the company refused to surrender it on proper demand. This case does not require any expression of opinion in respect to the right which is acquired by a bona fide purchaser or mortgagee, without notice, of land, to which the owner has affixed property, personal in character, which he holds under such a contract of sale as appeared in this case, before payment of the purchase price. As was pointed out in Campbell v. Roddy, *ubi supra*, the courts of this country are not in agreement upon that question; and the lack of harmony among them

will appear, not only upon the cases there cited, but from others collated in the notes to *Hobson v. Gorringer*, 12 Eng. Ruling Cas. 208. The Palmateers were neither purchasers nor mortgagees of the land with the machinery apparently affixed thereto. They have laid out nothing in its acquisition. They have simply retaken possession of their land upon the company's default in the performance of its contract to purchase it. Upon retaking possession, they have found upon the land the machinery in question, which was brought upon it and affixed to it by the company, which they had put in possession under a contract of purchase and sale. The title to the machinery has never passed from Robinson, the owner of it, unless annexation of it to the land has divested him of it. But such annexation was not made by the Palmateers, but by the company, which became able to annex only by being put in possession by them; and such annexation was, as we have seen, with the express reservation of its character as personalty. Under such circumstances, they occupy, in respect to the machinery, the same relation which the company occupied, and can no more defend possession of it—the purchase price not having been paid—than could the company. The case of *Hendy v. Dinkerhoff*, 57 Cal. 3, presents the same features which appear in the case before us, and the conclusion reached was such as is above indicated. The case of *Campbell v. Roddy*, 44 N. J. Eq. 244, 14 Atl. 279, is analogous, and justifies the conclusion above stated. In that case, Mr. Justice Reed, in delivering the opinion of the majority of this court, points out that a mutual agreement between the owner of lands and the owner of chattels will be efficacious in preserving the personal character of the latter after annexation; and, while admitting the difficulty of applying the rule in cases where the rights of others become involved, he did apply it under the following circumstances: To land which was subject to a prior mortgage, the owner annexed machinery, which was subject to a chattel mortgage. It was held that the lien of the chattel mortgage would be protected, so far as it would not diminish the security which the real-estate mortgagee would have had if there had been no annexation. The mortgagee in that case, and the Palmateers in the case before us, occupy similar, though not identical, positions. The title to the chattels annexed to the land in the former case had passed to the owner of the land, and the vendor retained an interest, which was held to be that of a chattel mortgagee. In this case the company obtained no title whatever, and expressly agreed that annexation to land should not convert the chattels into realty. If the interest of the chattel mortgagee can be asserted against the prior real-estate mortgage, the title of the real owner of the chattels must be capable of assertion, as against the landowner, under the circumstances of such annexation as is shown in this case. Wheth-

er, if the machinery had been put into a building which was on the lands the Palmateers contracted to sell to the company at the time the contract was made, and if, in removing it, damage might be done, diminishing the value of the real estate, the owner of the machinery could recover its full value, or only after allowance for the injury to the real estate, is a question not presented in the case; for the machinery was affixed to the land, and a small building erected over it, by the company. It appears that it can be removed without injury to other buildings, and without substantial injury to the new building. The result is that the judgment below must be affirmed.

(56 N. J. E. 183)

GUILD v. MEYER et al.

(Court of Chancery of New Jersey. Nov. 23, 1897.)

CREDITORS' SUITS—PRELIMINARY RELIEF—INJUNCTION—RECEIVERS—SUPPLEMENTAL PROCEEDINGS—RIGHTS OF RECEIVER—LIS PENDENS.

1. Where a receiver appointed in supplemental proceedings files a bill against the judgment debtor and another person, alleging that defendants are carrying on a business which belongs to the judgment debtor, but is in the name of the other defendant to cover up the debtor's property, and the allegations of the bill are denied by defendants' answers, preliminary relief will not be granted to complainant by way of injunction or receivership.

2. Nor will such preliminary relief be granted where the bill alleges that defendants are partners, and defendants' answers deny the partnership.

3. A receiver appointed under the supplemental execution act (Gen. St. p. 1419, par. 26), which provides that on his appointment he is entitled to the property and things in action of the judgment debtor, belonging or due to or held in trust for him "at the time of issuing said execution, or at any time afterwards," is not entitled to recover a debt which was not in existence at the time of his appointment.

4. When a receiver has been appointed in supplemental proceedings, and the judgment debtor is in partnership with another person, after notice to the partner of the receiver's appointment, all his dealings with the debtor's interest in the partnership are at said partner's risk.

5. When a receiver is appointed in supplemental proceedings, and the execution debtor is in partnership with another person, in a suit brought by the receiver against said partners to realize the value of the judgment debtor's interest in the partnership, the receiver would not be entitled to a preliminary injunction to prevent the partner of said debtor paying over to him the profits of said business which accrued either before or after the appointment of the receiver.

Action by Frederick W. Guild, as receiver, against Michael Meyer and Charles Metzger, to reach property of Meyer standing in Metzger's name. On application for a preliminary injunction and a receiver. Heard on bill and affidavits, and answers and affidavits. Motion denied.

R. H. McOarter, for the motion. Samuel Kallsch, opposed.

EMERY, V. O. This is a bill filed by complainant, who is a receiver appointed on supplementary proceedings under an execution, and is filed against the judgment debtor,

Meyer, and one Metzger. The object of the bill is to reach certain property and business now held and carried on in Metzger's name, and to obtain a decree that Meyer is the owner of this business, or, failing in this, to declare that Meyer is a partner in the business, and to obtain a decree for account of his interest and profits therein. An application is now made for the appointment of a receiver of the property and business, and an injunction against making payments to Meyer out of the business pending the decision of the cause. The application is based upon two grounds or claims for ultimate relief: First, that the property and business for which a receiver is prayed is really the property and business of the judgment debtor, Meyer, and the legal title thereto, if it is in the defendant Metzger, is so held in fraud of complainant, as a creditor or representing creditors of Meyer. Second, that the defendants Meyer and Metzger are in fact partners in the business; that, this being so, Meyer has certainly an interest in the profits of the business, and perhaps in the property; and that inasmuch as Meyer's interest in the profits is, by the arrangements between the alleged partners, paid over to him as fast as earned, a receiver or preliminary injunction against such payment is necessary in order to give adequate relief, or in fact any relief to complainant, in case this claim as to partnership be well founded.

As to the first ground, the facts set up in the answers and affidavits amount to a denial of the ownership of the property and business by Meyer, and of the allegations in complainant's bill and affidavits upon which the claim of ownership is based. Under the usual rule, therefore, the complainant is not entitled to a preliminary injunction or receiver on the ground of Meyer's sole ownership, and there are no circumstances in the case which bring it within the exceptions to the rule.

In reference to granting either an injunction or receiver on the second ground,—that of Meyer's interest either in the profits or property, as a partner,—the first material point to be noticed is that the partnership is denied both by Meyer and Metzger, and their claim is that the arrangement for his sharing in the profits is a payment for his labor and services as an employé or manager of the business for Metzger. Where the existence of a partnership is denied, the usual rule is not to appoint a receiver until that question is determined; and the English practice formerly was to direct an issue to try the fact, the motion for receiver in the meantime standing over. *Lindl. Partn.* 552; *Peacock v. Peacock*, 16 Ves. 49. This was the rule applied where the existence of a partnership was in dispute between the alleged partners themselves, and the complainant, who is or represents a judgment creditor of one of the alleged partners, can (at least ordinarily) have no greater or more extensive

rights to a receiver than the judgment debtor or himself, under whose alleged partnership he claims. Ordinarily, therefore, the question of partnership or no partnership must first be settled before the court should undertake, by injunction or receiver, to interfere with the custody or control of the property or business which, if no partnership exists, belongs absolutely to the defendant denying the partnership to manage as his own. But it must be further noticed that the complainant, as receiver, does not stand in the position of a person claiming for himself as partner the continued existence of a partnership, and claiming, by reason thereof, an interest in the property or in the profits accrued or to accrue. Complainant was appointed receiver by order of a judge made under the supplementary execution act, which declares (2 Gen. St. p. 1419, par. 26) that, on his appointment, he is entitled to the property and things in action of the judgment debtor, belonging or due to or held in trust for him, "at the time of issuing said execution, or at any time afterwards." The court of errors and appeals, in *Willison v. Salmon* (1889) 45 N. J. Eq. 257, 17 Atl. 815, have decided that a receiver under such appointment is not entitled to recover a debt which was not in existence at the time of his appointment; and this rule, as it now seems to me, would prevent the receiver from recovering in this suit any profits of the business earned by Meyer after the appointment of the receiver, and due to him simply as a partner, by reason of the mere continuance of the firm after the appointment for services thereafter performed. And as I now look at the receiver's rights under the statutory appointment, and on the basis that Meyer is a partner, his rights are limited to what was due to Meyer as a partner at the time of this appointment, and he is entitled to an account of what was then due Meyer as a partner, on an accounting, following, if necessary, the subsequent transactions solely for the purpose of ascertaining and recovering what was then due. Seizure and sale on execution against one partner ordinarily dissolves a partnership (Lindl. Partn. *359); and this must be the effect so far as relates to an execution creditor who sets up the purchase under execution against the other partner. The execution creditor cannot become a partner. *Helmere v. Smith*, 35 Ch. Div. 436, 440.

Supplementary proceedings to reach the debtor's interest in a partnership would in this respect seem to have the same effect as a seizure and sale under execution, and the receiver's rights under the statute, as construed by the court in the above case, cannot extend further than to dissolve the partnership of the debtor as of the date of his appointment, and the consequent transfer of the debtor's interest, and to entitle him, as against the judgment debtor, to an account of the debtor's interest as of that date. All dealings by the other partner, or alleged partner, with the debtor's then interest, after notice of the appointment of the receiver, would be at his

own peril. In *Coleman v. Roff* (Sup. Ct.; 1883) 45 N. J. Law, 7, the court held that an assignment of choses in action made by a defendant in execution, after proceedings for discovery, to an assignee who had notice of the proceedings, was void as against the receiver subsequently appointed; and Chief Justice Beasley said (page 11) that such assignment, after filing a bill in equity, and with notice thereof, would clearly be ineffectual. Whether, as against Metzger, the right to account, in case a partnership be finally established as existing, should be fixed as the date of the commencement of proceedings or the date of notice thereof to Metzger or of the receiver's appointment, is a matter for future determination; but, as it now seems to me, the right of the receiver, as against Metzger, if he has any right by reason of the existence of a partnership, is to an account as upon dissolution from one of those dates. For the protection of this ultimate right, it does not seem to me that any preliminary injunction or receiver against Metzger is necessary; and it certainly should not be ordered pending the decision of the disputed question of partnership. The motion for injunction and a receiver at the present time will therefore be denied, but will be directed to stand over until final hearing. Costs of the motion will be costs in the cause.

(80 N. J. L. 464)

FOLEY v. LOUGHRAN.

(Court of Errors and Appeals of New Jersey.
Dec. 7, 1897.)WITNESSES—HUSBAND AND WIFE—COMPETENCY—
TRANSACTIONS WITH DECEDENT—INSTRUCTIONS—COMMENTS ON EVIDENCE.

1. The husband and wife, by the statutes of this state, are made competent and compellable witnesses, for or against each other, in any civil action, when either is a party thereto.

2. The wife or husband of a plaintiff who sues or is sued in a representative capacity is a competent and compellable witness in such action to testify to the transactions with or statements by any testator or intestate represented therein.

3. The first section of the supplement to the act concerning evidence (P. L. 1880, p. 52; 2 Gen. St. p. 1407) qualifies any party to any action to be examined as a witness therein, notwithstanding such party may sue or be sued in a representative capacity; and the proviso to that section, "that this supplement shall not extend so as to permit testimony to be given as to any transaction with or statement by any testator or intestate represented in said action," simply circumscribes the extent to which testimony may be given under that act, and is a limit only upon the operation of the act, and excludes only the party to the action from giving such evidence, and does not in any sense exclude or restrict the testimony of the wife or husband of such party as to such evidence.

4. A trial judge in a civil action has the undoubted right to make such comments upon the testimony as he thinks necessary or proper for the direction of the jury. He may intimate an opinion as to the weight of evidence, or call the attention of the jury to any matter in the cause affecting the credibility of a witness, whenever he may think it required or necessary for the promotion of justice, so long as he fairly leaves the jury to determine the facts and draw their own conclusions.

(Syllabus by the Court.)

Error to circuit court, Hudson county; Nevius, Judge.

Action by Peter Loughran against Louis B. Foley, administrator of James T. Gibbons, deceased, to recover a debt. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

Allan L. McDermott, for plaintiff in error.
Charles O. Black, for defendant in error.

LIPPINCOTT, J. This brings up for review a judgment of the Hudson county circuit court. It is alleged that certain errors were committed in the trial of the action in the court below. The action was by Peter Loughran against Louis B. Foley, administrator of James T. Gibbons, deceased, and was brought to recover an alleged debt due the plaintiff, for the value of the board and nursing of the five children of Gibbons during his lifetime and after the decease of his wife. After the death of Mrs. Gibbons, the mother of the children, who were all of tender age, they were taken into the household of the plaintiff, who was their grandfather, some for a longer and some for shorter times, covering a period of three or four years altogether, and were there boarded, nursed, and taken care of. After the death of Gibbons the plaintiff brought this action. The trial resulted in a verdict for the plaintiff, upon which judgment was entered in the circuit court. The evidence shows that the engagements for the board, care, and nursing of these children were made between the wife of the plaintiff, who was their grandmother, and the defendant. All of the arrangements appear to have been made between them. The wife of the plaintiff was not engaged in any business whatever, and was only acting in behalf of her husband, as the head of the household. There is no contention in the case that this action was not rightly brought in the name of the husband. The facts in proof in this case clearly demonstrate that the right of action, if any existed, was in the plaintiff as the head of his household. Some of the evidence tends to show that Gibbons, during his lifetime, made some payment on account of the board and care of the children. Much evidence was admitted on the trial, without objection, to show the circumstances under which the children were taken into the household of the plaintiff and the character of the services rendered to them.

The first assignment of error arises upon the admission by the learned trial judge of the evidence of Mrs. Loughran, the wife of the plaintiff. She was a witness produced by the plaintiff, and, against objection and exception, testified to certain conversations which she had with Gibbons, and certain transactions with him, in relation to the board and nursing of the children. The en-

gagements were made by Gibbons with her, and it was to these engagements with him that she was permitted to give evidence. Some of the conversations with Gibbons in relation to this matter were in the presence of her husband; others were with her alone. I think that a reference to the statutes on the subject will clearly establish her competency to testify to these transactions. The third section of the act, entitled "An act concerning evidence" (Revision, approved March 27, 1874; 2 Gen. St. p. 1397), provides "that no person shall be disqualified as a witness in any suit or proceeding at law or in equity by reason of his or her interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his or her credit; provided nevertheless, that no party shall be sworn in any case when the opposite party is prohibited by any legal disability from being sworn as a witness, or either of the parties in a cause, sue, or are sued, in a representative capacity, except as hereinafter provided." The fourth section of the same act provides "that a party to a suit in a representative capacity may be admitted as a witness therein, and if called as a witness in his own behalf, and admitted, the opposite party may in like manner be admitted as a witness." The fifth section provides "that in any trial or inquiry in any suit, action or proceeding in any court, or before any person having by law or consent of parties authority to examine witnesses or hear evidence, the husband or wife of any person interested therein as a party or otherwise, shall be competent and compellable to give evidence the same as other witnesses, on behalf of any party to such suit, action or proceeding." The proviso to this section only excepts from this statutory rule of evidence the husband or wife, in any criminal action or proceeding, or in actions for divorce on account of adultery, except to prove the fact of marriage, or in any action for criminal conversation, or to disclose confidential communications made by one to the other during the marriage. In such excepted cases the husband and wife are not competent or compellable to give evidence for or against each other. By section 1 of a supplement to this act, approved February 25, 1880 (2 Gen. St. p. 1407), it is provided "that in all civil actions in any court of law or equity in this state, any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity; provided nevertheless, that this supplement shall not extend, so as to permit testimony to be given as to any transaction with, or statement by, any testator or intestate represented in said action." At common law neither the husband nor wife was admissible as a witness in a civil or criminal action when the other was a party, and this principle applied to all actions at

law in representative capacity or otherwise. The husband and wife were said to be identical in interest. *Windham v. Chetwynd*, 1 Burrows, 414; 1 Greenl. Ev. 334. The main ground of exclusion appeared to be that of public policy in the maintenance of marital confidence and peace. Best, Ev. (6th London Ed.) § 176. Mr. Justice Magie, in *Jackson v. Johnson*, 51 N. J. Law, 457-459, 17 Atl. 959, in view of the statutes of this state, indicated that no other reason than this supposed public policy existed for the exclusion of the wife. It is perhaps needless to inquire the reason for the exclusion of the evidence of the husband and wife where either was a party to the action. With the statutory restrictions, the parties to the action are both competent and compellable as witnesses. By a supplement to the act entitled "An act to regulate the practice of the courts of law," approved March 1, 1849 (P. L. 1849, p. 264), a plaintiff or a defendant to an action was a compellable witness when called by the adverse party. By a supplement to the act entitled "An act concerning witnesses," approved March 18, 1859 (P. L. 1859, p. 490), the disqualification was removed, and parties to the action were entitled to testify as witnesses. By this latter act the wife of a party to the action was expressly excluded, except when the suit or proceeding was between her and her husband, and the parties were also excluded when the opposite parties were prohibited by any legal disability from being sworn as witnesses, or either of the parties sued or were sued in a representative capacity. *Handlong v. Barnes*, 30 N. J. Law, 69. This exclusion of the wife remained until the passage of the further supplement to the "Act concerning witnesses," approved March 17, 1870 (P. L. 1870, p. 59), in which the disqualification of the husband and wife, when either was a party to the action, was removed, and they were by such statute made competent and compellable witnesses, for or against each other, the same as other witnesses, except in criminal actions, or in proceedings for divorce on account of adultery, or in any case of bigamy, except to prove the fact of marriage, or in any action or proceeding for or on account of criminal conversation, or as to any confidential communication made by one to the other during marriage. Save in the excepted cases under this statute, the wife became a competent witness in actions at law in which her husband was a party. *Jackson v. Johnson*, 51 N. J. Law, 457-459, 17 Atl. 959. The revision of 1874 is substantially the act of 1870, its verbiage being only slightly changed, and, except as to the restrictions therein contained, in clear and express terms places the husband and wife, so far as actions in which either are parties or interested, on the same plane as other witnesses. The language of the act is general, and the proviso containing the restrictions cannot be made to disqualify any further

than its provisions go. The disqualification by reason of the identity of interest is expressly and entirely removed, and no construction leading to a different result can be permitted against the plain intent of the statute. The qualification of the husband or wife is nowise restricted by the existence of a legal disability of the adverse party when the other is either plaintiff or defendant or otherwise interested. They are made to stand apart as other witnesses. The party, being either husband or wife, under the third section of the act, remains under the disability as a witness when the opposite party is prohibited as a witness by reason of legal disability, or when either sues or is sued in a representative capacity, yet the other stands, so far as being a witness, in that section, in the category of other witnesses. The restriction in the act of 1880 (P. L. 1880, p. 52; 2 Gen. St. p. 1407) can only apply to the party to the action. This statute only deals with the party to the action, in whatever character he or she may sue or be sued, and by it the party, while competent as a witness, as he was under the act of 1870 as revised, is restricted from giving evidence as to transactions with or statements by any testator or intestate represented in the action. The exclusion of this character of evidence by the terms of the act can only apply to the party to the action, and this also clearly appears when the other statutes on this subject are taken into consideration. The separation of the husband and wife as witnesses for or against each other has been dealt with by other statutes, and legislatively determined upon, and the public policy changed to meet new conditions. The disability of the wife or husband to be a witness in an action where the other is a party has been specifically removed by the statute, except in those cases mentioned in the restrictive proviso, and as to all other cases she is a competent and compellable witness. The only exclusion of the statute of 1880 is the party to the action, and the proviso cannot be enlarged by judicial construction to embrace the disqualification of witnesses competent by other legislative enactments. The restrictive provision, by all rules of construction, must be confined to the party to the action and to his incompetency, which is the only subject-matter dealt with by the proviso. In *McCartin v. McCartin*, 45 N. J. Eq. 265-267, 17 Atl. 809, in this court, it was held that "the language of the proviso that this supplement shall not extend so as to permit testimony to be given to any transaction with or statement by any testator or intestate represented in said action" is a limitation only upon the operation of the act of 1880. It simply circumscribes the extent to which the testimony may be given under that act. *New Jersey Trust & Safe-Deposit Co. v. Camden Safe-Deposit & Trust Co.*, 58 N. J. Law, 197, 33 Atl. 475; *Woolverton v. Van Syckel*, 57 N. J. Law, 393,

31 Atl. 603. The conclusion reached is that the wife of the plaintiff was a competent and compellable witness in this action to the transactions with, and statements made by, the intestate.

The other assignments of error can be considered together. Their substance is that the court by its instructions to the jury took away from its consideration the question whether there existed an express contract between the plaintiff and the intestate for compensation for the board and nursing of the children; and also the question whether the circumstances under which the services were rendered were such as exhibited a reasonable and proper expectation that there would be compensation; and also the question whether the remuneration had been paid by the estate; and also the question of the reasonable value or price of the services rendered. The contention of the defendant was that, under the instructions, the trial judge determined these questions of fact in favor of the plaintiff. It is unnecessary to discuss the charge of the trial court in detail. An examination of the instructions shows that, with certain comments upon the evidence and its weight, the court distinctly submitted to the jury to determine, from the evidence, whether an express or implied contract for compensation or remuneration for the board and care of the children existed between the plaintiff and the intestate. *Disbrow v. Durand*, 54 N. J. Law, 343, 24 Atl. 545, and cases cited. The jury were instructed that, if no express contract existed, the mere fact that the services were rendered by the plaintiff to the children, they all being members of the same household, would give rise to no implication to pay for such services; and that, in order to sustain a recovery, the jury must find that the evidence and the circumstances must be such as to exhibit to the jury a reasonable expectation on the one side to pay, and on the other side to receive compensation, for the services rendered. It was submitted to the jury whether upon any ground there should be a recovery, and, if a recovery, for what amount, including a submission to the jury to determine, if a debt was established, the question whether any part of it had been paid. We do not find that the comments upon the evidence of the trial court either misled or influenced the jury as to the matters of fact submitted to their determination. The rule is that a trial judge has the undoubted right to make such comments upon the testimony as he thinks necessary or proper for the direction of the jury. He may intimate an opinion as to the weight of evidence, or call the attention of the jury to any matter in the cause affecting the credibility of a witness, whenever he may think it is required or necessary for the promotion of justice, so long as he leaves the jury to determine the facts and draw their own conclusions. This rule was not in any respect violated by the trial judge. *Bruch v. Carter*, 32 N. J. Law, 554-565; *Castner v. Silker*, 33 N. J. Law, 508-512. The judgment must be affirmed, with costs.

BURNE v. O'SHAUGHNESSY et al.

(Court of Chancery of New Jersey. Dec. 20, 1897.)

CREDITORS' BILL—MULTIFARIOUSNESS—PARTIES.

1. A creditors' bill is not multifarious because complainant attempts to follow, in the one bill, separate properties and classes of property of the debtor in the hands of separate defendants, though the fraudulent transactions alleged in regard to personalty occurred eight or nine years after those relating to real estate.

2. A creditors' bill against B., O., the debtor, and a life insurance company and its officers, sought to reach land, personalty, and the proceeds of a life policy payable to defendant. The bill charged that land held by B. was bought with the debtor's funds, and that the title was put in his wife's name, in fraud of creditors, and for the same purpose was conveyed by her shortly before her death to B. As to the personalty and the life insurance money, the bill charged that O., under a fraudulent judgment, on which nothing was due, had levied on the debtor's personal property, and was about to sell it in fraud of complainant. An injunction was prayed, restraining payment of the insurance money to O. or any other person. *Held*, that B. and O. were properly joined as defendants, because their separate titles were connected in their operation against complainant's remedy at law, and also in the relief to be administered, since, on decree against both, the land could only be sold to pay the balance due after applying the personalty to complainant's claim.

3. The insurance company was a necessary party to the relief prayed by way of reaching the insurance money, as equitable assets, and for the purpose of restraining payment to O. pending the suit.

Creditors' bill by Martin Burne against John O'Shaughnessy and others. Heard on demurrers to the bill. Demurrers overruled.

J. H. Meeker, for complainant. Wm. J. Kearns, for defendants John O'Shaughnessy and others. Wm. C. Nicoll, for defendant Oury.

EMERY, V. O. The complainant is a judgment and execution creditor of the defendant John O'Shaughnessy, and filed this bill to enable him to obtain satisfaction of his judgment out of the property of defendant. Three classes of property are sought to be reached, viz. real estate, personal chattels, and the proceeds of a life insurance policy, payable to defendant. The real estate is held by the defendant Bridget O'Shaughnessy; and, as to the real estate, the bill substantially charges that it was purchased with funds of the debtor, and that the title was put in the name of his wife, in fraud of the complainant's right as creditor, and for the same purpose was conveyed by the wife shortly before her death to the defendant Bridget O'Shaughnessy. As to the personal chattels and the life insurance money, the bill charges that another defendant, Oury, under a fraudulent judgment and execution, upon which nothing is due, has levied upon the judgment debtor's personal property, and, his execution being prior to complainant's, is about to sell this property thereunder in fraud of complainant. An injunction is prayed, restraining the pay-

ment of the insurance money to the judgment debtor or any other person, and to this end the insurance company is made a defendant. Separate demurrers, for multifariousness only, have been filed by the defendants John O'Shaughnessy, the judgment debtor, Oury, Bridget O'Shaughnessy, and the insurance company, together with its officers. The ground relied on by counsel for demurrants is that each of the separate demurrants had no connection with the case against the other defendants, and should not be put to the burden of a defense against these claims. But while, as to defendants other than the judgment debtor, this want of connection with portions of the whole case as presented by the bill may exist, yet the settled rule of this court in relation to bills of this character is that they are not, on that account alone, multifarious. Creditors' bills of this class are considered to present the single object of enabling the complainant to obtain satisfaction of his judgment at law out of the judgment debtor's property, and the equitable jurisdiction of the bill is based on this object. Inasmuch as the object of the bill and the relief prayed are the satisfaction of the judgment, and this may be decreed out of any property of the debtor, which is properly reached by the aid of this court, the complainant, in his bill filed for this general purpose, is not restricted to relief against a single class of property, alleged to belong to the debtor, and he may follow in one bill separate properties of the debtor in the hands of separate defendants. This rule in relation to creditors' bills was settled by Chancellor Green in *Way v. Bragaw* (1863) 16 N. J. Eq. 213. In that case real estate of the judgment debtor was alleged to be fraudulently conveyed to one defendant, personal estate to have been similarly conveyed to another defendant, and certain equitable interests and property not to be reached by execution at law were also sought to be applied. A demurrer for multifariousness on the ground of the separate interests of defendants in the property sought to be reached was overruled. This rule was followed on this point in a similar case (*Randolph v. Daly* [1863] 16 N. J. Eq. 313), Chancellor Green saying (page 315): "It is well settled that on a bill to set aside fraudulent conveyances made by a debtor, and for a discovery of his property, it is no objection that a defendant to whom a portion of the property has been conveyed has no connection with other fraudulent transactions of the debtor. The case against the debtor is entire. If the defendant is a necessary party to some part of the case as stated, he cannot object that he has no interest in other transactions which constitute a part of the entire case." These cases have not been since questioned, and they control the present case on the point now involved. I have examined all of the cases referred to by the demurrants' counsel, and find nothing in them to qualify or control the doctrine of

these cases, nor do I think that the present case is distinguishable.

The distinction mainly insisted on is that the fraudulent transactions alleged in regard to the real estate occurred before 1889, and that those relating to the personal estate occurred in 1897. But this only relates to the degree or marked character of the separation between the two classes of property and of the claims against the separate owners, and manifestly does not prevent the operation of the rule settled by the above cases, that claims against persons in fact owning separate properties by separate fraudulent transactions may be united in bills of this character. And so far as Oury, the claimant of a lien on the personal property, and Bridget O'Shaughnessy, the claimant of the real estate, are concerned, it must also be observed that they are properly joined for another reason, pointed out in *Way v. Bragaw*, supra (page 216), viz. that their separate titles are connected not only in their operation against the complainant's remedy at law, but in the relief to be administered, inasmuch as, on a decree in favor of complainant against both, the real estate can only be sold to pay the balance remaining due after the application of the personal estate to the complainant's claim. The insurance company is a necessary party to the relief prayed by way of reaching the insurance moneys in their hands as equitable assets, and for the purpose of restraining payment to the judgment debtor pending the suit. They may, by petition for payment into court, be relieved from further prosecution. *Meyers v. Schuman* (N. J. Ch.; Green, V. C., March, 1895) 31 Atl. 460, 461. The demurrers are therefore overruled, with costs, and an injunction under the rule to show cause will be advised.

(80 N. J. L. 560)

COOPER v. HAWLEY.

(Court of Errors and Appeals of New Jersey.
Dec. 10, 1897.)

BUILDING CONTRACT—CONSTRUCTION—EXTRAS.

A building contract contained, among others, these provisions: "Third. Should the owner at any time during the progress of said building request any alterations, deviations, additions, or omissions from the said contract, she shall be at liberty to do so; and the same shall in no way affect or make void the contract, but will be added or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation. * * * Fifth. * * * Should any dispute arise respecting the true value of the extra work or of the works omitted, the same shall be valued by two competent persons,—one employed by the owner, and the other by the contractor; and those two shall have power to name an umpire, whose decision shall be binding on all parties. * * * Seventh. No alterations or extra work shall be done without a written order from the architect, and an express agreement in writing as to the cost." *Held*, that the prohibition of the seventh clause extended only to orders of the architect, and had no relation to the other clauses.

Depue, Gummere, Bogert, and Nixon, JJ., dissenting.

(Syllabus by the Court.)

Error to supreme court.

Action by Ira E. Hawley against Hattie E. Cooper to recover on a contract. From a judgment for plaintiff, defendant brings error. Affirmed.

The parties agreed, under seal, that Hawley should erect a building on Miss Cooper's land, and that she should pay him therefor, in installments, \$3,925. The work was to be done under the direction of Herman Fritz, an architect. The following provisions of the contract are pertinent to the controversy now under review: "Third. Should the owner at any time during the progress of said building request any alterations, deviations, additions, or omissions from the said contract, she shall be at liberty to do so; and the same shall in no way affect or make void the contract, but will be added or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation. Fourth. Should the contractor, at any time during the progress of such works, refuse or neglect to supply a sufficiency of materials or workmen, the owner shall have power to provide materials and workmen, after three days' notice, in writing, being given, to finish the said works, and the expense shall be deducted from the amount of the contract. Fifth. Should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by Herman Fritz, and his decision shall be final and conclusive; but should any dispute arise respecting the true value of the extra work, or of the works omitted, the same shall be valued by two competent persons,—one employed by the owner, and the other by the contractor; and those two shall have power to name an umpire, whose decision shall be binding on all parties. Seventh. No alterations or extra work shall be done without a written order from the architect, and an express agreement in writing as to the cost." Four months after the time fixed by the contract for its completion, the building was still unfinished, and the owner, on three days' notice, discharged the contractor and caused it to be finished by others. The contractor brought suit in the circuit court of the county of Essex for \$2,275, the amount of the unpaid installments of the contract price, and \$96.29, the cost of a few extras. In defense, the owner claimed that the work done by the contractor varied so greatly from the specifications as to defeat any recovery, and, by way of recoupment and set-off, sought damages for delay and defective work, and allowance for the cost of finishing the building. At the trial, the contractor claimed modifications of the contract and other acts of the owner, justifying the delay, and asserted that his work was in substantial compliance with the contract as modified. He conceded a deduction of the estimated cost to him to finish the building, which cost he undertook to show would have been less than the cost to the

owner. The character of the work up to the time of the discharge and the propriety of such discharge were submitted to the jury, under instructions to which no exception was taken, and that seem unexceptionable. The evidence showed deviations from what was specified in the contract. These the contractor sought to vindicate by parol authority. The defense objected to any proof of alterations or extra work authorized only by parol. The trial judge, under exception, permitted such proof, but directed it to be limited to cases where the parties themselves had mutually agreed to the modifications, and, in his charge, instructed the jury as follows: "Before you can find that there was a change in the contract,—a modification of the plans,—you must be satisfied that the parties to the contract—not the architect and the plaintiff, but the defendant and the plaintiff—mutually agreed to such changes." He assumed in his charge that the contract required that such an agreement should be in writing expressing the cost, and should be accompanied by a written order from the architect, but instructed the jury that those requirements might be waived, and that a waiver might be inferred from the facts and circumstances proved in the case. To these instructions exception was taken. The verdict was for \$1,532.35. The two exceptions recited present the only matters assigned for error in the supreme court, where the resultant judgment was affirmed. The plaint under the present writ is such affirmance.

Robert H. McCarter, for plaintiff in error.
William B. Guild, for defendant in error.

COLLINS, J. (after stating the facts). The contention, unsuccessful at the trial and in the supreme court, now pressed for our decision, is that, inasmuch as the contract between the parties was under seal, it could not be altered by parol. Speaking for myself, I can see no reason why a valid contract, of whatever nature, should be denied efficacy because the parties had previously made a different contract, however solemn in form; but it is sufficient now to say that such a determination is in no way involved in an affirmance of the judgment under review. The cause was tried on the mistaken assumption of court and counsel of a correlation between the provisions of the seventh clause of the contract and those of the third and fifth clauses of that instrument. They are so discrepant as to be clearly independent provisions. Alterations, deviations, additions, or omissions requested by the owner are to be valued after the work is done. Alterations or extras ordered by the architect are conditioned on a previous agreement as to their cost. The language of the seventh clause is obscured by condensation; but, construed in the light of the other clauses, it plainly refers only to orders of the architect. An agency for an owner is readily in-

ferred, in certain cases, to rest in a supervising architect. *Seymour v. Dock Co.*, 20 N. J. Eq. 396; *Bridge Co. v. McGrath*, 134 U. S. 280, 10 Sup. Ct. 730. In this contract, by the seventh clause, such agency is expressed and circumscribed. The ruling, therefore, of the trial judge, was all that the plaintiff in error could ask. The unnecessary statement in the charge that the contract requirements might be waived was harmless even if incorrect.

The only other complaint urged in this court is that alterations were proved for which the only authority shown was that of the architect by parol. If this be so, it must be assumed that, under the lucid instructions of the judge, the jury treated such alterations as unauthorized. It follows that they found them to be consistent with a substantial compliance with the contract. The amount of the verdict as applied to the evidence does not indicate any disregard of the principles laid down to guide the jury. If the plaintiff in error conceived otherwise, her remedy was by motion for a new trial, not by writ of error. If it could be shown, indeed, that in no case of deviation from the contract was there evidence of the owner's concurrence, it is possible that it might be held error for the judge to have submitted the matter at all to the jury; but this is not claimed. Authority to change the stairs was admitted to have been given, and there was evidence of authority to erect the building at a higher elevation than that called for by the plans. The grievance of the plaintiff in error is thus exhibited in the brief of her counsel: "There was error in the judge's charge, in that it left it to the jury to determine whether there was any evidence of a modification of the contract; when the case displayed absolutely none whatever, except in reference to the elevation of the house. The plaintiff below did offer proof that the defendant was present and assented to such location, but there was absolutely no proof of her assent to, or knowledge of, any of the other changes of which the case is replete with examples, beyond the mere occupancy of the house by her, after discharging the contractor. * * * The jury should have been charged that inasmuch as the case showed no evidence whatever of acceptance or waiver by the defendant of any of the provisions, that the plaintiff could not recover thereon. It was a great hardship upon the defendant to permit, under the guise of subsequently proving the defendant's assent to or ratification of the alterations and changes, evidence to be given of such changes, modifications, and alterations throughout the entire job, and then leave the case to the jury, although it was devoid of any proof whatever as to such ratification of deviation, except in reference to the variation in the elevation of the house." It appears, therefore, that the owner's authority for, at least, one deviation besides that conceded,

was fairly open to discussion. The testimony shows that this was the most important one. With the exception of the change in the stairs, passed by with the remark that authority for that was admitted, it was the only one to which the judge alluded in his charge to the jury. This court cannot be asked to scrutinize the voluminous testimony as to other deviations. We cannot know that claim of authority for any others was pressed before the jury. If so pressed without supporting proof, protection could have been afforded by appropriate requests to charge. I shall vote to affirm this judgment.

DEPUE, GUMMERE, BOGERT, and NIXON, JJ., dissent.

(54 N. J. E. 268)

KANE et al. v. LODOR.

(Court of Chancery of New Jersey. Dec. 6, 1897.)

CHATTEL MORTGAGES—VALIDITY—ENFORCEMENT—DEFENSES—ESTOPPEL—EXTENT OF LIEN.

1. A chattel mortgage is good, though the affidavit is defective, as against the receiver of the mortgagor.

2. In an action to foreclose a chattel mortgage given by a corporation, and assigned to complainants, it was no defense that complainants were indebted to the company for the money with which it was to commence business.

3. A chattel mortgage by a corporation, authorized by de facto stockholders only, is good as to third persons.

4. A chattel mortgage given by a mercantile corporation was not invalidated, as to it or other creditors, by the fact that it was delivered to the attorney of the lessor of the premises in which the company did business, in pledge, to carry out an agreement by which the lien of such mortgage was to be subordinated to the lien of a new mortgage made to such landlord for rent.

5. The lien of a chattel mortgage of a retail stock of goods, at the time of enforcement, rests only on the goods in stock at the time the mortgage was executed.

6. Where sellers of mortgaged personalty covenant "to warrant and defend the sale against all and every person whatsoever," and the mortgage is subsequently assigned to them, they are estopped to enforce it.

Action by Elizabeth Kane and Margaret Dorian against Daniel Lodor, receiver, etc., to foreclose a chattel mortgage. Judgment for defendant.

This bill is filed to foreclose a chattel mortgage. The order of events relating to the creation of this instrument, its ownership by the present complainants, and the status of the present defendant, is this: A number of years since, Patrick McGinley, Peter Kane, and Elizabeth Donahue were conducting a dry-goods business in Trenton under the name of McGinley & Co. While still in business under the name of McGinley & Co., that firm gave a chattel mortgage to Hood, Foulkrode & Co., to secure the sum of \$4,200. It gave another chattel mortgage to Crissman Bros., to secure \$13,530.28; still another chattel mortgage to Mr. Vroome, to secure \$500; still another to Mr. Holt, to secure \$600; and

another to Cook Bros., to secure \$2,000, which they owed for rent of the business premises. Besides these mortgages, there were two judgments against McGinley & Co.,—one for \$363.72, and another for \$93.30. On March 18, 1895, the Capital Dry-Goods Company was organized. This company was formed by Edward Kelly, Patrick McGinley, and Peter Kane. Mr. Kelly, for his interest in the new company, took 118 of the 120 shares; 1 each of the 2 remaining shares being held by McGinley and Kane. The capital stock of the company was stated in its certificate of incorporation to be \$25,000, and the amount with which they would commence business was stated to be \$6,000. The property with which they actually commenced business had its origin in this way: Besides the mortgages upon the stock of McGinley & Co., as I have already remarked, there were two judgments, amounting to about \$457. Executions were issued upon these judgments, and under these writs the equity of redemption of McGinley & Co. in the stock of goods was sold, and was bought in by Mr. Holt, who was at that time the attorney of McGinley & Co., for the sum of \$50. Mr. Holt sold this right to Edward Kelly, the father of Mrs. Kane (the wife of Peter Kane), for the sum of \$200. Then, as already remarked, the Capital Dry-Goods Company was organized; and Edward Kelly sold his interest to the company for the expressed consideration of \$1, and other good and valuable considerations. What he got was the 118 shares of stock in the new company. So, when the Capital Dry-Goods Company commenced business, its capital really consisted of the equity in the goods covered by the various mortgages, which equity had been bought for \$50, and conveyed to the new-fledged corporation. After the organization of the corporation, it substituted its own mortgages for the mortgages made by McGinley & Co. It gave on August 19, 1895, a mortgage for \$4,000 to Hood, Foulkrode & Co., one for \$600 to Mr. Vroome, and one for \$600 to Mr. Holt. Before the close of the year the Capital Dry-Goods Company was transformed into the Trenton Dry-Goods Company, the insolvent corporation whose receiver is the present defendant. The certificate of incorporation of the last company is dated September 30, 1895. Its capital stock is stated to be \$50,000; the number of shares, \$2,000, of the par value of \$25 each; and the amount with which the company would commence business was stated to be \$3,000. The stockholders were: Patrick McGinley, 1 share; Peter Kane, 1 share; Patrick Mohan, 20 shares; Elizabeth Kane, 49 shares; and Margaret Dorian, 49 shares. The shares of Mrs. Kane and Miss Dorian appear to have been paid for in the following manner: On October 19, 1895, the Capital Dry-Goods Company, the previous company, executed a bill of sale of its goods and chattels to these ladies for the consider-

ation of \$3,000. On the same day, these ladies, for the same expressed consideration, sold the same chattels to the Trenton Dry-Goods Company. Patrick Mohan paid for his in this way: He had loaned about \$800 to the Capital Dry-Goods Company, and in payment had received a lot of goods, which he stored. After the Trenton Dry-Goods Company was formed, he let the company have those goods, and received 20 shares of stock. The new corporation was practically a continuation of the business of the old company, with the same stock of goods, except so far as it had been changed by purchases and sales made during the period of time from March 18, 1895, to September 23, 1895. There was upon the property the \$4,000 mortgage of Hood, Foulkrode & Co., and the Vroome and Holt mortgages; and on October 19, 1895, the company gave a mortgage to Edward G. Cook and others to secure \$1,575 for rent due. The mortgage which the complainants are foreclosing is the \$4,000 mortgage originally made to Hood, Foulkrode & Co. The complainants became possessed of it in this way: In the latter part of 1896, Mr. Kane approached Mr. Thomas R. Allen, and told him that Hood, Foulkrode & Co. were pressing for the payment of their mortgage, and insisted that Mr. Allen should take it; saying that he could buy it for \$2,000, or a little less, and that the company would pay it off within a year. Mr. Allen bought it. On February 20, 1897, he assigned it to Elizabeth Kane and Margaret Dorian, taking seven houses,—four on Princeton avenue and three on South Broad street,—subject to mortgage. The property in these houses originated, according to the testimony of Miss Dorian, in this way: McGinley, her uncle, gave her a house on Prospect street; that house was traded for stock in a shoe store; that stock was traded on August 16, 1895, for a farm; and the farm was traded for the houses conveyed to Mr. Allen.

James L. Kelly and W. D. Holt, for complainants. J. L. Conard, for defendant.

REED, V. C. (after stating the facts). The defendant sets up, among other things, that the affidavit to the chattel mortgage is defective. But as against the receiver, who was the only party defendant, the mortgage is good without registry or affidavit. The mortgage, as against the mortgagor, was entirely efficacious as an incumbrance, and the receiver took his title to the property subject to all the equities to which it was subject in the hands of the debtor. This rule was asserted in respect to an assignment for the benefit of creditors in the case of Shaw v. Glen, 37 N. J. Eq. 32. A receiver, in this respect, stands upon the same footing as an assignee for the benefit of creditors. It is also set up that the complainants were indebted to the insolvent corporation in the sum of \$3,000, cash, with which the corporation

was to commence business, when in fact it had nothing but the equity of redemption in the mortgaged goods, coupled with the fact that the complainants were the real stockholders, and that they did not make any cash payments. But this, if true, is no defense to the mortgage. If there is any right to assert a claim against the complainants upon this ground, it must be done by another suit. It is, again, asserted that this mortgage was executed without corporate authority, and that those who executed it were not bona fide stockholders. They were, however, de facto stockholders, whose official acts were valid as to third persons. It is, again, asserted that this mortgage was delivered to the attorney of the landlord from whom it rented the premises in which it conducted its business, to be canceled. The evidence shows that the delivery was only for the purpose of putting the mortgage in pledge, to carry out an agreement by which the lien of this mortgage was to be subordinated to the lien of a new mortgage made to such landlord for rent. The transaction did not invalidate the mortgage, so far as it stood against the company or against other creditors. It is asserted that other mortgages have been made to other parties. This appears to be so. The evidence shows the existence of several other mortgages upon the property. The mortgagees are not parties to the bill, but the result of the existence of such other mortgages, if still unpaid, would be that a decree in favor of the complainants in this suit will settle nothing as against the lien of any other mortgagees. The question of priority will remain open, to be settled by another suit, or upon a proceeding taken to distribute the assets in the hands of the receiver resulting from a sale of the property already made by order of this court.

The troublesome questions in the case are two. The first rests upon the defense set up, that the goods sold by the receiver were purchased by the company after the execution of the mortgage, and are not subject to the lien of that instrument. The facts upon which this insistence rests are these: The mortgage was executed on August 19, 1895, at the time of the organization of the Capital Dry-Goods Company. The mortgage covered the goods then in possession of the company. That company went on using those goods in its business of retailing until September 30th following, when what was left of the goods passed to the Trenton Dry-Goods Company, the insolvent corporation. This corporation continued the business until December 26, 1896, when it went into the hands of a receiver. The lien of the mortgage, of course, rested at that time upon those goods only which had been in stock on August 19, 1895. Now, what remained of the original stock, after 16 months of retailing, is a question almost impossible to solve. The receiver had already sold a considerable portion of the

stock before any claim was put in by the mortgagee, and thereafter no effort was made to distinguish the old from the new stock. The stock, of course, was replenished from time to time, in the usual course of business. That some of the original stock remained at the time of the assumption of possession by the receiver, I have no doubt; but, in my judgment, the proportion in value of the old stock to the whole stock was very small. The value of the entire stock, as shown by the inventory and by the receiver's sale, was at the time of the company's insolvency much less than the estimate put upon it by the officers of the company. In fixing upon any figure as the value of the old stock still remaining at the time of the company's insolvency, the effort would be a mere guess. Whether the complainants, who have upon them the burden of showing the extent of their lien, should have a decree at all, for any amount, is doubtful. I should be inclined, however, to make an estimate of the proportion of the proceeds to which, as against the receiver, a decree should go, if it were not for another feature of the case, which, in my judgment, precludes them from any decree. This feature consists of a collocation of facts as follows: In the bill of sale executed by the complainants to the Trenton Dry-Goods Company on October 19, 1895, there is this warranty: "We covenant and agree to warrant and defend the sale against all and every person whatsoever." This, it is perceived, was a general warranty of title. There was then outstanding this Hood, Foulkrode & Co. mortgage. On February 20, 1897, the complainants purchased this mortgage. The rule is entirely settled, in regard to sales of real estate, that, if the sale is accompanied by a general warranty of title, then any title afterwards acquired by the grantor passes directly to the grantee. The rule rests upon the doctrine of estoppel, which shuts off the vendor, who has warranted a clear title, from asserting a claim against the title which he conveyed and warranted. *Gough v. Bell*, 21 N. J. Law, 157; *Moore v. Rake*, 26 N. J. Law, 574; *Brundred v. Walker*, 12 N. J. Eq. 140; *Vreeland v. Blauvelt*, 23 N. J. Eq. 483; *Matthiessen & Wiechers Sugar-Refining Co. v. Mayor, etc., of Jersey City*, 26 N. J. Eq. 247. In respect to sales of personal property, it has been held that, without any express warranty of title, the same result follows as in cases of the covenant of warranty in the sale of real estate. The sale of personalty by a person in possession—and, in England, by any one, whether in possession or not—carries with it an implied warranty that the vendor has the right to sell. In this respect such sales differ from sales of real estate by a deed of bargain and sale; for such a deed includes no implied warranty of title. *Phillips v. Mayor, etc., of Hudson*, 31 N. J. Law, 143; *Gano v. Vanderveer*, 34 N. J. Law, 293. In

sales of personalty, therefore, it has been held (and, I think, rightly) that, without an express covenant of warranty, a title afterwards acquired by a vendor, in property which he has sold, passes to his grantee. *Littlefield v. Perry*, 21 Wall. 205; *Gottfried v. Miller*, 104 U. S. 521; *Curran v. Burdsall*, 20 Fed. 835; *Frazer v. Hilliard*, 2 Strob. 309. Although the rule was criticised by the American editors of the *Duchess of Kingston Case* on the ground that it was an evasion of the rule that no interest can pass, either in land or chattels, which is not vested at the time of the sale (2 Smith, Lead. Cas. 742), yet a court of equity constantly recognizes the validity of a sale of future-acquired property. Such a contract transfers the beneficial interest in the property, as soon as it is acquired, to the vendee or mortgagee, who may have an injunction to restrain any interference with the property. *Holroyd v. Marshall*, 10 H. L. Cas. 191. Where there is, as in this case, an express warranty of title, the criticism just referred to, if sound, would explode the entire doctrine of title by estoppel in sale of both real and personal property. The rule in respect to real property is settled by an overwhelming weight of authority in respect to sales of all kinds, and Mr. Bigelow remarks that "it may be considered that the weight of authority is in favor of the estoppel, whenever there is a sufficient warranty or recital." *Bigelow, Estop.* p. 437. Upon this ground, the moment that the mortgagee's title passed to the present complainants, that title, by force of their general warranty to the *Trenton Dry-Goods Company*, passed, by the doctrine of estoppel, to the latter company, and so to the receiver.

(61 N. J. L. 457)

**STATE (CONTINENTAL MATCH CO.,
Prosecutor) v. SWETT.**

(Supreme Court of New Jersey. Dec. 10, 1897.)

ACTION FOR SERVICES—INCOMPETENCY AS A DEFENSE—REBUTTAL EVIDENCE.

Where the defense to a suit by an artisan for breach of a contract of employment is the incompetency of the plaintiff, rebutting proof need not be limited to work done for the defendant.

(Syllabus by the Court.)

Certiorari to court of common pleas, Passaic county; Barkalow, Judge.

Action by William R. Swett against the Continental Match Company. From a judgment for plaintiff, defendant brings certiorari. Affirmed.

Argued November term, 1897, before VAN SYCKEL, DIXON, and COLLINS, JJ.

H. Kettell, for plaintiff. W. W. Watson, for defendant.

COLLINS, J. This suit was by an artisan for breach of a contract of employment. The defense was incompetency of the plaintiff

justifying his discharge. The proof to support the defense was that the product turned out by the plaintiff for the defendant was defective. In rebuttal, after testimony tending to show that in the defendant's factory unsuitable materials were furnished to the plaintiff, it was proved under objection that in another factory the product of the plaintiff's work in the same capacity was satisfactory. The admission of that evidence is now claimed to have been erroneous, because the facts proved were *res inter alios acta*. Such collateral facts are generally incompetent as evidence (*Association v. Giles*, 33 N. J. Law, 263), though there are exceptions to this rule (7 Am. & Eng. Enc. Law, p. 58), within which the challenged proof might fall. One in close analogy to some features of such proof is found in the case of *Brierly v. Mills*, 123 Mass. 291. There the plaintiff was to furnish loom attachments that would work successfully on the defendant's looms. The defendant refused to accept the attachments, on the ground that they were not successful. In a suit for the price, the plaintiff claimed that the defendant's test was not fair, and he was permitted to show that the appliances worked successfully on looms substantially like defendant's, though differing in details. We think, however, that the rule itself has no bearing on the case in hand. The competency or incompetency of the plaintiff was the issue, and the natural proof was the character of his work under proper conditions. Suppose the defendant had broken the contract as soon as made, on learning of the plaintiff's incompetency, would it not have been lawful, in a suit for the breach, for the defendant to show such incompetency by proof of the result of the plaintiff's work for other employers? No one can deny that such proof would be competent, or that it could be met by counter proof of the same character. In the common case of an action by servant against master for personal injury resulting from the acts of an incompetent fellow servant, it is permissible to show the incompetency by such proof. Indeed, it can hardly be shown in any other way. Of course, in such a case, knowledge, or means of knowledge, of the incompetency, must be brought home to the master; but the incompetency itself may be shown by proof of collateral facts. *Baulec v. Railroad Co.*, 59 N. Y. 356. Competency may be proved in like manner.

It is further objected that the service of the plaintiff in the other factory was after his discharge by the defendant. That circumstance affects only the weight of the evidence, not its relevancy. The range of such proof in the matter of time must be left largely to the discretion of the trial judge.

It was contended that the proof was hearsay. This objection is not apparent from the state of the case, and is not alleged in the causes assigned for reversal.

The only other error suggested is that the judgment is for more than the demand. This

seems to be unfounded. The demand is for \$200, and the judgment is for \$114.32. The contract alleged to have been broken was that the plaintiff should have a month's notice or a month's wages in case of discharge, and presumably the damages were correctly assessed. True, it is recited in the state of demand that the wages were to be at the monthly rate of \$103, while the verdict was for \$108.32 and interest; but the recital was evidently a mistake, and, as the demand was ample, such mistake cannot be used to the defendant's advantage. The judgment of the common pleas will be affirmed.

SEIBERT v. GRAFF et al.

(Court of Chancery of New Jersey. Dec. 16, 1897.)

ESTOPPEL BY DEED.

On March 1, 1894, the north terminus of N. Y. avenue, in Atlantic City, as an open street, was B. avenue, running east and west. The owner of the land on the north side of B. avenue, which would be included in N. Y. avenue if extended north of B. avenue, and also of the land adjoining it on the west on said date, conveyed the latter by a deed which described the north line as beginning at a certain point, and running eastwardly "to the intended N. Y. avenue line," and the east line as running thence southwardly "along said intended N. Y. avenue line," etc. At the time, every one expected that N. Y. avenue would be extended north; and both grantor and grantee bargained in the belief that it would be extended along the land sold. *Held*, that such grantor and his privies were estopped from asserting that the grantee had no right of way over the land which would be included in N. Y. avenue extended.

Action by Justus Seibert against Catharine Graff and others to prevent the defendants closing a certain way. Injunction made perpetual.

This bill is filed to prevent the defendants closing an alleged way, which is claimed by complainant to exist over certain property, of which Louis Graff holds the legal title, and upon which he asserts that he has a right to build, and has commenced to build, structures which will shut off the complainant from using the land as a way to his property. The tract in question is a strip of land 50 feet in width and 200 feet in length, on the north side of Baltic avenue, opposite the terminus of New York avenue, on the south side of Baltic avenue. New York avenue is a street 50 feet in width, running from the ocean, across Pacific and Atlantic avenues, and stopping as an open street at Baltic avenue. If the said New York avenue should be extended further north, it would include substantially the strip of land in dispute, as the westerly side of said New York avenue would run entirely or almost coincidently with the west side of this tract, and the east side of the avenue with the east side of the tract. The complainant owns a piece of land adjacent on the west side of this land of Graff's. He claims that he had a right of

way over said land of Graff, and whether he has such right is the question in dispute. The evolution of the titles of the respective parties is as follows: Both tracts were originally owned by Richard Hackett. On October 20, 1880, he sold to Edward Champion a tract, including the land now owned by both complainant and defendants. The deed from Hackett to Champion contained the following description: "Beginning at a point in the northerly line of Baltic avenue, whence the same would be intersected by the easterly line of New York avenue, if continued across Baltic avenue; and runs thence (1) westerly, along Baltic avenue, about one hundred and sixty five feet, more or less, to a point in J. J. Gardner's line; thence (2) at right angles with Baltic avenue, and along J. J. Gardner's line, two hundred feet to a point; thence (3) easterly, parallel with Baltic avenue, about one hundred and sixty-five feet, more or less, to a point in the continuation of the easterly line of the said New York avenue; thence (4) southerly, at right angles to said last-described line, two hundred feet, to the place of beginning." Edward Champion, on March 1, 1894, sold a part of this tract to Justus Seibert, the complainant. The following is the description contained in this deed: "Beginning at the northeast corner of Justus Seibert's land, in the line of Daniel Morris' land; and runs thence (1) eastwardly, along said Daniel Morris' line, sixty feet, more or less, to the intended New York avenue line; thence (2) southwardly, along said intended New York avenue line, one hundred and twenty feet, to a post; thence (3) westwardly, along the line of Ed. Champion's land, fifty-eight feet, to Justus Seibert's land; thence (4) northwardly, along said Seibert's land, one hundred and twenty feet, more or less, to the place of beginning." This description, it is perceived, carried Seibert's title to the west side of the intended New York avenue. On January 6, 1896, Champion conveyed to Catharine Graff the space adjoining Seibert's land, which would be included in said New York avenue if extended north of Baltic avenue. The description covers a piece of land 50 feet on Baltic avenue, running north that width, 200 feet. She and her husband erected a fence, and began the erection of buildings which would substantially cover the entire tract. It is in evidence that, after Champion bought of Hackett, he took down a fence which had inclosed a lot on the north side of Baltic avenue, opposite the terminus of New York avenue. He put a double house on the north side of Baltic avenue, and made a footwalk along what would be the west side of New York avenue, if extended, with a rude curb. This was the condition of the land when Seibert bought. After his purchase, he built several houses fronting on New York avenue, if extended, and made a path or sidewalk, which met the footpath or sidewalk of Champion. Besides this, the

space which would be covered by New York avenue extended has been used by wagons in delivering coal and groceries to those residing along it.

G. A. Bourgeois, for complainant. A. Stephany & Son, for defendants.

REED, V. C. (after stating the facts). It is entirely settled that if a person sells land by reference to a map, and there is delineated upon the map a road adjoining the land sold, the grantor, if owner of the land upon which the road is marked, is estopped from asserting, as against his grantee, that such road does not exist. *Clark v. City of Elizabeth*, 40 N. J. Law, 172; *Crowell v. Beverly*, 134 Mass. 98; *Lowe v. Redgate*, 42 Ohio St. 329; *Bartlette v. Bangor*, 67 Me. 460; *Donohoo v. Murray*, 62 Wis. 100, 22 N. W. 167. The reference to the map in the deed implies that the land sold has, as an appurtenant, a way to and from it; and it is presumed that the presence of the way enhanced the consideration paid for the property. The grantor, therefore, will not be permitted to close the way against his grantee. Although there may be no reference to a map, yet the fact that land is described in a deed as bounding upon a street, and there are marked, upon the ground adjacent to the land sold, traces of the existence of a street, this condition of affairs will produce the same result. *Tobey v. Taunton*, 119 Mass. 404; *Smith v. Lock*, 18 Mich. 56. The estoppel is effective, not only against the grantor himself, but his privies. Under the principle just stated, I am of the opinion that Mr. Champion, the grantor, and his privies, the Graffs, are estopped from asserting that Mr. Selbert has no right of way over the 50-foot strip which would be included in New York avenue extended. The description contained in the deed from Champion to Selbert ran to and along an intended New York avenue line. Champion owned the land covered by the intended New York avenue. As already remarked, New York avenue stopped as a physical open street, and is marked upon the maps of Atlantic City on the southerly side of Baltic avenue. Every one acquainted with local affairs confidently expected that it would be extended north whenever increase of population required such extension. The allusion to the line of an intended New York avenue, both by reference to the physical appearance of the ground, and by the plotting upon the said map, was as clear as if the intended street had been mapped or had been in actual use. Both grantor and grantee bargained in the belief that New York avenue would be extended alongside the property sold. It will be presumed that the consideration was fixed in view of that circumstance; and, in my judgment, neither Champion nor Graff is now in a condition to say that no such right of way exists. I will advise a decree that the injunction be made perpetual.

TIERNEY et al. v. TIERNEY et al.

(Court of Chancery of New Jersey. Dec. 20, 1897.)

EXECUTORS—ACCOUNTING IN CHANCERY COURT—DISPOSITION OF TESTATOR'S BUSINESS—BILL FOR DIRECTIONS—DISCRETIONARY ACTION.

1. In a bill filed by executors for directions relating to the management of the estate in their hands, there cannot be an accounting to date in the court of chancery unless all the parties are before the court for the construction of the will.

2. A testator directed his executors to settle, and dispose of his mercantile business "as speedily as the same can judiciously be done after my decease, having always in view the best interests of my estate." The executors for the best interests of the estate, as they believed, continued the business for three years, because no opportunity for a judicious sale occurred. They then applied to the chancery court for directions as to the continuance of the business, or for a sale, and for a decree affirming their conduct of the business to date. *Held*, that the bill would be dismissed, since the application should have been made when the executors entered on the trust, and the propriety of their past conduct should not be passed on till the termination of the trust.

Bill by Myles Tierney and another, executors of William Tierney, deceased, against Sarah Jane Tierney and others, for directions to manage the estate in their hands, and for settlement of the executors' accounts. Bill dismissed.

John H. Meeker, for complainants. John R. Hardin, for infant defendants.

EMERY, V. C. Equitable jurisdiction in this case is invoked upon two grounds: First, for directions to the complainants, who are executors, in relation to the management of the estate in their hands; and, second, for the settlement of their accounts, as executors, up to the present time, in this court.

The right to ask an accounting to date in this court has no other proper basis than its connection with the right to directions and the rule of the court that, where all of the parties are before the court for the construction of the will, the accounts may be settled here. The testator, William M. Tierney, died March 25, 1894, being at the time of his death engaged in carrying on a large grocery business in the city of Newark. In relation to the business, the will contained the following provision: "Item Third. I authorize, empower, and direct my executors, hereinafter named, to settle, close up, and dispose of my interest in the store business now carried on at Nos. 69 and 71 Market street, in the city of Newark, or wherever the same may at my decease be located, and any interest I may have in any other business, as speedily as the same can judiciously be done after my decease, having always in view the best interests of my estate." The executors have not sold the business, but have carried it on as a going concern since the testator's death. The business has been carried on for

the reason that, in the judgment of the executors, no opportunity for a judicious sale has yet occurred; and the continuance of the business as a going concern pending a sale is necessary, in their judgment, in order to prevent a sacrifice of the stock, good will, and business. Having carried on the business for this reason for about three years, the complainants, the two active executors, now apply to this court for directions as to the continuance of the business or for its sale, and also for a decree or adjudication that their continuance of the business hitherto has been authorized. In the meantime no settlement has been made of the executors' accounts, and proceedings commenced with a view of such accounting in the orphans' court of Essex county were abandoned. I am unable to see how this court can either give the directions asked for, as to the future course of the executors in relation to disposing of this business, or adjudicate at the present time, directly or indirectly, upon the propriety of their conduct hitherto. As to directions relating to the sale, the testator has expressly directed and authorized the business to be settled, closed up, and disposed of by his executors, with the provision that this is to be done as speedily after his death as can judiciously be done. The power to continue the business, if given at all, is given only by implication, and as incidental to a sale; and the court cannot, on the application of those who have continued the business for three years without any application, now substitute its judgment and discretion, as to a sale and the manner of it, for the discretion and judgment of the executors, to whom the testator has committed it by his will.

I have examined the cases and authorities cited by complainants' counsel, and in none of them do I find authority for the direction now requested. The cases in our own courts, which have been referred to by counsel, upon the question of continuance of the business of testator by the executors, are cases relating to the personal liability of the executors in carrying on the business, and their indemnification therefor out of the estate. *Laible v. Ferry*, 32 N. J. Eq. 791; *Wild v. Davenport*, 48 N. J. Law, 136, 7 Atl. 295; *Doolittle v. Willet*, 57 N. J. Law, 398, 31 Atl. 385. And the cases in our courts relating to the jurisdiction of this court to give directions to trustees or executors, which have been referred to, are cases where the construction of the will and the powers of the trustees or executors under the will were in doubt, and the direction of the court was necessary, and was sought before any action by the trustees was taken. The case which comes nearest to the present is that of *Arnold v. Smith* [1896] 1 Ch. 171. Here the executors were directed with all convenient speed after testator's decease to sell and dispose of his business of a pawnbroker (as a going concern), carried on at two places

specified. The will also expressly empowered the trustees to postpone the sale and conversion of testator's real and personal estate for as long as they or he shall think fit, and in the meantime to lease the premises. The greater part of testator's estate consisted of the business and capital invested therein. The trustees arranged a sale of the business carried on at one place, but, in their judgment, it was desirable that the business at the other place should be carried on until the second son of testator reached his majority, in order to give the two eldest sons, then aged 20 and 18 respectively, an opportunity to purchase the business. On an application made at once (the case was heard in November, 1895), North, J., authorized them to postpone the sale for two years, with liberty to apply at the end of that time. The question was treated as one of construction of the provisions of testator's will, as to the effect of the express power to postpone the sale upon the previous direction to sell with all convenient speed. A declaration as to the power to carry on the business in the meantime was also asked, but no reference to this occurs in the opinion; and in the cases cited by Mr. Justice North the question did not arise upon application for direction as to carrying on the business, but upon the rights to the profits or income of the business after it had been carried on. The executors in this case have, in the exercise of their own best judgment, and, as they believe, for the best interests of the estate, carried on the business without any application to the court for instructions. Whether or not a loss to the estate has been sustained by their action is not now a question which fairly or properly arises for decision. The complainants claim that up to the present time a profit has resulted, but the realization of the profit depends, of course, upon the ultimate sale. The question cannot arise, as it seems to me, except upon an accounting and as incidental thereto, and perhaps cannot arise until after a sale has been actually made; and adjudication now upon the propriety of their past conduct would seem to be premature and unauthorized. As to direction for the future continuance of the business, such directions would in the present instance substitute the judgment of the court for that of the executors. If the court should now undertake to direct a sale, this would certainly be the practical effect of the decree; and it has, in my judgment, no right to exercise this power on the application of the executors, and for the purpose of relieving them from the duty of a decision imposed on them by the will.

The power now invoked seems to go beyond any which has been heretofore exercised by this court, and the practical effect of the exercise of such power to direct executors upon the business questions arising in the settlement of estates and on their own application would be so far-reaching and so subversive of the general policy of our laws and practice re-

lating to the settlement of estates that it ought not to be assumed. And even if this view of the power of this court be erroneous, and it has the general power to direct the continuance or the sale of a business, in order to assist the executors in carrying out a testator's will, yet the application to the court in such cases for its direction should be made promptly, and before undertaking the continuance of the business, as in the case *Arnold v. Smith*, supra, so that the power, as well as the responsibility of the court, as to the continuance of the business, might exist from the commencement of the business and risk. The executors here seem to have acted honestly, and in the most undoubted good faith, and for the best interests of the estate, thus far in continuing the business; but having on their own responsibility, and on their own views as to their powers, rights, and duties, continued the business thus far, they are not now entitled, by way of anticipating future losses, and protection against them, to ask that the future continuance of the business shall be under the express authority of the court. To extend the power of the court to this extent would clearly infringe the general and settled policy of the law in relation to the settlement of estates. It is more in accordance with its general policy that the whole liability of executors for the continuance of a business for the purpose of an ultimate beneficial sale should be passed upon when it regularly arises, at the termination of the trust. The interests of infant defendants who cannot act for themselves are involved, and the court should not make adjudications which would affect their future rights, without the basis of clear authority so to do. The bill therefore cannot be sustained as a bill for directions or construction of the testator's will, and, failing in this main purpose, there are no reasons apparent why the accounting of the executors should not take the usual course of settlement in the orphans' court. I will therefore advise a dismissal of the bill.

(61 N. J. L. 259)

BINDERNAGLE v. STATE.

(Court of Errors and Appeals of New Jersey.
Dec. 21, 1897.)

DISORDERLY HOUSE—EVIDENCE—UNLAWFUL SENTENCE—CORRECTION.

1. The defendant was indicted for keeping a disorderly house, and the evidence tended to prove that two buildings in close proximity to the defendant's tavern were maintained as places for gambling. *Held*, that the circumstances disclosed by the testimony warranted the conclusion that both places were kept by the defendant as a single establishment, and justified his conviction.

2. In cases covered by paragraph 192 of the "Crimes Act," and paragraphs 169 and 213 of "Criminal Procedure," an order made by the court, when sentencing a convict to imprisonment at hard labor for the term of one year, that the imprisonment shall be served in the state prison, forms no part of the judgment proper, and, if

unlawful, may be annulled on error without impairing the judgment itself.

Magie, C. J., and Gummere and Adams, JJ., dissenting.

(Syllabus by the Court.)

Error to supreme court.

Philip Bindernagle was convicted of keeping a disorderly house, and from judgment of the supreme court (87 Atl. 619), affirming the same, he brings error. Affirmed.

Allan McDermott, for defendant. C. H. Winfield, Dist. Atty., and S. H. Grey, Atty. Gen., for the State.

DIXON, J. At the April term, 1896, of the Hudson county oyer and terminer, the defendant was indicted for keeping a disorderly house in Weehawken between March, 1895, and the finding of the indictment; and having been thereon convicted in the Hudson quarter sessions, and his conviction having been affirmed in the supreme court, he has brought into this court "the record of the proceedings at the trial," under the act of May 9, 1894 (1 Gen. St. p. 1154), as well as the record of the judgment and bills of exceptions. Upon the main argument in this court the defendant relied for reversal on two propositions: First, that the evidence did not warrant the verdict; and, second, that the trial judge erred in refusing to charge that there was no evidence of any right in the defendant to exercise control over the southerly building mentioned by the witnesses. The circumstances disclosed by the testimony are these: That during the time covered by the indictment the defendant kept a tavern at Weehawken, near the ferry from New York; that adjoining his tavern on the north was a dwelling house owned and occupied by his mother; that adjoining the dwelling on the north was a long low building, also owned by his mother, but not used except as hereafter stated; that a few feet from the tavern on the south was another long low building, used only as hereafter stated, and belonging to an unknown owner; that from a side door of the defendant's barroom a pathway or passageway led to the rear door of the low building on the north, and that the entrance to the building on the south was near the end of the piazza in front of the tavern; that the defendant's mother never looked after the building on the north, never let it to any one, or got any rent for it, but that the defendant took care of it for her; that these four buildings were in an out of the way place, and there were no other buildings within 500 feet of them, except one which had formerly been a poolroom and was then a factory; that on many occasions, during the time embraced in the indictment, crowds of men came over from New York, visited the defendant's barroom, and sauntered around the premises; that on an afternoon in January, 1896, a number of persons came over from New York, and went directly into

the northerly building, and there openly engaged in gambling at "red and black"; that on an afternoon in April, 1896, a crowd, numbering between 100 and 200, were in the same building, openly buying pools on horse races run in St. Louis and New Orleans, and at the same time from 50 to 75 men were openly gambling at faro, poker, roulette, and other games in the building south of the tavern, the people passing back and forth from one building to the other; that the defendant, as a witness on his own behalf, had no reasonable explanation to offer of the inducement which brought these crowds of idlers from New York, or of the right the gamblers seemed to have to use the northerly building, which was under his care solely, but confined himself to a bare denial of knowledge that there had been any gambling anywhere about the premises.

We think these circumstances fully warranted the jury in finding that the defendant maintained the northerly building as a disorderly house. The openness with which the gambling was carried on, the crowds of men participating in it, his business of supplying drink in such close proximity to the gambling room, with a visible pathway leading therefrom in the rear to his barroom, coupled with the fact that he and he alone took care of the gambling room, point strongly to the conclusion that he knew of the gambling, and authorized the use of the room for gambling purposes.

With regard to the southerly building there are two answers to the claim of the defendant:

(1) The use of that building for gambling was so closely connected with the use of the northerly building for the same purpose as to make it a fair question for the jury whether, if the defendant maintained the latter, he did not also maintain the former. There appeared to be no other proprietor for either of them, nor did any other person seem to have any interest in their maintenance, while no doubt both afforded material aid to the traffic over the defendant's bar. It was a permissible inference, from all the circumstances, that both gambling rooms were parts of one establishment, and as such were under the defendant's control.

(2) The only witness who testified to gambling in the southerly building testified to the pool selling in the northerly building, and it is incredible that the jury should have believed his testimony as to the former, and not have believed it as to the latter. If, therefore, they concluded that the defendant maintained a gambling room in the southerly building, they must have concluded that he also maintained one in the northerly building, and the verdict would not have been different if the jury had been charged as requested. If, on the other hand, the jury did not believe that the defendant controlled the southerly building, they must have acquitted him of criminality with respect to that

building, under the charge which was given, to the effect that his guilt depended on his keeping, or causing to be kept, the gambling establishment. Hence it appears that this refusal to charge could not, in any rational view of the case, have prejudiced the defendant on the merits.

Our conclusion is that the defendant was lawfully convicted.

After this conclusion was announced the defendant applied for a further hearing, because he had been sentenced to confinement at hard labor for one year in the state prison, notwithstanding the act of May 15, 1894 (1 Gen. St. p. 1162), which declares that such a term of imprisonment must be served in the county penitentiary. This application having been granted, the point has been argued before us.

This objection is not one that can be made under the act of May 9, 1894 (1 Gen. St. p. 1154), which is limited to proceedings at the trial (*Kohl v. State* [N. J. Err. & App.] 36 Atl. 104), nor is there any assignment of error directed against it. Still, as the matter complained of is clearly illegal and prejudicial to the defendant, we think the court should exercise its corrective power. The pertinent statutes are paragraph 192 of the "Crimes Act" (1 Gen. St. p. 1063), and paragraphs 169 and 216, under the title "Criminal Procedure" (Gen. St. p. 1117). Paragraph 192 provides that, for such a misdemeanor as that of which the defendant is convicted, the offender shall be punished by imprisonment at hard labor or otherwise not exceeding two years, or by fine not exceeding \$500, or both. This section indicates the scope of the matters relating to the penalty which are committed to the judgment of the court. It may determine the duration of the imprisonment, not exceeding two years, and its character, whether it shall be at hard labor or not; but the court is not, in terms, authorized to designate the place of imprisonment. Paragraph 169, under "Criminal Procedure," enacts "that every person sentenced to hard labor and imprisonment under the laws of this state for any time not less than six months shall, within twenty days after such sentence, be transported * * * by the sheriff of the county * * * to the state prison, and there delivered into the custody of the keeper of said prison, together with a copy of the sentence of the court ordering such punishment, * * * and said person so delivered to the keeper of said prison shall be safely kept therein until the time of his confinement shall have expired." The later paragraph (216), enacted May 15, 1894, provides "that in any county of this state wherein a penitentiary is located, every person sentenced to hard labor and imprisonment under the laws of this state, for any time over six and not exceeding eighteen months, shall be imprisoned in the penitentiary located wherein such conviction was had, instead of state prison." The language of these paragraphs plainly confines the scope

of the sentence to the duration and character of the imprisonment, and, whenever the offender is sentenced to imprisonment at hard labor for six months or over, the statute designates the place of imprisonment. It follows from this that in such cases the designation of the place of imprisonment forms no part of the judgment or sentence of the court. While the place of confinement may be, and usually is, declared by the court when pronouncing sentence, and is usually entered upon the minutes, and even inserted in the record, as if it were part of the judgment, yet in legal contemplation it is not such; and its legitimate function is merely by way of direction to the executive officers of the court as to the mode in which the judgment or sentence shall be carried into execution. This interpretation of the statutes is in harmony with the doctrine of the common law, according to which the place of imprisonment was not specified in the sentence, but was indicated by the warrant issued thereon. *Ex parte Waterman*, 33 Fed. 29; 4 Bl. Comm. 404; *Dodge v. State*, 24 N. J. Law, 455, 466. It appears by one of our public statutes (Pub. Laws 1872, p. 1129) that there is a penitentiary in the county of Hudson, and consequently the direction that the defendant should be confined at hard labor for the term of one year in the state prison was illegal, so far as it related to the place of imprisonment; but, as that direction forms no part of the legal judgment, it may now be set aside and annulled without impairing or affecting the judgment itself. Our opinion, therefore, is that the designation of the place of imprisonment should be stricken from the record as not legally a part of the judgment of the quarter sessions; that the judgment then remaining in the record should be affirmed; and the record should forthwith be remitted to the sessions, in order that the judgment may be executed according to law.

MAGIE, C. J., and GUMMERE and ADAMS, JJ., dissent. GARRISON and VREDENBURGH, JJ., vote to reverse.

(30 R. I. 390)

BRADFORD et al. v. BURGESS et al.

(Supreme Court of Rhode Island. Dec. 2, 1897.)

DEFAULT JUDGMENT—CONCLUSIVENESS—EXTINGUISHMENT OF MORTGAGE—DURATION OF TRUST—PRESUMPTIONS—ESTOPPEL.

1. Judgment for plaintiff in ejectment, though by default, is, till set aside by direct proceedings, conclusive against defendant as to plaintiff's title, though it is not sufficiently set forth in the declaration; the court having had jurisdiction of the parties and subject-matter.

2. That the owner of an estate, instead of having a mortgage thereon discharged of record, purchased it, and took a transfer of it to herself, is not enough of itself, it not appearing that it was to her interest to keep the mortgage alive, to overcome the presumption that she intended to extinguish it.

3. A husband, and likewise his heir after his death, is estopped to set up as against premises

to which his wife had title through foreclosure of a mortgage which he gave with warranty against all claims, a prior mortgage, which he inherited from her, on her death, as personal property.

4. Where a married woman assigned a mortgage to another in trust for herself, it will be presumed, in the absence of a contrary showing, that the trust was to continue merely during her coverture.

Suit by William Bradford, trustee, and others, against Mary U. Burgess and others.

Samuel Norris, Jr., for complainant. Brennan & Holland, for respondents.

MATTESON, C. J. The main issue in this suit is as to the title to the land described in the bill of which partition is sought. The conveyances on which the title depends are as follows: On October 30, 1848, Mary Reynolds, then seised in fee of the land, conveyed it in fee to Samuel J. Reynolds, who, by deed of that date, mortgaged it back to the grantor, to secure the payment of his note for \$500, payable in 10 years, with interest. On March 17, 1851, Samuel J. Reynolds, by deed of that date, conveyed the land in fee to George H. Reynolds. This deed was the usual short form of warranty deed. The covenants contained in it excepted from their operation the mortgage for \$500 given to Mary Reynolds by the grantor, and the deed itself stipulated that the mortgage, with the interest from the time the deed was given, should be paid by the grantee, the amount of the mortgage having been deducted from the consideration mentioned in the deed. On September 30, 1851, George H. Reynolds, by deed of that date, mortgaged the estate to Mary P. Reynolds to secure the payment of his note for \$1,000, payable one year after date, with interest. This mortgage contained a covenant against incumbrances, and also of general warranty against the lawful claims and demands of all persons. Neither covenant contained any exception of the prior mortgage given by Samuel J. Reynolds to Mary Reynolds for \$500 and interest. On October 23, 1851, Mary P. Reynolds, by deed of that date, assigned the last-mentioned mortgage, and all her interest in the mortgaged premises and mortgage debt, to Hannah B. Reynolds, wife of the mortgagor. On April 13, 1852, Mary Reynolds, by her deed of that date, assigned the mortgage first above mentioned to Thomas Wilson, Jr., which mortgage will hereafter be referred to as the "Wilson Mortgage." The bill avers that on the — day of — 18—, George H. Reynolds and Hannah B. Reynolds, his wife, assigned the mortgage note of the former for \$1,000, given with the mortgage deed securing payment of it, to William Bradford, as trustee for said Hannah. The note bears on its back what purports to be an assignment of it, as set forth in the averment; but no assignment of the mortgage has been produced, and it is stated by the complainants that neither the assignment nor any record

of it can be found. On April 16, 1872, William Bradford, assuming to be trustee for Hannah B. Reynolds, brought an action of trespass and ejectment in that capacity in the court of common pleas for the county of Bristol at its May term, 1872, and recited in his declaration the giving of the mortgage by the defendant George H. Reynolds to Mary P. Reynolds, as already stated, her assignment of it to Hannah B. Reynolds, and the assignment of it by Hannah to himself by deed dated April 17, 1872, duly executed and acknowledged, whereby he became seised in fee by way of mortgage of the mortgaged premises, and ought to be in possession thereof, but that the defendant had entered into and disseised him of the premises, and had withheld the possession thereof from him. The defendant in this suit suffered a default, whereupon the court gave judgment in favor of the plaintiff. Execution issued on this judgment on May 21, 1872, by virtue of which the plaintiff was put into possession of the mortgaged premises by the sheriff. At the September term, 1876, of this court for the county of Bristol, Thomas Wilson, assignee of the mortgage first above mentioned, brought his action of ejectment against George H. Reynolds, Hannah B. Reynolds, and William Bradford in his capacity as trustee, to recover possession of the mortgaged premises. The defendants in that action by their plea averred a right of redemption in themselves, and prayed the entry of a conditional judgment, and thereupon such proceedings were had that the court rendered a conditional judgment that, if the mortgagor, his heirs, executors, administrators, or assigns, should pay the plaintiff, or deposit in the clerk's office for him, the sum of \$1,107.55, with interest, and costs of suit, within two months from the date of the judgment, the mortgage should be void, and discharged; otherwise the plaintiff should have his writ of possession. The defendants did not comply with this judgment, nor was any writ of possession issued upon it; but subsequently, on August 9, 1877, Wilson, in consideration of the payment to him of \$1,119.74 by Hannah B. Reynolds, assigned to her the mortgaged premises and all his right, title, and interest therein, together with the note and deed secured by mortgage. No possession of the mortgaged premises was ever taken by Hannah B. Reynolds under this mortgage, which still stands on the record undischarged. Though Bradford, as trustee, was put into possession of the mortgaged premises by the sheriff, under the execution issued in his suit against George H. Reynolds, as already stated, George H. Reynolds and Hannah B. Reynolds continued in actual occupation of them until the death of Hannah, on November 12, 1879. After her decease, George H. Reynolds remained on the premises a few months, and then went to Michigan, where he died on March 15, 1880. Subsequently to the death of George H. Reynolds the premises

were let by Bradford, through his agent, William R. Taylor, who collected the rents to the time of his death. No part of either of the mortgage debts was paid by George H. Reynolds. The complainants contend that the legal estate in the mortgaged premises was vested in William Bradford, as trustee for Hannah B. Reynolds, and that on her decease the trust became a mere naked trust, and the legal and equitable estate vested in them as her heirs at law. The respondent Walter H. Barney, who, on the decease of Bradford, was appointed by a decree of this court a trustee in the place of Bradford, maintains that the trust created by the transfer of the mortgage and note from Hannah B. Reynolds to Bradford as trustee is still in force, and therefore that he has the legal estate in the premises, as trustee for the heirs of Hannah B. Reynolds, but avers his willingness to dispose of the estate, and distribute the proceeds among the heirs of Hannah B. Reynolds, or to convey the estate to them, as he shall be directed by the court. The respondent Mary U. Burgess, on the other hand, contends that on the decease of George H. Reynolds the estate vested in his heirs at law, to wit, his grandchildren, who are herself and one William R. Reynolds; and that, he having quitclaimed his interest in the property to her, she is alone entitled to it. The basis of this contention is that the Reynolds mortgage was never effectually assigned by Hannah B. Reynolds to Bradford, as trustee, and that the judgment in the ejectment suit under which he was put into possession of the mortgaged premises was not a valid judgment, and, consequently, that the possession under it did not bar the equity of redemption of the mortgagor; that this mortgage, and also the Wilson mortgage, remaining as outstanding mortgages on the property, were personal estate of Hannah B. Reynolds, which, on her decease intestate, became the property of her husband, George H. Reynolds, and merged in his title as the owner of the estate.

The first ground on which the validity of the judgment in the ejectment suit of Bradford, trustee, against Reynolds is assailed is that the writ in the suit was issued by the clerk of the court of common pleas for Providence county, and made returnable to the court of common pleas in Bristol county. It is claimed in support of the point that authority for making writs returnable in any other county than that in which they were issued was not given until January 22, 1873. Pub. Laws R. I. c. 271. This, however, is a mistaken claim. Pub. Laws R. I. c. 403, passed February 27, 1862, provided that all original writs in the supreme court or court of common pleas might be issued by the clerks of said courts in any county, and made returnable in another county. This act remained in force until repealed by Gen. St. R. I. c. 261, § 12, which went into effect December 7, 1872, and was re-enacted by Pub.

Laws R. I. c. 271, passed January 22, 1873. The writ in question is dated April 18, 1872, during the period that Pub. Laws R. I. c. 403, passed February 27, 1862, was in force, and, consequently, though issued by the clerk of the court in Providence county, was properly made returnable to the court in Bristol county.

The second ground on which the judgment in the ejectment suit of Bradford, trustee, against Reynolds is attacked is that, as the judgment was by default, it is conclusive only as to facts well pleaded, and hence that it was not binding on the defendant, and is not binding on the respondent Burgess, as his heir at law, because the declaration in the suit shows no title in the plaintiff to the mortgaged premises. The averments in the declaration, after setting forth the making of the mortgage by George H. Reynolds to Mary P. Reynolds, and her assignment of it and of the mortgaged premises to Hannah B. Reynolds, continued: "By force whereof, the said Hannah B. Reynolds then and there became seised of said premises in her demesne as of fee and in mortgage as aforesaid, and, being so seised thereof, on the 15th day of April, 1872, by her deed thereof, duly executed and acknowledged, for a valuable consideration, therein expressed, conveyed, assigned, and transferred the said premises to the plaintiff; to hold," etc. Rev. St. R. I. p. 316, §§ 4, 5, in force at the date of the transfer of the mortgage set out in the declaration, taken together, authorized the sale and conveyance of debts, secured by mortgage on property which were the property of any woman before marriage, or might become the property of any woman after marriage, by deed executed by both husband and wife; thus by implication excluding such sale and conveyance in any other manner. In view of this provision it is contended that, as the declaration alleges merely that Hannah B. Reynolds, by her deed duly executed and acknowledged, conveyed, assigned, and transferred the mortgaged premises to the plaintiff, and does not allege that her husband joined in the execution of the deed, it is insufficient to show that the plaintiff had any title to the mortgaged premises, and, consequently, that the judgment rendered on it by default was void. We think it may well be doubted whether the allegation of the declaration does not sufficiently set forth title to the mortgaged premises in the plaintiff, since it states that the assignment of the mortgaged premises by Hannah B. Reynolds was by her deed duly executed, and there could have been no due execution of the deed by her unless her husband had joined with her in its execution. But, whether this be so or not, the question of the plaintiff's title, and of the sufficiency of the averment of it in the declaration, and of his right to the possession of the mortgaged premises, were within the jurisdiction of the court to determine; and, as there had been valid service of process on the defend-

ant, it also had jurisdiction over the parties. Hence its judgment, even if it be assumed that the averment in the declaration was defective in not sufficiently setting forth the title of the plaintiff to the demanded premises, was not void, but voidable merely. It may have been liable to be set aside as erroneous in some proceeding operating directly on the record, but, until so set aside, it was conclusive on the defendant, and is conclusive on those in privity of title with him.

The case shows that Bradford, as trustee, was put into possession of the mortgaged premises by the sheriff under the execution issued on the judgment on May 25, 1872. The statutory period of three years within which the mortgagor, his heirs or assigns, were entitled to redeem, began to run from that date. No steps having been taken by him to vacate the judgment, assuming it to have been erroneous, and the three years limited by statute as the period of redemption having expired while the judgment remained in force, and Bradford, trustee, having been in possession of the mortgaged premises for twenty years under that claim of right, we think the mortgage must be regarded as effectually foreclosed, and the mortgagor, and those in privity with him, barred of all right of redemption.

We do not think that the respondent Mrs. Burgess is entitled to enforce the Wilson mortgage on the ground that it was an outstanding incumbrance at the decease of Hannah B. Reynolds, which became a part of the personal estate of her grandfather, George H. Reynolds, as the husband of Hannah. When the owner of an estate pays off an incumbrance, the presumption is that he intends to extinguish it, and relieve the estate. The incumbrance may be kept alive if an intention to do so sufficiently appears. If there is no evidence of intention, and it is for the interest of the owner that the incumbrance should be preserved, equity will so treat it; his intention being presumed to be in accordance with his interest. *Dodge v. Hogan*, 19 R. I. —, 31 Atl. 268, 1059. In the present instance, the only circumstance from which an intention to keep the Wilson mortgage alive can be inferred is the fact that Mrs. Reynolds took a transfer of it to herself, instead of having it discharged on the record. By what advice, or from what motive, she did so, does not appear. Nor does it appear that it was for her interest that the mortgage should be kept alive. In *Hood v. Phillips*, 3 Beav. 513, the owner of an estate purchased an outstanding mortgage upon it, and took a transfer of it, not to herself, but to a trustee, who covenanted with her, her executors, administrators, and assigns, that he would, at her request, convey the estate to her, her heirs and assigns, or to such other person as she, her heirs, executors, administrators, and assigns, should direct. The taking of a transfer to a trustee would certainly afford as strong evidence of an intention to

keep an incumbrance alive as the taking of a transfer of it directly to the owner of the incumbered estate; but it was nevertheless held in *Hood v. Phillips* that it was not decisive, and was not sufficient of itself to overcome the presumption of an intent by the payment to extinguish the incumbrance, and relieve the estate. But, even if this were not so, Mrs. Burgess would be precluded by the covenant of warranty in her grandfather's mortgage, under which the complainants derive their title, as has been shown, from setting up any claim to the mortgaged estate under the Wilson mortgage. That covenant warranted the mortgaged premises to the mortgagee, her heirs and assigns, against the lawful claims and demands of all persons, making no exception of the prior Wilson mortgage, payment of which by the deed of Samuel J. Reynolds to him had been assumed by George H. Reynolds as a part of the consideration for the purchase of the property. *Urquhart v. Brayton*, 12 R. I. 169. If George H. Reynolds had attempted to foreclose the Wilson mortgage after the decease of his wife, this covenant of warranty would have been an insurmountable barrier to such attempt, and it would be none the less so to any attempt of Mrs. Burgess, who is a privy in title with him as his heir at law. As the assignment of the mortgage by Mrs. Reynolds to Bradford, as trustee, cannot be produced, it is impossible to determine the extent of the trust created by it. In its absence, and the absence of other evidence concerning the trust, we think it is to be presumed that it was a trust to continue merely during the coverture of Mrs. Reynolds. If so, it terminated on her decease, and the subsequent management of the estate by Bradford is to be deemed to have been as the agent of her heirs, rather than by virtue of the trust. If this be so, the subsequent appointment of the respondent Barney as trustee in place of Bradford, on his decease, was without due consideration. We are of the opinion that the title to the land is in the complainants, and that they are entitled to partition.

(20 R. I. 302)

STATE v. DROWNE.

(Supreme Court of Rhode Island. Dec. 4, 1897.)

COURTS—CRIMINAL JURISDICTION—SENTENCE—STATUTES—CONSTRUCTION.

1. Under its general criminal jurisdiction, the district court has jurisdiction only to fine "or" imprison, and not to combine the two methods of punishment.

2. Gen. Laws, c. 147, § 9, provides that every person who shall be found guilty before "a district court" of violating specified provisions of the statute shall be punished by fine, or by fine and imprisonment. Chapter 223, § 5, provides that the common pleas division of the supreme court shall have jurisdiction of all offenses whatsoever brought before it on appeal, "and shall sentence all persons convicted before it to such punishment as is or shall be by law prescribed." *Held*, that the former provision does not deprive the common pleas division of its power under the

latter to impose the penalty prescribed therein, in a case appealed to it from the district court, because—First, the jurisdiction of a superior court cannot be taken away except by express words or by necessary implication; and, second, the court is bound to construe a statute so as to prevent inconsistency, injustice, or absurdity; and to hold otherwise than as stated above would, in case of appeal, have the effect of depriving both of said courts of jurisdiction to render a judgment.

Case certified from court of common pleas, Providence county.

Charles A. Drowne was convicted in the district court of violating a statute, and he appealed to the common pleas division. On trial he was found guilty, and on being called for sentence he moved for a discharge, whereupon the common pleas division certified the case. Motion denied.

William B. Greenough, for the State. John W. Hogan and Edward DeV. O'Connor, for defendant.

TILLINGHAST, J. The defendant was found guilty, in the district court of the Sixth judicial district, of violating section 6, c. 147, Gen. Laws R. I., and was sentenced to pay a fine of \$20 and costs. He thereupon appealed to the common pleas division, where he was tried by a jury and found guilty. Upon being called for sentence the defendant filed a motion that he be discharged, on the ground that no penalty is prescribed by statute, upon conviction of the offense alleged in the complaint, except such conviction be had before a district court; that is to say, that there is no punishment provided by law which the common pleas division can impose on a person convicted before it, on appeal, of the offense alleged in the complaint. The case was thereupon certified to this division, under Gen. Laws R. I. c. 250, § 9.

The section of the statute under which the defendant was sentenced in the district court is as follows: "Sec. 9. Every person who shall be found guilty before a district court of violating any of the provisions of the three sections next preceding, upon the first conviction shall be fined twenty dollars; and upon the second, and every subsequent conviction, shall be fined twenty dollars and be imprisoned in the county jail for ten days." The contention of defendant's counsel is that, as the district court, by virtue of its general jurisdiction in criminal proceedings, had power to sentence under this statute without being specially authorized so to do, it must be held that the language, "who shall be found guilty before a district court," has the effect of limiting the imposition of the penalty prescribed in that court. The position thus taken is tenable only in part. Under Gen. Laws R. I. c. 229, § 2, the district court had authority to sentence the defendant to pay a fine of \$20 and costs in this case, independently of the special authority conferred by said section 9. But the authority to sentence upon a second or any subsequent conviction,

by fine and imprisonment, is not given by said section 2 of chapter 229, and hence it was necessary for the general assembly to confer special jurisdiction upon district courts in order to enable them to impose such sentence.

In support of the defendant's contention that the district court, under its general jurisdiction in criminal proceedings, had power to sentence under said section 9 of chapter 147, he cites the cases of *State v. Crogan*, 6 R. I. 40; *State v. Fletcher*, 13 R. I. 522; and *State v. Nolan*, 15 R. I. 529, 10 Atl. 481. These cases are clearly distinguishable from the one before us. In *State v. Crogan*, it is true, there is a dictum to the effect that, under the general jurisdiction of justices of the peace (which, in so far as the point before us is concerned, was the same then as that now conferred upon district courts), the court of magistrates of Providence, exercising the same jurisdiction as a justice of the peace, had power to punish both by fine and imprisonment. But as it clearly appears in that case that the court had jurisdiction under another provision of the statute, viz. under Rev. St. R. I. c. 78, § 2, as held in the opinion, it was not necessary for the court to rely on the general jurisdiction aforesaid. In *State v. Fletcher* it was expressly held that a similar provision to that under which defendant now claims the district court had jurisdiction in this case did not authorize a justice court to punish by fine and imprisonment, but only by fine or imprisonment. And the court in that case based its jurisdiction upon another statute, viz. Pub. Laws R. I. 1886-87, c. 598, which, while not expressly conferring the jurisdiction to punish by fine and imprisonment, yet the court held that it did so by implication. *State v. Nolan* follows the last-named case upon the question of jurisdiction. The dictum of *Brayton, J.*, in *State v. Crogan*, must, therefore, be treated as having been overruled by the subsequent cases. As it appears, then, that district courts have authority, under their general jurisdiction, only to fine or imprison, but not to combine the two methods of punishment, the insertion of the clause, "who shall be found guilty before a district court," in the act before us, or of some similar provision, was rendered necessary in order to extend the jurisdiction of such courts, so as to enable them in a proper case both to fine and imprison. This was evidently the view which the general assembly took in the passage of the act, and hence they employed the language aforesaid for the purpose of giving jurisdiction, not over the first offense, for the court already had jurisdiction over that, but over the second and all subsequent offenses.

As to the defendant's contention that the language, "who shall be found guilty before a district court," limits and restricts the punishment to be inflicted to that court, we are clearly of the opinion that such is not the

effect thereof. The mere fact that the statute expressly authorizes the district court to punish a person found guilty before it in no way affects the jurisdiction of the common pleas division over the same case on appeal. Gen. Laws R. I. c. 249, § 7, provides that "all criminal appeals shall be heard and tried in the common pleas division of the supreme court with a jury; and the verdict or decision in said division in said case shall be final, except in matters of law." And section 5 of chapter 223 provides that "said common pleas division shall have original jurisdiction of all crimes, offenses and misdemeanors whatsoever, except as otherwise provided; and also shall have cognizance and jurisdiction of all crimes, offenses and misdemeanors which shall be brought before it by appeal, commitment, recognizance, indictment or otherwise; and shall sentence all persons convicted before it to such punishment as is or shall be by law prescribed." In order to take away from the common pleas division any part of the jurisdiction thus clearly conferred, the language used for this purpose ought to show expressly, or by necessary implication, that the general assembly so intended; it being a well-settled rule of construction that the jurisdiction of superior courts cannot be taken away except by express words or necessary implication. *End. Interp. St. §§ 152, 153; Am. & Eng. Enc. Law, 353, and cases cited; Com. v. Hudson, 11 Gray, 64; People v. Insurance Co., 15 Johns. 358.* Moreover, we are bound to construe a statute in the most beneficial way which its language will permit, in order to prevent inconsistency or injustice. *Suth. St. Const. §§ 323, 324, and cases cited.* Another and equally well settled rule in the construction of statutes is that, when the language is not precise and clear, such construction will be adopted as shall appear most reasonable and best suited to accomplish the objects of the statute, and that a construction which leads to an absurdity will be avoided if possible. *Dawley v. Probate Court, 16 R. I. 696, 19 Atl. 248; In re State House Com'rs, Index RR, 204, 33 Atl. 448; Com. v. Kimball, 24 Pick. 370.* For us to hold that the particular language in question limits the power to sentence, under the statute in question, to district courts, would be to practically render said statute null and void, as, the moment an appeal should be taken from the district court, neither that court nor any other would have jurisdiction of the case for the purpose of rendering judgment thereon. A construction which would lead to such an absurd consequence will never be adopted, unless it is clear that the appellate court is without jurisdiction. *See 23 Am. & Eng. Enc. Law, p. 353, and cases cited in note 3; also, Id. pp. 354, 355.* We therefore decide that the common pleas division has jurisdiction of the case before us, and the motion to discharge is therefore denied, and the case remitted for sentence.

(20 R. I. 300)

LODGE v. O'TOOLE.

(Supreme Court of Rhode Island. Dec. 2, 1897.)

JUDGMENT—MOTION IN ARREST—PRACTICE.

All that is meant by Gen. Laws, c. 251, § 9, providing that after verdict all motions in arrest of judgment, arising on the face of the record only, shall be filed within five days after verdict, "and in other respects shall follow the same course as claims for new trial on questions arising on the record, and shall be heard by the appellate division of the supreme court," is that, on the filing of the motion within the time limited, the clerk of the court of common pleas shall certify the papers in the case to the appellate division, as provided in section 6, cl. 4, in case of petition for new trial.

Action by Joanna Lodge against Alexander J. O'Toole. Plaintiff had verdict, and defendant moves for new trial. Granted.

C. Frank Parkhurst, for plaintiff. James H. Williams, for defendant.

MATTESON, C. J. This is an action of trespass on the case, for slander. The defendant on May 12, 1897, within five days after the verdict of a jury against him, filed his motion in arrest of judgment, on the ground that the declaration did not set forth a cause of action. On June 7, 1897, the plaintiff filed a motion for judgment and execution. These motions were heard by the common pleas division June 12, 1897. For the plaintiff, it was contended that the defendant had lost his right to have his motion certified to this division, because he had not complied with the statutory requirements relating to the certifying of such motions to this division. For the defendant, it was insisted that all the statutory requirements had been fulfilled. The common pleas division ruled that the plaintiff was entitled to judgment on the verdict, and to execution, on the ground that the defendant's motion was of no effect, because he had failed to comply with the statutory requirements necessary to entitle him to have his motion certified to this division, and accordingly granted the plaintiff's motion for judgment and execution. The defendant excepted to the rulings of the common pleas division, and filed his petition for a new trial, alleging that the rulings were erroneous. The case is before us on this petition.

Gen. Laws R. I. c. 251, § 9, provides that "after conviction, in criminal cases, and after verdict by the jury, or decision by the court, in civil cases, all motions in arrest of judgment, and all motions of a similar nature or purpose, arising on the face of the record only, shall be filed within five days after conviction, verdict, or decision, respectively; and in other respects shall follow the same course as claims for new trials on questions arising on the record, and shall be heard by the appellate division of the supreme court." We think that the requirement that such motions, when filed within the time limited, shall follow in other respects the same course as claims for new trial on questions arising on

the record, is to be construed as requiring the following of the same course so far as applicable. Neither the rulings of the common pleas division, nor the brief of the plaintiff, specifies wherein the defendant failed to comply with the requirement of section 6 of the chapter referred to, regulating the procedure in case of petitions for new trial. The first section of the clause relating to notice of intention to prefer a petition for a new trial is dispensed with by the filing of the motion itself within the five days limited for so doing. The second clause relates to petitions for new trials, founded on rulings, or on evidence and rulings thereon to be brought on the record, and provides for the filing of a statement of the rulings, or of such evidence and rulings, for allowance. This clause clearly has no application to a motion for arrest of judgment, which arises, not upon rulings, or evidence and rulings thereon, but on the record itself. The third clause requires that within 15 days after said 5 days, or within 15 days after the filing of the statement or statements referred to in the second clause, a petition for new trial shall be filed, stating specifically the grounds for such new trial, and provides that, in case all the steps specified in the clause have been taken, judgment shall be stayed, but that, in case of default in any step, judgment shall be entered as if such claim had not been made, etc. We do not see that this clause is applicable to a motion in arrest of judgment. Such a motion of itself sets forth, and must necessarily set forth, the ground on which it proceeds. To require a petition for a new trial to be filed in addition to it, setting forth specifically the grounds enumerated in it, would be an idle proceeding. We are of the opinion that all that is intended by the requirement of section 9 is that, on the filing of the motion within the time limited, the clerk of the common pleas division shall certify the papers in the case to the appellate division, as provided in the fourth clause of section 6, in the same manner as though it were a petition for a new trial. We think, therefore, that the common pleas division erred in granting the plaintiff's motion for judgment and execution, and that the motion in arrest of judgment should have been certified to this division for hearing. Petition for new trial granted, and case remitted to the common pleas division, with direction to certify it to this court on the plaintiff's motion in arrest of judgment.

(20 R. I. 279)

RAILTON v. TAYLOR et al.

(Supreme Court of Rhode Island. Nov. 22, 1897.)

LANDLORD AND TENANT—NEGLECT—PLEADING.

1. A provision in a lease that the property of the lessee is to be kept on the premises at the risk of the lessee in regard to damage by fire, water, or otherwise, is not a bar to an action by lessee for damage to his goods arising from

the negligent management by the lessor of a steam-heating apparatus.

2. Where a lessee sues for damage to his goods arising from the negligent management by the lessor of a steam-heating apparatus, the rule of caveat emptor does not apply, as the lessee does not claim that the building itself is not suitable for the purpose for which he hired it.

3. A demurrer to a special plea in bar reaches back through the whole record, and attaches upon the first substantial defect in the pleadings.

4. A landlord, who so negligently manages a steam-heating apparatus that the goods of his tenant are damaged by the smoke, ashes, etc., therefrom, is liable to his tenant for such damage.

5. A count in a declaration by a lessee claiming damages from a lessor for injury to goods while in the leased building, attributing the injury to the fact that the building and the steam-heating apparatus therein were not properly constructed, does not state a cause of action, when there is no allegation that the condition of the premises has been changed since the commencement of the tenancy.

Trespass on the case for negligence by Helen A. Railton against Ransom O. Taylor and another. A demurrer to a special plea in bar is sustained.

James C. Collins and James O. Collins, Jr., for plaintiff. James L. Jenks, for defendants.

TILLINGHAEST, J. This is an action of trespass on the case for negligence. The plaintiff is a tenant of the defendant Taylor under a written lease. The declaration alleges, in the first count thereof, that the plaintiff entered into possession of the store in question, which consisted of a portion only of the building owned and controlled by the defendant Taylor; that a portion only of the cellar under said store is occupied by plaintiff; that the remainder of said cellar is occupied by said Taylor, and contains steam-heating apparatus, planned for and used by said defendant in the heating of the stores and rooms in said building; that said heating apparatus was put in by defendant, and is under his control and management; that said store was let to the plaintiff for the purpose of a dry-goods store; and that the defendant Taylor has so negligently managed his part of the premises, including the heating apparatus, and all appliances connected therewith, as to cause large amounts of smoke, dirt, ashes, gases, and an excessive amount of heat to arise into the plaintiff's store, and render the same unfit for the purposes of trade, thereby greatly damaging the stock of goods of the plaintiff; and, furthermore, that said defendant has persisted in said negligence, though often warned by the plaintiff of the damage he was thereby doing. The second count alleges that the plaintiff's store was let to her by said defendant for, and used by her in, the sale of dry goods, fancy goods, etc.; that said defendant kept and used a portion of the cellar under the store for the heating of the building, having furnished the same with steam-heating apparatus; that there

were means supplied for the receiving of coal into said cellar, and for the removal of ashes therefrom, all of which were put in and constructed in an unsafe and unsuitable condition for the use they were intended for, and to which they were afterwards put; that said cellar was let to and used by one Bliss for the heating of said building, he being a tenant of the upper portions of said building; that said Bliss entered into possession and used said apparatus and the appurtenances thereunto connected, as was intended by said defendant that they should be used, and as a result thereof large quantities of smoke, dust, coal, dirt, ashes, gases, and an excessive amount of heat were caused to arise into the store of the plaintiff; that said defendant was frequently warned of these defects, but neglected to remedy the same; and that by reason thereof the plaintiff has suffered damage by reason of the loss of trade, etc. The third and fourth counts are substantially like the second. After the commencement of the action, the plaintiff, by leave of court, summoned in Harlan P. Bliss as a defendant, and in sundry additional counts charges him with negligence in the management of said heating apparatus, which plaintiff here alleges was under his control. Other counts were also added, charging the defendants jointly with negligence in the control and management of said heating apparatus, and also charging that said heating apparatus was improperly constructed as aforesaid, whereby plaintiff suffered damage. To this declaration the defendant Taylor has filed a special plea in bar, setting up that by the terms of the lease entered into between him and the plaintiff it was agreed that he should not be liable for any loss or damage suffered by the plaintiff from any cause or reason whatsoever; wherefore he prays judgment, etc. The provision in the lease relied on in bar of the action is as follows: "And it is also hereby understood and expressly agreed by the parties to this indenture that all merchandise, furniture, and property of any kind which may be on the premises during the continuance of this lease is to be at the sole risk and hazard of the lessee, and that, if the whole or any part thereof shall be destroyed or damaged by fire, water, or otherwise, or by the use or abuse of the Cochituate water, or by the leakage or bursting of water pipes, or in any other way or manner, no part of said loss or damage is to be charged to or borne by the lessor in any case whatever. And the lessee further promises that she will keep whole and in good condition all the window and other glass on the premises, and also the pipes, faucets, and water fixtures, and that she will leave the same whole, and in good condition, at the termination of this lease." The plaintiff contends that this provision cannot properly be so construed as to exempt the lessor from liability for his own

negligence or for that of his servants and agents. We agree to this contention. The exemption clause of the provision above quoted includes two classes of causes of injury which might be sustained by plaintiff, viz. damage by fire and damage by water, and the other and more general terms used in connection therewith are evidently but different forms of these two possible causes of injury, and there is nothing to show that they were intended to embrace matters outside of those specifically named. In other words, the general expression, "or in any other way or manner," does not stand alone, but immediately follows, and is clearly a part of, the specification relating to damage by water, and should be construed as relating to the same subject-matter. Moreover, it appears, by examination of the original lease on file in the case, that the entire provision in question, like all of the other provisions therein, is in print, and that the form used was evidently intended for the city of Boston, as it refers to Cochituate water; and we think it is evident that what the parties had in mind when using the language, "by the use or abuse of Cochituate water, or by the leakage or bursting of water pipes, or in any other way or manner," was such damage only as might result from the use or abuse of public water in said building. If it had been understood or agreed by the parties that the exemption was to extend beyond this, and include another and distinct cause of injury, viz. the lessor's own negligence in the management and use of that part of the premises remaining in his control, including the heating apparatus, they would doubtless have stipulated to that effect, and not have left so important a matter in any doubt. Of course, we do not wish to be understood by what we have thus said as intimating what the legal effect of such a stipulation would be had it been incorporated in the lease. It is a familiar rule in the construction of contracts that general terms are restricted and limited by particular recitals, when used in connection with them. *Lawson, Cont. § 389; Vaughan v. Porter, 16 Vt. 270; Gage v. Turrell, 9 Allen, 305; Harris v. Corlies, 40 Minn. 106, 41 N. W. 940; Torrance v. McDougald, 12 Ga. 526; Payler v. Homersham, 4 Maule & S. 423, 427; Jones, Com. & Tr. Cont. § 220. "All words," says Lord Bacon, "whether they be in deeds, or statutes, or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter and the person." Bac. Law Max. Reg. 10; Hoffman v. Insurance Co., 32 N. Y. 413. In Saner v. Bilton, 7 Ch. Div. 815, which was an action on a covenant to rebate rent in case of "inevitable accident," it was held that the words imported something ejusdem generis with what had been mentioned previously, and did not apply to that which, though not avoidable so far as the lessee was concerned, was not, in its nature,*

inevitable. We therefore decide that the exemption clause in question does not release the defendant Taylor from liability for his own negligence.

As to the defendant's contention that the rule of caveat emptor applies as to the fitness of the leased premises for the use to which the tenant puts them,—that is, that there is no implied warranty in the lease of a store or warehouse that the building is well built, or fit for any particular use,—we reply that, admitting this to be the law (and the cases are substantially to that effect. See *Dutton v. Gerrish, 9 Cush. 89; McGlashan v. Tallmadge, 37 Barb. 313; Libbey v. Tolford, 48 Me. 316; Lucas v. Coulter, 104 Ind. 81, 3 N. E. 622; Tayl. Landl. & T. § 822; Wood, Landl. & T. pp. 517, 518*), yet it is not controlling in this case, for the very obvious reason that here the plaintiff is not claiming that the store in question is not suitable for the purpose for which she hired it, but that the defendant, by the negligent and improper management of a certain part of the building and the appurtenances connected therewith other than and outside of that leased by her, has thereby rendered it unsuitable, and caused her damage and injury.

As the defendant's counsel has called our attention to certain defects in the declaration, and as the demurrer reaches back, in effect, through the whole record, and attaches ultimately upon the first substantial defect in the pleadings (*Gould, Pl. c. 9, §§ 36-39; Steph. Pl. [Heard's Ed.] *144; 6 Enc. Pl. & Prac. 331; Ward v. Sackrider, 3 Calnes, 263; Railroad Co. v. Neill, 16 Ill. 271; Baldwin v. Cross, 5 Ark. 510; Carlock v. Spencer, 7 Ark. 22; Smith v. State, 66 Md. 219, 7 Atl. 49; Ellis v. Ellis, 4 R. I. 122*), it becomes necessary to determine as to the sufficiency of the plaintiff's declaration. We think the first count thereof sufficiently states a cause of action for negligence. We think the second, third, and fourth counts are bad in that the plaintiff thereunder seeks to recover damages by reason of the faulty construction of certain parts of the building, and also of the steam-heating apparatus connected therewith. The mere fact that the building, together with said apparatus, was not properly constructed, gives the plaintiff no cause of action, as the defendant had the right to construct his building as he saw fit, so long as he violated no one's rights; and she does not allege that the condition of the premises has been changed since the commencement of the tenancy. See *Henson v. Beckwith, 20 R. I. 169, 37 Atl. 702*. If, however, he used a defective appliance in said building, to the plaintiff's damage as tenant, that might constitute actionable negligence on his part. Said second, third, and fourth counts are therefore quashed. We think the counts contained in the amendment to the declaration sufficiently state a case of negligence in the management and use of that part of the

premises, including the heating apparatus, which is alleged to have been under the control of the defendants, either jointly or severally, and these counts are therefore sustained. The demurrer is sustained, and the special plea in bar overruled. Case remitted to the common pleas division for further proceedings.

(36 Md. 400)

DUCKETT et al. v. NATIONAL MECHANICS' BANK OF BALTIMORE et al.

(Court of Appeals of Maryland. Dec. 1, 1897.)

TRUSTS—CONVERSION BY TRUSTEE OF DEPOSITS IN BANK—LIABILITY OF BANK—LIMITATIONS—WHO MAY PLEAD STATUTE—HOW DEFENSE INVOKED.

1. A bank credited to the personal account of C., who was trustee of an estate, the proceeds of a check deposited therein, issued in payment of a debt due such estate, in these words: "Pay to the order of S., cashier, \$2,000, for deposit to the credit of C., being the balance of purchase money due him as trustee from J." C. drew the money from the bank, and embezzled it. *Held*, that the bank was not liable to the estate on the theory that it knowingly participated in the breach of trust, since it credited the proceeds as directed in the check.

2. The bank was liable to said estate for the proceeds of a check deposited therein, and credited to C.'s personal account, and afterwards drawn and embezzled by C., where the check was: "Pay to the order of S., cashier, \$2,024.30, to deposit to the credit of C., trustee."

3. The liability of the bank was not affected by the fact that C. ratified its act in placing the money to his individual credit.

4. A participant in a breach of trust cannot invoke the defense of limitations.

5. The defense of limitations is not available, unless pleaded.

Appeal from circuit court of Baltimore city.

Bill by Marion Duckett and others, trustees, against the National Mechanics' Bank of Baltimore and Henry W. Clagett to recover money belonging to the trust estate deposited in defendant bank, and drawn therefrom and embezzled by defendant Clagett. From a decree dismissing the bill, complainants appeal. Reversed and remanded.

Argued before McSHERRY, C. J., and BRYAN, PAGE, BOYD, FOWLER and ROBERTS, JJ.

Marion Duckett, Charles Stanley, and David S. Briscoe, for appellants. Barton & Wilmer and Randolph Barton, Jr., for appellees.

McSHERRY, C. J. These proceedings had their origin in a bill filed by the appellants against the appellees in the circuit court of Baltimore city. The appellants are trustees, who were appointed, by an order of the circuit court for Prince George's county, in the place and stead of Henry W. Clagett, the survivor of three trustees named in the will of John D. Bowling. To these latter (the testamentary trustees) certain funds were bequeathed by Mr. Bowling, to be held in trust for the purposes designated in the will; but, as those purposes have no relation what-

ever to the questions presented in the record, they need not be alluded to here. It is only necessary to state that the funds now in controversy formed part of the corpus of that trust estate. Upon the death of his associates, Clagett became, under a decree of the circuit court for Prince George's county, sole trustee; and thereafter, having made default to the trust estate, was in due course removed, and the appellants were immediately appointed to discharge the trusts created by the will of Mr. Bowling. Among the investments belonging to the trust estate in the hands of Clagett were two mortgages, each for \$2,000, one due by Thomas S. Duckett and the other by Washington J. Beall. The mortgage given by Beall was foreclosed by Clagett after he became sole trustee, and the money realized from the sale was paid to him through Mr. Charles H. Stanley. The payment was made by Mr. Stanley's check, which reads as follows: "Laurel, Md., February 13, 1892. Citizens' National Bank: Pay to the order of James Scott, cashier, \$2,000.00 (two thousand dollars), for deposit to credit of Henry W. Clagett; being the balance of purchase money due him as trustee from John R. Coale. O. H. Stanley." When the Duckett mortgage matured the amount secured by it was paid to Clagett through Mr. Stanley by a check in these words: "State of Maryland, Citizens' National Bank of Laurel. Laurel, Maryland, Sept. 17, 1892. Pay to the order of James Scott, cashier, \$2,024.30 (two thousand and twenty-four 30/100 dollars), to deposit to the credit of Henry W. Clagett, trustee. O. H. Stanley." Both of these checks were deposited in the National Mechanics' Bank of Baltimore, where Clagett kept an individual or personal account, and the proceeds of each were carried to his credit in that account. Clagett, in his capacity as trustee, had no account with the bank. The individual account of Clagett, including the proceeds of the two checks just transcribed, was drawn on from time to time by him, and after his removal as trustee it was discovered that these funds had been dissipated and spent. Clagett was and still is insolvent. The new trustees (the present appellants) made demand upon the National Mechanics' Bank for a restitution of the amount of the two checks, claiming that the bank was accountable therefor, because it had wrongfully placed the proceeds thereof to Clagett's individual account, instead of to his account as trustee, and had thereby aided and participated in his breach of trust, and to enforce that demand they filed the pending bill against the bank and Clagett. Upon final hearing the circuit court of Baltimore city decreed that the bank was not liable, and dismissed the bill, whereupon this appeal was taken.

The ultimate inquiry is whether, under the circumstances stated, the bank is liable to make good to the new trustees the amounts

of these two checks. In addition, there are subordinate questions arising, by way of defense, that will be disposed of after the main one has been dealt with.

There can be no dispute that, as a general principle, all persons who knowingly participate or aid in committing a breach of trust are responsible for the money, and may be compelled to replace the fund which they have been instrumental in diverting. Every violation by a trustee of a duty which equity lays upon him, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust. 2 Pom. Eq. Jur. § 1079. There is in such instances no primary or secondary liability as respects the parties guilty of, or participating in, the breach of trust, because all are equally amenable. That a breach of trust was committed by Clagett does not admit of a doubt. The defaulting trustee was removed because he was a defaulter. He unquestionably received the proceeds of these two checks, and those proceeds formed part of the corpus of the trust estate which it was his imperative duty to preserve intact. Instead of performing that duty, he spent the funds,—they have disappeared, and he has not explained what he did with them,—and it can make no possible difference for what purpose he did spend them, if, by spending them, he impaired the corpus of the trust estate; and that he did impair the corpus of the trust estate no one pretends to deny. Whoever knowingly aided him, or knowingly participated with him, in misapplying that fund, became, by reason of so aiding and so participating, equally liable with him to make the fund good by restoring it to the trust estate. *Id.* If the bank knowingly aided and participated in Clagett's breach of trust, then the bank is, beyond dispute, as responsible to the new trustees as is the defaulting trustee himself. This liability of the bank depends, however, altogether upon the contingency that it knowingly aided the trustee, Clagett, to commit the default of which he was undeniably guilty. If without knowledge of Clagett's misconduct, or if without sufficient notice to put it on inquiry that would have enabled it to ascertain that Clagett was mingling with his individual deposits, and using as his own, money that the bank knew, or had the means of knowing, was trust money; or if it was merely the innocent agency through which, without fault or negligence on its part, Clagett depleted the trust estate,—then it was not guilty of aiding him in misappropriating the trust fund, and is not liable to restore it. In seeking, then, to solve the principal inquiry, we must look to the record for the evidence which will fasten on the bank this knowledge or notice, if in fact it possessed such knowledge or notice.

At the outset, it ought to be noted that there is a marked difference between the phraseology and the legal effect of the two

checks already set forth. The one is payable to Scott, cashier, for deposit to the credit of Clagett personally,—that is, not in his capacity as trustee,—though there is a memorandum added of which we will speak in a moment. The other check is payable to Scott, cashier, "to deposit to the credit of Henry W. Clagett, trustee." Apart from these two checks, and the information which they themselves, by their terms, imparted, there is no pretense that the bank had any notice or knowledge that the funds collected on them belonged to or formed part of any trust estate, or were other than Clagett's own individual property. As a consequence, we are restricted to the checks alone in determining whether the bank is liable. It is true, undoubtedly, that a bank is bound to honor the checks of its customer so long as he has funds on deposit to his credit, unless such funds are intercepted by a garnishment or other like process or are held under the bank's right of set-off. It is equally true that whenever money is placed in bank on deposit, and the bank's officers are unaware that the fund does not belong to the person depositing it, the bank, upon paying the fund out on the depositor's check, will be free from liability, even though it should afterwards turn out that the fund in reality belonged to some one else than the individual who deposited it. It is immaterial, so far as respects the duty of the bank to the depositor, in what capacity the depositor holds or possesses the fund which he places on deposit. The obligation of the bank is simply to keep the fund safely, and to return it to the proper person or to pay it to his order. If it be deposited by one as trustee, the depositor, as trustee, has the right to withdraw it, and the bank, in the absence of knowledge or notice to the contrary, would be bound to assume that the trustee would appropriate the money, when drawn, to a proper use. Any other rule would throw upon a bank the duty of inquiring as to the appropriation made of every fund deposited by a trustee or other like fiduciary; and the imposition of such a duty would practically put an end to the banking business, because no bank could possibly conduct business if, without fault on its part, it were held accountable for the misconduct or malversations of its depositors who occupy some fiduciary relation to the fund placed by them with the bank. In the absence of notice or knowledge, a bank cannot question the right of its customer to withdraw funds, nor refuse (except in the instances already noted), to honor his demands by check; and therefore, even though the deposit be to the customer's credit in trust, the bank is under no obligation to look after the appropriation of the trust funds when withdrawn, or to protect the trust by setting up a *jus tertii* against a demand. But if the bank has notice or knowledge that a breach of trust is being committed by an improper withdrawal of funds, or if it par-

participates in the profits or fruits of the fund, then it will be undoubtedly liable. In support of these general principles, if support they need at all, we may refer to *Munnerlyn v. Bank*, 88 Ga. 333, 14 S. E. 554; *Bank v. Rellly*, 124 Ill. 404, 14 N. E. 657; *Board of Chosen Freeholders of County of Essex v. Newark City Nat. Bank*, 48 N. J. Eq. 51, 21 Atl. 185,—all cited in 3 Am. & Eng. Enc. Law (2d Ed.) 833, 834; *Walker v. Bank*, 25 Fed. 255; 1 Morse, Banks, § 317; *Swift v. Williams*, 68 Md. 237, 11 Atl. 835.

As the bank, then, would not be responsible for the use made of the trust funds by the trustee unless it knowingly participated in a breach of trust or profited by the fraud, do the checks, which are, as we have said, the only evidence in the record on this branch of the case, show that the bank is liable? As respects the first check, representing the proceeds of the foreclosures of the Beall mortgage, we are of opinion that there is no liability on the part of the bank. It will be remembered that this particular check was not made payable to Clagett, as trustee, nor, being payable to Scott, cashier, were the proceeds directed to be placed to the credit of Clagett, trustee. In placing the proceeds to the individual credit of Clagett, the bank did just precisely the thing it was directed on the face of the check to do. In doing this it violated no duty to any one, unless the addition of the words, "being the balance of purchase money due him as trustee from John R. Coale," controlled the explicit direction in the body of the check to deposit the fund to the credit of Clagett individually, and gave the bank notice that, instead of doing what the check required should be done, it must do something it was not instructed to do at all, viz. place the funds to the credit of Clagett as trustee. Mr. Stanley's check was drawn, not on the National Mechanics' Bank, but upon the Citizens' National Bank of Laurel; and the memorandum descriptive of what the funds were, or the source from whence they came, was neither an instruction to the Mechanics' Bank, through which the check passed, as to the account in which these funds, when collected from the Citizens' Bank, should be credited in the Mechanics' Bank, to Clagett, nor was it a notification to the Mechanics' Bank that the funds were impressed with a trust that would be invaded by their being carried to Clagett's individual credit. On the contrary, the specific instruction on the face of the check was to credit Clagett individually with the proceeds, whatever the origin or ultimate use of those proceeds might be. This memorandum imposed no duty on the Mechanics' Bank, and operated only to subvert the convenience of the drawer of the check. In the case of *Bank v. Dodge*, 124 U. S. 333, 8 Sup. Ct. 521, it appeared that the clerk of the United States district court for the Southern district of Illinois deposited with the State National Bank

the funds belonging to the registry of the court. Whenever a deposit was made it was accompanied by a deposit ticket giving the number of the bankruptcy case to which the fund belonged, and a corresponding entry was made upon the books of the bank, indicating that the particular deposit belonged to a particular case designated by its number. All this was fully understood by the officers of the bank. When checks signed by the clerk, and countersigned by the judge, were drawn upon this account, the number of the case to which the fund to be paid on the check belonged was written on the upper right-hand corner of the check, following the words "Case No." Numerous deposits were made in many cases, but each and every deposit showed the number of the case, and consequently identified the case, to which each deposit actually belonged. Many checks were drawn upon and paid by the bank in cases in which no deposits had been made by the clerk at all, and the checks themselves showed, by the case numbers written on the top right-hand corners, that no deposits belonging to those cases had ever been received, because there were no deposits credited to the cases bearing those numbers. In consequence of the bank having paid various checks bearing case numbers to the credit of which cases no deposits had ever been made, the entire sum to the credit of the whole account was checked out before Dodge, to whom several checks were given in the distribution of the assets of a particular estate, received his checks and presented them to the bank for payment. In the case in which Dodge was interested as a creditor of a bankrupt there had been deposited, as shown by the deposit tickets and by the entry of the case number on the bank's books, more than sufficient to pay the checks held by Dodge, as well as all other checks delivered to other creditors of the same bankrupt; but because the bank had paid out the funds belonging to this case, on checks bearing the numbers of other and different cases, as to which latter cases there had been no deposits made at all, there were no funds in bank to the credit of the registry with which to pay the checks held by Dodge, and the bank refused to pay them. Dodge brought suit against the bank, and based his claim to recover on the distinct ground that the bank had actual notice from its own books as to what estates had funds on deposit, and had actual notice, on the face of every check drawn in a case from which no funds had been received, that there were no funds on deposit applicable to the payment of such checks, and that, consequently, when it paid those checks it paid them knowingly out of funds belonging to other and different cases or estates, and was bound to honor the checks held by Dodge, as they were drawn against funds which had been actually deposited as part of the assets of the bankrupt estate of which he was creditor. But the supreme

court held that "no bank is bound to take notice of memoranda and figures upon the margin of a check, which a depositor places there merely for his own convenience, to preserve information for his own benefit; and, in such case, the memoranda and figures are not a notice to the bank that a particular check is to be paid only from a particular fund. So, too, a mark on a deposit ticket, if intended to require a particular deposit to be kept separate from all other deposits placed to the credit of the same depositor, must be in the shape of a plain direction, if such a duty is to be imposed on the bank." The court likewise held that "the bank had a right to assume that these memoranda of numbers in the deposits and in the checks were merely for the convenience of the court and its officers." Dodge was accordingly denied a recovery.

Unless we give to the memorandum made by Mr. Stanley, for his own convenience, on the first check, an effect which the supreme court declined to give to a much more significant memorandum contained in the checks delivered to Dodge, we must hold that the Mechanics' Bank, by carrying to the personal credit of Clagett the proceeds of the check representing the avails of the Beall foreclosure, did no act that made it liable to the Bowling trust estate for the misappropriation of those particular proceeds by the deposed trustee; and this is so because the memorandum could not operate to qualify the right of Clagett to receive the funds individually, and the bank did no wrong in placing them to his credit in the capacity in which he was obviously authorized to receive them. The bank having, therefore, rightfully entered the proceeds of this first check to Clagett's individual credit, he was entitled to draw them out, so far as the bank was concerned, and the bank was under no obligation and had no authority to interfere with him in doing so.

Precisely for the reasons that the bank is not responsible for the misappropriation of the proceeds of the first check it is liable to the new trustees for the misapplication by Clagett of the funds collected by it on the second check. The second, or Duckett, check, in terms directed the cashier of the Mechanics' Bank "to deposit" the \$2,024.30 "to the credit of Henry W. Clagett, trustee." This was an explicit notification to the bank that Clagett was not the actual owner of the money. *Bundy v. Town of Monticello*, 84 Ind. 119, 3 Am. & Eng. Enc. Law (2d Ed.) 832. It was an equally explicit instruction to the bank not to place the funds to the credit of Clagett's personal account. It was consequently more than a mere memorandum made for the convenience of the drawer of the check. Knowing that the money was not Clagett's, but that it was payable to him, and to be deposited to his credit as trustee, the bank had no authority to place it to his individual credit (*American Exch. Nat. Bank*

v. Loretta Gold & Silver Min. Co., 165 Ill. 109, 46 N. E. 202); and, if loss ensued by reason of Clagett drawing the fund out by checks on his personal account, the bank is liable to make restitution to the trust estate. The bank deliberately participated in the breach of trust of which Clagett was guilty. In fact, the bank took the first step that ended in the spoliation of the trust. Its act in placing distinctly marked trust funds to the personal credit of Clagett was obviously wrongful, and it must bear the resulting consequences. It is no answer to say that had the bank obeyed the direction given to it, and had it opened an account in the name of Clagett as trustee, and credited that account with these funds, still Clagett could have withdrawn them on checks appropriately signed, and could then have misapplied the money without involving the bank in any liability. This is no answer, simply because what might have been done was not done. Had the bank opened the account for this fund in the name of Clagett, trustee, instead of entering the credit to his personal account, it would have done what it was its plain duty to do, and it would not have been guilty of the error which it did commit. Had it done its duty, and had Clagett afterwards withdrawn the money, as he might have done, and had he then misapplied it without the co-operation of the bank, there would have been no liability incurred by the bank at all. But this was not done, and the failure of the bank to do what it ought to have done cannot be treated as tantamount to the thing that it did do, unless contraries are equivalents of each other. What it ought to have done is not what it did do, and it cannot escape liability upon the mere conjecture that what did happen to the funds might have also happened had the bank not been derelict in its dealings with those funds.

It has, however, been insisted that Clagett, knowing that the bank had wrongfully placed trust funds to his individual credit, ratified that wrongful act by his subsequent conduct, and, as his ratification was equivalent to a prior direction to do what was done, the bank is not answerable. Both Clagett and the bank participated in the wrong with respect to the proceeds of the Duckett mortgage. Because they both did wrong, they are both accountable for it. But the contention is, if one of two wrongdoers who reaps the fruits of the joint wrongful act ratifies what his accomplice has done, that accomplice is thereby released and exculpated. This, of course, is not the bald form in which the rather ingenious argument advanced to support the contention is presented. But, reduced to its last analysis, it comes to that startling proposition. The wrong was done, not to the trustee, but to the trust estate. As between the bank and the trustee, his ratification of its act might bind him; but upon what principle can such a ratification bind the beneficiaries of the trust, who have been

injured by the joint breach of trust on the part of the bank and the trustee? No ratification by the trustee of the bank's participation in the breach of trust can possibly affect in any way the bank's accountability to the new trustees.

As to the statute of limitations, it is only necessary to say that a participant in a breach of trust cannot, any more than can the trustee himself, invoke that defense. 2 Pom. Eq. Jur. § 1080. Even if the statute applied, to be availed of as a defense it must be invoked by either a plea or an answer. *Allender v. Vestry of Trinity Church*, 3 Gill, 166. The answer of the bank relies on limitations only as against the claim for \$2,000, which is not the claim for the \$2,024.30 collected on the check given in payment of the Duckett mortgage debt, and that is the claim for which we hold the bank liable. So, in fact, the statute is pleaded against the claim that the bank is not liable for, and is not pleaded against, the claim for which it is responsible.

We have made no allusion to a line of cases of which *Bank v. Lange*, 51 Md. 138, *Marbury v. Ehlen*, 72 Md. 206, 19 Atl. 648, and *Stewart v. Insurance Co.*, 53 Md. 564, are illustrations, because the principles applied in that group of decisions have no relation to the questions involved on the record now before us. The sale of a promissory note payable to a trustee, and therefore a nonnegotiable note, or the transfer of a certificate of stock standing in the name of an individual as trustee, is quite a different thing from the payment of a check drawn by a trustee on an account standing to his credit as trustee in a bank. Where certificates of stock are held in trust, and on their face indicate that they are so held, the bank or other corporation is bound, before suffering them to be transferred on the books of the corporation, to know, or at least to use proper diligence to ascertain, that the trustee has authority to make the transfer, whereas, in the case of a deposit, the relation of debtor and creditor is created in the capacity in which the deposit is made, and the bank's duty is to pay out the fund to or upon the order of the person making the deposit when the check is properly signed, without looking to the application of the fund; and it incurs no responsibility by so doing unless it knowingly participates in a breach of trust or itself reaps the fruit thereof. We hold, then, on the entire case, that the bank is accountable for the sum of \$2,024.30, the amount of the check dated September 17, 1892, with interest thereon from the date of the deposit of the proceeds to the credit of Claggett's individual account, and that it is not liable for the proceeds of the other check. The decree dismissing the bill of complaint will accordingly be reversed, and the cause will be remanded, that a new decree may be passed conforming to this opinion. Decree reversed, with costs above and below, and cause remanded.

(86 Md. 443)

WELLS v. MUNROE et al.

(Court of Appeals of Maryland. Dec. 1, 1897.)

ELECTIONS—BALLOT—MANDAMUS—CONTEST—RIGHTS OF DEFEATED INCUMBENT.

1. Act 1896, c. 202, § 39, provides that all certificates of nomination for office of any division greater than a county office shall be filed with the secretary of state, and certificates of nomination for all other offices shall be filed with the supervisors of election of the proper counties. Section 49 makes it the duty of the supervisors of election to cause to be printed on the ballot the name of every candidate whose name is properly certified. Section 50 provides that all ballots shall contain the name of every candidate whose nomination for an office specified in the ballot shall be certified and filed. Held that, as the supervisors of election have no discretion as to placing a certified name on the ballot, mandamus will compel them to do so on their refusal.

2. In an action to compel the supervisors of election to place the name of a candidate for an office on the ballot, when it appears that no vacancy exists in respect to that office the court will not direct by mandamus the name of the nominee to be placed on the ballot.

3. Where a candidate for office is returned as elected, and receives his commission from the governor, but is declared not elected by the house of delegates, he is entitled, after qualifying, to hold office only until his successor shall be elected and qualified.

4. Where a vacancy occurs in the office of clerk of the circuit court by virtue of a contest, it is the duty of the house of delegates to order a new election within 30 days.

5. Where one has been returned as elected, and commissioned clerk of court, and has been defeated in a contest, his successor's election may take place at the time appointed by the house of delegates, or, in the event that that is impossible, then at the next general election.

6. Where one has been elected as successor to a clerk of court who has been declared not legally elected by the house of delegates, he is entitled to hold his office for six years, under the provisions of Const. art. 4, § 25.

Appeal from circuit court, Anne Arundel county.

Action by George Wells against Frank A. Munroe and others. From an order refusing plaintiff a writ of mandamus, he appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Robert Moss, for appellant. Jas. M. Munroe, John P. Poe, and Dennis Claude, for appellees.

PAGE, J. This proceeding was instituted for the purpose of obtaining a mandamus directing the supervisors of Anne Arundel county to receive the certificate of the nomination of the appellant for clerk of the circuit court, and to place his name as a candidate for that office on the official ballot to be voted at the election to be held in November, 1897. In view of the urgency of the case, we have already rendered our judgment, reversing the order below, and we will now proceed to give the reason for our action. There is no dispute as to the facts of the case, as stated in the petition. They may briefly be stated as follows: At the general election in November, 1895, Dr. George Wells was duly returned elected clerk of the

circuit court for Anne Arundel county for the full term of six years, and was duly commissioned by the governor, and bonded and qualified, and entered upon the discharge of the duties of the office, and has so continued to the present time. His election, however, was contested by Dr. Washington G. Tuck, and on the 24th of March the house of delegates passed the following resolutions: "Resolved by the house of delegates of Maryland, that at an election held on the 5th day of November, 1895, for clerk of the circuit court for Anne Arundel county, George Wells was not duly and legally elected clerk of the circuit court for Anne Arundel county." "Resolved by the house of delegates of Maryland, that an election for clerk of the circuit court for Anne Arundel county be, and the same is hereby, ordered to be held on the 21st day of April, 1896, in pursuance of section 12 of article 4 of the constitution." The special election thus directed, however, could not be held for the reasons stated by this court in the case of *Munroe v. Wells*, 83 Md. 505, 35 Atl. 142. In August, 1897, the petitioner was nominated for the office of clerk of the circuit court for Anne Arundel county by a convention of the Democratic party, and a certificate thereof in due form of law was filed with the supervisors of election of Anne Arundel county. The supervisors, however, refused to place his name upon the official ballot; the reason therefor being, as appears from their answer to the petition, that there was no vacancy in the said office.

It is contended that these facts do not present a case for a mandamus, because the power of the supervisors with respect to the placing of names upon the judicial ballot is discretionary. The rule in regard to the powers of the court to issue mandamus is too well settled to require the citation of authority. In *Green v. Purnell*, 12 Md. 336, it is stated as follows: "It cannot issue in a case where discretion and judgment are to be exercised by the officer, and it can only be granted when the act required to be done is merely ministerial, and the relator without adequate remedy." Now, what was the duty of the supervisors in respect to a case like this? By the thirty-sixth section of the act of 1896, c. 202, any convention and primary meeting held for the purpose of making nominations to public office "may nominate candidates for public office, to be filed by election within the state." All nominations "so made shall be certified as provided by the 37th section and by the 39th section. Such certificates shall be filed for the nomination of candidates for congress, state offices, and offices of any division greater than a county, with the secretary of state, and certificates of nomination for all other offices, with the supervisors of election of the respective counties or of the city of Baltimore, as the case may be, not less than eighteen days before the election the secretary of the state, must certify to the supervisors of election of each county, or of the city of Baltimore, within which any of the

voters may by law vote for candidates for such office," the name and description of each person nominated for such office; as specified in the certificate of nomination filed with the secretary of state (section 43); and, eight days before the election, publish "the nominations to office, which have been filed with or certified to them under the provisions of this article." By the forty-ninth section it is made their duty "to cause to be printed on the ballot the name of every candidate whose name has been certified to or filed with the proper officers, in the manner herein provided for"; and by the fiftieth section all ballots shall contain the name of every candidate whose nomination for any office specified in the ballot has been "certified to and filed" according to the provisions of the article. There are other provisions relating to the preparation of the official ballot, but nothing therein contained in anywise varies the clear intent of the legislature to be gathered from those we have cited. It is manifest it was not the purpose to invest the supervisors with any discretion as to what names should be placed upon the official ballot. It will not for a moment be contended that the supervisors can reject any of the nominations certified to them by the secretary of state under the forty-third section, because in their opinion there were no vacancies in the offices for which such nominations were made, nor is there any authority to be found anywhere in the statute investing them with power to act differently in respect to nominations certified from a convention or a primary meeting. Where the nominations come to the supervisors from the proper sources, certified in the proper manner, as the law provides, it is their plain duty to place the names certified to on the ballots, and all ballots shall contain every such name. The court below, therefore, had full jurisdiction to entertain this proceeding. But, for all that, it will not do a nugatory act, but will refuse the writ if it be manifest that it can have no beneficial effect. *State v. Taylor*, 59 Md. 338. If there is no vacancy in the office of clerk of the circuit court for Anne Arundel county, and no such officer was legally to be elected at the election to be held in the month of November, 1897, the court will not direct the name of a nominee for that position to be placed on the ballot. *Worman v. Hagan*, 78 Md. 163, 27 Atl. 616.

The next question that is presented, therefore, is, was there such a vacancy in that office as must be filled by the voters of the county at the approaching election? The counsel for the appellees insist that the decision of this court in the case of *Ijams v. Duvall* (recently decided) 38 Atl. 819, is conclusive of this controversy. But we cannot concur in this view. In that case, as in this, Duvall had been duly commissioned by the governor, and had entered upon the discharge of his duties. His election was contested by

Ijams; and the house of delegates decided that Duvall had not been duly elected, and ordered a new election, which could not be and was not held. Thereupon the governor, regarding the office as vacant within the meaning of section 40 of article 4 of the constitution, appointed and issued a commission to Ijams, who, on the refusal of Duvall to surrender the office to him, applied for a mandamus; so that the question in that case was whether there was such a vacancy in the office as enabled the governor to appoint some other person to fill it. In its decision the court discusses the nature of the vacancy referred to in section 40 of article 4, and holds it to be a vacancy occurring after an election by the people, "created by deaths, resignation, or by some other cause, of one or more of the three men who had been chosen by the qualified voters." What was decided by that case was that the governor had no power to appoint a successor to Duvall, because there was no vacancy within the meaning of the only section of the constitution that conferred upon him the authority to make such appointment. In the case at bar the question is, is there such a vacancy in the office as must be filled by the election of the people? Upon being returned elected, Dr. Wells received his commission from the governor, and duly qualified and entered on the discharge of his duties, and these facts alone conferred upon him a valid title to the office. *Brooke v. Widdicombe*, 39 Md. 402. This title, however, is not that conferred by the constitution on one who has been elected by a plurality of the qualified voters, under the twenty-fifth section of article 4 of the constitution. To the house of delegates, under section 12, art. 4, is confided the power and authority to decide upon the election and qualification of candidates for this office, and its decision that the appellant "was not duly and legally elected clerk," etc., at the election of November, 1895, must be taken to be decisive. Dr. Wells, therefore, was not entitled, under the governor's commission, to a term of six years, which, under section 25, can only begin "from the time of his election." Whatever rights he acquired to the office were derived solely from the governor's commission and his qualification. *Jump v. Spence*, 28 Md. 1; *Brooke v. Widdicombe*, supra. The commission could not confer upon him the rights of an officer elected by the voters. It in fact entitled him, after qualifying, to hold the office only temporarily, a *locum tenens*, until his successor was properly and legally appointed and qualified. *Robb v. Carter*, 65 Md. 334, 4 Atl. 282.

How shall such successor be chosen, in accordance with the provision of the constitution? Under the circumstances of this case, it is not within the power of the judges to appoint; the "vacancy" contemplated by the twenty-fifth section of article 4 being one that occurs after an election by the voters. The reasoning stated in *Ijams v. Duvall* applies here and is decisive of the point. The

general intent of the constitution, when all its provisions applicable to the subject are regarded, is manifest that clerks of all courts in the state shall be elected by the people. All the sections relating to the terms of their offices provide for a term "beginning from the time of his election." By section 17, art. 4, the clerk of the court of appeals holds his office "for the term of six years from the time of his election." The same language is employed in section 37, art. 4, relating to clerks of the courts of Baltimore city; and by section 25, art. 4, clerks of the circuit court for the counties hold their offices for six years from the time of their election. Moreover, the policy of the constitution is clear that in cases of vacancy, where the judges have power to fill the same, their appointments hold only until the next general election for delegates to the general assembly, "when a successor shall be elected for the term of six years." So, if there be a contest, and the judgment be against the one who has the commission of the governor, the house of delegates is to refer the matter again to the voters by ordering a "new election within thirty days." It is therefore clearly contrary to the spirit of the constitution that one who has been declared not to have been duly elected by the house of delegates, the judges designated by the constitution to settle the matter, shall yet hold the office for the full term of six years, where the legal right to such a term can only accrue in consequence of an election by the legally qualified voters. The last clause of section 12, art. 4, "if the judgment shall be against the one who has been returned elected or the one who has been commissioned by the governor, the house of delegates shall order a new election within thirty days," was inserted for the purpose of securing a reference of the matter to the people at an earlier period than that of the next general election; in fact, for the purpose of so referring it at the earliest day practicable. Under the present constitution the house has no power to decide who is elected and entitled to the term, differing in that respect from the preceding constitution. The duty of the house of delegates is now only to judge of the election and qualification of the candidates, and to order a new election, if the decision be against the one who was returned elected; thus emphasizing the general intent that all clerks shall hold their offices only by an election by the people, except in cases where necessity requires a temporary appointment until the will of the people can be expressed. If these views be correct, while there was no vacancy in this office, Dr. Wells holding it temporarily under the commission of the governor until his successor was duly appointed and qualified, no one having been duly elected there is no one entitled to the term provided by section 25 of article 4. But this section also provides: "There shall be a clerk of the cr-

cult court for each county, who shall be elected by a plurality of the qualified voters of said county and shall hold his office for six years from the time of his election and until his successor is elected and qualified," etc. We are therefore of the opinion that, by the spirit and intent of the constitution, there is such a vacancy in the office as to make it necessary and proper that an election for the office shall be held at the earliest possible moment. If it could not be held at the time the house of delegates appointed, there are no reasons why it cannot be held at the general election on the day designated by section 7 of article 15. If such election be held, it is obvious the person elected would not take a fragment of a term. Dr. Wells, as we have said, has not been holding for any part of the term designated by section 25 of article 4, but temporarily only, until a term should legally begin. The person elected, therefore, would be entitled to the full term of six years from the time of his election. For these reasons the order is reversed.

(86 Md. 475)

R. FRANK WILLIAMS CO. v. UNITED STATES BAKING CO. et al. (two cases).
(Court of Appeals of Maryland. Dec. 2, 1897.)

APPEAL—WHEN LIES—APPEALABLE ORDERS—EQUITY PRACTICE—CORPORATIONS.

1. Under Code, art. 5, § 21, providing for an appeal from an order appointing a receiver, an order refusing to rescind the order of appointment, not being in the nature of a final decree, is not appealable.

2. Under Code, art. 5, § 21, providing that an appeal may be allowed from "an order appointing a receiver, the answer of the party appealing being first filed," an appeal from such an order will be dismissed, if taken before answer filed.

3. A bill in equity may be answered by a corporation only under its corporate seal.

Appeals from circuit court, Wicomico county, in equity.

Bill in equity by the United States Baking Company and others against the R. Frank Williams Company for the appointment of a receiver. From an order appointing receivers, and from an order overruling a motion to dismiss the bill and to rescind said appointment, defendant appeals. On motion to dismiss. Granted.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, PAGE, BOYD, and FOWLER, JJ.

Jas. E. Ellegood and G. Grier Ratcliff, for appellant. Jay Williams and Rob. Graham, for appellees.

McSHERRY, C. J. A bill of complaint was filed on the equity side of the circuit court for Wicomico county on July 22, 1897, by the appellees against the appellant, praying for the appointment of receivers to take possession of the appellant's assets and property. The appellant is a body corporate, duly incorporated under the general laws of Maryland

pertaining to the creation and formation of corporations. On the day the bill was filed an order was signed appointing receivers as prayed. In disposing of the only question which we are required to decide or can determine as the record stands, it is unnecessary to make reference to the allegations of the bill. On the 28th of July the appellant filed in the court below a motion to dismiss the bill and to rescind the order appointing the receivers; but this motion was overruled on August 2d. On the 4th of August what purports to be an answer of the defendant corporation, signed by two solicitors, but not under the seal of the corporation, was filed; and on the same day an appeal was taken by the defendant from the order of July 22d appointing the receivers, and from the order of August 2d overruling the motion to dismiss the bill and to rescind the appointment of the receivers. On the 7th of August another paper, signed by three persons, professing to be a majority of the directors of the defendant corporation, was filed, wherein all the allegations of the bill are admitted, and whereby it is claimed that the appeal of August 4th was taken without the authority of the company. This paper is not under the corporate seal. A motion has been made in this court to dismiss the two appeals docketed pursuant to the prayer of appeal dated August 4th. Various reasons have been assigned in support of this motion, but, as one of them is decisive, and must prevail, it alone will be considered. This is the third reason, and it asks that the two appeals shall be dismissed "because the appellant did not file any answer at all before entering an order for appeal." From the order denying the motion of July 22d, which motion asked that the bill be dismissed, and that the appointment of the receivers be rescinded, standing alone, no appeal will lie. This precise proposition has been decided in *Hull v. Caughy*, 66 Md. 104, 6 Atl. 591. The order overruling this motion is in no sense a final decree, nor is it an order in the nature of a final decree; and, though an appeal is allowed from an order appointing a receiver, no appeal is provided by statute from an order refusing to rescind the appointment, or refusing to discharge the receiver. Code, art. 5, § 21. As observed in *Hull v. Caughy*, there are cases reported where, upon appeals taken and entertained from orders appointing receivers, or from other like orders from which an appeal is especially provided for by statute, the propriety of continuing or of discharging the receiver has been considered. But the propriety of continuing or of discharging the receiver was considered only because there was an appeal properly taken on some other ground. So it comes to this inquiry: Has there been an appeal properly taken from the order of July 22d appointing the receivers? The section of the Code to which reference has just been made expressly provides for an appeal from an order appointing a receiver; but the appeal can only be taken after the defendant has

filed an answer. The filing of an answer is an indispensable prerequisite to an appeal. Though the answer cannot be looked to in determining whether the order appealed from ought to have been granted or not, for the propriety of the order is dependent alone upon the sufficiency of the averments of the bill, still the appeal cannot be entertained, and therefore the sufficiency of the allegations of the bill cannot be considered, unless an answer has been filed before the appeal was prayed. This is the imperative requirement of the statute, and cannot be disregarded. If no answer was filed below, or if that which purports to be an answer is in law no answer at all, then there is no appeal before us which can be considered, and the motion to dismiss must prevail. We have said that the appellant—the defendant below, and the only defendant in the case—is a body corporate; and we have stated that the paper purporting to be its answer is not under its corporate seal. If a defendant corporation cannot answer in a court of chancery except under its corporate seal, then there is no answer in the case, and there was none before the appeal was taken. Now, can a defendant corporation make answer in a court of chancery to a bill of complaint filed against it, except under its corporate seal? It is perfectly clear that it may sue as plaintiff, in equity or at law, without affixing its corporate seal to the bill of complaint or the declaration. *Iron Co. v. Detmold*, 1 Md. Ch. Dec. 371. But it is equally true that it can only answer in a court of equity under its seal. *McKim v. Odom*, 8 Bland, 420; *Telegraph Co. v. Pearce*, 71 Md. 539, 18 Atl. 910; *Miller, Eq. Mortg.* § 167; *Barr. Ch. Prac.* 460; *Alex. Ch. Prac.* 61; 2 *Danell, Ch. Prac.* *270; *Coop. Eq. Pl.* 325; *Story, Eq. Pl.* § 874; *Iron Co. v. Wingert*, 8 Gill, 170; *Railroad Co. v. City of Wheeling*, 13 Grat. 40; *Ransom v. Bank*, 13 N. J. Eq. 212; *Haight v. Morris Aqueduct*, 4 Wash. C. C. 601, Fed. Cas. No. 5,902; *Griffin v. Bank*, 17 Ala. 258; 1 *Enc. Pl. & Prac.* 886, note 6; *Ang. & A. Corp.* § 665, and notes. The form of the answer is given in section 665, last cited. It is obvious, then, as the paper purporting to be an answer is, by reason of the absence of a seal, no answer at all, that there is no answer in the case; and it follows, from the plain provisions of the statute, that the appeals taken without an answer being filed cannot be considered, and must be dismissed; and it is so ordered. Appeals dismissed, with costs.

(86 Md. 479)

FRANKLIN SUGAR-REFINING CO. v.
HENDERSON et al. BROWN et al. v.
SAME. EDMONDSON et al. v. SAME.
LEDERER et al. v. SAME.

(Court of Appeals of Maryland. Dec. 2, 1897.)
PARTNERSHIP—INSOLVENCY—CONVEYANCE BY PARTNER—ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. One of three partners sold and conveyed his interest in the partnership to his associates,

who immediately gave notice of dissolution, and formed a new firm. Ten days afterwards they executed a deed of trust for the purpose of the payment of the debts of the new firm and the personal debts of the members thereof. On suit by the creditors of the old firm against the trustee of the new firm, there being no evidence of bad faith on the part of the trustee, *held* that, the old firm being insolvent at the time of the first dissolution, the conveyance by the retiring partner was void as to creditors of the old firm.

2. The trust deed ignoring the rights of the creditors of the original firm was void.

Appeals from superior court of Baltimore city.

Four separate attachments by the Franklin Sugar-Refining Company, V. J. Brown & Co., Edmondson, Steuart & Co., and Lederer Bros. against Henderson, Pfeil & Co. and others. From an order pro forma quashing the attachments, the plaintiffs appeal, all in one record. Reversed.

Argued before McSHERRY, C. J., and BRISCOE, BRYAN, PAGE, and BOYD, JJ.

Frank Gosnell, Wm. S. Bryan, Jr., and Jas. W. McElroy, for appellants. A. S. Niles and Oscar Wolff, for appellees.

McSHERRY, C. J. These four cases come up from a pro forma order quashing attachments sued out by the appellants against the appellees Henderson, Pfeil & Co. In November, 1892, John B. Henderson, George Henry Pfeil, and Alexander J. McDonald formed a co-partnership, which carried on business in Baltimore city until October 4, 1895. On that day the co-partnership was dissolved. It was indebted at the time to sundry persons, but whether it was insolvent or not is one of the controverted issues of fact that will be considered later on. Henderson sold his interest in the concern to his associates, and assigned and made over to them all of his right and title, as a member of the firm, in and to the property and assets of every kind, real, personal, and mixed, owned by the co-partnership. Notice of dissolution was given, and Pfeil and McDonald at once formed a new firm, under the old name. Just 10 days afterwards—that is, on the 14th day of October, 1895—Pfeil and McDonald executed a deed of trust to Oscar Wolff, Esq. The deed was made by "George H. Pfeil and Alexander J. McDonald, trading as Henderson, Pfeil & Co.," and is not signed by Henderson. It recites that "the parties of the first part" (that is, Pfeil and McDonald) "are indebted to divers persons and firms in various sums of money, and have become and are unable to pay such indebtedness in full"; and that, "in order to have their assets and effects collected and faithfully applied to the payment of their said debts" (that is, the debts due by the grantors), the assignment was made. After making provision for the payment of costs and commissions and such preferences as the law creates, the deed proceeds to declare that the trustee shall apply

the "proceeds of the joint stock of the said co-partnership" (that is, the co-partnership of which Henderson was not a member) to pay the creditors of the co-partnership (that is, the co-partnership composed of Pfeil and McDonald), "and to appropriate the net proceeds of the separate estate of each partner to pay his separate creditors"; and the surplus of each partner's separate estate after the payment of his individual creditors is directed to be added to the social assets, and the surplus, if any, of the partnership assets, is directed to be divided between the partners in the proportions of their respective interests, and to be applied to the payment of their separate debts. It is important to observe that the deed of assignment makes no reference whatever to the old firm, of which Henderson had been a member, and contains no provision, in terms or by implication, for the payment of the creditors of that firm out of the assets owned by it, on October 4th, the day of its dissolution. On October 15th, the day following the execution and recording of the deed of trust, the appellants, who are creditors of the old firm of Henderson, Pfeil & Co., sued out of the superior court of Baltimore city attachments which they caused to be laid in the hands of Mr. Wolff, as garnishee. They allege, as one of the grounds upon which the attachments are founded, that Henderson, Pfeil, and McDonald, have assigned, disposed of, or concealed, or are about to assign, dispose of, or conceal, their property, or some part thereof, with intent to defraud their creditors. The garnishee appeared, pleaded *nulla bona*, and filed a motion to quash, founded on the claim that the property and assets attached were the property and assets of Mr. Wolff, the trustee, and not of the defendants. The motion was heard, and the learned judge at large was of opinion that the motion to quash ought to be overruled; but, by an agreement made between the parties, a *pro forma* order was signed, overruling the motion, and finally quashing the attachments. From this *pro forma* order the pending appeals were taken.

A reversal is claimed upon two grounds: First, that the deed of trust to Mr. Wolff is fraudulent in law, as hindering and delaying the creditors of the old firm; and, secondly, that the deed is fraudulent in fact.

We may as well dispose of the second ground first, because but little need be said respecting it. The record has been minutely read and carefully considered, and we all agree that it furnishes not the slightest warrant for impeaching the deed on account of actual fraud. The conduct of Mr. Wolff throughout is free from the faintest shade of bad faith. There is nothing to suggest even a suspicion that he was not actuated by the very highest and most honorable motives and intentions; and there is no evidence whatever that can be tortured into an imputation of bad faith. We are thoroughly

convinced that the trustee acted in the utmost good faith, and we accordingly dismiss this branch of the case without further comment, and turn at once to the consideration of the other.

Partnership creditors have no lien on partnership assets, but the partners themselves have a right to insist upon the appropriation of the joint property to the payment of joint debts, upon the principle that, as the joint debts were contracted in making the purchases of the joint assets, the latter ought primarily to be charged with the burden of paying the former. This right of the partners to have the joint debts paid out of the joint assets, in preference to the right of the separate creditors to be paid out of the same assets, gives rise to the derivative equity of the joint creditors to have payment of their claims made out of the proceeds of the co-partnership property before any of those proceeds can be devoted, either to the separate use, or appropriated to the payment of the separate debts, of any of the members of the firm. The derivative right is the right of the creditor. It belongs to him, and the partners have, if insolvent, no power or authority to destroy or impair it to his injury or prejudice. This is so in the very nature of things. Any act, therefore, of the partners, which is destructive of this right of the creditor, and which, as a result, hinders, delays, and interferes with his assertion of it, and impedes his ability to realize, through its enforcement, the payment of the debt due to him by the firm, is, by operation of law, a fraud upon the creditor, if the co-partnership is itself insolvent. This principle has been often applied. In a number of cases it has been held—and it may certainly be regarded as the law of Maryland to-day—that the conversion of the firm's assets into individual assets, by an assignment from one partner of all his interest in the concern to another, works a conversion of the property from joint to separate property, and, when the firm is insolvent, operates to hinder, delay, and defraud the firm's creditors, if the transfer be permitted to stand. It is obvious that this must be so. As the creditors' preference or priority to be paid out of the joint property can only be worked out through the partners' right to have that property applied in the first instance to the payment of the firm's creditors, and as the individual creditors have a prior right to require that the separate estate shall be first applied to the satisfaction of the individual debts, it necessarily follows that the conversion of the joint property into separate property, if sustained, would, when the firm and its members are insolvent, destroy the right of the partnership creditors to a preference over the creditors of the individual partner to whom the assets had been transferred, because, when the assets cease to be joint assets, the right of the partner to have them applied to the payment of partnership debts is gone,

and, when that right is gone, the derivative right of the firm's creditors is extinguished. This being the consequence of such a transfer of the assets, the transfer itself, when the firm is insolvent, is inhibited, and is deemed ineffectual to convert the joint property into separate property, as against the firm's creditors. *Collier v. Hanna*, 71 Md. 261, 17 Atl. 1017; *Darby v. Gilligan*, 33 W. Va. 249, 10 S. E. 400; *Id.*, with notes, 6 Lawy. Rep. Ann. 740.

While this principle is not denied as being applicable to a case where a transfer has been attempted by one or more partners to another singly, it is insisted that it has no relation to a case where the transfer has been made by a retiring partner to two or more of his co-partners, who continue the business; and the reason assigned is that the joint assets are not, by such a transfer, converted into separate assets, but remain the joint property of the co-partners to whom they are transferred. The difference in the facts does not produce a difference in the result, so far as respects the creditors. By the express agreement of the three partners, and by the withdrawal of Henderson from the firm, the co-partnership of Henderson, Pfeil & Co. was dissolved at the close of business on the 4th day of October, 1895. The new co-partnership was at once formed, and, under the transfer from Henderson, assumed to acquire all his rights and title to the old firm's property. The transfer of the old firm's whole assets to the new firm, if valid, as effectually precluded the old firm's creditors from asserting their derivative right through the equity of the old firm's members as though the assets had been converted into the separate assets of one member, because, while in the latter instance the right would have been lost by reason of the separate creditors being preferred, in the other instance the old firm's creditors' right would have been lost by being either subordinated to the claims of the new firm's creditors, or by being placed on an equal footing with them. 17 Am. & Eng. Enc. Law, 978, 979, and notes 1-3; *Huiskamp v. Wagon Co.*, 121 U. S. 310, 7 Sup. Ct. 899.

It is not solely because the transfer by one to another partner converts the joint into separate property that such a transfer is, when the firm is insolvent, prohibited as against the joint creditors, but it is because by such a conversion, if effective, the equity of the joint creditors to have a priority through the lien of the partners would be destroyed. The destruction of this lien, and the consequent extinguishment of the creditors' derivative equity, is the injurious act. It is the detrimental end. The transfer itself is merely the means by which that end is accomplished. The law levels its inhibition at the means merely because the end worked out by those means is injurious. The results are the things with which it is chiefly concerned. If the equity of the joint creditor is destroyed

by a transfer that does not convert joint into separate property, the result to the creditor is precisely the same as though the joint had been converted into separate assets; and it will not do to say that the right of the creditor to relief depends on the manner in which the means employed to defeat him may produce their result, rather than on the ultimate fact that he has in fact been defeated by those means. And so, while a transfer of all his interest by one to two other members of an insolvent firm may not convert what was joint into separate property, it nevertheless does, if effective at all, by divesting that property out of the old and vesting it in the new firm, as completely defeat the equity of the old firm's creditors, by subordinating that equity to the equity of the creditors of the new firm, or by placing the equity of the latter on an equality with that of the former.

We have just said that the transfer by one to two other members of an insolvent firm conveying the retiring partner's interest in the joint property, if effective at all as against the creditors of the firm, is prejudicial to their equity. But is such a transfer any more effective when assailed than the transfer from one or more to another member of such a firm would be? In *Collier v. Hanna*, supra, we held that a transfer from one to another member of an insolvent firm cannot be upheld against the firm's creditors, and precisely the same conclusion must be reached in the other instance. Thus, in *Peyser v. Myers*, 135 N. Y. 599, 32 N. E. 699, there were two sets of creditors. There was a change in the firm, and, in discussing the respective rights of these creditors, the court said: "The priority of the lien of firm creditors is not divested by a transfer by an insolvent firm of the firm assets to one or more of the partners; nor can it be affected, as we conceive, by any mere change in the personnel of the firm, as by the withdrawal of one partner from the firm, or the introduction of a new member." See, also, *Phelps v. McNeely*, 66 Mo. 554; *Thayer v. Humphrey* (Wis.) 84 N. W. 1007. It was said in the argument that no case could be found where the doctrine announced in *Collier v. Hanna* had been applied to the state of facts presented by this record; that is, where a retiring partner had transferred his interest in the social assets to two or more remaining members of the firm. But it is not material whether a parallel case can be cited or not. We are not dealing with precedents, but with principles; and, if the legal principle underlying the one state of facts is applicable to and fits the other state of facts, the mere circumstance that no adjudged case actually applying such principle can be produced furnishes no reason for refusing to make the application when the occasion does arise. But the case of *Peyser v. Myers*, supra, distinctly recognizes the doctrine as applicable to such a case as this.

This brings us to the deed of trust, and, in

the light of what has been just stated, we are to determine whether its legal effect is to hinder and delay the creditors of the old firm, and whether, therefore, it is in law fraudulent and invalid as to those creditors. The whole discussion thus far has proceeded upon the theory that the firm of Henderson, Pfeil & Co. was insolvent on October 4, 1895; and what we have said must be understood in that view; and, as the ultimate decision of these cases hinges on the question of solvency, we now proceed to consider that question before examining the terms of the deed of trust.

Henderson retired from the old firm on Friday, October 4th. The new firm took charge at the close of business on that day. They continued in business until Monday, the 14th, when the deed of trust was made. Excluding the two intervening Sundays (the 6th and the 13th), they conducted the business for just seven days. On Saturday, the 12th of October (the last of those seven days), the new firm was, as a matter of fact, no worse off financially than it had been on the preceding 4th of the same month. This is distinctly stated in the evidence of Pfeil, and nowhere controverted. On the 14th, when the deed of trust was executed, the firm's financial condition had not changed from what it was the prior Saturday. As its condition on the 14th was no worse financially than on the 4th, if it was insolvent on the 14th it could not have been solvent on the 4th. That it was insolvent on the 14th is abundantly evident from the recitals in the deed itself, and from the statement of its liabilities and assets furnished by the trustee to the creditors. Its liabilities on the 14th were over \$56,000, and its actual assets were something over \$31,000, which were afterwards swelled some \$5,000 by book accounts collected, but were diminished in the neighborhood of \$3,000 by a sale of the plant at less than the estimated value. Its liabilities were far in excess of its assets when the assignment to Mr. Wolff was made, and it was no worse off financially than when Henderson withdrew, ten days previously. Its collapse in seven business days, with no cause existing to produce that result other than the demand of some of the old firm's creditors for the payment of overdue debts, conclusively shows that it was utterly insolvent—unable to pay its debts when due and demandable—at the time Henderson retired; especially as, at the time the deed was executed, the firm was confessedly no worse off financially than it had been on October 4th. We are convinced, then, that both the old and the new firms were insolvent on October 4th.

The deed of trust, as we have seen, was signed only by Pfeil and McDonald, and made provision solely for the payment of the debts due by the co-partnership composed of those two individuals. The quotations we have made from the deed are quite sufficient to show this conclusively. The deed thus un-

dertakes to treat the assets which the trustee claims under it—and they are largely the assets which belonged to the old firm—as the property of the new firm; and it further undertakes to appropriate those assets to the payment of the new firm's debts, without the slightest regard to the rights of the creditors of the old firm who are not creditors of the new concern. Had the transfer by Henderson been made by himself and by one other member of the firm to the remaining member, the firm itself being insolvent, and had the purchasing member executed a deed of trust providing for the payment of his debts, the deed would, under these circumstances, have been invalid. *Collier v. Hanna*, supra; *Gable v. Williams*, 59 Md. 53. For the reasons we have already suggested, the mere fact that the transfer by Henderson was made to two members of the old firm does not rescue the deed from condemnation. The deed entirely ignores, and, if effect were given to it, it would utterly destroy, the privilege or preference to which the creditors of the old firm are entitled, of having the debts due to them paid out of the assets of the old firm; and it would destroy this preference notwithstanding no transfer by any member of an insolvent firm to the other members thereof can be efficacious to defeat the rights of such creditors. The deed expressly dedicates the property conveyed by it to the payment of the creditors of the grantors. This Pfeil and McDonald had no right to do. The insolvency of the old firm at the time of Henderson's attempted transfer, of his interest therein to his co-partners prevented that transfer from becoming effective as against the right of the creditors of Henderson, Pfeil & Co. to work out their equities through the lien of the partners, and therefore did not vest the title in the remaining partners, as a bona fide sale by a partner of a solvent concern would have done. The transfer by Henderson to Pfeil and McDonald did not clothe the latter with a title which they could, by a deed of trust, convey for the benefit of their creditors alone; and, consequently, the deed of trust, which, by its terms, excludes the creditors of the old firm, is a conveyance that hinders, delays, and defrauds those creditors. The deed is, and can therefore be, no barrier to the condemnation of the credits attached in the hands of the trustee. The pro forma order quashing the attachments will be reversed, and the cases will be remanded for further proceedings; and it is accordingly so ordered. Pro forma order reversed and cases remanded; the costs to be paid out of the trust estate.

(123 Pa. St. 432)

HUMPHREY et al. v. COOPER.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)
SURVEYS—QUESTION FOR JURY—INSTRUCTION—
HARMLESS ERROR.

1. It appeared that the surveyor, who, in 1794, located a block of nine tracts, discovered before

making his return that he had overstepped the boundary of an older survey 48 rods. He then shortened the lines of the block on his plot that number of rods, and adopted the older survey as an adjoiner on that side. Apparently, from the returns, all the land lost by the mistake was taken from the three tracts abutting on the older survey, instead of being apportioned among the nine tracts of the block by a change of the interior lines. But there was evidence that one of the interior lines had been relocated by marks on the ground parallel with, and 50 rods east of, the line first adopted. *Held*, that while an actual line, run on the ground, and re-marked as the division line of the tracts, would, if proven, control and fix the boundaries of the tracts with relation to each other, yet, as the evidence bearing on the question was contradictory, the court properly left it to the jury to find whether the second line had really been run as a division line of tracts in the block.

2. Where the trial judge, in his charge, alludes to a wholly irrelevant fact, yet at the same time gives the jury to understand that such fact has no bearing on the question at issue, the supreme court will not reverse, unless it appears that the jury were, or might have been, misled by the irrelevant allusion.

(Syllabus by Judge.)

Appeal from court of common pleas, Jefferson county.

Action by W. N. Humphrey and another against Ninian Cooper. Judgment for defendant. Plaintiffs appeal. Affirmed.

W. F. Stewart and G. A. Jenks, for appellants. O. Mitchell, Charles Corbet, and Cadmus Z. Gordon, for appellee.

DEAN, J. This is an action of trespass by plaintiffs against defendant for cutting timber on a tract of about 50 acres of land in Jefferson county. Both parties claim title to the land on which the timber was cut. It was unimproved, and in the actual occupancy of neither, up to the date of the alleged trespass. On the application of William Willink and others, known as the Holland Land Company, warrants for the survey of nine tracts were issued to them in 1792. These warrants were placed in the hands of William P. Brady, deputy surveyor, who on the 7th and 10th of November, 1794, located the nine tracts in a block three surveys wide and three deep. In his return the three eastern and three middle tracts are plotted, each, as 477 rods long and 320 wide, and each containing 900 acres and allowance; the three western tracts, while of the same width as the others, yet as only 461 rods long, and each containing only 870 acres and allowance. The original corners of the block, corresponding to the date of the survey, were found upon the ground as late as 1863. In fact, there is no doubt as to the location of the block. Further, it was clear that at the western north and south line of the block the surveyor had overstepped the boundary of an older survey made the year before in the name of Nichols & McPherson, and that after his field work was done he had discovered this fact; so, before making his return, he adopted on his plot the eastern boundary of the Nichols & McPherson as the western

boundary of his block. As this shortened the lengths of his north and south block lines, he shortened the north and south lines of the western tracts of the block so that they appear on the return as but 461 rods long, instead of 477, the plotted length of the other six tracts. The plot assumes that the north and south line of the Nichols & McPherson survey had the same course as that of the block, but in this the surveyor was mistaken. Evidently, after discovering that he was over on the Nichols & McPherson, he did not run the eastern line of that block on the ground; for it is a well-marked line, and, run by its course, cuts off about 48 rods of the northwestern tract, and 27 rods of the southwestern tract, of the block. As before noticed, there is no question as to the location of the block, but this contention arises from a dispute as to the location of the north and south interior line dividing the three western tracts from the three middle ones. Without noticing further the chain of title of plaintiffs and defendant, respectively, it is sufficient to say that the true location of this interior line determined the title and right of possession in one or the other of these parties. The plaintiffs had title to the survey made on warrant 2,983, which was the northwest corner one of the block. They claimed that the surveyor, when he discovered that his location of the block overlapped the Nichols & McPherson survey, changed his return by moving this survey (2,983) and the next one to it (2,981) 50 rods further east; ran and marked an interior line, 50 rods further east, as the eastern boundary of the three middle warrants, and plotted a division line between the three western and three middle warrants, which division line throws the land in dispute to the west side of that line, and within the boundaries of 2,983, their survey. The defendant claimed that the surveyor, on discovering his mistake in running over on the Nichols & McPherson, merely shortened, in his return, the north and south lines of the three western warrants of the block, leaving the interior lines standing as he had run them, and the quantities in the three middle and eastern surveys unchanged. It was very clear that there was a well-marked line, very old, 50 rods east of that apparently returned in the plot of Brady's survey, which line was claimed by plaintiffs to have been run on the ground as the division line between the middle and eastern tracts, and that this line had been run by Brady after he had discovered the location of the block overlapped the Nichols & McPherson. If this old line had indisputably counted to the date of Brady's survey, 1794, plaintiffs' theory would have been established, and they would have been entitled to a verdict; but the evidence was conflicting. Some of it was very significant, as tending to show that this line counted only to 1806,—12 years later than the Brady survey. It started from a corner on the south line of the block, and to

that extent was connected with the original survey of the block; but the corner, instead of a hemlock, as called for, was a beech, and the beech counted only to 1806. The line then extended north by a course parallel with the line claimed by defendant, but the evidence to show that it terminated at the northern line of the block was very vague. True, there was some evidence tending to show that the 1806 marks were but a re-marking of an older line, but there was other evidence to contradict this. The court below was of the opinion it was a question of fact as to the true location of the dividing line between the three western and three middle surveys, and submitted the evidence bearing on that point to the jury, who found for defendant, and we have this appeal by plaintiffs. Eight errors are assigned, all except the last alleging errors in the charge to the jury.

As already noticed the contention arose because of dispute as to the location of the division line between the three western and middle warrants. The location of the north and south lines of the block was not disputed. There was evidence that two lines had been run north and south, parallel to each other, and about 50 rods apart. Either of them, on competent evidence, might have been found by the jury to be the original division line. If the one located nearest the eastern boundary of the block was the true one, then defendant had trespassed on plaintiffs' land. If the one nearest the western boundary was the true one, the land belonged to defendant. In submitting the conflicting evidence tending to establish one or other of these lines to the jury, we are unable to detect any substantial error in the instruction. Plaintiffs' first point asked the court to say that as there was a well-defined line 50 rods east of the line claimed by defendant, which extended from the north to the south boundary of the block, that was "a pregnant circumstance" to show that the surveyor, after he discovered his mistake in overlapping the Nichols & McPherson survey, abandoned the line claimed by defendant, and located this new line, and made return thereof in his survey. The court, in effect, affirmed this point, by saying that the evidence should be considered by the jury, but modified the language thus: "While we will not say the matter referred to is a pregnant circumstance, still it is a material matter." The exact difference in the significance of "a pregnant circumstance" and "a material matter," which the learned judge of the court below saw when he gave a modified answer to the point, and which counsel for appellants now see when they assign the answer for error, is not very clear to us. We think it entirely probable that the distinction was not quite clear to the jury, and that in consequence they gave to the circumstance, whether a "pregnant one" or a "material one," all the weight it was entitled to. For that reason the assignment is not sustained.

The second assignment of error, to the interpretation put by the court on the act of March 29, 1824, is not sustained. The act was intended only to prevent the willful or careless cutting of another's timber. *Kramer v. Goodlander*, 98 Pa. St. 353.

The third, fourth, fifth, sixth, and seventh assignments complain of the reference made by the judge, in his charge, to the Timothy Pickering warrant. It appears that some 10 years before the date of these surveys a warrant had been laid on part of the same land in name of Timothy Pickering. It seems to have extended over parts of three of the eastern and middle tracts. Whether actual surveys had been made on it, or whether any survey had been returned into the land office, did not appear. One thing did clearly appear: The deputy surveyor, Brady, who located this block, was ignorant of the existence of any such survey, and nowhere notes it in his return, nor does he recognize in any manner a single mark upon its lines. Obviously, he ran the lines of his block wholly regardless of it. Neither party claimed an inch of land under it, or professed to locate his land by it. Why the learned judge of the court below referred to it at all in his charge, we cannot discover. It was lugged in, only to be thrown out again as of no consequence. While we cannot discover any reason for reference to it, neither can we discover that reference to it did plaintiffs any harm. After the appearance of this ghost, the jury was informed of its harmless character, and their attention directed to the evidence bearing on the true location of the division line. The testimony on each side tending to establish the one line or the other by marks and monuments on the ground was pointedly called to the notice of the jury, without allusion to the Timothy Pickering as a material fact. If we could discover that the attention of the jury had been diverted in any degree from the real point in dispute by this wholly irrelevant subject, we would pronounce this part of the charge error; but, as we are of the opinion that it could not have had the slightest weight in shaping the verdict, these assignments are overruled.

The objection to the deposition of Henry Keys is not noticed, because appellant has neglected to print it as part of the evidence. If evidence be objectionable, and counsel expect us to so decide, the least they can do is to conform to the rule of court which requires the printing of the testimony. The judgment is affirmed.

(184 Pa. St. 164)

PEOPLE'S NAT. BANK OF PITTSBURGH
et al. v. LOEFFERT et al.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

FRAUDULENT CONVEYANCES—LIEN OF CREDITORS—
EQUITY JURISDICTION—WAIVER OF OBJECTION.

1. Where debtors conspiring with another to defraud their creditors furnish materials for erecting buildings on his land, he not paying

therefor or in any way becoming indebted to them, the creditors may be awarded a lien on the real estate to the extent the debtors' property became merged therein.

2. Objection that a bill does not state that plaintiffs have exhausted their legal remedy cannot be raised for the first time on appeal.

3. Objection to jurisdiction of equity not being taken by demurrer or plea before answer, suit will be entertained unless it is devoid of any circumstance to give the court jurisdiction.

Appeal from court of common pleas, Allegheny county.

Suit by the People's National Bank of Pittsburgh and others against George Loeffert and others. Decree for plaintiffs. Defendant Albert L. Loeffert appeals. Affirmed.

J. A. Wakefield, for appellant. R. B. Ivory, for appellees.

FELL, J. Briefly stated, the facts upon which the decree is based, as found by the court, are these: In 1896, two of the defendants, John and George Loeffert, were in the planing-mill business as partners. They were then, and had been for several years, irretrievably insolvent, and had carried on their business with money fraudulently obtained by false statements as to their financial condition. The third defendant, Albert Loeffert, was the superintendent of their mill. He knew of their financial condition, and actively co-operated with them in secreting their property, preparatory to a dishonest failure. In pursuance of the conspiracy formed, houses were built upon lots before owned by Albert, or procured by him for the purpose with his own money. The lumber and mill work were furnished directly by the firm, and they paid for a part, at least, of the other materials, and for the labor, with the intent thus to secrete their property from their creditors. No debt was created between the parties by the transaction. It was not intended that Albert should pay for the materials furnished by the firm, or repay the money they had expended in the construction of the houses. It was a scheme into which all three entered, to put the property of the firm beyond the reach of its creditors. This finding seems to be fully sustained by the testimony.

The plaintiffs are judgment creditors of the firm, and one of the prayers of their bill was for a decree that their judgment be declared a lien on the real estate on which improvements had been made, to the extent to which their debtors' property had become merged in and a part of the realty. This prayer was granted. The general jurisdiction of courts of equity to grant relief on the ground of fraud has been freely exercised to defeat the conveyance of property by insolvent debtors in fraud of creditors in cases where the law furnishes no adequate remedy. It has been exercised in numerous cases where a debtor, with intent to defraud his creditors, has conveyed his land directly

to another, or has purchased land or paid part of the consideration for land purchased in the name of another, or has made improvements on the land of another, as well as for the removal of fraudulent liens and incumbrances. Where the estate or interest of the debtor has been placed beyond the reach of the ordinary process of execution, he has been held to have an equitable interest, which will be made subject to his debts. Although none of our cases are directly in point, the principle stated has been recognized in *Suydam v. Insurance Co.*, 51 Pa. St. 394; *Barto's Appeal*, 55 Pa. St. 386; and *Fowler's Appeal*, 87 Pa. St. 449. In *Wait, Fraud. Conv.* § 26, it is said: "An extreme illustration of the disposition of courts to favor creditors is the familiar and salutary rule that improvements placed by the debtor upon the real property of another, acting in concert with him, and to defraud creditors, can be followed, and the realty charged in favor of the creditors of the debtor with the value of such improvements." And in *Bump, Fraud. Conv.* § 218: "If a debtor uses his personal property upon the real estate of another, with the knowledge and consent of the owner, so that it becomes a part of such realty, for the purpose of defrauding his creditors and preventing them from obtaining satisfaction of their demands, they may still follow the property into the hands of the owner of the premises thus benefited, and fasten their claims upon such premises to the extent of the debtor's property so appropriated. If a debt, however, has been created between the parties, the creditors can only have the debt appropriated to the satisfaction of their demands; but, if no debt has been created, the appropriate remedy is to fasten their claim upon the real estate to the extent of the debtor's property thus made part of the realty." Among the many cases which support this proposition are *Isham v. Schafer*, 60 Barb. 317; *Lynde v. McGregor*, 95 Mass. 182; *Dietz v. Atwood*, 19 Ill. App. 96; *Foster v. Knowles*, 42 N. J. Eq. 226, 7 Atl. 290.

As the debtors had no interest in the land which their personal property went to improve, a decree making a judgment against them a lien upon the land does not seem regular. If they had conveyed the land or taken title in the name of another, a reconveyance might have been ordered, or the conveyance set aside, and their judgment decreed to be a lien. This would have made a judgment against them a lien on their own property, which they had fraudulently concealed. A decree in this case ascertaining the amount of the debtors' property which had become merged in the real estate, and awarding a lien for the amount, would be more logical and more in harmony with chancery practice than the one made, and it would as effectually secure the rights of the plaintiffs. Such a lien would be by virtue of the decree, and the anomaly of making a

judgment against one person a lien on the property of another would be avoided. The same result has been effected by this decree. A sale has been made under it, and the interests of purchasers are now to be considered. While not approving the form of the decree, we are not disposed to modify or set it aside, and it does substantial justice. The plaintiffs might have asked for more. While they are content with what they got, the defendants have no ground for complaint.

The objection that the plaintiffs did not allege that they had exhausted their legal rights against the defendants appears to have been first made on the argument in this court. Whatever force there might have been in the objection if made at the proper time and in a proper manner, it cannot be considered now. The motion at the hearing to dismiss the bill, for the reason that there was an adequate remedy at law, was not supported on the ground that the bill was defective, and the defects now alleged were not brought to the attention of the court at any time. The court had general jurisdiction of the subject-matter, and it was competent for it to grant the relief sought, and it is now too late to object to defects in the bill of this character. "An objection on the ground of jurisdiction must be taken either by demurrer or plea before answer; otherwise, the court will entertain the suit, although the defendant may object to it at the hearing, unless it is a case in which no circumstances whatever can give the court jurisdiction." *Daniell, Ch. Pl. & Prac.* p. 631. The decree is affirmed, at the cost of the appellant.

(123 Pa. St. 414)

PORTLAND LUMBER CO. v. KIEHL.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)
SHERIFF'S SALE—NOTICE OF OWNERSHIP—ELECTION OF REMEDY—ESTOPPEL—PURCHASE BY AGENT—DAMAGES.

1. Notice given by one at sheriff's sale that the goods belong to him, and that the purchaser will take no title, does not, in the absence of bad faith, estop him to sue the sheriff in trespass, and confine him to his remedy against the purchaser.

2. Purchase at sheriff's sale of the goods by the owners' agent, authorized to look after their interest in the matter, and to employ counsel therefor, including the giving of notice at the sale of claim of ownership, is in law a purchase by the owners, and cannot, so as to increase the measure of damages against the sheriff, be treated by them as a purchase by the agent for himself.

Appeal from court of common pleas, Clarion county.

Action by W. H. Hyde and others, partners, as the Portland Lumber Company, against Jesse Kiehl, for the seizure and sale by him, as sheriff, on execution against W. W. O'Neil, Jr., of certain timber belonging to plaintiffs. Judgment for plaintiffs. Defendant appeals. Reversed.

C. Heydrick, Harry R. Wilson, C. Z. Gordon, W. A. Hindman, and W. H. Hockman,

for appellant. B. J. Reid, F. J. Maffett, Geo. F. Whitmer, and Geo. A. Jenks, for appellees.

MITCHELL, J. There is not much room for controversy over the law of delivery or of waiver, as involved in this case, but appellant claims that the charge of the learned judge below so applied the law to the facts that the jury were misled. An examination of the charge as a connected whole fails to sustain the complaint. The expressions assigned for error, and perhaps some others, taken separately and apart from their context, might seem to fall in giving due weight to the acts of the parties in regard to the first two rafts, as showing that they, or at least the plaintiffs, did not mean to insist on the strict terms of the contract, and might also have a tendency to lead the jury to suppose that the defense required proof of an express alteration of the contract, and not merely an indulgent or loose enforcement of it, from which a waiver might be implied. But, taken in its entirety, the charge gave the law correctly to the jury, and at least once in the very words asked by the appellant himself, and in connection with the facts relied upon by him as a defense. His second point was that "if the plaintiffs, in pursuance of the contract in evidence, sent two rafts of timber to the place designated for delivery, and W. W. O'Neil, Jr., accepted the same, took possession thereof, caused the same to be measured, and commenced manufacturing the same upon his mill; and, while he was so manufacturing the same, James K. Gardner, by whom and in whose name the contract was made, visited the mill, and there learned what had been and was being done with the timber, and made no objection thereto, but afterwards, with full knowledge of the facts, met the said O'Neil in Clarion, and, after receiving part payment on account of the timber specified in the contract, ordered the remainder of the said timber to be delivered at the place designated for delivery, and then and there requested the said O'Neil to have his line ready to secure the rafts when they should arrive; and the said timber was, in pursuance of said Gardner's orders, sent to the said place of delivery, and the persons in whose charge it was so sent notified said O'Neil's employes thereof, and took their lines from the rafts, and left them without any other provision for their care than such notification; and the said O'Neil's employes thereupon took charge of the said rafts, and secured them with his lines, and the plaintiffs thereafter exercised no care over the same to prevent their loss by floods or other casualties,—the jury may find that the plaintiffs waived the provisions of the contract in respect to measurement and full payment of the hand money as conditions precedent to delivery and vesting of title, and that the delivery was complete and title vested in O'Neil before the levy." This was affirmed without qualification. Again, when

the jury came in and requested further instructions on the subject of waiver, the judge, after repeating in substance what he had said before, continued: "We will say, in addition to that, you do not require the express proof of a waiver. You can infer a waiver from the acts and conduct and declarations of the parties; but the burden of proof is upon the defendant to satisfy you that those acts and declarations were such as would warrant you in saying that there was a waiver of the original terms of the contract." If there was any danger that the jury might have been misled by some detached expressions in the previous portions of the charge, it was removed by these clear directions, and the charge as a whole is not open to the criticisms based on the first three assignments of error.

The next and perhaps most serious question is the effect of the notice given by the plaintiffs at the sheriff's sale. Appellant claims that as it tended to deter bidders, and thereby prevent the property from bringing its full value, it should be treated as a binding election to pursue the remedy against the purchasers, and operate as an estoppel against plaintiffs' present demand. This argument is not without apparent equity. It derives some support also from the cases cited by appellant: *Vetter's Appeal*, 99 Pa. St. 52; *Edward's Appeal*, 105 Pa. St. 103; and *Birney's Appeal*, 114 Pa. St. 519, 7 Atl. 150. But these were all cases of distribution of a fund in court as proceeds of a sheriff's sale, and really rest on the principle settled in *Bush's Appeal*, 65 Pa. St. 365, that no question can be raised concerning the regularity of the proceedings by which the fund was brought into court, and therefore no party claiming under title adverse to the proceedings can share in the distribution. "Thus, if the goods of A. are sold upon an execution against B., A. cannot be heard to urge his right to the proceeds, however clear and indisputable may be his title to the goods." And the reason is that the fund represents the title of the defendant in the execution, whether it be good or bad. Those who affirm its validity, and claim under it, are entitled to share in the fund which it produced; but those who dispute it, and claim adversely to it, must stand on their adverse title, and pursue their remedy upon it, either against the sheriff for the trespass, or against the purchaser for the property itself; otherwise, they would be claiming and recovering upon adverse and inconsistent rights. Upon this same ground, that no party can be allowed to recover on repugnant rights, it is held that an action for trespass prosecuted to judgment against the sheriff or the plaintiff in the execution is a bar to assumpsit for the money received from the sale, and vice versa. One is in disaffirmance of the sale, and the other in affirmation or ratification of it, and they cannot stand together. In *Floyd v. Brown*, 1 Rawle, 121, it was held that the judgment against the

plaintiff in the execution was a bar to a subsequent assumpsit against the sheriff, although the judgment had been fruitless as to execution. This case is much relied on by the appellant, as less strong than the present; and it is argued that the distinction between the institution of a fruitless suit and the giving of a notice such as was given here is shadowy in so far as a manifestation of an election is concerned. But the basis of decision in *Floyd v. Brown* is that, by the judgment against the trespasser, the title to the goods was divested out of the former owner, the plaintiff, and he could not subsequently maintain any action founded on that title. It was a debatable question in *Floyd v. Brown* whether the title was fully divested by a judgment without satisfaction; and in *Fox v. Northern Liberties*, 3 Watts & S. 103, it was said that the authorities on the subject are conflicting. But in *Merrick's Estate*, 5 Watts & S. 9, it was said that it was no longer an open question in this state. "A judgment for the value of a chattel is placed on the same footing as an actual satisfaction, and consequently divests the plaintiff's title."

But, while it is thus held that a judgment is per se a bar, no case has been found which holds that anything less than a judgment shall have that effect. The technical reason of divesting the title does not apply to a notice such as was given in the present case, and we should be taking a long and doubtful step in advance of our previous decisions by holding that such notice should operate as an estoppel. It is said by Sharswood, J., in *Bush's Appeal*, 65 Pa. St. 365, already cited, that "it is every day's practice for such an assignee or vendee under a bill of sale [i. e. the claimant of an adverse and superior title] to give notice to the sheriff and at the sale, and pursue his remedy either by an action of trespass against the sheriff, or of trover or replevin against his vendee." While the effect of such notice is to deter bidders, and thus lead to an apparent hardship on the sheriff in preventing his receiving the full value of the goods, and yet holding him subsequently liable to the same party for such value, yet there is a countervailing equity in the sheriff, or the plaintiff in the execution, who, having indemnified the sheriff, is here, as usually, the real party defendant. In the eye of the law, he is being wronged by the sale of his goods as the property of another. The law gives him a choice of remedies, either to maintain his title against the goods themselves in the hands of the purchaser, or to let the goods go, and hold the sheriff for the trespass. One or other of these remedies may be preferable according to the circumstances. If there be a single purchaser, at a very inadequate price, the owner may elect to pursue the goods; while if the purchasers are numerous, and prices varying, so as to involve many suits and perhaps difficulty of proof of values, he may decide to abandon

the goods, and seek damages for the trespass. Why should he be compelled to make his election before he can have full knowledge of the facts? No rule of law yet declared has required him to do so, and we do not think the equity against him is clear enough to justify us in giving a new and perhaps dangerous effect to what has been characterized by this court as "every day's practice." Of course, a notice not given bona fide in furtherance of a genuine claim would stand on a different basis. This was one of the grounds of decision in Birney's Appeal, 114 Pa. St. 519, 7 Atl. 150, already cited, where it was said by the present chief justice: "In the absence of any explanation, it is not unreasonable to infer that his purpose was to secure the property at an undervalue, and then, to the detriment of the defendant in the execution as well as his creditors, claim the greater part of the proceeds of the sale as applicable to his own lien. To sanction such a transaction would be to encourage the practice of deception, trickery, and fraud." There is no such element in the present case. We hold, therefore, that the plaintiffs were not estopped from this action by the notice given at the sheriff's sale that the goods belonged to them, and the purchaser would take no title.

But, although the appellant's contention as to the measure of damages was broader than we can sustain, yet the facts show that the jury were given too large a standard for their verdict. If the plaintiffs had bought in the lumber, and thus been restored to the possession of their property, their damages would have been, not its full value, but the expense and loss they had been put to in getting it back, including any loss by its seizure and detention, the price they had paid the sheriff, etc. But the uncontroverted testimony shows that plaintiffs' agent bought in four of the five rafts sold, under such circumstances as made him a purchaser for them. Gardner, the agent, was in charge of the proceedings for his employers. One of the plaintiffs, Mr. Hyde, testified that Gardner was authorized to employ counsel to look after plaintiffs' interest, including the giving of notice at the sale. Gardner himself testified that he reported his purchase to his employers, and they made no objection. "It was perfectly satisfactory with the Portland Lumber Company, as they had adopted their plan of defense. Q. They had adopted their form of procedure? A. Yes." It is entirely clear, therefore, that in law the purchase by Gardner was a purchase by plaintiffs. As between him and themselves, plaintiffs might have waived their rights, and ratified his act for his benefit. But they could not do so to the prejudice of defendant. Having been restored to the legal possession of their property, the measure of their damages was fixed by the loss and expense they had been put to up to that time, and they could not enlarge the defendant's liability by any

subsequent act of their own. The jury should have been so instructed. We must therefore sustain the fifth assignment of error. Judgment reversed, and venire de novo awarded.

(20 R. I. 331)

BAKER et al. v. HOXIE.

(Supreme Court of Rhode Island. Dec. 23, 1897.)

INSOLVENT ESTATE—PROSECUTION OF CLAIM.

The supreme court, under Pub. St. c. 221, § 8, can grant a trial in a case in which a party has neglected to prosecute his appeal from the judgment of commissioners on an insolvent estate.

Petition by Catherine Baker and others to enforce a claim against William Hoxie, administrator of an insolvent's estate.

Page & Owen, for petitioners. W. B. Vincent, for defendant.

PER CURIAM. Harris v. Earle (April term, 1889), 39 Atl. 192, holds that under Pub. St. R. I. c. 221, § 8, this court may grant a trial in this court in a case in which the party has neglected to prosecute his appeal from the judgment of commissioners on an insolvent estate. We do not think that the charges of fraud and conspiracy on which the present petition rests are established. If the petitioners are able to amend their petition so as to show a sufficient reason for the nonprosecution of the appeal, of which notice was given by their attorney, we will entertain a motion for that purpose. We think, too, that the person whose claim the petitioners desire to contest should also be made a party to the petition.

(20 R. I. 337)

LYON v. BROWN UNIVERSITY.

(Supreme Court of Rhode Island. Jan. 1, 1898.)

WILLS—CONSTRUCTION.

The obvious meaning of the third and fourth clauses in a will providing, "And, in case the residue of my estate applicable to the payments of the legacies in this * * * clause of my will contained shall not be sufficient to pay all of said legacies in full, * * * said legacies * * * shall be proportionally reduced in amount," is that, in case the estate remaining after the payment of preceding gifts is insufficient to pay the legatees under this clause in full, then these legacies shall abate proportionally; and the words "applicable to the payment of the legacies of this clause" mean the residue not hereinbefore disposed of.

On rehearing. Denied.

For former opinion, see 37 Atl. 309.

PER CURIAM. The defendant, John Gano Benedict, in his brief upon the reargument of this cause, relies particularly upon the words, in the third and subsequent clauses of the will, "applicable to the payment of the legacies in this * * * clause of my will contained," etc., as limiting these clauses to personal estate and the proceeds of real es-

tate, and so distinguishing the case at bar from *Pond v. Allen*, 15 R. I. 177, 2 Atl. 302. We do not see the force of this argument. The obvious meaning of the words is simply: "In case my estate remaining after the payment of preceding gifts is insufficient to pay the legatees under this clause in full, then these legacies shall abate." The words "applicable to the payment of the legacies in this clause," etc., mean "the residue not herein-before disposed of," which residue the testatrix has just made applicable to the legacies now given. As we have before observed, there were created by this will successive residues, each becoming "applicable" to successive classes of legacies when the prior ones had been satisfied. The relation of the clause containing the power of sale to the other clauses of the will we have fully considered in the former opinion. 37 Atl. 309. The decision in the case of *Pond v. Allen* we consider decisive of the case at bar.

(30 R. I. 332)

RHODE ISLAND HOSPITAL TRUST CO. v. PECKHAM et al.

(Supreme Court of Rhode Island. Dec. 30, 1897.)

WILLS — CONSTRUCTION — DESIGNATION OF BENEFICIARIES.

Testator bequeathed the income of his property to his two children during their lives, "and, should either of them die, the survivor shall take" the deceased's share "during her natural life, and her children, if she has any"; and, should both die without children, the property was to go to testator's heirs; but, should either or both have children, the latter were to have their parent's share. *Held* that, when one of the devisees died leaving a child, the latter took a fee in one-half the estate, and hence the net income of the estate devised should be paid, one-half to the child of the deceased devisee, and one-half to the survivor.

Bill by the Rhode Island Hospital Trust Company against Mary R. Peckham and others to obtain construction of a will.

James Tillinghast, for complainant. Warren R. Perce, for respondents.

MATTESON, C. J. This is a bill to obtain a construction of the will of Samuel Staples, Jr., formerly of Providence, deceased, on whose estate the complainant is administrator with the will annexed. The material portions of the will are: "Thirdly, I give and bequeath all my property, real and personal, the income of it, to my natural children Mary A. Staples and Isabella F. Staples, who now are at school at Essex, state of Connecticut, during their lives, and, should either of them die, the survivor shall take what would belong to the deceased during her natural life, and her children, if she has any; and, should they die without leaving any children, the property shall descend, as the law provides, to my blood, and not to any one who might claim blood akin to my said children; but, should either or both have children, they shall inherit what I gave to their

parents." The respondent Mary R. Peckham is the widow of Emory H. Peckham, and is the Mary A. Staples, named in the will. Isabella F. Staples, the other legatee named in the will, married William H. Calder, and died intestate, May 22, 1897, leaving her husband, the said William H. Calder, and her only child, George B. Calder, 2d, surviving her, both of whom are also respondents to the bill. No administrator has been appointed on the estate of said Isabella. During the life of Isabella the complainant paid the net income of the estate in equal shares to her and to the respondent Mary R. Peckham, the last payment having been made February 10, 1897. The complainant submits two questions: (1) Whether the net income is now payable, one-half to said Mary R. Peckham and the other half to said George B. Calder, 2d, as claimed by him, or whether the whole is now payable to said Mary R. Peckham, as claimed by her; (2) whether such income as has accrued or was received by the complainant after February 10, 1897, shall be apportioned to the date of the death of Isabella, May 22, 1897, and, if so, to whom the income so apportioned shall be paid.

We think that it is apparent that the intent of the testator was to divide the income of the estate equally between the two daughters during their lives, with remainder in fee in equal shares to the children of each; and, in default of children of either, that the whole estate should go to the other and her children; and, in default of children of both, the whole estate should go to the testator's own heirs, to the exclusion of the blood of the mother of the children. The only doubt concerning this intent arises from the language of the first clause: "And, should either of them die, the survivor shall take what would belong to the deceased during her natural life, and her children, if she has any." We think that in this clause the testator was contemplating the death of one of his daughters without leaving a child or children, and that it should be construed as if it read: "And, should either of them die without leaving a child or children, the survivor shall take," etc. This construction makes it consistent with the subsequent provision: "But, should either or both have children, they shall inherit what I gave to their parents." At the time of the execution of the will the daughters, as the will shows, were children at school. The first contingency which was presented to the testator's mind, after having given them the income for life, was the possibility that one of them might die childless, and he proceeds to dispose of her portion of the estate by a gift over to the survivor for life, and to her children, if she has any. It is true that he omits to say, in terms, that the gift over is on condition of the death of the daughter without leaving a child or children; but we think that it is sufficiently evident that he had it in mind, for in the next provision he proceeds to dispose of the estate on the contingency that both shall die

without leaving any children, to wit, that the property shall descend, as the law provides, to his blood; and, finally, goes on to provide that, in case either or both shall have children, the children shall take what is given to their parents,—which last provision, as we have seen, would be inconsistent with the provision under consideration unless the child contemplated as dying should have died childless. Our opinion, therefore, is that, on the death of his mother, George B. Calder, 2d, became entitled in fee to one-half of the estate, the income of which she was entitled to during her life. We accordingly answer to the first question that the net income of the estate is to be paid, one-half to said Mary R. Peckham, and one-half to the said George B. Calder, 2d. The bill does not show that the deceased, Isabella F. Calder, owed any debts at her decease. It states that no administration has been granted on her estate. Her husband, William H. Calder, by his answer waives all claims that he might have to her estate. In this state of facts we see no occasion for the apportionment inquired about in the second question, and hence no necessity for an answer to that question.

(20 R. I. 380)

CROMPTON v. SPENCER.

(Supreme Court of Rhode Island. Dec. 18, 1897.)

NOTES—SUBSEQUENT INDORSER—RES JUDICATA.

1. In the absence of any agreement affecting the liability of successive indorsers, their liability is determined by the order in which their names appear on the note.

2. A judgment in favor of the holder of a note is not conclusive of the rights between the various indorsers of the note.

Action by William N. Crompton against James L. Spencer. Judgment for plaintiff.

Dexter B. Potter, for plaintiff. Samuel W. K. Allen, for defendant.

MATTESON, C. J. The defendant's claim is based on the assumption that the two accommodation indorsers were joint makers of the note in suit. The note itself shows, however, that they were not joint makers, but successive indorsers; the note being payable to the order of the defendant, and indorsed by him before being indorsed by the plaintiff. In this respect it differs from *Carpenter v. McLaughlin*, 12 R. I. 270. In the absence of any agreement affecting the liability of indorsers, their liability is determined by the order in which their names appear on the note. We find no error in the ruling of the court directing a verdict for the plaintiff.

The defendant makes the point that the judgment on the note in the suit brought by the bank operated as a merger of the note, is conclusive on the parties to it, and excludes a defense growing out of the relations of first and second indorser, existing between

them prior to the recovery of the judgment. The only case cited in support of the point is *Marshall v. Aiken*, 25 Vt. 328. That case, however, treats of the effect of a merger on the rights of a surety as against a creditor. The court held that, as against a creditor, judgment upon the note operated as a merger of the note at law, though it might not be so at equity, and became so far conclusive on the parties as to exclude a defense growing out of the relation of principal and surety, existing between the parties in the judgment prior to its recovery. The court, on page 335 of its opinion, says: "We do not suppose that the judgment in any way affects the relation between the principal and surety. That stands, as before, between themselves." We do not think that the merger of the note in the judgment in favor of the bank affected the relation between the plaintiff and defendant as successive indorsers of the note. New trial denied, and case remitted to the common pleas division, with direction to enter judgment on the verdict.

(68 N. H. 338)

FAUCHER v. WILSON.

(Supreme Court of New Hampshire. Hillsborough. July 26, 1895.)

COMMON CARRIERS—LOSS OF GOODS FROM NATURAL CAUSES.

1. One engaged in the business of trucking goods from the depot to different stores for particular customers, at prices fixed in each case by special contract, is bound only to exercise reasonable care in respect to the goods.

2. A common carrier is not liable for the loss of molasses by the bursting of the barrel, caused by the fermentation of the contents.

Action by Henry I. Faucher against John W. Wilson. Judgment for defendant.

The defendant was engaged in the business of trucking goods for hire from the railway freight station in Manchester to different stores in the city. On one of the warmest days in the summer of 1891, he transported a hogshead of molasses from the freight station to the plaintiff's store, on Elm street, a distance of a little over half a mile. By reason of the fermentation of the molasses, the hogshead burst while being unloaded. The plaintiff's loss was not caused by any want of ordinary care on the part of the defendant. Each party moved for judgment in his favor.

Burnham, Brown & Warren, for plaintiff. Joseph W. Fellows, for defendant.

CHASE, J. It is not found that the defendant was a common carrier. The finding that he was engaged in the business of trucking goods for hire from the railway freight station to different stores in the city lacks the distinguishing characteristics of a common carrier, namely, the holding of oneself out as ready "to carry at reasonable rates such commodities as are in his line of

business, for all persons who offer them, as early as his means will allow." *Shelden v. Robinson*, 7 N. H. 157, 163; *Elkins v. Railroad Co.*, 23 N. H. 275; *Moses v. Railroad Co.*, 24 N. H. 71, 80, 88, 89; *McDuffee v. Railroad Co.*, 52 N. H. 430, 448; *State v. United States & Canada Exp. Co.*, 60 N. H. 219, 261; 2 Kent, Comm. 597, 598; *Story*, Ballm. §§ 495, 508; *Brind v. Dale*, 8 Car. & P. 207; *Alkali Co. v. Johnson*, L. R. 9 Exch. 338, 343; *Scaife v. Farrant*, L. R. 10 Exch. 358, 365; *Nugent v. Smith*, 1 C. P. Div. 423; *Fish v. Chapman*, 2 Kelly, 349; *Allen v. Sackrider*, 37 N. Y. 341; *Lough v. Outerbridge*, 143 N. Y. 271, 278, 38 N. E. 292. The inference from this finding is as strong, to say the least, that the defendant's business was limited to trucking for particular customers at prices fixed in each case by special contract, as it is that he held himself out as ready to truck for the public indiscriminately, at reasonable prices. If such was the character of his business, he was not an insurer of the plaintiff's goods (there being no special contract of insurance), and was only bound to exercise ordinary care in respect to them.

If the defendant was a common carrier, he is not liable for the plaintiff's loss, since it happened from the operation of natural laws, which a common carrier does not insure against. *Hudson v. Baxendale*, 2 Hurl. & N. 574; *Railway Co. v. Blower*, 20 Wkly. Rep. 776; *Nugent v. Smith*, 1 C. P. Div. 428; *Nelson v. Woodruff*, 1 Black, 156; *Smith v. Railroad Co.*, 12 Allen, 531, 533; *Swetland v. Railroad Co.*, 102 Mass. 276, 282; *Dow v. Packet Co.*, 84 Me. 490, 24 Atl. 945; *Coupland v. Railroad Co.*, 61 Conn. 531, 23 Atl. 870; *Rixford v. Smith*, 52 N. H. 355. In *Farrar v. Adams*, 1 Bull. N. P. 69, it is said that "if an action were brought against a carrier for negligently driving his cart, so that a pipe of wine was burst, and was lost, it would be good evidence for the defendant that the wine was upon the ferment, and, when the pipe burst, he was driving gently." It being found that the plaintiff's loss was not due to any want of ordinary care on the part of the defendant, there must be judgment for the defendant.

SMITH, J., did not sit. The others concurred.

(68 N. H. 241)

FOSTER v. WILLSON.

(Supreme Court of New Hampshire. Cheshire. March 15, 1895.)

TESTAMENTARY TRUSTS—PRECATORY WORDS.

A devise by a wife to her husband, containing an expression of her desire that he should furnish a home, maintenance, and care to and for her father, who was infirm, aged, and dependent, during life, should he need it, imposes upon the husband accepting the devise, a binding trust.

Bill by Benjamin F. Foster against Fred H. Willson. Demurrer to the bill overruled.

Bill in equity, alleging that Ella H. Willson, daughter of the plaintiff and wife of the defendant, died April 13, 1892, leaving a will, which was made and executed March 28, 1892, and was approved and allowed April 22, 1892; that the defendant was appointed executor thereof, and has accepted said trust; that since her decease the plaintiff continued to live in the defendant's family until March 1, 1893; that the plaintiff is 82 years old, is infirm by reason of his advanced age, and requires personal care and attention; that, by reason of the defendant's neglect and ill treatment, the plaintiff has been compelled to leave the defendant's family, and reside elsewhere; that the plaintiff has no property and no means of support; and that the defendant, since March 1, 1893, has refused to support him, though requested so to do. The material portions of the will set forth in the bill are as follows: "(1) As to my life policy, I give and bequeath one-half the amount which shall be collected on it to my husband, Fred H. Willson, and one-half to my father, Benjamin F. Foster. (2) As to all the rest, residue, and remainder of my estate I give, bequeath, and devise the same to my said husband, Fred H. Willson, to have and to hold the same, to him and his heirs and assigns, forever; but it is my wish and desire that he shall furnish a home, maintenance, and care to and for my said father during life, should he need and require it." The prayer of the bill is for a decree for a reasonable sum to be paid by the defendant for the plaintiff's support since March 1, 1893, and for such further sums as from time to time may be needed for the plaintiff's support. The defendant's answer admits the making and probate of the will, but denies that the defendant has neglected or ill treated the plaintiff, or that the plaintiff was compelled to leave the defendant's family by reason of neglect or ill treatment; and avers that the defendant, though under no legal obligation to furnish the plaintiff with a home in his family, has been and still is willing to support and care for him there, but the plaintiff, without cause, refuses to live there. The answer also avers that, by the terms of the will, the defendant is not legally or equitably bound to support or provide for the plaintiff in his family or elsewhere, and insists upon this as a special matter of defense, and claims the same benefit therefrom as if the defendant had demurred to the bill.

D. H. Woodward, for plaintiff. Batchelder & Faulkner, for defendant.

BLODGETT, J. The intention of the testatrix to provide for the maintenance of her father being sufficiently apparent from the will itself, it is the duty of the court to effectuate it by regarding the defendant as

trustee for the father, if, from the whole transaction and the words used, such a trust may be fairly implied. In determining this question it is to be borne in mind that there is no uncertainty as to the subject or object of the testatrix's expression of her wish and desire, and that precatory words in a will, equally with direct fiduciary expressions, will constitute a trust. "Technical language is not necessary to constitute a trust. It is enough if such intention is apparent. Thus words of recommendation, request, entreaty, wish, or expectation, addressed to a devisee or legatee, will make him a trustee for those persons in favor of whom such expressions are used, provided that, from the construction of the whole will, such was the apparent intention of the testator, and provided he has pointed out with sufficient clearness and certainty both the subject-matter and the object of the trust." 1 Perry, *Trusts* (3d Ed.) 114, note; 1 Jarm. Wills (5th Am. Ed.) 680; Erickson v. Willard, 1 N. H. 217, 229. "The criticisms which have been sometimes applied to this rule by text writers and in judicial opinions will be found to rest mainly on its application in particular cases, and not to involve a doubt of the correctness of the rule itself as a sound principle of construction." Warner v. Bates, 98 Mass. 277, per Bigelow, C. J.

The only element of uncertainty, then, is whether the maintenance of the testatrix's father was intended by her to be executed by her husband as a trust. That is to say, did the testatrix intend to impose an obligation on her husband to carry her wish and desire as to her father's maintenance into effect, or, having expressed her wish and desire, did she intend to leave it to him to comply with them or not, at his discretion? From the nature of the case, no certain answer can be given; but upon the established rule of testamentary construction in this state, as well as in accordance with the general rule where like words have been used by testators (44 Am. Dec., note, 372-379), and with a plain moral duty on the part of the defendant, we are of opinion that the clause of the will which is the subject of the present controversy does not leave the maintenance of the plaintiff to the discretion of the defendant, to be afforded or withheld at his pleasure, but that the devise to him was made on the trust that he should furnish such maintenance during the plaintiff's life, should he need and require it, which the bill alleges and the demurrer admits. "The wish of a testator, like the request of a sovereign, is equivalent to a command" (1 Hill, *Trusts* [4th Am. Ed.] 73; 1 Perry, *Trusts*, 121, note); and especially should it be so held in a case like the present, where it would seem that even the slightest wish of the deceased wife, as to the care of her aged, infirm, and dependent father, ought of itself to be sufficiently binding on the defendant's conscience. The question whether

the maintenance of the plaintiff shall be in the defendant's family or elsewhere will be determined at the trial term. Demurrer overruled. All concurred.

(98 N. H. 232)

BARTLETT v. BLAIR.

(Supreme Court of New Hampshire. Hillsboro, March 15, 1895.)

SERVICE OF PROCESS — PRIVILEGE OF CONGRESSMAN.

Whether or not a member of congress is privileged from service of a process issued out of a state court while he is in attendance at a session of congress, which writ is returnable during the session by virtue of the provisions of Const. U. S. art. 1, § 6, exempting senators and representatives from arrest, except for treason, felony, and breach of the peace, during their attendance at a session of congress, is a federal question; and, in the absence of a decision of the supreme court of the United States extending the privilege to civil suits, a motion to quash such a writ thus served on a member of congress will be denied.

Assumpsit by James Bartlett against Henry W. Blair. Defendant's motion to quash summons denied.

A copy of the writ, duly attested, was seasonably left at the usual abode of the defendant, in Manchester, N. H., by a qualified officer. The defendant was then, and still is, a member of the house of representatives of the United States. When the copy was served he was in actual attendance at a special session of congress, and has since been in attendance at said session, and at the regular session of congress, most of the time, in the discharge of his public duties. Counsel for the defendant appeared specially, and moved that the writ and service thereof be quashed, and the case dismissed, on the ground that, as a member of congress in attendance at a session of the house to which he belonged, the defendant was privileged from service of any civil process issued by any state court, and returnable during the session of said house; that no valid service had been made upon him, under the circumstances of this case; and that the court had no jurisdiction.

S. W. Emery, for plaintiff. Burleigh & Adams, for defendant.

BLODGETT, J. The question raised involves the construction of section 6, art. 1, of the federal constitution, by which senators and representatives are privileged from arrest, except for treason, felony, and breach of the peace, during their attendance at the sessions of their respective houses, and in going to and returning from the same. This question being a federal one, it is not necessary, and would be useless, for us to form or express an opinion upon it; and in the absence of any adjudication by the supreme court of the United States extending the privilege to the service of a summons, or like civil process, the motion is denied. All concurred.

(68 N. H. 272)

BOYD v. TOWN OF DERRY.

(Supreme Court of New Hampshire. Rockingham. July 26, 1895.)

MUNICIPAL CORPORATIONS—INJURY UPON CULVERT—FILING CLAIM—RES JUDICATA.

1. A covered drain, leading from the gutter to a point under the middle of the sidewalk, and thence, under and lengthwise of the sidewalk, to a culvert running across the street, is a "culvert," within Laws 1893, c. 59, § 1, providing that towns shall be liable for injuries happening to persons by reason of defects in any "bridge, culvert or sluiceway."

2. A woman who was injured on a culvert showed that she did not know of the law requiring her, in person, to file her statement of her claim against the town within 10 days; that she was ill at the time; that her husband, at her request, sent a letter to the selectmen of the town, notifying them of the accident. *Held*, that a finding that she was unavoidably prevented from filing her statement was justified by the evidence.

3. A finding by the trial court, under Pub. St. c. 76, § 8, that a party injured on a culvert was unavoidably prevented from filing her claim with the selectmen within the 10 days provided by the statute, is conclusive upon the parties.

Exceptions from Rockingham county.

Petition by Ella A. Boyd to file a statement of a claim against the town of Derry for damages from a defective culvert. Exceptions by defendants. Overruled.

There was a covered drain leading from the gutter, between the carriage-way and the sidewalk, to a point about midway of the sidewalk, and there turning, and running, in the direction of the sidewalk, about seven feet, to a point where it connected with a culvert extending across the highway. There were holes in the sidewalk above this drain, caused by the sifting of the sand and gravel between the covering stones into the drain. The plaintiff, while walking on the sidewalk in the evening, stepped into one of these holes, and was injured. The defendants denied their liability on the ground that the place of the injury was not "a bridge, culvert or sluiceway," within the meaning of Laws 1893, c. 59, § 1. The plaintiff testified, in substance, that she did not know about the law requiring the filing of a statement of a claim of this nature; that, on the eighth day after the injury, her husband, at her request, sent a letter to the selectmen of the town, notifying them of the accident, which they supposed was a sufficient compliance with the law; and that she was too sick to attend to it herself, and intrusted the matter to her husband, not understanding that she was to do it in person. Upon this evidence, it was found that the plaintiff was unavoidably prevented from filing a statement, and leave to file one was granted, subject to the defendants' exception.

G. I. McAllister and Burnham, Brown & Warren, for plaintiff. G. K. Bartlett and J. S. H. Frink, for defendants.

CHASE, J. "Towns are liable for damages happening to any person * * * travelling upon a bridge, culvert, or sluiceway * * * upon any highway, by reason of any obstruction, defect, insufficiency or want of repair of such bridge, culvert or sluiceway * * * which renders it unsuitable for the travel thereon." Laws 1893, c. 59, § 1. "Culvert" is here used in its ordinary sense, namely, a covered drain under a road, designed for the passage of water. The jury would be warranted in finding that the plaintiff's injury happened by reason of a defect, insufficiency, or want of repair of a culvert, within the meaning of the statute.

The plaintiff's evidence tended to show that her failure to file a proper statement of her claim within 10 days after receiving her injury (Pub. St. c. 76, § 7) was due to her ignorance of the law, and was without any neglect or fault upon her part. It justified the court's finding (*Bolles v. Dalton*, 59 N. H. 479; *Kelsea v. Manchester*, 64 N. H. 570, 15 Atl. 206); and the finding is conclusive upon the parties (*Sewell v. Webster*, 59 N. H. 586; *Page v. Campton*, 63 N. H. 197). Exceptions overruled.

SMITH, J., did not sit. The others concurred.

(68 N. H. 289)

SIMPSON et al. v. PEMIGEWASSETT NAT. BANK.

(Supreme Court of New Hampshire. Belknap. July 26, 1895.)

BANK DEPOSITS—LOSS IN TRANSIT.

Regular depositors sent currency to the bank by registered mail. It arrived at 1:30 p. m. one day, but the bank had no notice of its arrival until 5 p. m. the next day, when the teller refused to receive the letter, because it was against the rules of the bank to receive money at that hour. That night burglars stole the registered package from the post office. *Held*, that since it could not be inferred that the bank promised to pay the depositors for the money, in the absence of negligence on the bank's part, the depositors could not recover from it.

Assumpsit by George A. Simpson and another against the Pemigewasset National Bank for money paid and lent. Facts found by the court. Judgment for defendants.

The plaintiffs did business at Centre Harbor, and the defendants at Plymouth. From 1839 to 1893, the plaintiffs, in accordance with an agreement with the defendants, sent money for deposit, subject to withdrawal by check, to the defendants, sometimes by registered letter, and sometimes by express, the defendants paying the charges when the money was sent by express. On July 31, 1893, the plaintiffs sent the defendants, by registered letter, \$240 in currency; and it was received at the Plymouth post office about 1:30 o'clock p. m., August 1st. On August 2d they sent another sum in the same way, which was received at the Plymouth post office about 1:30 o'clock p.

m., on the same day, and was delivered to the defendants soon afterwards. About half past 5 o'clock in the afternoon of August 2d, the defendants' teller was informed by the post-master's assistant that the registered letter which arrived August 1st was in the post office, and should have been delivered to the defendants with their noon mail. This was the first information any one connected with the bank received that the letter was in the post office. The teller declined to receive the letter then, because it was against the rules of the bank to receive money at that time of the day, it being after banking hours, and because the vault of the bank, being locked by a time lock, could not be opened. During the night of August 2d, the post office was broken into, and the registered letter last mentioned was stolen. The plaintiffs seek to recover the \$240, and they and the defendants moved for judgment in their favor, respectively.

Jewell & Stone, for plaintiffs. Burleigh & Adams, for defendants.

CHASE, J. It is not found that the defendants promised to pay the plaintiffs for the money in question. Such a promise cannot be inferred from the facts reported. Neither is it found that the defendants were guilty of negligence; and so it is unnecessary to consider the question whether the defendants would be liable in this action if they were negligent. Judgment for the defendants.

SMITH, J., did not sit. The others concurred.

(68 N. H. 337)

BRYSON v. HALEY.

(Supreme Court of New Hampshire. Hillsboro. July 26, 1895.)

CONTRACTS—ILLEGALITY.

He who performs labor and furnishes materials for a bar and the room containing it may recover therefor, though he knew they were intended to be used for unlawful purposes.

Exceptions from Hillsboro county.

Assumpsit by John Bryson against Patrick Haley. There was a judgment for plaintiff, and defendant brings exceptions. Overruled.

O'Connor & Shea, for plaintiff. Sulloway & Topliff, for defendant.

BLODGETT, J. The plaintiff is not precluded from a recovery of the value of his labor and materials upon the bar and the room containing it by his knowledge that the defendant intended to use them for an unlawful purpose. The case is not distinguishable in principle from *Delavina v. Hill*, 65 N. H. 27, 19 Atl. 1000. See, in addition, *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132, and note; *Tyler v. Carlisle*, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301, and note; *Mi-*

chael v. Bacon, 49 Mo. 474, 8 Am. Rep. 138, and note; *Webber v. Donnelly*, 33 Mich. 469; *Hubbard v. Moore*, 24 La. Ann. 591; *Mahood v. Tealza*, 26 La. Ann. 108. Exception overruled.

CHASE, J., did not sit. The others concurred.

(183 Pa. St. 326)

PAUL et al. v. GRIMM.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

OPENING JUDGMENT—OBJECTION TO JURISDICTION—WAIVER.

1. Where a case is ended in the common pleas by the entry of judgment in pursuance of the order of the supreme court, it cannot be opened by the common pleas for any purpose.

2. The question of jurisdiction cannot be raised in the common pleas after a final adjudication on review.

Appeal from court of common pleas, Westmoreland county.

Assumpsit by John T. Paul, administrator of the estate of Sarah Paul, deceased, and others, against Simon H. Grimm, administrator of the estate of James L. Thompson, deceased, to recover money alleged to have been received by defendant's intestate for land sold and conveyed by him as plaintiffs' attorney in fact. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

For prior report, see 30 Atl. 721.

Williams, Sloan & Griffith, for appellant. John F. Wentling, David A. Miller, and Edward B. McCormick, for appellees.

FELL, J. The judgment against the defendant, as administrator, to which exceptions were filed in the common pleas, was entered by direction of this court, and was in entire accordance with the order made. Two of the exceptions related to findings of fact by the court at the trial, which had taken place five years before, and the evident purpose of the appellant was to secure by this means a rehearing of the case. The third exception questioned the validity of the judgment on the ground that the agreement to waive trial by jury was not authorized by the defendant, and could not have been authorized by him, as he was acting in a fiduciary capacity. The limit of time within which the first two exceptions could be filed is fixed by the act of April 22, 1874, at 30 days after service of notice of the decision of the court. The effect of the limitation, by the first section of the act, of a right conferred by section 27 of article 5 of the constitution, need not be considered, as there was no ground on which the third exception could be sustained. The case was ended in the common pleas by the entry of judgment in pursuance of the order of this court, and could not be opened by that court for any purpose. The most liberal rule as to the time within which a question of jurisdiction

may be raised would not sanction its being raised in that court after a final adjudication on review. The judgment is affirmed.

(184 Pa. St. 25)

In re KALBFELL'S ESTATE.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

EXECUTOR—ACCOUNTING—REHEARING.

Where counsel for executor, on hearing of exceptions to his account,—resulting in his being surcharged with the amount of testator's interest in a business as appraised and inventoried, though the executor claimed it was worthless when it came into his hands,—were misled by the court, though they should not have been, into not putting forward all the evidence relevant to the item, executor should be allowed a rehearing thereon.

Appeal from orphans' court, Allegheny county.

Accounting by Henry Kalbfell, executor. His account was, on exceptions thereto, surcharged with a certain item, and a rehearing denied him; and he appeals. Reversed.

A. H. & H. H. Rowand and James Fitzsimmons, for appellant. Alex. Gillilan, Richard B. Scandrett, and Alfred J. Niles, for appellees.

MITCHELL, J. The decedent, who had accumulated a comfortable fortune as a shoemaker, unfortunately invested a considerable portion of it in the wholesale liquor business. He became the financial partner in the firm, and kept or was responsible for the keeping of such books as were kept at all. In four months the financial affairs of the firm were in such confusion that the decedent found himself obliged to call in the services of a professional accountant, and before the examination was concluded, on June 19, 1894, the decedent died. In July, his son and executor, the appellant, had an appraisement made, in which the decedent's interest in the firm was valued at \$12,404.30. The surviving partner either continued the business, or wound it up slowly, making sales and new purchases (the object and effect of his action being in controversy); and in October, less than four months from decedent's death, the firm was declared insolvent, and put in the hands of a receiver. When appellant filed his account as executor, he claimed a credit against the inventory and appraisement of \$12,404.30, on the ground that this item was in fact worthless at the time it came into his hands. The court refused to allow the credit, surcharged him with the amount, and dismissed a petition subsequently filed by him for a rehearing. This is the substantial ground of appeal.

It will be readily seen from the foregoing outline that the case admits of a very wide divergence of views; on one hand the appellant claiming that he had fair reason to suppose the capital his father had so recently put into the business gave his interest the value

at which it was appraised, and the actual result was not through any fault of his, and, on the other (the view adopted by the court), that his administration of the trust had been grossly negligent and incompetent, if not corrupt. There was evidence which, separately regarded, tended strongly to each view. In the petition for rehearing, appellant claimed ability to show various matters in regard to the value of the firm assets, which he had not presented at the hearing by reason of having understood from the court that they belonged properly to the settlement of the receiver's account in the common pleas. It is quite true that counsel should have appreciated the distinction, and have put forward all the evidence relevant to the item of credit claimed as to the appraisement. But if, as is averred, they were misled, even though they should not have been, a court of equity may look at their case leniently. An appraisement is only prima facie evidence of value, and where the discrepancy is so great, and the consequences so serious, the hearing ought to be full. The disastrous course of the decedent's venture into a business with which he was unfamiliar undoubtedly began in his lifetime, and how far the executor could or ought to have foreseen and averted the final outcome, and whether his own conduct contributed to it, is a serious question. Having adopted and filed the appraisement, the burden of proof is, of course, on him to show that it was erroneous, without fault of his; but a consideration of all the circumstances leads us to the opinion that he should have a fuller opportunity to do so. So much of the petition for rehearing, therefore, as relates to the surcharge of \$12,404.30 on the item for appraised value of decedent's interest in the firm of Berger & Kalbfell, should have been granted. Decree reversed, and rehearing awarded, in accordance with this opinion.

(183 Pa. St. 480)

ANDERSON et al. v. ANDERSON et al.
(Supreme Court of Pennsylvania. Jan. 3, 1898.)

EXECUTOR—EFFECT OF APPOINTMENT ON DEBTS OF TESTATOR.

Appointment of an executor does not discharge a judgment of testator against him.

Appeal from court of common pleas, Westmoreland county.

Partition proceedings by Jacob H. Anderson and others against Henry L. Anderson, executor of Samuel Anderson, deceased, and others. From the decree distributing the fund realized by sale, plaintiffs appeal. Reversed.

S. A. Kline, David A. Miller, and John F. Wentling, for appellants. Laird & Keenan, for appellees.

STERRETT, C. J. This appeal, from the decree of the court below distributing the

fund realized by the sale in partition of a farm of which William Anderson died seised, involves a question as to the effect of a judgment creditor's appointment of his judgment debtor as executor of his will. It is claimed that the learned auditor and court below erred in holding, substantially, that the effect of such appointment was to release and discharge the lien of the testator's judgment against the executor's interest in the land which was the subject of the proceedings in partition, so as to let a junior lien creditor in on that portion of the fund. In 1850, William Anderson died, testate, seised of the farm in question, leaving, to survive him, a widow, since deceased, and eight children, all of whom, except his daughter Rebecca J. Rings, one of the appellants, are now dead. By his will, the testator gave a life estate in the farm to his widow, and at her death a life estate to his sons James, George, and Joseph, and at their death, if they died without issue, which they did, the fee vested in his lawful heirs. All his children except the sole survivor, Mrs. Rings, died in the following order, as to time, etc.: (1) James died first, intestate and without issue. (2) Robert died second, intestate and without issue. (3) John died third, intestate, leaving, to survive him, six children, all of whom are appellants, with their aunt, Mrs. Rings. (4) Mary died fourth, intestate and without issue. (5) George died September 1, 1877, without issue. (6) Joseph died August 28, 1892, without issue. (7) Samuel died April 27, 1896, pending the proceedings in partition, and before the auditor to distribute the fund was appointed, leaving issue and a will, in which his son Henry L. is named executor. Pending the proceedings in partition, questions arose as to the interest of testator's sons James, George, and Joseph in the farm under their father's will, etc., which were finally determined by this court in October, 1894. *Anderson v. Anderson*, 164 Pa. St. 338, 30 Atl. 304. As will appear by reference to that case, we held, *inter alia*, that the interest given to James, George, and Joseph in the farm was merely a life estate to them and the survivors and survivor of them; and hence the defendants in the partition, Samuel Anderson and his sister Rebecca J. Rings, took no interest in the land under the joint will of their brothers George and Joseph. As above stated, Samuel Anderson died testate, etc., before the auditor to distribute was appointed; so that the only heirs of said William Anderson, deceased, are Rebecca J. Rings, the heirs of John Anderson, deceased, and the heirs of Samuel Anderson, deceased.

The learned auditor, recognizing the decree of this court in *Anderson v. Anderson*, supra, as a final adjudication of the questions involved in that appeal, rightly held that the net fund for distribution should be divided into three equal parts, one of which he awarded to the children and heirs of John Anderson, deceased, etc., another of which

(except the portion thereof that was impounded, etc.) he awarded to Rebecca J. Rings, and the third he awarded to H. P. Laird, Esq., the holder of the mortgage of Samuel Anderson, covering, *inter alia*, his interest, as one of the heirs of his father, in the farm from the sale of which the fund in court was realized. This was excepted to by appellants Mrs. Rings and the heirs of John Anderson, deceased, who, as heirs at law of George and Joseph Anderson, deceased, claim that Samuel Anderson's share of the fund should have been applied to the two judgments against him in favor of said George and Joseph, both of which were liens on Samuel Anderson's interest in the land, prior in date to the Laird mortgage. The reason given by the auditor for distributing to the Laird mortgage, and not to the judgments, is that George and Joseph Anderson, in their joint will, made their brother Samuel their executor, and that act operated as a release and discharge of the lien of said judgments, and thus gave precedence to the Laird mortgage, which was recorded nearly a year after the entry of the judgments. In approving that conclusion and making it the basis of its decree, we are all of opinion that the learned court erred.

According to the technical and rigid rules of the common law, the decision of the auditor might possibly be sustained; but under the changed conditions now existing here and elsewhere, as to the effect of acceptance of the office of executor either by a debtor or creditor of the testator, those rules have been very considerably modified. As to our own state, this is evidenced by the act of February 24, 1834, and by the earlier decisions, some of which are cited and relied on by the auditor. At common law, the appointment of a debtor as executor operated, not merely as an extinguishment of the legal remedy for the collection of the debt, but as an absolute discharge of the debt itself, except in case of a deficiency of assets to satisfy the claims of creditors. 2 Williams, Ex'rs, 1125. But, as was said in *Griffith v. Chew*, 8 Serg. & R. 31: "This doctrine of extinguishment has become obsolete, in consequence of the application of the principles and rules of equity, unless it appears that the testator, by naming the debtor his executor, gives him not only the office of executor, but some beneficial interest. He is considered as a trustee holding a resulting trusteeship for those entitled either as residuary legatees or next of kin. At no time in this state was it an extinguishment of the debt, for the executor has always been held as a trustee. *Wilson v. Wilson*, 3 Rin. 557. And an action for money had and received will lie against him in his personal character to recover the distributive share. The executor takes nothing but what is given him by the will." Our act of February 24, 1834 (P. L. p. 73, § 6), following *Griffith v. Chew*, supra, declares that "the appointment of any person to be an executor shall in no case be deemed a release or ex-

tinguishment of any debt or demand which the testator may have had against him," etc. In like manner, a testator's creditor accepting an appointment as executor enjoyed at common law the privilege of retaining for his own debt a sufficient sum out of the assets in priority to all other creditors of equal degree. That privilege, however, was not an extinguishment of the executor's claim, unless he had sufficient assets in his hands applicable to debts of same degree as his own. If he had such assets, that fact, in connection with his privilege of applying them to his own debt, operated as a satisfaction or extinguishment thereof, because he was within the rule that the person who is to receive is the person who ought to pay; but, if he had no assets, the rule did not apply. The debt, in other words, was not extinguished, except upon the assumption that the executor had assets which he could retain to pay himself. 2 Williams, Ex'rs, 1130. Under our system of distribution, priority over other creditors of the same grade or class is prohibited, and hence the privilege of retaining gives the executor no special advantage over other creditors. Without referring specially to any of the authorities cited and relied on by the auditor, some of which are decisions in cases that arose prior to the act of 1834, *supra*, it is quite apparent that they relate to the right of action alone, and were never intended to affect or impair the incidents of a judgment as security for the debt that is merged therein, including priority of lien, etc. We have not been referred to any authority that goes the length of sustaining the auditor and court below in refusing to recognize the two judgments which antedated the Laird mortgage, nor do we think any such authority can be found. It follows that both assignments of error must be sustained.

It may not be amiss to say that the money applicable to these judgments should not be awarded directly to these appellants, or to either of them. No such short cut as that can be taken. It must be awarded to the personal representative or representatives of the deceased plaintiffs in the judgments, for the purpose of administration and distribution in due course. Non constat that it may not all be required for payment of debts of the deceased plaintiffs. Decree reversed, at appellees' costs, and record remitted, with instructions to distribute the fund in controversy in accordance with this opinion.

(183 Pa. St. 450)

MUELLER et al. v. MONONGAHELA FIRE-CLAY CO. et al.

(Supreme Court of Pennsylvania. Jan. 8, 1898.)

CORPORATIONS—INSOLVENCY—SECURING DIRECTORS.

1. A corporation is not insolvent at the time its directors authorize judgment to be confessed against it in favor of creditors, where its debts

are little more than a third of the market value of its property.

2. Where creditors of a corporation holding its notes on which its directors were indorsers, demanded security as a condition of not instituting proceedings to collect, the confession of judgment in their favor, authorized by the directors at a time when the property of the corporation would have sold for more than its debts, is not fraudulent, though the directors are incidentally relieved from liability.

Appeal from court of common pleas, Beaver county.

Suit by G. A. Mueller and others against the Monongahela Fire-Clay Company and others. Decree for plaintiffs. Defendants appeal. Reversed.

J. F. Reed, for appellants. John M. Buchanan and Wm. A. McConnel, for appellee G. A. Mueller. Alfred P. Marshall, for appellee Elijah Stewart, receiver.

DEAN, J. On the 1st of October, 1891, there was issued to Orr B. Bovard, James C. Bovard, Ansley V. Parnell, R. F. Orr, and James H. Chambers, as incorporators, a charter for the organization of the Monongahela Fire-Clay Company. The purpose of the company was mining fire clay and coal, and manufacturing fire brick. The capital stock was fixed at \$60,000, which was afterwards reduced to \$40,000. Before the issue of the letters patent the two Bovards, Orr, and Parnell were co-partners, under the name of Bovard, Orr & Parnell. They had established a fire-brick manufactory and were carrying it on. The property of the partnership consisted of four and a half acres of land in the borough of Monaca, having thereon erected a fire-clay brick factory, outbuildings, office, boilers, and machinery,—everything necessary to the manufacture of brick. Adjoining this they owned about 20 acres of land underlaid with fire clay. All this property was conveyed to the corporation at a valuation of \$32,000. In addition, the corporation agreed to assume the partnership liabilities then existing amounting to \$9,000, making the actual cost of the plant \$41,000. There was sold, cash stock, about \$10,500, payable by installments; leaving, at most, a cash working capital after payment of the \$9,000, debts of the old partnership, of only \$1,500. On this basis the corporation commenced business about the 1st of January, 1892, the incorporators being elected directors. From the confused method of presenting the annual statements in these paper books, it is difficult to determine satisfactorily the amount of business done by the company. The statements were offered and marked as exhibits, but copies are not printed,—only some of the items from them testified to by witnesses. We infer, however, from the testimony, the corporation manufactured and sold, including payment of freights, approximately about \$20,000 worth of bricks annually. The first step taken by the new company was to provide for the debt assumed; and it borrowed from Mrs. Orr \$5,000, for

which was executed on 30th December, 1891, a mortgage. The money was applied in part payment of the \$9,000 indebtedness. The company also soon after borrowed on its notes for the same purpose, from the Lincoln National Bank of Pittsburgh, \$4,250. There was also borrowed, on note of the company, from First National Bank of Beaver, \$750. On all these notes J. C. Bovard, A. V. Parnell, O. B. Bovard, and Benjamin Weaver, directors, became indorsers. These notes were renewed from time to time, with the same indorsers, down until June, 1895. At a regular monthly meeting of the board held previously, March 9, 1895, a resolution had been adopted authorizing the secretary and treasurer, among other claims, to make the necessary arrangements with the Lincoln National Bank and the First National Bank of Beaver in regard to the following notes: Notes for \$2,000, \$1,500, and \$750, held by the Lincoln Bank, and \$750 held by the First National Bank of Beaver. The banks soon after, either in June or July following, from the facts of nonpayment for more than three years, and information that another creditor threatened suit, demanded security from the company for their debts, with the statement that if security were not given they would not renew. The directors did not seek the banks to be released from their indorsements, but the banks called upon the officers of the company who were indorsers, and demanded security from the company. Notice the testimony of J. O. Bovard: "I was in the West. I came home. They told me [at] the Monongahela Fire-Clay Co. Mr. McLain wanted to see me. I went to see Mr. McLain, and asked him what he wanted. He said he wanted those notes better secured, and I asked him what security he wanted, and he said that the only way they could be secured would be for us to take the first judgment, and make a transfer of their interests, it being in two hands,—to make a transfer of their interests in the judgment. * * * He said it would be better to put it in one judgment. * * * I made an arrangement right then and there to do that. * * * We called a meeting directly, * * * and gave him judgment as stated on the minutes." The Mr. McLain who represented the bank in this arrangement, and who was president, is not called; but the cashier of the bank is called, and testifies to having, in substance, made the same demand of O. B. Bovard, another of the directors, and the bank was notified about the 11th or 12th of July following that a judgment had been confessed against the company to the two Bovards, Parnell, and Weaver, as trustees for the two banks, in the sum of \$5,000. The cashier's testimony is corroborated by that of O. B. Bovard, who testifies the judgment was to be taken in the names of the directors, and the Lincoln Bank's interest assigned to it. At a monthly meeting of the board of directors, on July 10, 1895, by resolution, the board

was authorized and directed to execute and deliver to the two Bovards, Parnell, and Weaver the note of the company in the sum of \$5,000, at one day after date, with power of attorney to confess judgment to secure their continued indorsements and renewal of the paper of the company. On July 13th following the note was executed and judgment confessed in the common pleas of Beaver county. On 15th April, 1896, \$4,250 of the judgment was assigned to the Lincoln National Bank, and \$750 to First National Bank of Beaver. The banks continued to renew the notes down to and after this assignment. It is not disputed that the indorsers on the notes were four of the directors who authorized the execution and delivery of the \$5,000 note and confession of the judgment. On August 13, 1895, the plaintiff filed this bill against the company and the four directors, as defendants, averring, among other facts and conclusions, that the judgment was without consideration, and given to prefer the directors as creditors; solvency of the company; mismanagement; a purpose to permit the seizure and sale of the corporate property for their individual benefit; concealment of the books and real condition of the company; and praying that a receiver be appointed to manage the property and take possession of its assets; further, that the \$5,000 judgment be declared null and void. To this defendants filed answer, denying mismanagement or intention to have the property sold, and averring that the judgment was lawful and just. Ten days after the filing of the bill the court appointed Elijah Stewart receiver, who duly qualified on his petition. September 16, 1895, an order for sale of the property was awarded by the court, and it was accordingly sold by the receiver for the sum of \$5,000, subject to the first mortgage of \$5,000 in favor of Mrs. Orr, which sale was confirmed absolutely by the court. July 2, 1896, an auditor was appointed to distribute the balance in the hands of the receiver as shown by his accounts filed, but was directed to suspend the audit until final event on the proceeding in equity. On February 13, 1897, the Lincoln National Bank was permitted to intervene as defendant to the extent of its interest in the judgment. After full hearing the court found as facts: (1) That at the time the judgment note was authorized the company was insolvent, and known to be so by the directors; (2) that the directors authorized the judgment to be confessed, to protect themselves as indorsers on the bank paper, thus securing a preference over other creditors. Therefore the judgment was a fraud in law, and it was declared null and void as against other creditors. From this decree the defendants appeal, assigning eight errors, all of them, however, in substance, denying the correctness of the court's two findings of fact and conclusion of law.

First, as to the finding relating to the insol-

vency of the company. That the business project at the foot of a lawsuit ended in business disaster may be conceded, but that fact does not establish insolvency prior to that date. When the company was organized it had a property fully worth, from almost undisputed testimony, \$32,000. It received cash for stock, \$10,500. It then had assets of \$42,500, and was in debt the amount of the old partnership liabilities it had assumed, \$9,000. It is obvious that a corporation with, at most, a working capital of \$1,500, proposing to do an annual business of \$20,000, with monthly payments of at least \$1,200, and monthly receipts depending on the quickness of sales and collections, is in financial peril from the start, not necessarily of insolvency, but of inability to carry on business. It may be entirely solvent, in the sense that its assets far exceed its liabilities, but that it will be able to promptly pay its debts contracted in the course of business is exceedingly doubtful. Here the first year's business showed a small profit; the second, third, and fourth years' considerable loss. These were years of business depression peculiarly trying to enterprises of this kind. Such times demanded of the stockholders the utmost harmony of action, that their property might be saved. A prompt ratable contribution of a comparatively small amount of money, as working capital, would have averted trouble. But instead of harmony the plaintiff and other dissatisfied stockholders commenced litigation by averments of record which must necessarily have alarmed creditors and caused public distrust; put their property in the hands of a court official, who, with remarkable promptness, knocks it down at a sale for a bid less than one-fourth of what both sides allege was its market value; and the litigation now proceeds over the right to this fragment.

The finding that, at the date the judgment was authorized, the company was insolvent, and that the directors knew it, is not warranted by the evidence; on the contrary, it is in the face of the evidence. The note, with warrant of attorney to confess judgment, was given July 10, 1895. More than a month afterwards these plaintiffs file their bill, in which they make affidavit to this averment: "The fair market value of said plant is not less than \$40,000, as your orator believes and expects to show." It was proven by the decided weight of the testimony that the property was worth what plaintiff averred, and that its entire indebtedness did not exceed \$16,000; that is, at the end of nearly four years of most serious depression, a property worth \$40,000, doing a comparatively large annual business, has lost \$7,000. Clearly, if this is to continue, in three or four years more the corporation will be insolvent. But, if business improve soon, it may pay its debts and earn dividends; or a loan on mortgage may be effected, creating a fixed interest charge, without peril from immediate demand

of principal; or the property may be sold by the owners for its "fair market value," \$40,000, and \$16,000 appropriated to payment of debts, and the balance, \$24,000, divided among the stockholders. These directors had no reason to believe the company was insolvent. That they were disappointed in realizing the profits they expected in the beginning, were weary of the labor of managing and carrying on the operations with insufficient working capital, were vexed by the complaints of dissatisfied stockholders, may be conceded, but that they believed the company was insolvent there is no sufficient evidence. There is what is called, in bankrupt statutes, an act of insolvency, which authorizes proceedings to have the debtor declared a bankrupt; such as inability to pay debts contracted in the course of business, as they became due. *Buchanan v. Smith*, 16 Wall. 308. This may be called statutory insolvency, and may occur where the assets of the debtor largely exceed his obligations. In such case, a large estate may be turned over to the debtor after the law has discharged every liability. But insolvency generally signifies insufficiency of assets, when turned into money, to discharge existing indebtedness. In *Bowersox's Appeal*, 100 Pa. St. 434, we held that insolvency, such as disqualified an administratrix from taking out letters on the estate of her deceased husband, was the owing of debts in excess of the value of her tangible property. And this is the commonly accepted meaning of the word. In this sense, the company was far from insolvency when the judgment was authorized. We do not consider the fact that the property sold for only \$10,000 as important. It is very improbable that a property, no matter how valuable, when decried by some of its owners on the public records as unprofitable, and as having sunk large sums of money during three years of its operations, will be considered a very valuable property by bidders. The significant facts here tending to establish solvency at the date the judgment was given are that the debts were little more than one-third the market value; that afterwards this complaining stockholder averred in his bill that it was entirely solvent, and then called witnesses who proved it. In the preliminary hearing, asking for the appointment of a receiver, the court ostensibly appointed one to save the property from insolvency through mismanagement of its officers. It by this appointment found the averments of solvency and mismanagement at that date to be true. This was, in effect, an adjudication of solvency after the date of the judgment note.

Neither does the evidence warrant the second finding, that the judgment was intended as a preference to the officers themselves, and was therefore a fraud in law. The evidence of the two Bovards and the cashier of the bank conclusively shows it was given to secure the banks because demanded by them. The directors had been indorsers of these notes for three years. The money

had been loaned the company, not by the directors, but by the banks, and the lender was now exacting further security from the company, the borrower; and the implied threat was, not only would they refuse to renew, but would proceed to obtain judgment against the company, unless security was given, coupled with the express promise, however, that they would continue to renew the paper if their demand was complied with. If the object of the indorsers was to prefer themselves as against other creditors, how could this have been best effected? Certainly, by permitting the banks to obtain judgment by adverse proceedings against the company. There was but one lien, then, the mortgage of Mrs. Orr for \$5,000, and it was clear the property would sell for at least \$10,000. But this would have been disastrous to the company, for it would have resulted in a seizure and sale by the sheriff. So they concurred in the proposition of the banks to confess a judgment as an additional security, the banks agreeing to continue a renewal of the notes, which was equivalent to an indefinite stay of execution on the judgment. This was, undoubtedly, for the benefit of the company. If the indorsers had been strangers to the company, protection of their interests would have prompted the first course; but, as they were stockholders and officers of the company, protection of the company prompted the second course. The general rule on which the court below founded its decree declaring the judgment constructively fraudulent and void is stated in *Mor. Corp. § 787*: "Directors of an insolvent corporation, who have claims against the company as creditors, must share ratably with other creditors in the distribution of the company's assets. They cannot secure to themselves any advantage or preference over other creditors by using their power as directors for that purpose. Their powers are held by them in trust for all the creditors, and cannot be used for their own benefit." This rule is sound, and we have applied it in many cases, notably in the late ones of *Rice's Appeal*, 79 Pa. St. 168; *Hopkins' Appeal*, 90 Pa. St. 69; *Kerstetter's Appeal*, 149 Pa. St. 148, 24 Atl. 168. But cases often arise which are palpable exceptions to the rule, because not within its reason, and where, if the rule were enforced, gross injustice would result. It is the settled law of this commonwealth that an insolvent debtor, whether corporation or individual, may prefer bona fide creditors; but if the creditor benefited be a director, or other officer possessed of corporate power and corporate knowledge of the insolvency of his corporation, then he has an advantage over other creditors, whose claims may be of equal merit. He has knowledge that his debt is in peril, and has the power to prefer himself. As he is, in a sense, trustee for all the stockholders and creditors, equity

forbids that he should act solely for himself, regardless of the interests of those for whom he is trustee; and, in case he prefers his own debt, the burden is on him to show circumstances which raise an equity in his favor, and which take the particular case out of the operation of the general rule. An examination of our own cases, from *Gordon v. Preston*, 1 Watts, 385, decided in 1833, indicates with sufficient clearness the nature of the circumstances sufficient to create the exception. In this case a director and creditor took a mortgage on the corporate property for an actual debt owing him, and the mortgage was put of record. The corporation stockholders and creditors remained silent for more than eight months, and until, by subsequent debts, the company became insolvent. Then a junior judgment creditor instituted proceedings to have the mortgage declared invalid, among other reasons because proper notice of the board meeting had not been given; and, further, because the mortgagees were the president and treasurer of the company when the mortgage was authorized and executed. This court, in an opinion by Gibson, C. J., held that "to disaffirm it now, when every opportunity of obtaining any other security is lost, would be unconscionable." And further: "That a corporator may sustain the relation of debtor or creditor in regard to the corporation, and in the latter receive a security, is a proposition which requires not the aid of an argument, and here the existence of a meritorious debt is not disputed."

Ashhurst's Appeal, 60 Pa. St. 290, was a bill in equity between warring stockholders, heard before Strong, J., at nisi prius, and his opinion and conclusions of law affirmed by this court per curiam, on appeal. The company owned a very valuable property, but was largely in debt, and its property, real and personal, on the verge of seizure by the sheriff. A meeting of the stockholders authorized the directors to sell the property. The directors sold to themselves, and paid a large sum. Everything was fair and open, and the transaction was for the best interests of creditors and stockholders. The sale was held valid, Justice Strong, in his opinion, saying: "There must be many things which directors can do for their individual benefit which are binding on a corporation of which they are directors. If they have advanced money, I cannot doubt they may pay themselves with corporate funds. If they have become liable as sureties for the corporation, they may provide for their indemnity. And although, ordinarily, the law frowns upon contracts made by them in their representative character, with themselves as private persons, such contracts are not necessarily void. They are carefully watched, and their fairness must be shown."

In *Neal's Appeal*, 129 Pa. St. 64, 18 Atl.

564, this court decided: "Where the judgment bond of a corporation is given to certain of its directors as a security to protect them on their indorsements for the company, and it is not made to appear that the company was insolvent at the time, or that at the time there was any collusion or actual fraudulent intent, the entry of the judgment on the bond, after insolvency, will not warrant an injunction to restrain the sale of the corporate property." It will be noticed in this case that the bond was given at a time when the company was not insolvent, but was used—that it, was entered of record—by the directors after they had knowledge of the insolvency.

In case of *Oil Co. v. Marbury*, 91 U. S. 587, the supreme court of the United States fully considers the application of the rule, and holds thus: "While it is true that the defendant, as a director of the corporation, was bound by all those rules of conscientious fairness which courts of equity have imposed as the guards of dealing in such cases, it cannot be maintained that any rule forbids one director, among several, from loaning money to the corporation, when the money is needed, and the transaction is open and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving it aid judiciously, and best qualified to judge of the necessity of that aid, and the extent to which it may safely be given." And the conclusion of the court, after discussing the theory on which the rule rests,—that is, that the directors are trustees,—comes to the conclusion that "when the lender is a director charged with others with the control and management of the corporation, representing in this regard the aggregated interests of all the stockholders, his obligation, if he become a party to a contract with the company, to candor and fair dealing is increased in the precise degree that his representative character has given him power and control." That is, if the favored director was but one out of a board of seven or nine, his power to prefer himself would be minimized, and the transaction would not be so rigidly scrutinized as if he were one of a board of three.

In the case in hand the number of directors was four, all of whom were indorsers on the notes held by the bank. They voted unanimously to authorize the judgment. Having thus the maximum of power, the other stockholders have the right to the most exacting inquiry into the nature of the transaction. That, we think, has been had. It conclusively establishes that part of the purchase money of the corporate property was \$9,000 of debts, which the company assumed, then due and payable. Money was borrowed on the notes of the company, with the

four directors as indorsers, and applied in part payment of this debt. This was in direct aid of the corporation at the very commencement of its business. The directors received not a cent of compensation for assuming a liability for the benefit of all the stockholders, or for continuing that liability when the banks demanded better security from the company. The debt ought to have been paid four years before. When demanded, the company was compelled to borrow the money somewhere. If instead of \$5,000 it had borrowed from Mrs. Orr \$10,000, and had given her a mortgage for the last amount, the validity of it would not have been disputed any more than is her \$5,000 mortgage. Both amounts were applied towards payment of the debt assumed. How does it impair the validity of the transaction that \$5,000 was shifted from the original creditors to the banks? Why should the legality of the banks' security be affected by the fact that incidentally the indorsers were relieved from a liability they assumed for the benefit of the company? The result of the contention of the appellees is that the judgment should be vacated, and the banks be turned over to suit against the indorsers, and that the indorsers should be compelled to contribute to other stockholders and creditors, for the privilege of loaning their credit to the company, \$5,000. There never was a time that the rule heretofore stated would have been permitted to work such injustice. But, even if there had been, we think we have shown that in later years the rule has been relaxed so as to accord with the growing necessities of the business world. Where one manufacturing corporation existed 50 years ago there are now thousands. To hold that it shall be a constructive fraud for the officers of such corporations to aid them with money or credit in a business exigency, without indemnity, as is said in *Oil Co. v. Marbury*, supra, is to deprive them of the aid of those most interested in their success, and who are best qualified to judge of the necessity of that aid. The true interpretation of the rule, as shown by our own cases and the weight of authority in the United States, is that the burden is on the officers, having both the power and preference, to show that the contract was fair, under all the circumstances, as in *Ashhurst's Appeal*, supra, and other cases cited; and that, even if the judgment was entered after insolvency was known, yet, the contract having been made before insolvency, as an indemnity to the directors for individual indorsements, such judgment could be enforced as a lien against the corporate property, as in *Neal's Appeal*, supra. We are of the opinion: First, that the finding of fact in the court below, that the company was insolvent at the date the judgment was authorized, is manifest error, because not in accord with the undisputed evidence; second, that even if the company was insolvent,

and the directors knew it, at the date the judgment was given, under the facts proven the conclusion that the judgment was therefore fraudulent and void is erroneous, because not in accord with the settled law. The decree is reversed, at the costs of the appellees, and it is directed that the balance in the hands of the receiver be distributed by the auditor in accordance with this opinion.

(183 Pa. St. 485)

SMITH v. OIL CITY TUBE CO.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

CONFLICTING EVIDENCE—QUESTION FOR JURY.

The evidence as to negligence in case of an employé injured while working in a dangerous place being conflicting, a binding instruction is properly refused.

Appeal from court of common pleas, Venango county.

Action by S. Smith against the Oil City Tube Company. Judgment for plaintiff. Defendant appeals. Affirmed.

J. H. Osmer and McCalmont & McGill, for appellant. Breene & Wilbert and Dunn & Carmichael, for appellee.

STERRETT, C. J. After a careful review of all the testimony, we are satisfied that material questions of fact, for the determination of the jury, are presented therein, and hence it was the duty of the court to submit the case to them, with proper instructions. There is not a single complaint as to the charge, or any of the learned judge's instructions, except his refusals to give the binding instructions requested in defendant's first and fifth points for charge, and these constitute the only assignments of error in this case. In the first of these he was asked to say "that, under all the evidence, the verdict should be for the defendant"; and in the other: "It appearing that the plaintiff's place was outside the skid, and therefore safe, and that no one in authority instructed him to go over where he was hurt, there is no evidence of negligence on the part of the defendant, and plaintiff cannot recover." As to the facts of which each of these points is predicated the testimony was more or less conflicting, and it would have been error to have withdrawn the case from the jury by affirming either of them. It was conceded that plaintiff was not a trespasser, but "a workman properly in the place in which he was working," and also "that the place in question was dangerous." As to the degree of danger, to what extent it was patent, and whether the plaintiff was properly instructed and warned of its existence and dangerous character or not, the testimony was conflicting, and therefore for the jury. In affirming defendant's 2d, 3d, 4th, 6th, and 7th points, the court, in defendant's own words, very

guardedly instructed the jury that, if they found "from all the evidence that the skids were so constructed that plaintiff could not be injured without leaving the place where he was to work, and stepping over the skid into the hole, and that such skids and machinery were safe when used with ordinary care, that is all that the law required, and the verdict should be for the defendant." "If there was a hole beyond the first skid into which one might have stepped by climbing over the skid, that cannot be imputed as negligence on the part of the defendant, unless the jury find that plaintiff's place was over there, or that some one in authority instructed him to go there." "That the subsequent covering of the hole is not, of itself, evidence of negligence." "If the hole was visible, or the plaintiff was properly instructed as to his duties, and warned not to step over the skid, it was his duty to recognize the danger of such a step. His failure to do so would be at his own risk, and would constitute such contributory negligence as will prevent any recovery in this case." "That the plaintiff was under no compulsion to enter upon the employment in which he was engaged at the time of his injury; that in undertaking the service required of him he is presumed to have considered himself competent to perform such service; and if from the situation, location, and character of the machinery, if it were visibly dangerous, or if by his exercise of ordinary and prudent care or inquiry the plaintiff would have discovered the place where he was injured, he was bound to observe care, under the circumstances, and, having omitted such care, the plaintiff was guilty of negligence, and cannot recover." Viewing the verdict in the light of these instructions, given at defendant's request, it is very evident that, in determining the disputed questions of fact, the jury must have found in accordance with the plaintiff's, and not the defendant's, theory of the controlling facts. There appears to be nothing in the record that requires further elaboration. Both specifications of error are overruled, and the judgment is affirmed.

(183 Pa. St. 489)

GOSSER v. GOSSER.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

DIVORCE—ADULTERY—CONDONATION.

In an action by a husband for divorce for adultery, it appeared that libelant had knowledge of many facts relied on in the suit as evidence previous to separation from his wife; but explanations which, while admitting gross impropriety of conduct, denied actual guilt, were made to him by her and accepted as satisfactory. When explanations ceased, and the conclusion of innocence was no longer possible, he left her, and marital relations were not resumed. *Held*, that the defense of condonation was not established.

Appeal from court of common pleas, Armstrong county.

Libel by Newton H. Gosser against Annie M. Gosser for divorce. From a decree for libelant, libelee appeals. Affirmed.

Jas. S. Whitworth, John Q. Cochran, and W. D. Patton, for appellant. M. F. Leason, for appellee.

FELL, J. The decree entered in the common pleas rests upon the finding by that court that the allegations of the libel were fully sustained by the proofs offered, and that the respondent failed to establish either of the two grounds of defense set up in the answer. This decree should be sustained, unless the finding is shown to be clearly erroneous. The responsibility of determining the facts rests in the first instance upon the judge who hears the testimony, and a mere doubt as to the correctness of his findings is not sufficient to disturb them. The most serious doubt raised by the testimony is whether the defense of condonation was established. The libelant had knowledge of many facts, now relied on as evidence of the offense charged, some time before he separated from his wife; but explanations which, while admitting gross impropriety of conduct, denied actual guilt, were made to him by his wife, and accepted as satisfactory. When explanations ceased, and the conclusion of innocence was no longer possible, he left her, and marital relations were not resumed. Much less might have been sufficient to have convinced others. That he resisted belief, and was slow to act, is to his credit. Condonation may be inferred from cohabitation after knowledge. In most cases where the presumption of condonation has been held to be conclusive the libelant has been estopped by his own act from alleging want of knowledge. Forgiveness implies a knowledge of the offense to be forgiven, and there can be no condonation without a belief in guilt and an intention to forgive it. Mere suspicion is not belief, and the proof of circumstances which might give rise to it is not sufficient to establish a conclusive presumption of condonation on the ground of cohabitation. The condonation which the act of assembly makes a bar to a divorce must be "after he or she knew of the criminal fact." The decree is affirmed.

(183 Pa. St. 336)

WILLIAMS et al. v. MILLIGAN.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

EJECTMENT—DIRECTING VERDICT.

1. Where defendant in ejectment sets up an equitable title, the chancellor—if, in his opinion, the evidence is insufficient to prevail against the legal title—should instruct the jury to find for the party having such title.

2. In ejectment it appeared that in October, 1877, defendant's husband obtained a deed to the land; that he took possession, and he and defendant lived on it until he left her; and that in 1892 it was sold to plaintiffs under an execution against him. The defense was that defendant furnish-

ed the money to pay for the land; that she had a legal title by virtue of a deed delivered to her in 1880, and which she destroyed two days afterwards; that thereafter, under a parol contract, she furnished the money to make improvements, and the husband, on completion, was to make her another deed. There was no corroboration of defendant's testimony, while, in regard to the payment of the purchase money, it was not in accordance with that of disinterested witnesses. The improvements made in 1880 were directed by the husband only, and he alone ordered and paid for the materials, and employed and paid the workmen. The written notice of her claim given by her at the sheriff's sale September 26, 1892, contained no allusion to the alleged deed. *Held*, that a direction of a verdict for plaintiffs was proper.

Appeal from court of common pleas, Westmoreland county.

Ejectment by Vin. E. Williams and another against Martha J. Milligan. From a judgment entered on a verdict directed by the court in favor of plaintiffs, defendant appeals. Affirmed.

Jno. S. Ferguson, Robbins & Kunkle, and Laird & Keenan, for appellant. D. S. Atkinson, John M. Peoples, Jas. S. Moorhead, and John B. Head, for appellees.

McCOLLUM, J. It is conceded that the defendant had a separate estate when she married her second husband, and that it was not founded upon, or enlarged by, any gift or contribution from him before or after their marriage. In October, 1877, he purchased the property described in the summons, and received a deed of the same, which was duly recorded on the 23d of August, 1888. Very soon after he purchased the property, he took possession of it, and he and his wife resided on it while they lived together. It was assessed to him, and he paid the taxes and made improvements upon it. In 1892, while the record title was still in him, the property was sold on a judgment against him, and the plaintiffs were the purchasers of it. Their suit for the possession of it is based on the sheriff's sale and deed to them. The first and principal contention of the defendant in answer to the suit is that she furnished the money for the purchase of the property under an agreement with her husband that the deed of it should be made to her, and that he, in violation of the agreement, had the deed made to himself. Her next contention is that she has the legal title to the property, by virtue of a deed which she says her husband made and delivered to her on a Saturday in August, 1880, and which she says she destroyed on the following Monday. These contentions are supplemented by another, which is that, two days after she destroyed the deed, peace was declared between the grantor and grantee, and that they then made a parol agreement by which she was to furnish the money required to make some improvements on the property, and he, on the completion of the improvements, was to make another deed of it to her. Neither claim of the defendant is available as a defense to the suit, unless it is

sustained by clear, unequivocal, and convincing evidence. The question, therefore, for the consideration of the court, was whether the defendant's evidence was sufficient to sustain her several claims, or either of them. In cases of this kind the judge acts as a chancellor, and it is his duty to carefully consider the evidence submitted to sustain the alleged equitable defenses; and if, in his opinion, it is insufficient to prevail against the legal title, he may and ought to instruct the jury to find for the party having such title. The decisions of this court sustaining this view of the evidence required, and of the duty of the judge, in a case like the one under consideration, are numerous and uniform. *Hess v. Calender*, 120 Pa. St. 138, 13 Atl. 720, was an action of ejectment, involving an equitable title based on an alleged parol gift of the land to the defendant by his father. In delivering the opinion of the court, our Brother Williams said: "The duty of a chancellor is not in doubt. He must scrutinize and weigh the evidence for himself. If the facts set up are sufficient in character, and are clearly and satisfactorily proved, so that he is persuaded that in equity and good conscience a decree should be made, he will enforce the contract. But specific execution is not of right, but of grace. If one has a legal right on which he can rest his title to relief, a court of law is his proper forum. It is because he has no right at law to the relief he seeks that he comes into a court of equity. He must come with clean hands. His application must be made with reasonable promptness. It must be conscionable. It must rest upon facts that are made to appear by proofs that are clear, satisfactory in character, and convincing. If such a case is not presented, it is unwarrantable abandonment of duty for a judge to turn a case over to a jury, and do by means of their verdict what, as a chancellor, he would refuse to do." See, also, the recent case of *Gilchrist v. Brown*, 165 Pa. St. 275, 30 Atl. 839.

Were the defenses relied on in the case at bar sustained by the evidence applicable to them? The learned judge of the court below was of the opinion that they were not, and he accordingly instructed the jury to find for the plaintiffs. The real question presented by this appeal is whether this instruction was erroneous. We are satisfied, from a careful examination and consideration of all the evidence, that it was not. There is no corroboration of the testimony of the defendant relating to the alleged agreements with her husband respecting the purchase of the property, the payment of the purchase money, and the payments for improvements. Besides, her testimony in regard to the payment of purchase money is not in accord with the testimony of disinterested witnesses, showing that the first payment on account of it was made by her husband on the 8th of October, and that the next payment was made by him within a week from that time, and also show-

ing that \$375 was the amount of the first payment, and the exact amount of the loan he made a day or two before, and that \$500 was the amount of the second payment, and the precise amount he loaned on the 12th of October. The correspondence in time and amount between the payments and the loans is significant. An inference that the payments mentioned were made with the husband's money might well be drawn from it. The addition and other improvements made upon the property in 1880 were supervised and directed by the husband. He ordered and paid for the materials, and employed and paid the workmen. Neither the materialmen nor the workmen dealt with the defendant, or received from her any instructions in regard to the materials furnished or the work done.

The assertion by the defendant that she acquired the legal title to the property by virtue of a deed from her husband in 1880 appears first in her abstract of title filed on the 10th of May, 1894. The written notice given by her at the sheriff's sale on the 26th of September, 1892, contained no allusion to a deed from him to her. It stated her claim as founded upon her payment of the purchase money, and represented her husband as having fraudulently, and in violation of his promise, taken the deed of the property in his own name. If he had conveyed the property to her 12 years before the sheriff's sale, we might reasonably suppose that she would have mentioned that fact in her notice of claim. Her omission to do so is a circumstance to be considered in connection with the testimony relating to her claim of a legal title founded upon a conveyance of the property to her by her husband in August, 1880. The testimony to sustain a claim of this nature must be clear and convincing. If it is not, a jury should not be allowed to guess from it that a deed was made, delivered, accepted, and destroyed. Proof of all these matters being essential to the maintenance of the claim of a legal title, slight and doubtful evidence of them, or either of them, is insufficient. The testimony of the defendant on this branch of her defense is vague, unsatisfactory, and inadequate, and has no substantial support or corroboration in the testimony of Erret or Walters. The former testified that in 1880 he heard the defendant's husband say to her that she should take charge of certain papers, as they were hers, and the latter testified that the papers "looked like deeds." Neither of these witnesses testified to any inspection of the papers, or to any knowledge of their contents. The defendant testified that the deed she claimed to have received from her husband was written by Henderson, and witnessed by him and Miller, and that he took the acknowledgment of it; while he testified that he had no recollection of writing, witnessing, or seeing such a deed, although he distinctly remembered that he wrote and took the acknowledgment of a deed for her husband for the Keefer property

about the time he sold it. No person except the defendant testified to having seen such a deed, or to any declaration of her husband that he had conveyed the Strawn property to her.

We are clearly of the opinion that the evidence in the case is insufficient to sustain the defendant's contentions, and that the learned judge of the court below did not err in so holding. All the assignments are therefore overruled. Judgment affirmed.

(183 Pa. St. 330)

PAUL et al. v. GRIMM et al.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

JUDGMENT AGAINST ADMINISTRATOR—DEFENSE BY HEIRS ON SCIRE FACIAS—AGENT'S LIABILITY TO PRINCIPAL.

1. The right of decedent's heirs, under Act Feb. 24, 1834, § 34, on scire facias to charge land in their possession with a debt for which judgment has been obtained against the administrator, to make any defense which it would have been competent for them to have made in the original action if they had been parties, does not permit their raising again questions which were settled in plaintiff's favor in the original action.

2. An agent with full power to sell and convey, but who, without fraud, exceeds his authority, and accepts bonds instead of money in payment, is liable only for the market value of the lands, though a greater price is recited in the deed; this being fictitious, and obtained only by reason of the agreement to accept in payment the bonds of doubtful value.

Appeal from court of common pleas, Westmoreland county.

Action by John T. Paul, administrator of Sarah Paul, deceased, and others, against Simon H. Grimm, administrator of James L. Thompson, deceased, and others. Judgment for plaintiffs. Defendants appeal. Reversed.

Williams, Sloan & Griffith, for appellants. John F. Wentling, David A. Miller, and Edward B. McCormick, for appellees.

FELL, J. Upon the trial of a scire facias to charge the land in the possession of the heirs of a decedent with a debt for which judgment has been obtained against the administrator, the defendants may make any defense which it would have been competent for them to have made in the original action if they had been parties thereto. The judgment, while conclusive as to the personal estate, as to the real estate is prima facie evidence, only, and the plaintiff's claim is open to contest on original grounds. This rule is founded on the construction given to section 34 of the act of February 24, 1834; and, while somewhat anomalous, it has been firmly established by the decision in *Sergeant's Heirs v. Ewing*, 36 Pa. St. 156, and the line of cases on which it rests, and it does not seem to have been seriously disputed at the trial. The defense offered was mainly a denial of liability for the acceptance by the decedent of bonds instead of money in payment for land which he had sold as agent. This question

had been definitely settled in favor of the plaintiffs by the decision of this court in *Paul v. Grimm*, reported in 165 Pa. St. 139, 30 Atl. 721, and was no longer open. The right to contest the plaintiffs' claim notwithstanding the judgment against the administrator was the right to contest it on valid grounds, and all testimony intended to raise again questions which had been decided adversely to the defendants was properly excluded.

The defendants, however, were denied one ground of defense which it was competent for them to make, as affecting the measure of damages. An offer was made to prove that the land conveyed was not worth \$40 per acre; that there was no market for it at the time; that the price was fictitious, and much more than the property was worth; and that it was not intended that the sale was for the consideration mentioned in the deed, payable in lawful money. The language of the offer is not clear, its purpose was not stated, it was made in connection with other offers of testimony which were properly rejected, and the learned judge, in his desire to follow strictly the rulings of this court, doubtless overlooked the effect of the offer, and regarded it as part and parcel of the attempt to reopen a question which had been settled. In the interest of justice, we should not now give it a too strict construction, and it may fairly be considered as raising the question of the extent of the liability of the agent for exceeding his authority. That question was not passed upon at the first trial, and was not considered in the decision in *Paul v. Grimm*, supra, in which the construction to be given the power of attorney was determined. If the agent sold the land for \$40 per acre, and accepted bonds instead of money in payment, the measure of his liability is the price for which he sold. If, however, it should appear that the price named in the deed was not the real price, but was fictitious; that the sale was not made, and could not have been made, for that price in money; that the price was in excess of the market value, and was obtained only by reason of the agreement to accept in payment securities of doubtful value,—then the recovery against the defendants should be limited to the market value of the land. This would be the measure of the actual loss of the plaintiffs. Their land was sold by an agent with full power to sell and convey, but who, without fraud, exceeded his authority, and accepted bonds instead of money in payment. If they are now paid the full market value of the land at the time, with interest, they are made whole.

We see no other error in the case. It was competent for the defendants to show ratification with knowledge, but there was no sufficient evidence on the subject to justify its submission to the jury. It does not appear from the record of the trial, or from the argument, why the testimony of R. C. McCurdy was withdrawn from the jury, and we cannot pass upon the assignment based upon

the order striking it out. If offered to show what the real transaction was, it was competent. The seventh assignment of error is sustained, and the judgment is reversed with a venire facias de novo.

(183 Pa. St. 547)

HENDERSON et al. v. FERRELL et al.
(Supreme Court of Pennsylvania. Jan. 3, 1898.)

LEASE—FORFEITURE—NOTICE.

1. A lessee of land for oil and gas purposes, required by his lease to commence operations on the premises within 30 days, on penalty of the lease being void, does not forfeit his rights if on the last day of the period allowed he in good faith enters and commences operations on the premises preparatory to drilling a well, and is prevented by the lessor from proceeding therewith.

2. Assignees of one who takes a lease with knowledge of a prior lease, and of the facts on which depends the question of forfeiture thereof have no greater rights against the prior lessee than their assignor.

Appeal from court of common pleas, Washington county.

Ejectment by T. O. Henderson and others against Thomas Ferrell and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

R. W. Cummins, David Sterrett, and Chas. C. Sterrett, for appellants. Andrew M. Linn and T. F. Birch, for appellees.

McCOLLUM, J. On the 4th of February, 1896, Albert Behling, being then the owner of the land in suit, leased the same to Alexander Adams, "for the purpose and with the exclusive right of drilling and operating for petroleum and gas." By the terms of the lease, the lessee was required to commence operations on the premises within 30 days from the date thereof, and, on his failure to do so, the lease was to be considered by the parties as "null and void." On the 24th of February, 1896, Adams assigned a half interest in the lease to Henderson. Nothing was done on the premises by the lessees, or by their direction, until the 5th of March, that being the last day of the period allowed by the lease within which to commence operation. On that day, Henderson drove a stake near the center of the lot, to indicate the location of the proposed well, and the point at which the lumber required in the performance of the work called for by the lease should be deposited. In the afternoon of the same day, and while an employé of the lessees was unloading some lumber upon the lot, in accordance with their instructions, he was met by the lessor, who denied that they had any right to put it there. The ground of the denial was that the time allowed for the commencement of operations expired in the forenoon of that day. The lessor was accompanied by a number of persons, who appeared to be in accord with his manifest purpose to prevent the unloading of the lumber

upon the lot and the occupancy of it by the lessees or their workmen. The lessor's insistence that the lumber should not be deposited on the lot resulted in the unloading of the balance of it by the roadside, and in his removal from the lot of the lumber unloaded there. It may be stated in this connection that the stake driven by Henderson as above described had been taken up and carried away by the lessor or some member of his family before any lumber was unloaded upon the lot, and that the lessees were not present when the stake or lumber was removed, or when their employé was forbidden to deposit the lumber where they had directed him to.

The lessees had a clear right to enter and commence operations upon the lot on the 5th of March, and if they did so in good faith, and with a purpose to continue the work in accordance with the provisions of the lease, the resistance of the lessor to their occupancy of the lot furnished no warrant for a forfeiture of the lease. This was the view that was taken of the lessor's action by the learned court below, and which the lessor contests on this appeal.

As the entry of the lessees upon the lot was before the time allowed for the commencement of operations under the lease had expired, it was *prima facie*, at least, a lawful entry, and the lessor's action was apparently an unlawful interference with it. It would seem, therefore, that the burden was on him to show conduct on their part which justified his action. But the lessees did not rest their suit for the possession of the lot on a bare presumption. They alleged and introduced evidence to prove that their entry was made in good faith, and with a determination on their part to prosecute with due diligence the work they were authorized by the lease to do. The evidence submitted by them showed the obstructions in the way of an earlier commencement of operations, and the efforts they made to secure the materials, machinery, and labor necessary to the proper performance of the work. It also showed that, when they commenced operations on the lot, they intended and were prepared to continue them, and that their failure to do so was caused by the refusal of the lessor to allow them to proceed. It is true that the defendants introduced evidence inconsistent with and tending to discredit the evidence to which we have referred; but this would not have justified a peremptory instruction from the court to the jury to find for the defendants. Certainly, the court could not say that the lessees had forfeited their right under the lease to enter and commence operations upon the lot when they did, or that their entry was a mere bluff, and they did not intend to comply with the provisions of the lease. Whether they commenced operations in good faith, and whether they intended to proceed with due diligence, were questions for the jury, and so was the question whether their failure to continue them was caused by the

action of the lessor. These questions were submitted to the jury in a clear and impartial charge, and the result was a verdict based on a finding of facts in accord with the lessees' contention. In other words, it is established by a verdict authorized by the evidence that the lessees entered and commenced operations upon the lot in good faith, and that they were prevented from continuing them by the unlawful interference of their lessor.

The defendants claim under a lease from Behling to Adam A. Welsh, dated March 28, 1896. Welsh saw and examined the Adams lease before he closed his contract with Behling, and, according to the testimony of the latter, was told by him about the occurrences on the 5th of March, and that he would have to be responsible for the lease Adams had. On the 24th of April, Welsh sold and assigned his interest in the lease of March 26th to Gilmor, who on the same day assigned a half interest in it to the Forest Oil Company. The defendants therefore have, as against the plaintiffs, the rights which Welsh acquired by his lease, and nothing more.

We discover no error in the rulings complained of in the first and second assignments, or in the excerpts from the charge on which the third, fourth, and fifth assignments were based; nor do we think that the defendants have any cause to complain of the answers to their second and fourth points. We are clearly of the opinion that, upon the facts established by the verdict, the action of ejectment is maintainable. The assignments are overruled, and the judgment is affirmed.

(184 Pa. St. 34)

STOBERT v. SMITH.

(Supreme Court of Pennsylvania. Jan. 8, 1898.)

COMMITTEE OF LUNATIC—POWERS—DISCONTINUANCE OF ACTION.

Pending an action to set aside a deed given by complainant to defendant for fraud, undue influence, nondelivery, etc., complainant was adjudged a lunatic, and a committee was appointed, and substituted as complainant. *Held*, that such committee had no authority to discontinue the suit on the death of the original complainant, his interest having passed to his devisee or heirs, and the committee's authority ending with his death.

Appeal from court of common pleas, Allegheny county.

Action by John Stobert against James M. Smith. From a judgment in favor of plaintiff, defendant appeals. Reversed.

R. A. Kennedy, for appellant. David Smith, for appellee.

MITCHELL, J. This is an action for the purchase money of land, and the defense is that plaintiff's title is not marketable. The case stated shows the facts to be briefly these: One Latham conveyed the land, in 1880, to his stepson, the plaintiff, who in turn conveyed to his mother, Latham's wife,

and she, dying, devised it to plaintiff in remainder after a life estate to Latham. In 1890, after his wife's death, Latham filed a bill to set aside the deed of 1880 to plaintiff on the grounds of fraud, undue influence, nondelivery, etc. Pending this bill, proceedings in lunacy resulted in a finding that Latham had been a lunatic from January, 1892. This finding was traversed, but before the traverse was filed a committee was appointed, and substituted as complainant in the bill in equity. Some testimony was then taken in the equity case, but both it and the lunacy proceedings were pending and undetermined, when, in November, 1893, Latham died, leaving a will dated in March, 1892, by which he devised his whole estate to a Mrs. Moore. In 1896 the master filed the testimony in the equity suit (but no report), the committee discontinued the suit of record, and on payment of costs, etc., the court formally approved the discontinuance. The objections of the appellant to the title are that neither the committee nor the attorney had any authority to discontinue the suit after the death of their principal, and that such discontinuance is not a bar to the devisee or heirs at law of Latham to have the suit reinstated, or to bring a new one for the same cause of action. The case stated then proceeds that, if the court shall be of opinion that the discontinuance was properly made, and that the plaintiff can, in so far as the said equity suit affects his title, convey to defendant a fee simple, etc., then judgment for plaintiff; but if the court shall be of opinion that the "said discontinuance was improperly entered, and therefore plaintiff's title is not a good marketable title," etc., then judgment for defendant. In thus submitting to the court an alternative judgment, turning merely on the validity of the discontinuance, the case stated is defective, because it bases the judgment on an inconclusive fact. A discontinuance, rightly or wrongly entered, even if entered by Latham himself in his lifetime, would not be a bar to a second action for the same cause by him or his successor in title, and defendant is not, and cannot be, put in the position of a purchaser without notice. But as it is very clear that the discontinuance was without authority, we are enabled, notwithstanding the defect, to enter judgment. The bill was an assertion by Latham that the title was still in himself, notwithstanding his conveyance, and his committee prosecuted the suit only in his right, and for his benefit. When he died, the authority of the committee ended, and Latham's title, whatever it was, passed to his devisee, if his will was valid, or otherwise to his heirs at law. In neither case had the committee any title or right to control the assertion of the title which had been in Latham. The bill was, in substance, an ejectment, and the right of a personal representative to bring or prosecute an ejectment must depend on special circumstances, such as a direction to sell,

etc. *Cornell v. Green*, 10 Serg. & R. 14; *Kirk v. Carr*, 54 Pa. St. 285. Whether the discontinuance of the equity suit, however, was rightly or wrongly entered, the title of plaintiff is still liable to appellant's objection that, at least as to a purchaser with notice, it is open to litigation on the subject-matter of the bill, and therefore is not marketable in the sense that the case stated calls for. Judgment reversed, and judgment directed to be entered for the defendant.

(183 Pa. St. 593)

HEMPHILL v. PRY et al.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

LIMITATIONS—RUNNING OF STATUTE—PAYMENT OF INTEREST—EXECUTOR—MORTGAGE TO SECURE DEBTS OF DECEDENT—VALIDITY.

1. A testator directed that all his debts be paid as soon after his decease as possible, and that all his property be sold, and converted into money; and he granted his executors five years in which to make sale of his "estate as aforesaid." *Held*, that there was no express trust to sell for payment of debts, and hence such provision in the will did not prevent limitations from running against testator's debts during such five years.

2. Even if such provision created an express trust to sell for payment of debts, it did not affect the operation of the statute, where the power to sell was not exercised within the five years limited by the will.

3. A mortgage by an executor to secure notes of the testator not under seal, pursuant to an order of the orphans' court, made nearly nine years after testator's death, and more than six years after such notes became due, did not affect the title of one who purchased the interest of two of the minor heirs after the notes were *prima facie* barred, and after a testamentary power of sale to pay debts, given the executor, had expired, though the executor had kept the interest paid on the notes; especially where such minors did not expressly assent to the payment of such interest.

4. But such mortgage was valid against adult parties who assented to keeping the notes alive by payment of interest.

Appeal from court of common pleas, Washington county.

Scire facias on a mortgage by John Hemphill against D. M. Pry, executor of the estate of J. T. Fredericks, deceased. Pending the action, W. H. Fredericks, Sarah A. Marks, and W. J. Fredericks were allowed to intervene as defendants. From a judgment in favor of plaintiff, defendants appeal. Reversed as to defendant W. H. Fredericks.

M. L. A. & B. E. McCracken and Young & Trent, for appellants. H. M. Dougan, for appellee.

MITCHELL, J. The practice of orphans' courts in ordering sale or mortgage of the real estate of decedents for payment of debts, years after death, and after the usual statutory period of limitations has run, appears to have become very loose, and is in need of revision, and greater caution for the preservation of the rights of heirs and devisees. The learned court below, in their

opinion on the question reserved at the first trial, expressed the very proper view that the better practice would be to have all the jurisdictional facts appear at large on the petition for the order of sale. But even this is not always enough. The statute unfortunately does not require notice to the widow and heirs or devisees, as it ought to do; but the orphans' court is a court of equity, and when the lapse of time or other circumstances in the case raise a reasonable presumption that other rights may have intervened, it is always the duty of a chancellor, even of his own motion, to be satisfied that such rights shall not be prejudiced without notice and an opportunity of hearing. In the absence of such opportunity, the proceedings will be closely scanned, to see that they conform strictly in all respects to the law. In the present case the order to mortgage was made nearly nine years after decedent's death, and more than six years after the notes which it was to secure had become due. *Prima facie*, therefore, the notes were barred by the statute of limitations, and their statutory lien as debts of the decedent upon his real estate had expired. This was the situation when the appellant W. H. Fredericks purchased the interest of two of the heirs. What was there to prevent his acquiring a clear title? It is said that there was a direction by the testator to sell for the payment of debts, and this took the case out of the statute. But the direction was the usual formal one that all his "honest debts be paid as soon after [his] decease as possible," and the further direction to sell was "that all my real and personal property be sold, and converted into money. * * * I hereby grant unto my executors the term of five years in which to make sale of my estate as aforesaid." There was here no express trust to sell for the payment of debts. The power to sell was for the general purposes of the will, and was, moreover, in express terms limited to five years, which had expired before this mortgage was made. But it is further said that the running of the statute of limitations against the notes had been prevented by the payment of interest on them by the executor, with the assent of the widow and heirs. This is the only ground on which the judgment can be sustained, and, so far as the evidence justified the verdict, it was entirely sound. The law was correctly stated by the learned court, in their opinion on the question reserved at the first trial, that "the jury should have been instructed that if the notes of Margaret Hemphill were not under seal, and were overdue six years before the mortgage given, that the mortgage was invalid as against the intervening defendants, unless the interest was kept paid upon the notes after the death of J. T. Fredericks, either by them or by the executor with their knowledge and consent, to within six years of the date when the mort-

gage was given, or unless something was done by them that would stop the running of the statute as against the collection of Mrs. Hemphill's notes, or stop them from calling in question the validity of the mortgage." The mortgage was clearly valid against parties assenting to keeping the notes alive by payment of interest, but on the second trial the court unfortunately overlooked the fact that two of the sons were minors at the time of such payments, and could give no assent which would bind them. When they sold to a purchaser,—the appellant,—they disaffirmed any assent they may have given during infancy, and, as already shown, the statute of limitations had already apparently run against the notes, the statutory period of lien of debts had expired, and so also had the testamentary power of sale given to the executor. Whether or not, under these circumstances, a purchaser would be bound by a secret lien, under the rule that a purchaser from an heir takes only such interest as the heir may ultimately be shown to have, it is clear that he would not be so bound unless his grantor would also. As already said, the two grantors of appellant W. H. Fredericks were minors at the time, and we have examined the testimony carefully without finding anything to show that they even expressly consented, much less that they had a guardian to advise and care for their interests. There was, therefore, no sufficient evidence to justify the submission to the jury of the question of assent as against them or their grantee. Judgment reversed as to appellant W. H. Fredericks.

(124 Pa. St. 202)

SWINT et al. v. McCALMONT OIL CO.
(Supreme Court of Pennsylvania. Jan. 3,
1898.)

**LANDLORD AND TENANT—OIL LEASES—ACTION FOR
ROYALTIES—DEFENSES.**

1. The owner of a farm made leases for oil purposes, reserving as royalty one-eighth of the oil produced. His son, who was of full age, and living on the farm with his father, was joined with the latter as a co-lessor. The oil reserved as royalty was delivered to the father and his vendees. *Held*, in an action by the son against the lessees to recover one-half the royalties, that defendant might show the circumstances under which plaintiff signed the leases, not to deny his landlord's title, but to deny that, as to the son, the leases created that relation.

2. All the royalties accrued up to the time suit was brought had been paid to the father or his assigns, with the knowledge of the son, and without protest, or notice from him of his individual claim. *Held*, that even if the leases were intended to be joint, though the title was in the father only, the remedy of the son was against those receiving the royalties, and not against the lessees.

3. The assignment by the father of his interest in the royalties did not amount to a severance on which the rent was apportioned as matter of law, so that the son had a right to recover one-half of the royalties, notwithstanding the payment of them to the father or his assigns.

Appeal from court of common pleas, Allegheny county.

Action by Peter Swint and J. E. Swint, for the use of J. E. Swint, against the McCalmont Oil Company, to recover royalties alleged to be due the use plaintiff on certain oil leases. From a judgment for defendant, plaintiffs appeal. Affirmed.

James T. Buchanan and J. L. Ritchey, for appellants. A. Leo. Weil and Chas. M. Thorp, for appellee.

WILLIAMS, J. Peter Swint was the owner in fee simple of a farm in Allegheny county, containing about 120 acres. J. E. Swint was his son. In 1885 he was of full age, and living with his father on the farm. It is alleged by him that he was associated with his father in the cultivation of the soil under some sort of verbal agreement, but no distinct contract between them is shown. In 1885, Peter Swint made a lease for oil purposes of part of his farm to Hunter. Two years later, he leased the whole farm, subject to the prior lease of Park to H. H. Locke. For some reason not distinctly shown by the evidence, J. E. Swint, the son, was joined with his father as a co-lessor in both leases. The royalty reserved in the leases was one-eighth part of the oil produced, which was to be delivered to the lessor in the pipe lines of the company transporting the oil from the wells. It appeared that the lessees delivered the oil in the pipe line for the royalty to the lessors, and that the father, the owner of the land, and his vendees after him, have taken possession of the entire one-eighth of the oil so delivered as royalty, and receipted to the lessees therefor. It further appears that J. E. Swint gave no notice, prior to the bringing of this suit, of his claim to have one-half of the royalty paid to him, or of any objection on his part to the payment of the whole royalty to his co-lessor. In this action he now seeks to recover one-half of the royalties, regardless of the fact that they have been paid to the holder of his father's title, and without objection on his part.

The first question arising upon these facts is: May the lessee show the circumstances under which the plaintiff signed the leases, as a reply to his demand for one-half of the rent reserved? This would not amount to a denial of the landlord's title, but to a denial that, as to the son, the lease created that relation. If he signed as a subscribing witness, but put his name in the wrong place; if he signed to show that his father, who was old and infirm, had not been misled by the lessee, but had understood the nature and extent of the contract; or if he signed as the result of any mistake as to the necessity or effect of his signature accompanying that of his father,—there could be no good reason why the fact should not be known, and the effect given to the ex-

execution of the leases by him which was in contemplation at the time. If the lessees did not deal with him as a party in interest, they are not estopped by his or their mistake from showing the truth. On the other hand, if they treated him as interested in the surface to such an extent as to render his consent to the lease necessary, and joined him as a co-lessor for that reason, they would fall under the rule which he invokes, and would not be allowed to deny his title. The question about the division of the rent would then be for the co-lessors to settle between themselves, and it would not interest the lessees until after notice from one or both of the joint claimants demanding a specific part of the rent which had been jointly reserved.

But if we assume that the lease was intended to be joint notwithstanding the fact that no interest in the farm is shown in the son, and that the father intended to share the royalties with him, although the title was in himself alone, we come to the next question, viz.: What and against whom is the remedy of the son upon the facts before us? The royalties reserved are payable to the co-lessors jointly. All the royalties accrued up to the time this suit was brought had been paid to the father or his assigns, with the knowledge of the son, and without protest or notice of his individual claim from him. One tenant in common cannot make a valid lease of the common property without the consent of his co-tenants. He can dispose only of his own undivided share. If, however, the co-tenants join in a lease reserving a common rent payable to the lessors jointly, either of them may receive and give a valid receipt for the entire rent until notice by one or more of the co-tenants that his share must be paid to himself. *Wood, Landl. & Ten. 125.* So, upon such a lease, the tenants in common may join in one action or in one distress for rent. *Jones v. Gundrim, 3 Watts & S. 531.* This was the rule of the common law. *Littleton* gives it thus: "If two tenants in common make a lease of their tenement to one for a term of years, reserving rent, and the rent be in arrears, the tenants in common shall have an action of debt against the lessee, and not diverse actions, for that the action is in personality." *Co. Litt. Per. § 316.* In *Powis v. Smith, 5 Barn. & Ald. 851*, the rule is stated in these words: "It is clear that, if there be a joint lease by two tenants in common, the two may join in an action for rent; but, if there be a separate reservation to each, then there must be separate actions." When there has been a joint reservation of rent, and rent has been paid without objection to one of the persons jointly entitled to receive it, the demand for rent is satisfied. Its division among those entitled, as between themselves, to share in it, must be settled by some appropriate action to secure

an account from the party actually receiving it. This, in the case of two persons jointly entitled to receive the rent, may be account render, and under some circumstances assumpsit. *Gillis v. M'Kinney, 6 Watts & S. 78.* Since the demand made by this action, the questions just considered will have no place. The plaintiff is in the position of demanding one-half of the rent or royalty reserved, and requiring its payment to him. The receipt of his co-lessor will therefore bind him no longer; but, if he is legally entitled to share in the rent, he must be separately dealt with in its payment. This question cannot be settled on this record.

It is suggested that the assignment by the father of his interest in the royalties amounted to a severance, upon which the rent was apportioned, as matter of law, so that the plaintiff had a right to recover one-half of the rent notwithstanding the payment of it to the co-lessor or his assigns. But we do not see that there is room for the doctrine of apportionment in this case. "Apportionment" is defined as "a division or partition of a rent or common, or a making of it into parts." This may be by the act of the law or the act of the parties. If freehold and leasehold premises are demised at an entire rent, upon the death of the lessor the rent must be apportioned as matter of law, since the freehold goes to his heirs, and the leasehold to his personal representatives. If the lessor of premises demised at an entire rent sells a portion of the demised premises to another, an apportionment is made necessary by the act of the lessor. But, under the evidence in this case, there was no division of the rent into parts as a result of the transfer by the father of all his right and interest in the royalties reserved to another. This transfer did not affect the son. It did not part the rent. The assignee became a tenant in common in the rent with the son, just exactly as the father had been before the assignment was made. There was no severance of the demised premises. The relation of the lessee to the lessor was not changed. There was therefore no reason in law, and none arising from the act of the parties, for an apportionment of the rent in this case. If the father had sold a part of the reversion to a stranger, his right to an apportionment of rent would have attached the instant the sale was made to him. *Linton v. Hart, 25 Pa. St. 193.* And the landlord who thus sells part of the demised premises to another will not be liable for the trespasses of his vendee, nor forfeit his right to his share of the rent because of an ouster of the tenant by his vendee from such part of the demised premises as passed to the vendee. *Reed v. Ward, 22 Pa. St. 144.* This is because, after the apportionment, the respective rights of vendor and vendee are separate and distinct. In the case before us the reversion was not

divided; the leasehold was not divided; the right of neither of the co-lessors was divided. There was therefore no party in a position to claim an apportionment of the rent, and the allotment of any specific portion thereof to himself, and for that reason the doctrine of apportionment has no place in this controversy. The lease, in the best view of it for the plaintiff, is a joint lease by the tenants in common for an entire rent. Either of the co-lessors could assign his interest in the lease without affecting in the slightest degree the rights or remedies of the other. The judgment is affirmed.

(128 Pa. St. 462)

BRADEN v. FIRST NAT. BANK OF CLARION.

(Supreme Court of Pennsylvania. Jan. 8, 1898.)

FRAUDULENT CONVEYANCES—JUDGMENT BY CONFESSION—PREFERENCE—CONTINGENT LIABILITIES—EXECUTION SALE—VALIDITY.

1. A judgment confessed by an insolvent to secure a bona fide creditor, though it be intended to, and has the effect of, giving him a preference over other creditors, is not fraudulent in law.

2. A judgment confessed by an insolvent is not fraudulent in law because the amount inserted is sufficient to cover the debtor's contingent liability on indorsements as well as his actual indebtedness.

3. A portion of the creditors of a lumber manufacturer agreed between them to buy at a sheriff's sale so much of the debtor's logs and other property as was practicable, manufacture the logs into boards, sell for the best price they could get, and divide the net proceeds. *Held*, that the agreement was not fraudulent so as to invalidate the sale.

Appeal from court of common pleas, Clarion county.

Bill of discovery by A. P. Braden against W. W. O'Neill, Jr., and others, in which a verdict was directed by the court against defendants the First National Bank of Clarion and Rachel R. Pollard, which verdict was afterwards set aside as to defendant Pollard. From a judgment on the verdict against defendant bank, it appeals. Reversed.

C. Heydrick, W. A. Hindman, W. H. Hockman, Harry R. Wilson, and C. Z. Gordon, for appellant. Geo. F. Whitmer, B. J. Reid, F. J. Maffett, and G. A. Jenks, for appellee.

WILLIAMS, J. The verdict in this case was directed by the court as against the appellant bank and Rachel R. Pollard. Upon a motion for a new trial this verdict was set aside as to Rachel Pollard, and a new trial granted, but the motion was refused so far as appellant was concerned, and judgment entered on the verdict. Our question is not whether the defendants stood on substantially the same ground, but whether the reasons for directing judgment on the verdict are tenable. The facts are these: W. W. O'Neill was engaged in the manufacture and sale of lumber in Clarion county, and was in possession of a consider-

able amount of property. On the 18th day of April, 1893, his affairs were not in a prosperous condition, and he was very sick in the city of Pittsburg. His principal creditors, and those whom he desired particularly to secure, were his mother-in-law, Mrs. Pollard, and the First National Bank of Clarion. He was indebted to the bank in the sum of \$7,245.75 upon notes made by him, and discounted for his credit, and in the sum of \$6,754.77 upon notes indorsed by him, and largely, if not wholly, discounted for him, and at his request. To secure the bank, he executed a judgment note in its favor for the sum of \$12,500, and sent it to the bank. The bank entered judgment upon it in Clarion county, and at once issued a writ of fieri facias upon it, and levied upon the goods of O'Neill. The learned judge of the court below held this to be a legal fraud, and the judgment in this action was entered against the bank upon the theory that the money raised by the sheriff's sale upon this judgment was subject to attachment by other creditors of O'Neill, as his money in the hands of the bank. This is made to appear by the answers to the points submitted by the defendant. Its second point asked an instruction that "a judgment confessed by an insolvent man to secure a bona fide creditor, whether contingent or otherwise, even though it be intended to and has the effect of giving him a preference over other creditors, is not fraudulent in law or in fact." This was answered, "Refused." We think the answer should have been substantially: "Such a confession of judgment is not a fraud in law. Whether it is a fraud in fact or not must depend on the attending circumstances." The answer made by the learned judge must have rested on one of two reasons: Either he regarded the preference resulting from the confession of the judgment a fraud upon other creditors, or that the making of the note large enough to cover, as the debtor supposed and intended, his indorsements as well as his own notes, was a fraud in law, and rendered the note void for all purposes. Something like the first of these positions was held in *Ashmead v. Hean*, 13 Pa. St. 583. An insolvent debtor made a conveyance of real estate to a bona fide creditor, and for full value. The conveyance was held void because both parties knew that its effect must be to give the vendee the preference, and so to delay other creditors, and this was the purpose of the vendee in insisting on the conveyance. But this case was promptly overruled in *Uhler v. Maulfair*, 23 Pa. St. 481, where the proposition was distinctly stated that, "so long as a debtor is the owner of real estate, he may prefer one creditor to another, either by judgment or by conveyance for a fair price." And why not? If the debtor does not convey or incur his real estate, the law will. The most vigilant creditor will secure the first lien, although it is clear that others may be hindered and delayed, or wholly defeated, in consequence. If, instead of obtaining his judgment through an action at law, the creditor is able to secure a confession of

judgment by his debtor, the result is precisely the same. In either case his purpose is to secure himself first, if that is possible, regardless of the effect that may follow as to others who are behind him. Since *Uhler v. Maulfair*, supra, this has been the settled law of this state. *Wilson v. Berg*, 88 Pa. St. 107; *Banking Co. v. Fuller*, 110 Pa. St. 156, 1 Atl. 731; *Werner v. Zierfuss*, 162 Pa. St. 360, 29 Atl. 737.

The other question remains: Was the note rendered invalid by the circumstance that it was made large enough to cover, or nearly so, the contingent liabilities of O'Neil to the bank, growing out of his indorsements? It is not alleged that the giving of the note was the result of a conference between the parties. It was the act of O'Neil, done in view of his financial condition at the time. There is no reason for imputing to him, therefore, a fraudulent motive in making the note, or for imputing such motive to the officers of the bank in accepting and using it. The question is, did the fact that the amount inserted in the note was intended to be large enough to cover both his actual and his contingent liabilities to the bank render it void in toto? In questions of distribution of assigned estates it often becomes necessary to inquire when the right of action in a claimant vested, or when his debt became an absolute indebtedness of the assignor or insolvent; but that question does not arise here. The question comes down to this: Can a debtor secure his friend against a contingent liability? We answer this question in the affirmative. This has been held as to bail. *Davis v. Charles*, 8 Pa. St. 82. I am not aware that the question has arisen upon just the circumstances presented in this case, but the general proposition that an indorser is contingently liable to the holder of the note, and that he may secure the holder by the delivery of collaterals, or by a confession of judgment, is recognized in many cases. The holder is not entitled to collect his debt from the indorser, who is primarily liable to him, and then collect it over again from the maker. The payment by either extinguishes the debt. If the maker pays, the indorser's liability to the bank is correspondingly reduced, and the judgment so far satisfied.

The court below also held that an agreement between a portion of the creditors of O'Neil by which it was agreed to buy at the sheriff's sale so much of the logs and other property of O'Neil as was practicable, manufacture the logs into boards, sell for the best price they could get, and divide the net proceeds of such sales, was fraudulent. This combination only embraced a portion of the creditors. It did not look to preventing competition at the sale, or to depressing the price. It was an attempt to make the goods, if bought by any member of the combination, bring the most money possible, to apply upon their debts, by adding to the value of the logs the profit of their manufacture into boards. This was not necessarily fraudulent. *Young v. Snyder*, 3 Grant, Cas. 151. There must be actual fraud, such as a

combination to purchase at an undervaluation, or to discourage bidding by others, to justify setting aside the sale, or treating it as a nullity. *Dick v. Cooper*, 24 Pa. St. 217. The cases cited in support of the judgment of the court below are not in point. *Oyster v. Short*, 177 Pa. St. 601, 35 Atl. 711, was the case of an assigned estate, and the question raised was one of distribution between claimants on the fund in the hands of the assignee. *Brough's Estate*, 71 Pa. St. 460, also arose on the distribution of an insolvent estate. The question in both cases was at what time the right of certain claimants to share in the fund matured. These cases throw no light upon the questions raised here.

On a consideration of the several assignments of error we sustain the second, third, and fourth. We incline also to sustain the first, as we see no evidence in the case that should justify the jury in finding fraud in fact; and, as the circumstances did not amount to fraud in law, there was, therefore, really nothing to submit to the jury upon this question. The judgment is reversed, and a venire de novo awarded.

(163 Pa. St. 469)

OLINGER v. SHULTZ et al.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

RESULTING TRUSTS—SUFFICIENCY OF EVIDENCE—LIMITATIONS.

1. In ejectment against a wife, it appeared that in 1835 the land was deeded to her husband, and afterwards was sold under execution against him to plaintiffs, who had notice of her equities. The deed to the husband was executed by the grantor with a blank for the name of the grantee, and the grantor's agent by mistake inserted the name of defendant's husband. She did not learn that the deed was not in her name until 1890. The husband gave his note for part of the price, leased the land in his own name, and recovered a verdict against a coal company for damages to the surface. The testimony that the whole price was paid by and for the wife was clear. Held sufficient to establish a resulting trust in favor of the wife.

2. Where the wife demanded a deed from the husband as soon as she knew the property stood in his name, and he promised to give it, a delay for over two years was not enough to bring the statute of limitations into operation.

Appeal from court of common pleas, Somerset county.

Ejectment by J. M. Olinger against Peter Shultz and Susan Mognet, to recover land conveyed in 1835 to the husband of defendant Mognet, and sold under execution against him to plaintiff. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Koontz & Ogle and Coffroth & Ruppel, for appellant. Kooser & Kooser and Wm. J. Baer, for appellees.

GREEN, J. In this case the action is ejectment, brought by a purchaser at a sheriff's sale, with full notice of the defendant's title. He was not an innocent purchaser, for value, of the title of Joseph G. Mognet, as it appeared

on the record, and without notice of any trust or adverse title, and cannot set up any title as such. He was not even a judgment creditor of Mognet. He occupies, therefore, the position of one who purchases with full notice of a title by means of a resulting trust, in opposition to an apparent legal title. He neither purchased the land nor loaned money on the faith of the apparent title. There is but little, if any, dispute about the facts. The deed for the land in controversy was filled up and executed by the grantor with a blank left for the name of the grantee. When the name was inserted Mrs. Mognet was not present, and knew nothing of what transpired. With an amount of ignorance and stupidity on the part of the person who made the purchase which seems incredible when regarded in the light of a past occurrence, no direction was given as to whose name was to be inserted as the grantee, and the deed was not examined. It was left with the agent of the seller, who left it at the office of the recorder of deeds, where the person who made the purchase afterwards found it, but says he never looked at it. The name of the husband was inserted instead of that of the wife, and thus has arisen the present controversy. It is the case of an alleged resulting trust in favor of a wife against her husband, in whose name the legal title was taken. The basis of the trust is the claim that the land, a farm of 142 acres, was purchased by the father of Mrs. Mognet for her; that he paid the whole of the down money, which was \$2,000, at the time the deed was delivered; and that all the subsequent payments were made with money of the wife and proceeds derived from the land. There is really but one question in the case, to wit, was the evidence sufficient to establish such a resulting trust? The rule of law in this class of cases, as established by numerous decisions of this court, is without any doubt or question. The evidence in support of the trust must be clear, precise, convincing, and satisfactory. It is not enough that it satisfies the jury. It must also satisfy the mind and conscience of the court, sitting as a chancellor reviewing the testimony; and if it fails in this respect the evidence must be withdrawn from the jury. *Reno v. Moss*, 120 Pa. St. 49, 13 Atl. 718; *Hess v. Calender*, 120 Pa. St. 138, 13 Atl. 720; *Hoover v. Hoover*, 129 Pa. St. 201, 19 Atl. 854; *Silliman v. Haas*, 151 Pa. St. 53, 25 Atl. 72; *In re Lau's Estate*, 176 Pa. St. 100, 34 Atl. 969; *Fowler v. Webster*, 180 Pa. St. 610, 37 Atl. 102; *Gilchrist v. Brown*, 165 Pa. St. 275, 30 Atl. 839; *Way v. Hooton*, 156 Pa. St. 8, 26 Atl. 784; and many other cases. It is manifest, therefore, that it is necessary only to examine the testimony with care, in order to determine whether it is within the requirements of our decisions.

Peter Shultz being a mere tenant, the real defendant is Susan Mognet, the wife of Joseph G. Mognet, both of whom are still living. As before remarked, there is scarcely any controversy as to the facts. The defendant's contention is that her father, Samuel P. Miller,

bought the farm in dispute for her, and directed his son Joseph S. Miller to make the purchase. There is no pretense, nor any proof, that the land was bought by the husband, Joseph G. Mognet. The son, Joseph S. Miller, testified that he bought the land for his sister, the defendant, at the instance of his father. He was asked: "Q. State what you came to Somerset for,—what you were directed to come for by your father. A. Well, to buy this farm—to buy a farm from Judge Baer, agent for George F. Baer—for Susan Mognet, his daughter. I bought the farm. A deed was made for that farm by George Baer. Q. Where did you get the deed? A. In the recorder's office. Q. Did you ever see the deed before it was recorded? A. I might have seen it, but I never looked at it. * * * After it was recorded, when did you next see the deed? A. I don't know how long after he had that deed at the recorder's office. I took it along home, and put it in my own safe. * * * Q. How long did you keep this deed in your safe after you had put it there? A. That is more than I can tell you. It was there a couple of years,—two, or three, or four. Q. Was Susan Mognet present when you bought this farm? A. No. Q. Was Susan Mognet present when you handed the deed to be taken to the recorder? A. No, sir. Q. Did she see the deed during the period it was in your safe? A. I know she did not. Q. When did you know that the deed was made in the name of J. G. Mognet? A. That is more than I can tell you. I never looked at the deed,—how it was made. Q. Tell us what you know of the payment of the purchase money of that farm. A. I paid the first payment,—the down money, \$2,000, and the first payment \$700. I paid so much money, and the balance had to be made off the farm for the first payment. Q. Where did you get the \$2,000 hand money? A. From my father. Q. For whom did you pay it? A. For Susan Mognet. Q. How much cash did you pay on the first payment? A. It was \$535. Q. How was the balance of the first payment made? A. That was made off the farm,—rent. Q. Who paid the rent? A. Sam. Ringler. He had leased the farm before I bought it. He had leased it at the time I bought it. Q. How much was that? A. Something like \$100 and something. Q. Have you any memorandum of it? A. Not of that. The balance was fixed up by the rent, and that way the \$750 was made up. I got the \$535 from my father, and paid it for Susan Mognet. Q. Did your father pay any more in his lifetime? A. That was the end while he was living. After his death he left a will. I was one of the executors. Q. Now, will you state what moneys you paid, if any, on this farm as executor of your father? A. I paid the balance to Mrs. Mognet. Q. Can you state what sums you paid her, and when? A. Yes, sir; the first distribution I paid \$1,269.41. That was January 14, 1891. Q. Did you not make two payments after the first payment before your father's death? A. I only made one payment. In 1885 I paid the down money and I

1886 I paid the \$750. Q. What year did your father die? A. In 1888. Q. Proceed. A. The last distribution I paid her \$829.67 March 17, 1893. Q. You paid her by these checks? A. That check and this receipt." After stating that he paid his sister all the money that was coming to her from her father's estate, except what his brother, who was a co-executor, paid her, he was asked, on cross-examination: "Q. How much money were you to pay for the farm? A. \$6,450. Q. \$2,000 was the hand money? A. Yes, sir. Q. And the balance in payments? A. Yes, sir. Q. How much a year? A. \$700 the first year, and the balance I don't know how many payments; and more, they were annual payments without interest." After stating that the deferred payments were secured by judgment note given by Joseph D. Mognet, and that the first payment of \$535 was made to Judge Baer by himself and the tenant, and the payment of \$1,209.41 was made partly in money and part of it in land he conveyed to her, he said that her whole interest in her father's estate was \$5,126.12, and was asked: "Q. She got in all \$5,100, and she paid of that \$816 on the property she lives on now. Then she gave you a note for \$408, and that note she paid afterwards? A. Yes, sir; after she had paid the farm." Samuel S. Miller, the co-executor, testified that he had paid her \$407.06 out of the estate. Susan Mognet testified that she was not present when the deed was delivered, and had no knowledge that it was in her husband's name until in 1890; that she furnished all the money that was paid for the farm, part of which was paid by her father during his life, and more was paid out of her share of her father's estate; that \$500, being the proceeds of a sale of her personal property on the farm, was paid on the farm; that rent received from the tenant was all applied in that way. This rent was shown by the testimony of her husband to be for eight years,—the first year \$225, and the other years \$212.50 each year. Mrs. Mognet testified that money was realized each year they occupied the farm, from sales of grain, butter, and other products, all of which went to pay on the farm. All these moneys were paid to her husband, who testified that he deposited them in bank, and made the deferred payments with them, in discharge of the judgment note he had given, until all were paid. A number of checks and receipts were given in confirmation of his testimony. Joseph G. Mognet was asked: "Q. Have you any knowledge of the payment of the hand money? A. Not more than Mr. Miller paid. The payment of some of the notes, which I paid from the money Mrs. Mognet had received from her father's estate, and money she received from the sale of the implements. They were on the farm when we went there, and there was hay on the farm when we moved there. Everything required by farming was there. I bought nothing. Q. What became of the money? A. That money I applied to the notes, the back payment of the farm. Q. What became of the rents? A. Them I treated the

same way, on the notes of George F. Baer for the farm. Q. Can you tell how much money you received from your wife to pay on this farm? A. Rents and money from the sale, and money as she received it from her father's estate,—from the executors,—I applied on the payment of the notes for the farm on the same day, but when a sufficient amount was collected together. Q. How did you come to pay it? A. She gave it to me to pay it. Q. How did you pay it? A. By checks to H. L. Baer, attorney for George F. Baer. Q. What did you do with the deposits? A. I put them in the Citizens' Bank of Meyersdale, and checked them out in my own name." Then follows a long statement of details of payments by the witness, accompanied by checks or receipts, which it is not necessary to repeat. It is enough to say that the whole of the purchase money was paid and the judgment taken on account was discharged in full. The last payment was made in April, 1893, with the money his wife received from Samuel S. Miller,—with that and some rent he says he paid the last \$500. He was asked: "Q. In a general way, from what sources were the several sums you have stated you paid derived? A. From the proceeds of the farm and from money Mrs. Mognet received from the estate. Q. Did you pay any portion of the hand money yourself? A. No, sir; I didn't make the transaction, nor pay any of the money. I had no part in it." He then explained how his name came to be inserted instead of his wife's. "Q. Do you know how the judgment for the unpaid purchase money came to be against you? A. I can explain that. When the deed was delivered, or when Judge Baer was at Joseph S. Miller's house, on the day of the delivery of the deed, I happened to be there. While Miller was doing something at his safe, Judge Baer just opened the deed, and said—The name was blank, the deed had already been acknowledged, and Judge Baer held the deed up to me, and said, 'What is your full name?' I saw the blank space, and he just wrote it in while Miller had his back turned, working at the safe, and was searching for the papers. Q. Did Mr. Miller see it, or not? A. No, sir."

It is manifest from this that Judge Baer supposed that the husband's name was the proper name to be inserted, and presumably he had not been informed to the contrary. So far as he was concerned, it was a clear mistake. So far as the husband was concerned, it may have been a fraud on his wife, or he may have supposed it made no difference. In either case, and on either of these suppositions, it is clear the wife could not thus be deprived of her equitable estate in the land, and would be entitled to her proper remedy to enforce her claim. The testimony delivered was sufficient to account for the whole of the purchase money. The testimony was direct and positive. It was clear, convincing, and satisfactory. There was no contradictory evidence as to the essential and controlling facts in support of the trust. The testimony satisfied the jury, who found the

verdict under correct instructions. It satisfied the court, who denied a new trial on the merits. The evidence was credible, and was believed by the court and the jury, and we know of no reason for discrediting it; and we have no disposition to disturb the verdict or the judgment. We consider the whole of the evidence sufficient to establish a resulting trust in the wife. The fact that the husband leased the land in his own name; that he brought an action, and recovered a verdict for damages to the surface, against a coal company; that he gave his personal obligation for the payment of part of the purchase money, which, however, it was testified, was paid with the wife's money,—these were all facts to be considered by the jury on the question of ownership. But they were not controlling facts. They would not necessarily, either separately or combined, suffice to destroy the wife's equitable estate. They were all susceptible of explanation, and such explanation was given. Nor do we consider there is any force in the contention that the wife's estate is barred by the statute of limitations. She testified, as did her husband, that the first knowledge she had that the deed was not in her name was in 1890, and that she immediately demanded a deed from her husband, which he promised, but procrastinated for upward of two years before he gave it to her. This period is not enough to bring the statute into operation. The authorities are abundant that the statute does not commence to run until she had knowledge of the fraud. The plaintiff is in the same situation as were the appellants in the case of *Miller v. Baker*, 160 Pa. St. 172, 23 Atl. 648; and of them we said: "If, after the deeds were recorded, and before the conveyance to her of the title acquired by them, he had sold the land to a bona fide purchaser, the latter would have taken a title unaffected by the trust. But the appellants were not such purchasers. They bought at a sheriff's sale, upon a judgment against the husband, and with notice of the wife's equity. They have, therefore, his title only; and that, as we have seen, cannot prevail against her." This is precisely the case here, as we have already pointed out.

The foregoing views dispose of all the assignments of error except the eighth, ninth, tenth, and eleventh. As to the first three of these, they relate only to the offer of proof by the wife that she was in ignorance of the fact that the deed was made to her husband until she saw it in 1890, and that she immediately made complaint to her husband, and demanded a deed to herself from him, and that such a deed was made in 1892. Most certainly this was competent testimony. There could be no possible reason for rejecting it. Her ignorance of the true character of the deed was her excuse for not having it at an earlier date. That kind of excuse the law recognizes as sufficient, and it would be strange, indeed, if such testimony, when offered, should be rejected.

What she said in regard to the payment of the money by her father and brother was not embraced in the offer, and was not expected to when stated. Besides, she might easily know the fact that such payments had been made, without having witnessed the actual delivery of the money. As to the admission of the deed from the husband in 1892, of course, it was proper to receive it. The eleventh assignment is only that the court refused a new trial. The mere statement of it is a sufficient answer to it. Judgment affirmed.

(183 Pa. St. 509)

BYERS v. BYERS.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

PARTITION—EVIDENCE—BURDEN OF PROOF—INSTRUCTIONS—PAROL AGREEMENT FOR PARTITION.

1. A parol partition between tenants in common may be limited to the surface of the land, leaving the coal in common.

2. Where tenants in common make a parol partition, the presumption is it included the whole land, the coal as well as the surface; and if one claims that the partition was only as to the surface, and did not include the coal, the burden is on him to show that fact.

3. In an action for partition of the coal only on certain land, both parties admitted that there had been a prior parol partition by agreement; but plaintiff claimed it did not include the coal. *Held*, that plaintiff's continuing to take coal after such partition did not show that there never was a fully executed partition of the coal, but it was a question for the jury to determine what the parties intended to include in the parol partition.

Appeal from court of common pleas, Westmoreland county.

Action by John H. Byers against Jacob Byers for partition. From a judgment for defendant, plaintiff appeals. Reversed.

James S. Moorhead and John B. Head, for appellant. D. S. Atkinson, John M. Peoples, and W. S. Byers, for appellee.

MITCHELL, J. The parties derived title in common, under the will of their father, in 1835. In 1895 appellant brought this action for partition of the coal only, thereby admitting that the surface of the land was held in severalty. The appellee defended on a parol partition claimed to have been made in 1848. Both parties therefore agreed that there was a partition, and, as it was admitted that there had never been any deed between them, the partition necessarily rested in parol. Appellant, however, claimed that what was done in 1848 was a temporary division of the surface for convenience of working only, which did not include the coal, and which was incomplete, but ripened into title in severalty as to the surface by the long-continued separate possession of the purparts taken under it. Appellee, on the other hand, contended that it was a complete and executed partition from its date, and included the coal as well as the surface. The difference as to how the parti-

tion of the surface became effective, whether by virtue of the agreement itself, or only by the subsequent several possession, is not material; and the only substantial question in controversy was what the partition included, the whole land or the surface only. The learned judge below charged the jury that there could be no parol severance of the estate in the coal from the estate in the surface, and therefore, if they found there had been a partition at all, it was a partition of the whole; or, to use his very graphic expression, if the jury found that there was a parol partition, "the cleaver of the law severed the ownership from the surface clear down to the center of the earth." This was practically a direction to find for the defendant, and all the assignments of error, though taken to different parts of the charge, and in varied phrase, are based upon this ruling of the court. We are of opinion that it was error.

It was settled as early as *Ebert v. Wood*, 1 Bln. 216, that a parol partition between tenants in common is valid and conclusive. Chief Justice Tilghman puts the decision mainly on the ground of part performance, which the English courts of equity had held to take such contracts out of the bar of the statute of frauds. But another and equally weighty reason might be added from the nature of tenancy in common. As each tenant has not only title, but joint and several possession of the whole and of every part, the change to a title in severalty in any specified part is not such a transfer of title to land as is within the mischief contemplated by the statute of frauds. This reason was indicated in *Mellon v. Reed*, 114 Pa. St. 647, 8 Atl. 227, and again more fully in *McKnight v. Bell*, 135 Pa. St. 358, 19 Atl. 1036, where it is said by our late Brother Clark: "A partition which merely severs the relation existing between tenants in common in the undivided whole, and vests title to a correspondent part in severalty, is not such a sale or transfer of title as will be affected by the statute of frauds. The reason of this rule rests in this: That the partition is not an acquisition or purchase of land, nor is it in any proper sense a transfer of the title to land. It is a mere setting apart in severalty of the same interest held in common, not in other, but in the same, lands." The cases have drawn the line between a mere parol agreement to partition and an agreement followed by acts of the parties on the land itself, indicating several possession taken in execution of the agreement. The former is inoperative, but the latter is valid.

The right of partition by the parties is an incident of ownership, and, like the right of an owner in severalty to a lien, is only limited by such restraints as the law has put upon it in regard to personal capacity and mode of conveyance. The statute of frauds requires ordinary conveyances of land to be in writing, but, as we have already seen, the statute does not apply to executed partitions between tenants in common. They are therefore free,

and, as they rest solely on the agreements and intentions of the owners, we see no room for distinctions in regard to the methods of partition, whether by vertical or by horizontal lines. There is no difference in the right nor in any other respect in facility of proof of the intent, inasmuch as the ordinary mode is by vertical lines; and therefore such partition is more readily presumed, and acts done in pursuance of it on the surface are more easily shown. Horizontal divisions of land, as such, are comparatively rare, but they are well established, and may be made in the same way, and subject to the same rules, as any other mode, if the parties so agree. Their modern development, especially in this state, may well account for the absence of cases in our reports, but the principles on which such questions are to be decided do not admit of doubt. They are illustrated by the case of *Caldwell v. Copeland*, 37 Pa. St. 427, where, although the court is treating of a conveyance by deed, it said: "There is no more reason why mines in another's land, whether opened or unopened, may not be held by a deed, * * * than why land in its most ordinary signification may not be so held. In other words, mines are land, and subject to the same laws of possession and conveyance." And the analogous right of severance of the strata of land horizontally by the individual owner by acts, as well as by deed, is established in *Canal Co. v. Hughes*, 183 Pa. St. 66 (opinion filed since this case was argued) 38 Atl. 568.

There was no objection to the plaintiff's proving, if he could, that the partition was limited to the surface, and that the coal was left in common. The parties might make partition of all their land, or of any part of it, and in any manner they chose to agree upon. In *Coleman v. Coleman*, 19 Pa. St. 100, the parties made partition of their land in 1787, excepting out of it the Cornwall ore banks, which they agreed should remain in common. This court held not only that the partition was valid, but that the retention of the ore banks in common was part of the consideration for the purparts in severalty, and therefore could not be subject to a new partition.

The ordinary mode of partition being of the whole land by vertical lines, and it being admitted that a partition had been made, the burden was upon the plaintiff to show that it was limited to the surface. In plaintiff's sixth point he asked the court to say that his continuing to take coal after the partition, even if only permissive, showed that there never was a fully executed partition of the coal, and plaintiff therefore must recover on his written title. This point, however, could not have been affirmed. The execution of a parol partition, which is required by the cases, means such acts of the parties upon the land as show a part performance of the agreement, sufficient, as suggested by Chief Justice Tilghman, *supra*, to bring it within the equity of enforcement. The presumption from the con-

ceded fact of partition was that it included the coal as well as the surface, that being the usual method. On the question whether it did or not, the plaintiff was entitled to go to the jury, but he had the burden of proof. An occasional use, such as was shown here, if the jury should find it to be permissive only, and not in the exercise of a right, would not prevent the partition from being executed in the legal sense, and including the coal as well as the surface. It was evidence of a claim of right, but not conclusive either of such right or of the failure to execute the partition.

The will of John Byers had no bearing on the case, except as showing that he had in his mind the timber, coal, and limestone on the tract as distinct elements to be considered in the equal division which he directed. But his devise was of the fee in common, and his devisees could divide in any way they pleased.

Nor had the statute of limitations any bearing on the case. The plaintiff clearly never had any possession of the coal which was either adverse or exclusive, and the surface, as already said, was admitted by both parties to be held in severalty. There was no dispute as to the parol partition, and the only contested issue was what it included. The jury should have been instructed that the parties had the right to make such partition as they chose, either of the whole land or of the surface only; that the presumption was that they parted the whole, but that presumption would give way to the intention of the parties; and it was for the jury to determine from all the evidence what the parties intended to include in the partition, and to find a verdict that would carry out that intention. Judgment reversed, and venire de novo awarded.

(183 Pa. St. 532)

In re JOHNSON. Appeal of GRAHAM et al.
Appeal of BYRNES.

(Supreme Court of Pennsylvania. Jan. 8,
1896.)

PLEDGES—DELIVERY.

An asphalt company gave a creditor a note, which, after the usual promise, recited that certain named property had been "deposited as collateral," "in our yard at N., Pa., which we agree to save harmless for the payment of this note." Held, that the pledge was not good against the company's receiver, where the pledgor did not deliver the goods, the pledgee did not remove them or take possession of them either actually or constructively, and they were not even separated, marked, or in any way distinguished from the company's unpledged assets.

Appeal from court of common pleas, Lawrence county.

Proceedings for the distribution of the money in the hands of George W. Johnson, receiver of the Western Asphalt Block & Tile Company. From an order and decree dismissing their exceptions to the auditor's report, A. F. Byrnes and James Graham & Son separately appeal. Affirmed.

Charles W. Jones and Robert K. Aiken, for appellants. David N. Keast and John L. Ralph, for appellees R. S. Newbold & Son. Geo. P. Hamilton, for appellees Bank of Pittsburg and People's Nat. Bank.

FELL, J. The contest before the auditor was between the general creditors of the Western Asphalt Block & Tile Company, and two creditors, Graham & Son and Byrnes, the appellants, who claim, as pledgees, to have had a lien upon certain of its assets. The evidence of the indebtedness of the corporation to these two creditors is in the form of collateral promissory notes, one of which, after the usual promise to pay, reads as follows: "Having deposited herewith, as collateral security, eight thousand No. 2 asphalt blocks, one lot seventy-five tons, more or less, crude asphalt, and one lot fifteen tons refined asphalt, more or less, now on the company's property at New Castle, Pa.," etc.; and the other: "Having deposited as collateral security for said sum the following property: Sixty thousand asphalt blocks and tiles in our yard at New Castle, Pa., which we agree to save harmless for the payment of this note," etc. The receiver was notified that the appellants claimed to have a lien upon the goods by reason of the pledges. Under an order of court he manufactured the raw material into asphalt blocks, and sold the same, together with the blocks previously manufactured; the terms of the order being that the lien of the pledges, if any, should remain upon the net proceeds of the sale. At the audit of his account the appellants claimed that part of the fund which arose from the sale of the goods alleged to have been pledged to them. It was not disputed that the debts were valid, and the pledges made in good faith. The goods pledged had been stored in the company's yard before the making of the collateral notes. Neither at that time, nor at any time thereafter, was anything done by either of the parties to carry the pledges into effect. The pledgor did not deliver the goods, nor did the pledgees remove them, or take possession of them, either actually or constructively. The goods were not even separated, marked, or in any way distinguished from the unpledged assets of the company, and they came into the receiver's hands in exactly the same state they were in before the contracts of pledge were made. The finding of the auditor upon the subject is as follows: "It was not shown what number of blocks and what number of tiles were on hand in the yard; nor was it shown that the blocks and tiles so claimed to be hypothecated were marked in any way, or that anything was done to distinguish them from the unpledged assets of the company, or that would have enabled the pledgees, in case they desired to enforce their pledge, to enter upon the grounds of the company, and designate or distinguish what particular part of the product there stored was covered by

their lien." Under this finding of facts, the pledges cannot be sustained. The rule is that delivery is essential to the contract of pledge. It is true that the rule has been relaxed in cases where, because of the nature of the thing pledged, or for other reasons, the requirement of delivery would be such a hardship as to defeat the purpose of the contract; but the policy of the law is against such relaxation, and it has been mainly confined to cases in which the goods have remained in the possession of the pledgor as agent of the pledgee under an express agreement to that effect. Even in such cases, the want of constructive or symbolical delivery, or of some act whereby the goods pledged may be distinguished and set apart from the other goods in the possession of the pledgor, has not been excused. Here we have no evidence of such an agreement, or of anything in the nature of a constructive delivery, and to relax the rule for any other reason, sufficiently to include such a case as this, would be to abrogate it entirely. The order of the court confirming the report of the auditor is affirmed.

(183 Pa. St. 519)

PEPPERDAY v. CITIZENS' NAT. BANK OF LATROBE.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

BANK—ACTING AS AGENT—LIABILITY.

Defendant national bank received from plaintiff, a depositor, railroad stock to be sold for his account on his direction, and transmitted it to brokers, who, on the order of plaintiff, given to defendant, and communicated by it to them, sold the stock. They then sent their check for amount of the proceeds to defendant, payable to its order. Defendant credited plaintiff's account on its books with the amount of the check, and then sent the check, with others, for collection for its account; but payment was refused, the brokers having failed before its presentation. In the meantime defendant had given plaintiff notice of the credit on his account, and he had thereupon drawn out an amount in excess thereof. *Held*, that the bank, being in the matter of the bonds merely an agent to sell, and its acceptance of the check in payment not having been ratified by plaintiff, it was liable for the amount thereof, and could not charge it back against plaintiff's account.

Mitchell, J., dissenting.

Appeal from court of common pleas, Westmoreland county.

Action by John J. Pepperday against the Citizens' National Bank of Latrobe. Judgment for plaintiff. Defendant appeals. Affirmed.

G. D. Albert, A. H. Bell, and Gaither & Woods, for appellant. James S. Moorhead and John B. Head, for appellee.

GREEN, J. If the plaintiff had been the owner of the check in question, and had deposited it with the defendant bank for collection, it may be conceded that the bank would not have been liable for the nonpayment of the check. While the course and

the process of collection were rather slow, it was still within the limits of ordinary bank usage, and we think a charge of negligence could not have been established. But the trouble with the case is that there were no such facts in it. The plaintiff was not the owner of the check, and he did not deposit it for collection. The check was drawn to the order of the defendant, and was, therefore, the property of the defendant. They might do with it as they chose. The liability of the defendant to the plaintiff was not a liability on the check, or for any use the defendant did make or could make of it. The check was the exclusive property of the defendant. The plaintiff had no interest in it whatever. In order that the plaintiff might become its owner, it would have been necessary for the defendant to indorse it, so as to make it payable to the plaintiff's order. Even if the plaintiff had received the physical custody of the check by delivery of its corpus to him, he could not have deposited it in the defendant's bank for collection without the indorsement of it by the defendant to his order or in blank. But there were no facts of that character in the case. The bank never delivered the check to the plaintiff, nor did they deposit the check to the credit of the plaintiff's account. They assumed it themselves, and, of course, assumed the collection of it. The plaintiff, as a matter of fact, had nothing whatever to do with the check. He had no right, title, or interest in it, and he was never placed in such a position by the bank that he could possibly have exercised any claim of dominion or ownership or interest of any kind in it. Moreover, the defendant still has the check. It has never delivered or tendered it to the plaintiff, and hence, if it had received the check from the plaintiff in regular course, it would have been liable. In *Bank v. Ashworth*, 123 Pa. St. 212, 16 Atl. 596, Mr. Justice Paxson, delivering the opinion, said: "It is safe to say, as a general rule, that when a bank receives a check from one of its depositors for collection, it must return him the check or the money." The present action is brought by the plaintiff, as a depositor in the defendant bank, to recover the amount of his deposit, \$516.86, standing to his credit on the books of the bank, after the refusal of the bank to pay his check for that amount on December 27, 1895. The defendant refuses to pay the money, because it says that, owing to a transaction which it had with the plaintiff, it had received from the plaintiff 51 shares of the capital stock of the Pennsylvania Railroad Company, to be sold for his account, and upon his direction; that they had sent the certificates of stock to a firm of brokers, L. H. Taylor & Co., in Philadelphia, where they remained until on December 17, 1895, the plaintiff directed the defendant to sell 20 shares of the stock at the best market price on the 18th or 19th. This order was communicated to the brokers by the bank, and

on the 18th of December the brokers reported that they had sold the stock. On the 20th of December the defendant received from the brokers their check on a Philadelphia bank, payable to the order of the defendant bank, for \$1,073.75. They then credited the plaintiff's account on their books, and sent the check, with other checks, to Second National Bank of Pittsburg for collection for the account of the defendant bank. On December 24th they received a telegram, which announced the assignment of Taylor & Co., of Philadelphia, and on December 27th the check came back protested. They charged back on the plaintiff's account the amount of the check and protest, and thus reduced the amount of his credit so that his account was overdrawn. They claim that they were relieved of liability for the loss on the Taylor check, and might lawfully charge the plaintiff's account with this loss. The question at once arises, what was the true legal relation between the plaintiff and defendant as to this particular transaction? It is perfectly clear that it is not a relation of depositor with the bank. The plaintiff, never having had the check, never deposited it with the defendant. It is true, the defendant credited the plaintiff's account with the amount of the check when they received it. They thus made themselves debtor to him for the amount credited. This they had a perfect right to do, and the plaintiff had a perfect right to accept the credit, and draw against it. When the bank gave the credit to the plaintiff, they, of course, assumed that the check would be paid, as they had a right to do; but does it follow that, when the check was dishonored, several days later, on presentation, the defendant had a lawful right to charge back the loss to the plaintiff's account? As has already been said, if the check had belonged to the plaintiff, and had been deposited by him, the bank would probably not have been chargeable with the commercial negligence which imposes liability on that ground upon such institutions. But it is perfectly clear that such was not the legal relation of the plaintiff and defendant, and hence the rule which would or might have exempted the bank from liability as a consequence of such a relation, has no application, and cannot be invoked by the bank. What, then, was their true legal relation? The bank voluntarily undertook to sell the plaintiff's stock at his request. But in doing so they were not exercising any function which pertained to them as a bank. It is no part of the business of a national bank to engage in the selling of stocks for anybody. It was a transaction outside of their regular banking business, and not within their chartered powers. This being so, when the bank received the stock from the plaintiff, and agreed to sell it, it could only be understood to assume the relation of agent for the plaintiff as principal in that particular transac-

tion. When it sold the stock, it was acting as his agent, and became subject to whatever rules of law are applicable to that relation. Of course, acting in that capacity, it could sell as any other agent, and would be responsible for its acts as any other agent.

In the case of *Bank v. Ashworth*, above referred to, the transaction in question was in the line of ordinary banking business, yet the defendant bank was held liable simply because, in collecting their customer's check, they took a cashier's check for the check deposited, instead of taking cash. The action was by a depositor against a bank with which he had deposited a check for \$2,622.25 on the Penn Bank. The check was presented next day through the clearing house, but the Penn Bank had then closed its doors, and the check was protested. A few days later the Penn Bank resumed operations, and was open, and doing business, on the day following. On that day the check was again presented, together with some other checks, by the defendant bank, and in exchange for them all a cashier's check of the Penn Bank was given to and received by the defendant bank. The Penn Bank was paying all checks presented. The cashier's check was deposited by the defendant bank with another bank through which it cleared, but on the next business day—which was Monday following the Saturday on which the cashier's check was given—the Penn Bank again closed its doors, and the cashier's check was not paid. On these facts we held the defendant bank responsible to the plaintiff for the loss. Paxson, J., further said: "It is equally clear that, if the collecting bank surrenders the check to the bank upon which it is drawn, and accepts a cashier's check or other obligation in lieu thereof, its liability to its depositor is fixed, as much so as if it had received the cash. It has no right, unless specially authorized to do so, to accept anything in lieu of money,"—citing *Bank v. Goodman*, 109 Pa. St. 422, 2 Atl. 687, and several other cases. "We need not discuss the question whether the defendant failed to exercise due diligence in not sending the dishonored check through the clearing house on Saturday. That it could have been done, and was done by some other parties, distinctly appears by the evidence, and is not disputed. We think the defendant bank fixed its liability by surrendering the check to the Penn Bank, and accepting the cashier's or teller's check of that bank. As between the defendant and its depositor, this amounted to payment. The plaintiff has neither his check nor his money." With how much more force do these remarks apply to the present case. Here the defendant accepted the check of Taylor & Co. in payment for the stock, when they had no legal right to accept anything but money. They credited the plaintiff's account with the amount of the check, and

thereby assumed it to be that much cash. They might have notified the plaintiff that they had received the check, and delivered it to him, or might have held it for collection before crediting his account. If he had accepted it as cash, the bank would have been exonerated, or if he had agreed they might hold it for collection before giving him credit, and had used due diligence in its collection, they probably could not have been held liable. But neither of these things was done; on the contrary, they assumed it as cash, and so treated it in their dealing with the plaintiff. We do not see how they can be relieved from responsibility. In the case of *Bank v. Goodman*, supra, we held that a bank which had received for collection from a depositor a check on another bank, and had sent the check to the bank on which it was drawn, and had received from that bank a draft on some other bank, which was not paid, was liable to its depositor for the check he had deposited. It was claimed that there was no negligence, because the usual course of business was followed. But we held this was not sufficient. The court below said, and we affirmed it: "The defendant assumed the responsibility of sending the evidence of the plaintiffs' right to have the money for which it called collected for their benefit, to the bank which was expected to make payment. Not obtaining the money, but a worthless draft, in return, the defendant, treating the draft as not paid, charged the amount of it back to the plaintiffs' account, and, when they called for the check, as the best evidence of their right to recover against the maker, they are informed: 'The check you call for cannot be returned. It was paid, charged to the drawer's account, and canceled.'" We held the same doctrine in *Hazlett v. Bank*, 132 Pa. St. 118, 19 Atl. 55. That an agent for sale has no power to receive anything but money in payment is too familiar a rule to require the citation of authorities to support it. A single reference to one of our most recent decisions, where the subject is reviewed, will suffice. *Paul v. Grimm*, 165 Pa. St. 139, 30 Atl. 721.

We cannot see how this case can be decided upon the question whether the bank used due diligence in collecting the check of Taylor & Co. It never was the property of the plaintiff. He did not deposit it, and had nothing to do with it. The defendant received it, owned it, held it, still holds it, and never even tendered it to the plaintiff. The bank treated it as cash on its own responsibility, and credited the plaintiff's account with the amount of it. We know of no principle upon which they can charge back to him a check which he never saw, never owned, never had any interest in, and upon which his name never did, and does not now, appear, either as drawer,

payee, indorser, or in any other manner whatever. The assignments of error are dismissed.

It is perfectly manifest that, if the bank had paid to the plaintiff in bank notes the amount of the check, and he had put them in his pocket, and gone about his business, the bank could never have recovered back the money. They could pay him the money if they chose, and he could receive it in good conscience. That being so, he could keep it, and could not be compelled to repay it. The law upon that subject is without question. The payment would be voluntary on the part of the bank, and, being such, the plaintiff could conscientiously receive it, and he could thereafter retain it. Now, it so happens that the actual facts make out just such a case. When the bank received the check, and credited the plaintiff's account, they gave him notice to that effect, and thereupon he drew a check for \$1,600 against his account, which included the whole amount of the sum credited, and \$600 besides; and when the check was presented the bank paid it. It was not until after this that they charged back the credit against the account. This, it is very clear, they could not do without his consent. Judgment affirmed.

MITCHELL, J. (dissenting). As to the stock, the bank was a mere agent for transmission and sale, not responsible for anything but negligence, of which there is no evidence. This is conceded. In the ordinary course of business, the bank received the check for the proceeds of the sale of stock, and, of course, its title to the check was only as agent for the real owner, the plaintiff. Treating the check as money also in the ordinary course of its business, the bank passed the amount to the credit of the plaintiff in his account. It is said in the opinion of the court that it is clear that as to the check the relation of depositor did not exist. But with great respect for my brethren who so hold, I think it perfectly clear that that was the exact relation. The bank treated the check as money of its depositor, credited it in his deposit account, so notified him, and he ratified and assented to its action by drawing against the sum. It is the basis of the alleged balance of deposit in his favor for which this suit is brought. Without that check as part of his deposit account, he has no such balance, his account is overdrawn. When the check came back unpaid, the bank charged it up against its depositor, to offset the formal credit which had been given him for it. This it had the right to do, just as if it had credited him with a deposit of \$1,000 in bank notes or gold coin, which later were found to be counterfeit. It is also said that the bank still has the check, and has not delivered it to plaintiff. He refused it. When he was

notified that it had come back, he said peremptorily he had nothing to do with it. In this he was wrong. It was the basis of a credit to which he was not entitled, and on which he should not be permitted to recover.

(183 Pa. St. 492)

In re NEIDIG'S ESTATE.

Appeal of RUPLEY.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

ADMINISTRATORS — REVOCATION OF LETTERS — WHEN PROPER — DECREE OF ORPHANS' COURT.

1. A petition to the register of wills prayed that letters of administration improvidently issued to R. be revoked. In his answer, R. denied that they were improvidently granted, and averred that those by whom he was nominated were the next of kin of the intestate, and that petitioners were not such next of kin as are entitled to administer. *Held* that, as soon as it was shown that the persons who nominated R. were not the next of kin, and that petitioners were, it was the register's duty to revoke such letters, and it was error to refuse to do so because the next of kin were incompetent to administer, since the latter question was not before him.

2. On petition of the next of kin of a decedent to revoke letters improvidently issued to one nominated by others than petitioners, the register of wills refused to revoke the letters because the next of kin were incompetent to administer, though the question of their competency was not before him. *Held*, that it was proper for the orphans' court, on appeal, to incorporate, in its decree revoking such letters, an order that letters be issued by the register to the nominee of the next of kin.

3. Where letters of administration improvidently granted to one not the next of kin or their nominee are revoked, he has no right to interfere with the granting of letters to any of the next of kin or their nominee.

Appeal from orphans' court, Cumberland county.

Petition to the register of wills by John S. Ocker and others for a citation to revoke the letters of administration on the estate of Emanuel Neidig, deceased, issued by such register to H. M. Rupley. The register refused to revoke the letters, and dismissed the citation, and the petitioners appealed to the orphans' court. From a decree revoking such letters, Rupley appeals. *Affirmed*.

The opinion of the orphans' court is as follows (Biddle, P. J.):

"Emanuel Neidig, an aged bachelor of Silver Spring township, died on the morning of Saturday, March 20th, last, at the house of one of his tenants, with whom he was then making his home. Upon the evening of the same day Mrs. Elizabeth Givler and Mrs. Anna E. Silvius executed and delivered to H. M. Rupley, Esq., a paper, of which the following is a copy: 'We, Elizabeth Givler and Annie Elizabeth Silvius, of West Fairview, Cumberland county, state of Pennsylvania, being heirs of law of Emanuel Neidig, late of Silver Spring township, county and state aforementioned, deceased, do hereby renounce all our right to letters of administration upon the estate of said deceased, and desire that the

same may be granted to H. M. Rupley, Esq., of West Fairview, Pa. We further suggest that the said Emanuel Neidig died leaving no father or mother, nor brother or sister, to survive him, and that we are the issue of a sister of his father, and to the best of our knowledge and belief the nearest of kin. In witness whereof we have hereunto set our hands this 20th day of March, 1897. Elizabeth Givler. Anna E. Silvius. Witness: Benj. Givler. John R. Silvius.' On Monday morning, March 22d, prior to the interment of Mr. Neidig, the above-mentioned paper was filed with the register of wills, and letters of administration were issued to H. M. Rupley, Esq., as therein suggested. At a later hour on Monday Mr. Neidig was buried, and on the following day four of his next of kin, being the children of a deceased half-brother, presented a petition to the register of wills, reciting their relationship to him, and setting forth that the aforesaid letters of administration 'were improvidently granted, and should be revoked, for the reason that the parties who appeared, alleging or representing that they were the next of kin of said decedent, and who renounced their alleged right to letters of administration upon his estate, and suggested that the same be granted to the said H. M. Rupley, Esq., are not the next of kin of said decedent, and therefore not entitled to letters, nor had they the right to renounce and suggest in whose favor the same should be granted; that the right to letters of administration is vested under the law in one or more of your petitioners, or in such person or persons that they may see fit to nominate, in the event of a renunciation of their right to said letters,' etc. The petition concluded by praying that a citation should be issued to H. M. Rupley, Esq., commanding him to appear upon a fixed day and show cause why the letters of administration should not be revoked. The administrator filed an answer to the citation, in which he set forth: 'It is not true that said letters of administration were issued to your respondent improvidently, but lawfully, on the nomination of the next of kin of said Emanuel Neidig, residing in the county of Cumberland. That the parties who nominated your respondent are the next of kin, as he is informed and believes, and entitled to letters, and respondent denies that the petitioners are such next of kin as are entitled under the act of assembly to letters of administration upon the estate of Emanuel Neidig, deceased. Respondent therefore prays that said citation be dismissed at cost of petitioners.'

"Upon the question of fact, as thus made up, evidence was taken which clearly showed that the next of kin of Emanuel Neidig at the time of his death were the children of three half-brothers, previously deceased. After carefully examining the testimony we do not see why the register hesitated in reaching this conclusion, for it was plainly established; so, likewise, it was shown that the relation-

ship between Mrs. Givler and Mrs. Silvius and the decedent was not so close,—his father's sister having been their grandmother. Subdivision 5 of section 4 of the act of April 8, 1833, provides that in a case such as the present one the personal estate of the intestate shall be distributed among his brothers and sisters and their issue 'without any distinction of blood.' In regard to the descent of personal property there is no distinction between brothers and sisters of the whole and half blood. In *re Miller's Estate*, 2 Woodw. Dec. 174. Nor is there a distinction between them as to the grant of letters of administration, for they are all in the nearest degree of consanguinity with the decedent. *Single's Appeal*, 59 Pa. St. 55. Section 22 of the act of March 15, 1832, directs that the register shall grant letters to the widow, if any, of the decedent, or to such of his relations or kindred as by law may be entitled to the residue of his personal estate, or to a share or shares therein after payment of his debts, except in case of their refusal to act or incompetency. If the parties entitled to letters do not desire to personally settle the estate, they may name a suitable person to do so, and the register must regard their selection. The opinion of Judge Watson in *Jones' Appeal*, 10 Wkly. Notes. Cas. 249, which was adopted by the supreme court, contains the following apposite language on this subject: 'I feel very confident that no case can be found where it has been held that the register is at liberty to disregard the clearly-expressed wishes of the parties preferred by the law and entitled to the estate, whether they be residents of this commonwealth or beyond its borders, and grant letters to a total stranger, whose only interest is the expectation of earning commissions by his services in the execution of the trust. * * * If the parties who are entitled to the estate are not in a position to administer it themselves, then the trust should be committed to their nominee, who has their confidence and whose services are to be paid for from their funds.' As soon as it was shown that Mrs. Givler and Mrs. Silvius, at whose instance the administrator was appointed, had no interest whatever in Emanuel Neldig's estate, the present letters should have been at once canceled, and others issued according to law. Henry C. Ocker and Sarah Ocker, by papers filed with the register on April 5th, became parties to the petition to have the outstanding letters revoked; hence, all of the interested parties who are residents in this county have united in the same prayer. Why should their request not be granted? It is futile to say that none of the petitioners made application for letters. Mr. Rupley was appointed in unseemly haste, without notice to the next of kin, and before the deceased had been buried, upon the strength of a so-called renunciation, signed on the day of his death by two persons, neither of whom had a jot of right to his property or any part of it. Those entitled to the estate,

who live here, began proceedings without delay to have the mistake rectified, and have vigorously pressed the matter to its present stage; the allegations upon which they based their claim to relief having been fully sustained by evidence taken. Upon the day of argument there was filed with the court a paper, signed by the six next of kin resident in the county and two others, renouncing their right to letters, and requesting that they be issued to Jacob S. Meily, of Silver Spring township. This document is herewith transmitted to the register. That Mr. Rupley is well qualified to perform the duties of administrator is immaterial, for his appointment to the position was obtained without the knowledge or consent of any of the distributees, and it is now sought to have him retained in the place against their protest. To permit this to be done would be violative both of the rules of business and of the principles of law. And now, June 8, 1897, the appeal is sustained, and it is ordered that the letters of administration in the estate of Emanuel Neldig, deceased, which were granted to H. M. Rupley, Esq., be and the same are hereby vacated; and it is further ordered that letters in said estate be issued by the register of wills to Jacob S. Meily, who is a suitable person and the nominee of the next of kin, upon his entering into bond with sureties as required by law. By agreement of the parties, it is ordered that the costs be paid out of the estate."

A. R. Rupley and Wetzel & Hambleton, for appellant. R. M. Henderson, J. Webster Henderson, and Chester C. Bashore, for appellees.

STERRETT, C. J. This appeal is from the decree of the orphans' court vacating "the letters of administration which were issued to H. M. Rupley, Esq., in the estate of Emanuel Neldig, deceased," and ordering "that letters in said estate be issued by the register of wills to Jacob S. Meily, who is a suitable person, and the nominee of the next of kin, upon his entering into bond with sureties as required by law." The facts of the case, together with the questions of law arising thereon, are clearly and concisely stated in the opinion of the learned president of the court below, and need not be recited here. In his argument the appellant says: "There are no disputed facts so far as this appeal is concerned, and therefore the testimony taken before the register of wills is not printed." He also "frankly admits that the petitioners, the Ocker family, are the next of kin, and the letters issued to Mr. Rupley were improvidently granted, and would have been revoked by the register had any of said next of kin been competent and applied for said letters." The reasons thus stated as a justification of the register's refusal to vacate the letters admitted to have been improvidently issued to appellant are frivolous and unsound. The issue before the register involved neither the

competency of the next of kin to administer, nor their demand that letters issue to them, or some of them, or to their nominee. For good and sufficient reasons, set forth in their petition, the prayer thereof was that the letters improvidently granted to the appellant in this case be revoked. In his answer, he denied that the letters were improvidently granted to him, and averred that those by whom he was nominated were the next of kin of the intestate, and that the petitioners were not such next of kin as are entitled to administer, etc. Under the issue thus presented, as soon as it was shown that the persons who nominated appellant were not the next of kin, and that the petitioners were, it was the clear duty of the register to revoke the letters granted to appellant. That would have cleared the way for an application by some of the petitioners or their nominee. The only orderly mode of proceeding was for the register to determine, first, whether the letters to appellant were or were not improvidently granted. It would have been premature for the next of kin to have demanded the issue of letters to themselves or their nominee until the register had first revoked the improvidently granted letters; but, as we understand, the register went outside of the questions involved in the issue before him, and decided that, because the next of kin were incompetent to administer, etc., the letters improvidently granted to appellant should not be revoked. This was simply undertaking to prejudge what was not then properly before him, and perhaps never would have been, if he had rightly decided the questions that were strictly involved in the issue without more; but he undertook to fortify his refusal to vacate the improvidently granted letters by deciding that none of the next of kin were competent to administer, etc. For reasons clearly and concisely set forth in his opinion, the learned judge found the facts as now conceded to be correct, viz. "that the Ocker family are the next of kin, and the letters issued to Mr. Rupley were improvidently granted," etc., and he accordingly vacated said letters. He might have stopped there, and left to the register of wills the granting of letters to one or more of the next of kin; but clearly he was not bound to do so. It was, doubtless, evident to him, as it is to us, that the questions that might again arise before that officer had not only been prejudged, but were erroneously decided, by him. Owing to the manner in which the case appears to have been heard and disposed of by the register, those questions were brought before the court below. It was therefore entirely proper to incorporate in the decree the order that letters be issued by the register to the nominee of the next of kin, etc. The appellant, having been rightly ousted from the office into which he was inducted with at least indecent haste, has no right to interfere with the granting of letters to any of the next of kin or their nom-

inee. In view of the clear and satisfactory manner in which the questions involved are disposed of in the opinion of the court below, further elaboration is unnecessary. Decree affirmed, and appeal dismissed, at appellant's costs; and it is ordered that the record be remitted to the court below.

(123 Pa. St. 500)

STAGE v. BOYER et al.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

OIL LEASES—ABANDONMENT—SUFFICIENCY OF EVIDENCE.

Plaintiff, in 1885, acquired an oil and gas lease, which gave him exclusive right to drill for oil for 10 years, and as long thereafter as oil and gas were found in paying quantities; required him to complete a well within a year; gave him the right to abandon the premises at any time, provided that an abandonment should not deprive him of the right to convey oil and gas over the land from other lands on an annual rental. Within a year he completed a well, which was unproductive. In 1887 he notified the lessor of his intention to abandon the well, and drew the casing, and removed all his machinery. After that time he made no search for oil or gas on the premises, but conducted operations in the vicinity, drilling 16 wells at a cost of nearly \$50,000. On being requested to surrender the lease five years after he abandoned his search, he refused to do so, and afterwards recorded it. He testified that he had never intended to abandon the lease. *Held*, that a finding of abandonment was justified by the evidence.

Appeal from court of common pleas, Butler county.

Ejectment by George G. Stage against Samuel P. Boyer and others, commenced in 1895, in which plaintiff claimed under an oil lease made in 1886. From a judgment in favor of defendants, plaintiff appeals. *Affirmed*.

Clarence Walker and Thompson & Son, for appellant. W. D. Brandon and R. W. Cummins, for appellees.

FELL, J. The plaintiff in this ejectment is the assignee of a lease of a farm for the purpose of drilling and operating for oil and gas. The defendants are lessees of the farm for the same purpose under a lease made 7½ years after the lease under which the plaintiff claims. The single question raised is whether the plaintiff has lost his rights under his lease by abandonment. By the terms of the lease the lessee and his assigns are given the exclusive right to drill and operate for oil for the term of 10 years, and for so long thereafter as oil and gas are found in paying quantities. The lessee is bound to commence operations and to complete a well within one year, and his failure to do so, or to pay a fixed sum for the delay, is ground for forfeiture of all his rights under the lease. The lessee is given the privilege of abandoning the premises at any time, but an abandonment does not deprive him of the right to convey oil and gas

over the land from other lands, upon the payment of an annual rental for the privilege. Within a year the plaintiff completed a well, which, after a thorough test, was found to be unproductive. In 1887 he notified the lessor of his intention to abandon the well, assigning as a reason that it was of no value; and he then drew the casing, plugged the hole, and removed all of his machinery and appliances from the premises. He has not since made any search for oil or gas on this farm, but has conducted operations on others in the vicinity, which were leased at the same time, and had drilled 16 wells at an expenditure of nearly \$50,000. Four or five years after the plaintiff abandoned his search, he was asked by the lessor to surrender his lease. This request he refused, saying he intended to keep it. He afterwards procured an assignment of his partner's interest in the lease, and recorded the lease and the assignment. He testified at the trial that he had not abandoned the lease, and that he had never intended to do so. The learned judge, before whom the case was tried without a jury, considering all of the testimony, found as matter of fact "that the plaintiff, considering the well he drilled as a sufficient test, abandoned further operations under this lease, and abandoned it, because he had failed to find either oil or gas." This finding of fact, if justified by the evidence, fully sustains the judgment entered, and it is unnecessary to consider the other findings of fact or law upon which also it is based.

The leases of the different farms in the locality were entirely independent of each other, and there is no foundation in the testimony for the argument that the search on other farms was made with a view to determine whether there was an oil belt extending under the farm in question, and whether the water in the whole section could be exhausted by pumping. The plaintiff did not so testify, although he was given the fullest opportunity to state what his intentions were at the time. The lease gave him two rights,—one to search for oil and gas, the other to convey oil and gas in pipes from other lands through and over the farm leased. The second right would continue after the abandonment of the first. It was a right for which he was not required to pay until he used it, and which might be of great value to him while operating in the locality. The lease was the written evidence of his right, and an explanation of his refusal to surrender the lease five years after he had given up the search for oil and gas is found in his desire to preserve this right. He had reserved the privilege of abandoning the lease at any time. After a thorough test, he gave up the search, abandoned the premises, and never again resumed operation. With these facts clearly established, and unexplained by his testimony

or by any course of action which indicated an intention to return and explore for oil or gas, the learned judge was justified in finding that he had exercised his reserved privilege, and abandoned the lease; and on this finding the judgment is affirmed.

(123 Pa. St. 555)

In re ALLISON'S ESTATE.

Appeal of FIRST NAT. BANK OF INDIANA COUNTY.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

ASSIGNMENT FOR CREDITORS—SALE—FRAUD—ACCOUNTING BY ASSIGNEE.

Where, at assignee's sale, the assignee has the property bid off in the name of H. without his knowledge or consent; and when H. is informed thereof it is agreed that he shall take the property only in case a better purchaser cannot be procured; and thereafter the assignee has H. convey the property to Z., neither H. nor Z. making any payment; and thereafter it is sold to B., at a large advance, through a real-estate agent, the assignee dealing with B., and conveying to him the idea that it was his property,—the assignee should, failing to show what was done with the purchase money paid by B., or that he acted in good faith in the entire transaction, be charged with the full amount paid by B., less the commissions of the real-estate agent.

Appeal from court of common pleas, Indiana county.

Accounting by W. C. Brown, assignee for the benefit of creditors of T. B. Allison. From a judgment dismissing exceptions to the confirmation of the account, the First National Bank of Indiana County, Pa., a creditor, appeals. Reversed.

John P. Blair, for appellant. J. N. Banks, for appellees.

STERRETT, C. J. In January, 1886, T. B. Allison executed a deed of voluntary assignment, for the benefit of creditors, to the appellee, William C. Brown, who thereupon accepted the trust, and entered upon the discharge of the duties thereof. Shortly afterwards, the court, on his petition, ordered a sale of certain assigned real estate, including a tract of 114 acres, known as the "Schlemmer Farm." After considerable delay, the assignee, in his return to a pluries order, reported the Schlemmer farm sold, August 30, 1887, to John Hill, for \$929, and thereupon the sale was confirmed. While the assignee's deed for this land is dated October 13, 1887, it was not acknowledged until July 1, 1890. Two days later, for the alleged consideration of \$1,200, Hill and wife conveyed the same to George D. Zeigler, who, with his wife, on July 1, 1893, executed a deed for the same to P. C. Muth and Jacob Buhite for the consideration of \$3,225, as expressed in the deed. After being cited to do so, the assignee, on July 17, 1890, filed an account, in which he charged himself with \$929 as the amount realized from the sale of the Schlemmer farm. To this the appel-

lant bank excepted, and on June 22, 1894, by leave of court, filed the following additional and more specific exception: "Instead of charging himself with \$929.00 realized from the sale of 114 acres of land in Canoe township, accountant should charge himself with either \$3,250 or \$3,500, the said land having been purchased by the said W. C. Brown at the assignee's sale for his own benefit through John Hill, and afterwards sold or caused to be sold by said Brown for either \$3,250 or \$3,500, to Buhite and Muth at private sale, effected by said Brown, or through his agents; that these matters were unknown to exceptants when the previous exceptions were filed." This exception was virtually dismissed by the learned judge who specially presided at the hearing, and that constitutes the main subject of complaint in this appeal. He in substance held that there was no such proof of "supine negligence," or "fraud," or "want of good faith" on the part of the trustee as would justify the court in sustaining the exception, and surcharging the accountant accordingly. In this we think he was mistaken. Our consideration of the testimony has led us to a very different conclusion. It clearly appears that Hill did not authorize the purchase of the farm. He was not present at the sale, and did not know until afterwards that the property had been bid off in his name. He paid no purchase money, nor did any one pay any for him. In the course of his testimony he says: "Of course, I didn't buy this Schlemmer place at public sale. I consummated the sale. I didn't know it was knocked down to me at \$929.00. Sheriff Brown told me of the sale. I think it was in 1897,—along there somewhere. I didn't pay him any money. I think it was in July, 1890,—sometime along there,—he made me a deed. I didn't get my deed sooner just because I was waiting to know whether I would get it. I agreed to take it at that price, but I didn't know but he could get a better price, and would not let me have it. * * * From 1887 to 1890, I didn't go out to see this land. I waited to hear from it. I paid no taxes. I got no rents from it. Didn't get a dollar of the crops. I didn't hire anybody to look after it. I let it alone until I could hear from it,—what they were going to do,—whether they were going to let me have it or not." The assignee himself testified that he had the property bid off in the name of John Hill without the knowledge or consent of the latter. He further said: "I came home, made my return, and took the deed down to John; and John preferred not to take it, although he says, 'If you can't get any one else to take it, come back, and I will pay you for it.' I went away that day, a long time, and I saw George Zeigler one day; talked to him. George says, 'Believe, if I had it, I could sell it.' So I asked him if he would take it, and he said he would. Then I went down and got Mr. Hill to make the deed to George Zeigler, and I told Zeigler I would help him

to sell it. So I did, and I did help to sell it." It appears from the testimony of these parties themselves that Hill was to have the farm only in the event that no other and better purchaser could be procured. In fact, the deed to Hill was not executed and delivered until a reasonable prospect of securing such purchaser was presented. Hill paid no money, and received none. He appears to have been a mere conduit selected by the trustee for the purpose of passing the title to some one else at an enhanced price; and, upon his conveying to Zeigler, he virtually dropped out of the case. It is very evident that, so far as he was concerned, the scheme that was originally devised was carried out. The testimony of the trustee further shows that Zeigler took title to the farm for the sole purpose of finding a purchaser and effecting an advantageous sale; and that, too, was successful. The bona fides of the irregular and circuitous transaction, so far as the trustee—appellant—is concerned, depends on the purpose for which the title was conveyed, first to Hill, and afterwards by him to Zeigler. If it was done, not with the view of realizing a higher and better price for the benefit of the assigned estate, but for the purpose of benefiting the trustee personally, and that object was accomplished by the sale to Muth and Buhite, there cannot be any question that it was a bad-faith transaction,—a fraud upon the assigned estate,—which should not be permitted to succeed in any court of justice. That it was such a transaction, substantially as claimed by the appellant, appears to be clearly established by the evidence, the decided weight of which points unmistakably to that conclusion: All the facts and circumstances harmonize therewith, and cannot be reconciled with any other hypothesis that can be reasonably suggested. The conveyance from Hill to Zeigler was evidently procured for the purpose of ultimately effecting an advantageous sale for the appellee's personal benefit. It was the appellee who procured the agent, Ham, through whom the sale to Muth and Buhite was effected. It was he who gave said agent \$150 for finding the purchasers. Ham testified that Brown, the appellee, "always conveyed to me the impression that it was his land." When the purchasers were found, it was Brown who dealt with them. Buhite so testified, and also said he had never heard any further than that it belonged to Captain Brown. When the consideration for the conveyance was paid, it was Brown's son who handled the money. It is also a significant fact that Zeigler paid nothing for the property at the time the deed to him bears date. In addition to all these and other facts shown by the evidence, the uncontradicted testimony of Zeigler is that he realized not more than \$200 from the transaction. Without further reference to the testimony in detail, we have such a condition of affairs, clearly established by the decided

weight of the evidence, as cast upon the appellee the burden of proving what disposition was made of the purchase money paid by Muth and Buhite, and that he acted in good faith in the entire transaction; and, having failed to do either, he should be surcharged with the difference between the \$920, with which he charged himself in his account, and the \$3,225, consideration named in the deed to Muth and Buhite, except so much thereof as is shown to have been legitimately disbursed. It does not appear that Zeigler did anything that entitled him to compensation in the shape of commissions on the sale, or otherwise; and it would be unjust to the trust estate to allow such payment. The same may be said of other payments or deductions made in furtherance of the attempt to defraud the trust estate. The only commission that can with any propriety be allowed is the \$150 paid to the agent who procured the last purchasers without knowledge of the intended fraud. With this exception, the assignee should be surcharged with the difference above stated, with interest from July 1, 1893, the date of the last sale.

The decree of the court below is reversed and set aside, at appellee's costs, as to the matters complained of in the specifications of error, and, to the extent above stated, appellant's exception is sustained; and it is further ordered that the record be remitted to the court below, with instructions to proceed, without unnecessary delay, to final decree in accordance with this opinion.

(183 Pa. St. 504)

SMITH v. METROPOLITAN LIFE INS. CO.
(Supreme Court of Pennsylvania. Jan. 3, 1898.)

ACTION ON LIFE INSURANCE POLICY—MISREPRESENTATIONS OF INSURED—QUESTIONS FOR JURY.

1. In an action on a life policy, whether insured was in sound health at the time the policy was issued is a question for the jury, where there is a positive conflict in the evidence as to his health at that time.

2. In an action on a life policy issued in April, 1894, it appeared that the insured stated in his application, in answer to questions, that he had not had disease of the heart; that about four months previously he had typhoid fever for about six or seven weeks, from which he had fully recovered; and that he was attended by Dr. D. The latter testified that the insured then had "a dilated, weak heart"; that nobody could cure it; and he had it in April, 1894. His junior partner stated that he occasionally visited, insured, and he thought he had "neurasthenia and a weak heart." T., another physician, said that from an examination made in April, 1893, he thought there was a slight paralysis on one side. Defendant's medical examiner reported that insured had no "intermittence or irregularity or undue strength or weakness in heart action," and that his chance of life appeared to be first class. Such report was sustained by his testimony, in which he explained the nature and extent of his examination, and that, as to the condition of the heart and lungs, it was thorough. Several of insured's acquaintances testified that he appeared to be a strong and healthy man. *Held*, that the court

could not say, as a matter of law, that insured had a weak heart when the policy was issued, or that his statement that D. attended him for typhoid fever was untrue.

3. Insured stated he had not consulted any physician other than D.; and insured's brother testified that when insured was examined by Dr. T., in April, 1893, he complained of the heat; that he was up and about the house half an hour afterwards; and that he asked the doctor the next day what was the matter with his brother, and was told "it was a rush of blood to the head." T. testified that insured was about town a day or two afterwards. *Held* that, whether there was bad faith or materiality in the omission of insured to mention T. and D.'s junior partner, in the answer to such question, was for the jury.

Appeal from court of common pleas, Westmoreland county.

Action by Katie Smith against the Metropolitan Life Insurance Company on a life insurance policy. From a judgment for plaintiff, defendant appeals. *Affirmed*.

The affidavit of defense is as follows: "Before me, the undersigned, a notary public, in and for said county, personally appeared John Heathcote, who, being duly sworn, deposes and says that he is the superintendent of the defendant company for the McKeesport district, and that the defendant company above named has a just, full, and legal defense to the whole of the plaintiff's claim in the above stated action, the nature of which is as follows, to wit: First. The first condition upon which said policy was issued, as indorsed thereon, is as follows: '(1) No obligation is assumed by this company upon this policy until the first premium has been paid, nor prior to the date of the policy, nor unless upon said date the insured is alive and in sound health.' Upon the date of said policy, to wit, the 30th day of April, 1894, the insured was not in sound health, as deponent is informed and believes, and expects to be able to prove upon the trial of this cause. Second. The application for said policy, which was signed by the insured, Henry J. Smith, dated April 28, 1894, contained, *inter alia*, the following questions and answers: 'Have you ever had . . . disease of the heart? Ans. No,'—whereas the insured had been troubled with a 'weak, irritable heart' and neurasthenia, and had been under treatment by a physician therefor at divers and sundry times between the 15th day of October, 1893, and the date of said policy, as deponent is informed and believes, and expects to be able to prove on the trial of this cause. Third. Said application contains the following questions and answers: '(3) Give full particulars of any illness you may have had since childhood, and name of medical attendant or attendants. Ans. About four months ago had an attack of typhoid fever lasting some six or seven weeks, and from which he has fully recovered. Attended by Dr. Donnelly, of Latrobe, Pa. (4) When were you last confined to the house by illness? Ans. Four months ago.' '(6) (a) Name and residence of your usual medical attendant? Ans. Dr. H. L. Donnelly, Latrobe, Pa. (b) When and for what have his

services been required? Ans. Four months ago, for typhoid fever. (7) Have you consulted any other physicians? If so, when and for what purpose? Ans. No.' These answers, taken together, were untrue, because the insured was attended by Dr. Donnelly for another illness than the one set out therein, viz. from the 15th of October, 1893, at divers times up to the date of the policy, and afterwards, until May, 1896, for 'nervous debility and weak heart and cerebral embolism, resulting in softening of the brain'; and said answers are also untrue, because the insured was attended by Dr. Jos. D. Casey several times between the 23d day of October, 1893, and the date of the policy, as deponent is informed and believes and expects to be able to prove. Fourth. Said insured never recovered from the effects of the first attack in October, 1893, but was in unsound health from that date until the time of his death, although there were periods of temporary improvement in his condition, as deponent is informed and believes and expects to be able to prove on the trial of this cause."

Gaither & Woods and Jennings & Wasson, for appellant. Moorehead & Head, for appellee.

MCCOLLUM, J. On the 30th of April, 1894, the defendant company issued a policy of insurance, in the sum of \$1,000, on the life of Henry J. Smith, who died on the 5th of September, 1896. The insurer now refuses to pay the insurance money on two grounds: (1) The insured was not in sound health "upon the date of the policy"; and (2) his answers to certain questions contained in his application for insurance were untrue. The first ground on which payment is resisted is sufficient, if established by competent evidence, to bar a recovery; and so is the second ground, if the answers complained of, although made in good faith by the applicant, relate to some matter material to the risk. "Statements made by an applicant for life insurance, which are incorrect and untrue, will not avoid the policy, if they are immaterial to the risk, and are made in good faith and in the belief that they are true." *Hermany v. Association*, 151 Pa. St. 17, 24 Atl. 1064; *Act June 23, 1885 (P. L. 134)*. In the case now under consideration there is a positive conflict in the evidence respecting the health of the insured at the time of the issuance of the policy on his life. It is conceded that he had a serious illness in October and November, 1893, which lasted about seven weeks, and that during that time Dr. D. H. Donnelly was the physician in charge of his case. Donnelly testified that he then had "a dilated, weak heart," and when asked if he had it on the 30th of April, 1894, he replied: "Why, certainly; that continued all the time. He never got well of that. Nobody can cure that." Dr. Casey, who was the junior partner of Dr. Donnelly, was not called as a

witness, but he made a written statement which indicates that he occasionally visited the patient, in the absence of his senior, and thought he had "neurasthenia and a weak heart." Dr. Thomas testified that he became acquainted with the deceased during his residence in Millerstown, Butler county, and that he was called on the 8th of April, 1893, to attend him; that from his examination of him he thought "there was a slight paralysis on one side"; that he made no note of the occurrence; and that he depended entirely upon his memory for his account of it. The witnesses to whose testimony we have referred are the witnesses relied on by the defendant company to establish its contention that the deceased was not in sound health when the policy was issued. It will be noticed that Dr. Donnelly, who was the only physician employed by him after his removal to Latrobe, never intimated to him, or to any person dependent upon him, or interested in his welfare, that the condition of his heart disabled him from carrying on the business in which he was engaged. Surely, if it was clear to his medical attendant that his disability was such as to preclude violent exertion, and the carrying or lifting of heavy loads, he should, and probably would, have been advised of it. Be this as it may, there is direct evidence in the case which negatives Dr. Donnelly's view of the nature and cause of his illness in October, 1893. Dr. McConaughy, who was the company's medical examiner for several years, and on whose examination the policy was issued, reported to his employer that the applicant had no "intermittence or irregularity or undue strength or weakness in heart action," but that his chances of life appeared to be first class. This report was sustained by his testimony, in which he explained the nature and extent of his examination, and that as to the condition of the heart and lungs it was thorough. In addition to and in line with the testimony of McConaughy, several witnesses who were acquainted with the deceased and his capacity for labor testified that he appeared to be a strong and healthy man. Surely, therefore, the question whether he was in sound health when he made his application for insurance was for the jury, upon the evidence in the case. *Diets v. Insurance Co.*, 168 Pa. St. 504, 82 Atl. 119; *Schwartz v. Insurance Co.*, 5 Pa. Super. Ct. 285; *McGraw v. Insurance Co.*, Id. 488.

Did the court err in not holding, as matter of law, that the policy was forfeited by the answers complained of? Certainly it was not for the court to say, upon the evidence we have referred to, that the assured had a dilated and weak heart when the policy was issued, or his statement that Donnelly attended him for typhoid fever in the fall of 1893 was untrue. This appears to have been the only serious illness he had previous to the issuance of the policy, and

the evidence shows that he and his wife and neighbors understood it as he stated it, and supposed that he was treated accordingly. Did his answers to the seventh question in the application impose on the court the duty, under the circumstances, of declaring the policy forfeited? Certainly not, if the answers were made in good faith, and related to an immaterial matter. "The questions of materiality and good faith are ordinarily questions of fact, and therefore for the jury." *Hermany v. Association*, supra. Whether there was bad faith or materiality in the omission to mention Drs. Casey and Thomas in the answer to the seventh question was, in our opinion, a matter to be determined by the jury upon the evidence. We have already seen what relation Dr. Casey sustained to the case, which was admittedly in charge of Dr. Donnelly. At the occurrence of April 8, 1893, F. P. Smith, a brother of the deceased, was present, and he testified that the latter complained of the heat, and of being dizzy, but that he was up and about the house half an hour afterwards. He also testified that he asked Dr. Thomas the next day what was the matter with his brother the day before, and he was told "it was a rush of blood to the head." Dr. Thomas testified that the deceased was about town a day or two after the occurrence. It may be noted also that neither Donnelly nor Casey said anything about the deceased having had paralysis until two years or more after the policy was issued. The case was carefully and correctly tried in the court below, and the defendant company has no reason to complain of the result. The assignments are therefore overruled. Judgment affirmed.

(183 Pa. St. 543)

In re TURNER'S ESTATE.

Appeal of CALL et al.

(Supreme Court of Pennsylvania. Jan. 8, 1898.)

APPEALABLE ORDER.

An order that further consideration of exceptions to report of auditor, to whom exceptions to executor's account had been referred, stand over until after the filing of an award, is not a final order, allowing appeal to review the questions involved in the exceptions.

Appeal from orphans' court, Greene county.

Accounting by James Call, executor of Elizabeth Turner, deceased. From an order postponing consideration of exceptions to the report of the auditor overruling exceptions to the executor's account, said executor and creditors of deceased appeal. Appeal quashed.

R. F. Downey and Buchanan & Walton, for appellants. A. F. Silveus, W. A. Hook, and J. B. Donley, for appellees.

WILLIAMS, J. Almost 30 years ago James L. Turner and Elizabeth, his wife,

found themselves growing aged and infirm, and needing to be relieved from the burden of their own care and support. Their own children were grown up and settled, but they found it necessary to arrange with another for the care needed to smooth their declining years, and keep them from want. They had a house in the little village of Oak Forest, Greene county, and a farm not far away, the title to both of which was in Mrs. Turner. On the 14th day of April, 1869, the old people made a written agreement with Asa B. McClelland and Nancy, his wife, by which the house in Oak Forest was conveyed to the McClellands, and the rent or income from the farm pledged to them so long as the survivor of the Turners should live, in consideration for their care and support, in sickness and in health, so long as they or either of them should live. On the same day, and evidently as part of the arrangement, Mrs. Turner made her will, in which she provided that, if the McClellands were not sufficiently compensated under the terms of the agreement, the moral obligation to pay what ought in conscience to be paid to them should be recognized by her representatives, notwithstanding the written agreement, and they should be paid, though it required the rest of her estate to pay them. But, to determine whether additional compensation was honestly due to the McClellands, and to what amount, she provided that the subject should be referred to three "disinterested and responsible men" for examination, from whose decision no appeal was provided for. The survivor lived nearly 19 years after this arrangement was made. After the death of the survivor notice was given by the McClellands that they were entitled to additional compensation, and requesting the executor to have three disinterested and responsible persons appointed to hear and pass upon their claim. The executor, in the absence of explicit directions in the will as to the manner of the appointment of the arbitrators, applied by petition to the orphans' court, nominating suitable men, and asking their appointment. The orphans' court entertained the petition and made the appointment. The residuary legatees then came in by petition, and moved the court to revoke the appointment of the arbitrators, and to dismiss the petition under which the appointment had been made; but the court, on hearing, refused the application of the residuary legatees, and discharged their rule. The arbitrators then met, investigated the claim of the McClellands, and found the sum of \$3,477.20 to be due to them for services rendered and expenses incurred under the contract of April 14, 1869. This award remains undisturbed, no exceptions, so far as appears, having ever been taken to it. In December, 1889, the executor filed his final account. This award was upon its face a valid claim against the estate in the hands of the executor, and he took credit in his final account for the sums paid by him to the

arbitrators for their services, and for the amount of the balance of the assets in his hands as paid upon the award. This controversy is over the executor's account. The residuary legatees except to the credits claimed for the payment of the fees of the arbitrators and the money paid upon their award. The question so raised is over the effect of the award in favor of the McClellands. It was neither appealed from nor excepted to. Why was not the executor entitled, therefore, to credit for its payment? The learned judge of the orphans' court seems to be of the opinion that the proceedings to ascertain whether the McClellands were justly entitled to additional compensation were begun too soon. We do not think so. It seems, also, to be thought that the executor should have converted the estate into money, brought it into court, and submitted its distribution and the claims of the McClellands to the decision of an auditor. The testatrix did not entertain that idea. She provided for a tribunal to dispose finally of the subject, not upon strict rules of law, but upon moral grounds, and according to the dictates of good conscience. The claim, if any was found to exist, could not be paid until the estate was converted into money by the executor, but its ascertainment had nothing whatever to do with the sale of the decedent's real and personal estate, and was in no way dependent on such sale. But the orphans' court, for some reason that we cannot now review, because of a consideration presently to be mentioned, upon an exception to the executor's account, has reversed and set aside the appointment of arbitrators made in 1887, and the decree made by the same court under the presidency of the predecessor of the present learned president judge refusing to vacate the appointment; set aside the award, without an exception or objection of any sort being filed against it; ordered the selection of a new board of arbitrators; and directed that, meantime, the "further consideration of the exceptions filed to the report of the auditor," to whom the exceptions to the executor's account had been referred, "stand over until after the filing of" the new award by the new board of arbitrators. This is a suspension of the controversy over the executor's account. It is in no sense a final order upon any question that was properly before the orphans' court, and it is not easy to see how any other disposition of this appeal is possible than to quash it as prematurely taken. The time may come when the exceptions to the executor's account will be disposed of by a final decree, and when that time comes appeal can be taken that will bring this extraordinary record up for review. Meantime we can only say that the order appealed from is interlocutory in its character, and in express terms stays the pending proceedings on the executor's account for the present, leaving the questions that were before the court

wholly undecided. For this reason we hold that the appeal is premature, and must be quashed. It is quashed accordingly.

(133 Pa. St. 532)

YEANEY et al. v. KECK.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

FRAUD OF AGENT—ACCOUNTING—JURISDICTION.

1. In an action against an executor, the evidence showed that deceased, having an option to buy land in a foreign state through certain agents, represented to plaintiffs that he would have to pay six dollars per acre, and accepted from plaintiffs an authority to purchase the land at that price for all the parties; that portions of the purchase money were paid in advance to him, at the rate of six dollars per acre; that a deed was made by the owner, and delivered to deceased, for the whole tract, which recited the price at six dollars per acre; that such deed was to plaintiffs and others, as tenants in common of expressed, undivided interests; that deceased's representation that the price to be paid was six dollars per acre was false; that he only paid about one-half that sum; and that he concealed such fact from plaintiffs, and kept the difference. *Held*, that defendant was liable to account to plaintiffs for their respective proportions of the sum so kept by deceased.

2. A court of equity had jurisdiction of such case.

Appeal from court of common pleas, Jefferson county.

Bill by John Yeane, Walker Smith, John O. Smith, and John F. Dinger against Benjamin Keck, executor of the estate of John Keck, deceased, for an accounting. From a decree for plaintiffs, defendant appeals. Affirmed.

Harry B. Willson and G. A. Jenks, for appellant. C. Heydrick, for appellees.

GREEN, J. It was proved by indisputable testimony, and not at all denied, that the actual selling price of the land by the owner was \$12,000, and that John Keck, deceased, obtained from W. R. Brown & Co., who were the selling agents of the owners, an option to buy the land for \$15,000. It is also an undisputed fact that the price named in the deed was \$24,240, and that the deed was made directly by the owner, Henry S. Mitchell, and his wife, to the ultimate purchasers. The plaintiffs were four of these purchasers, to wit, John Yeane, Walker Smith, John O. Smith, and John F. Dinger. The conveyance was made to all the purchasers jointly, and it expressed the interest of each one thus: W. H. Gotwald, one-eighth; John F. Dinger, one-eighth; Walker Smith, nine thirty-seconds; John O. Smith, three-sixteenths; John Keck, one-eighth; John Yeane, one-eighth; Benjamin Keck, one thirty-second. Under the deed the vendees took title to the whole property (4,040 acres), as tenants in common; and the fractional interests of each were in the whole property, and the relation of the par-

ties to each other was that of tenants in common. The evidence also shows, without dispute, that John Keck was the one and only person who negotiated the sale. It was he, individually, who procured the purchasers. Whatever representations, therefore, he made to induce the purchasers to buy, were made upon his personal responsibility. It is also an undoubted fact, established by a mass of testimony, which is not disputed, that John Keck did actually represent that the purchasing price which was to be paid for the land was six dollars per acre. It is desirable that some of the testimony should be quoted, in order to show just what was said, and by whom and to whom it was said, in relation to this subject. John Slicker testified that he had known John Keck about 13 years; that he met him at church in the summer of 1888; and that Keck told him "he had been to Florida, and looked at a piece of timber land, in which there was about four thousand acres." He showed me a draft he had. He said, "This tract of timber land we can buy for \$6 an acre, which will make about \$24,000." "Now," he says, "this timber land is valuable property, and I would like to get enough partners to buy this whole tract of land." He asked me to go in with him and take it, and asked if I could get anybody else that he could get in as a partner. I said to him—I had been over to John Dinger's—that I had heard him (Dinger) say he wanted to go to Florida the coming fall, to look at some timber land, and I said, "You go over and see him; he will likely go in." He then wanted me to go and see Dinger. * * * He said that he had Mr. John Yeane that he thought would go in.—Mr. Walker Smith. He said he thought Mr. Ben Keck would go in, but he would rather not have him go in. He told me he was taking an interest himself, but did not say how much. * * * Mr. Keck told me to speak to Mr. Dinger and my father, and Mr. Dinger then came over to my place, and I told Mr. Dinger what Mr. Keck had told me. I told Mr. Dinger that I thought there was a bargain in this land by what Mr. Keck had told me. * * * I had no further conversation with him until after he came back from Florida. When he came back, he said, "We have got everything fixed up; there is a good company that we can start into business at any time." He stated that there was in it Mr. John F. Dinger, John Yeane, Walker Smith, John C. Smith, Mr. Gotwald, and number one, himself, and Mr. Ben Keck. * * * He stated from whom they were buying the land, but I cannot recollect the names. He said he and the parties named were going in as partners to buy that land. He said the \$6 an acre was the price they were to pay for the land to the party in Florida, and I heard the names of Mitchell and Brown & Co. mentioned."

If the foregoing testimony is believed,—and we know of no reason why it should not be,—it meets several points of contention which are supposed to affect adversely any right of recovery in this case. It seems clearly that the scheme of Keck was a scheme for a joint, and not a several, purchase of the land. His whole plan contemplated a purchase by others joined with himself in one common enterprise. The deed is quite conclusive proof in the same direction. It is a matter of no consequence whatever whether they were, or were not, partners, in the technical sense of that term. They were beyond all question associated together in one joint purchase of a large tract of land, to which each was to contribute a definite proportion of the purchase money. It was shown by other testimony that such contributions were actually made, and that all the money to pay for this land was paid over to Keck by his associates, and that he paid the seller the real amount of the actual purchase money, and presumably kept the residue of what was apparently the total sum of the purchase money himself. The testimony of Slicker also shows that Keck declared to Slicker that the purchase money of the land was \$6 per acre, and that this would make about \$24,000 in all. Now, the witness testified that, at the request of Keck, he saw Dinger, and told Dinger what Keck told him. Dinger is one of the plaintiffs, and this testimony brings Keck's representations directly to him through an authorized agent, and establishes Keck's responsibility to Dinger, both for the truth of what he said and the character of the association as being a joint one. William H. Merket said he was present and heard the conversation between Slicker and Keck, and he corroborated Slicker's testimony. Among other things, he said that Keck said that "he was trying now to get parties to take shares in with him to buy this land, as he thought there was big money in it. I asked him if he had any share in it. He said he was going to take some share in it. * * * He thought there would be no trouble in getting partners enough to take the other three-quarters." Hulett E. Smith, a son of Walker Smith, one of the plaintiffs, testified that he was present at a conversation between Keck and his father and John C. Smith, his uncle, another of the plaintiffs, in June, 1888. He said: "Mr. Keck, my father, and Uncle John talked the matter over in the presence of myself and my brother. Father said, 'If we go in, we will have to be very careful and see that the title is good.' Mr. Keck produced some papers, and explained how Mr. Mitchell came by the land. He said he was buying from Mr. Mitchell; Judge Mitchell, I believe, he called him. He said the price was \$6 per acre; that is, Mitchell's price was \$6 per acre. Father said, 'If we paid the cash, couldn't we get

it cheaper?" Mr. Keck said, 'No;' that that was their price,—Mitchell's price. * * * Mr. Keck said he had seen Mr. Dinger and Mr. Yeane. Father said to Mr. Keck, 'If you will take the half, we will take the other half, rather than have so many partners in it.' Mr. Keck said that Mr. Yeane and Mr. Dinger had partly agreed to take an interest in it, but he couldn't tell until Mr. Dinger came from seeing his father-in-law. They agreed to send Mr. Keck down to make the purchase." It was shown by other testimony that Keck did go to Florida, and complete the purchase, taking the deed in the name of all, receiving from his associates their several portions of the purchase money, which he paid over to the vendor, Mitchell. As it seems to us, this was a most complete case, not only of a joint association in the purchase, but of an agency on the part of Keck to make and complete the purchase for all the parties, and including the acquisition of the title by obtaining the deed for the premises. We do not understand that this testimony was at all impeached or contradicted. If believed, it imposed, in addition to the other features, a relation of trust and confidence on the part of Keck to his associates. The testimony thus far includes all the plaintiffs, and joins Keck to them all in a common venture, in a relation of principal and agent, and in a relation also of trust and confidence. Elmer E. Smith, a brother of the last witness, fully corroborated his brother's testimony as to the conversation in the presence of both, with Walker Smith and John C. Smith. He said that in a conversation about a week previously, to which also his brother testified, Keck said: "I have struck a nice thing in Florida. There is 4,080 acres of land, that can be bought for \$6 per acre. I am around trying to get parties to go in along and buy it, as it is too big a thing for me myself, and would like to have your father take a share too, as it would be a nice thing for you boys." * * * I then asked him who this land could be bought from. He said, 'Mitchell;' Judge Mitchell, he called him. He then spoke of Mr. Brown being Mitchell's agent. I said, 'Are you getting it from Brown or from Mitchell?' He said, 'If I get up the company, we will get it direct from Mitchell; there will be no trouble about the title.' Then I asked him if he didn't suppose it could be bought for less than \$6 per acre, as it was a good deal of money. He said, 'No;' that it could not, and he had only to the 1st of July at that price." Referring to the second conversation, when all were together, he testified that: "He [Keck] said that Yeane and Dinger were privileged to go in along, and spoke of paying Mitchell \$6 per acre for the land. Afterwards Keck said that Mr. Yeane had an eighth in the land." He also testified that, when Keck came back from Florida, he "had a bill of the expenses, and had what each one's share

would be separate. He says, 'You [me] count it yourself, and see that I made no mistake.' While I was counting it, then he counted it over. We reduced it to 32nds. Father paid for $\frac{9}{32}$, John C. Smith's cost at $\frac{6}{32}$, Mr. John Yeane's was $\frac{4}{32}$, Mr. Benj. Keck's was $\frac{1}{32}$, John Keck's was $\frac{4}{32}$, Gotwald $\frac{4}{32}$, and Dinger $\frac{4}{32}$." Here was an exact ascertainment in figures, by Keck himself, of the precise joint interest of each party in the association. There is no dispute as to this testimony, and it seems impossible, in view of it, to give any force to the contention on behalf of the appellant that there was no joint interest in the transaction. Mr. Keck dealt with the whole number as his associates in a common enterprise, and he received their several proportions of the purchase money, and also of the expense money, entirely in that capacity. Some of the parties consulted Mr. C. Z. Gordon, a member of the bar of Jefferson county, in relation to the transaction, before it was consummated; and he testified as to what took place, John Keck being present. He said: "When the parties named came into my office, Walker Smith began the conversation. Keck was not present. Walker told me they were all going in together to buy a piece of land in Florida. I think the names of all the parties who now appear in the deed were mentioned. That is my recollection. He [Smith] spoke of the number of acres. The price was also mentioned at \$6 per acre. He said that John Keck had been in Florida, and knew all about the land, and that he was going to negotiate the purchase and transact the business, I think he said for us." The witness spoke somewhat reproachfully to Walker Smith for trusting a matter of such importance to John Keck without seeing the land, and he says: "At that Walker Smith and John C. Smith began to protest very strongly that they had the utmost confidence in John Keck's integrity, and said that they would as soon trust him as they would themselves, and spoke of being neighbors." The witness insisted that one of them, at least, should go with Keck to Florida, and see the land, and consult an attorney there as to the title. As a matter of fact, Walker Smith and Dinger did go to Florida with Keck; but as Keck was dead, and the others could not testify, there is nothing in the testimony as to what happened there that affects the relations of the parties. Mr. Gordon was asked, "Q. Did Mr. Keck say whether the Smiths were or were not buying the land from him? A. Mr. Keck said nothing about it, but Mr. Walker Smith said, in the presence of Mr. Keck, that they were all going in together to buy this tract of land from Brown or Mitchell,—I don't know which; it was certainly not from Keck,—and Keck did not refute the statement." Other testimony was taken to show the payment by the plaintiffs of their several portions of the purchase

money, the receipt of which was not at all disputed. In addition to the verbal testimony, there were given in evidence two written agreements,—one between John Keck and John Yeane, dated June 20, 1888; and the other between John Keck and John C. Smith, dated June 19, 1888. Yeane's agreement, after reciting that Keck had the refusal of 4,080 acres of land in Florida at \$6 per acre, stipulated that Keck should have conveyed to Yeane an undivided one-eighth interest in the land, for which Yeane agreed to pay at the rate of \$6 per acre,—\$1,000 down, and the rest at any time thereafter when Keck should notify him, by a draft on New York to be sent to Keck in Florida; "said Keck not to pay until he is satisfied the title to said land is good." The agreement with John C. Smith was to the same effect, except that the interest was to be the undivided three-sixteenths of the land.

It will be seen that both these instruments recited the fact that the refusal price of the land was \$6 per acre, and the amount to be paid by each party was fixed on the basis that that was the actual purchasing price to be paid. Neither of them was an agreement by Keck to sell, as his own, the respective interests of each, but that those interests, respectively, should be conveyed by the owner, Mitchell, to these gentlemen as purchasers, and this is what was actually done. As we view the case, then, the evidence establishes the facts that John Keck, having an option to buy the land through Brown & Co. for \$12,000, but for which he was to allow Brown & Co. \$3,000, sought the plaintiffs, and asked them to join him in the purchase of the tract; that, in order to induce them to join in the purchase, he represented to them that he could buy the land for \$6 per acre, which would amount to \$24,000, that this was the sum which would have to be paid to the owner, and that it could not be had for less; that he accepted an authority from them to go to Florida, and purchase the land at that price for all the parties, and to close up the transaction by accepting a deed for the premises if he was satisfied that the title was good; that portions of the purchase money were paid in advance to him, to be paid for the land; and that all the purchase money which was furnished by these plaintiffs was sent to him in Florida, to be paid for the land, and that it was all furnished at the rate of \$6 per acre for the entire tract; that a deed was made by the owner and his wife, and delivered to Keck, for the whole of the premises, which recited that the purchase money of the land was \$24,240, which was \$6 per acre for 4,040 acres; and that this deed included all of the plaintiffs (Keck himself and several others) as grantees as tenants in common of different and expressed undivided fractional interests in the land. The testimony also shows, without any contradictory evi-

dence, that the original and continued assertion by Keck that the purchase money price to be paid to the owner was \$6 per acre was an unqualified falsehood; that no such price was to be paid to the owner, or to the owner and other parties; that his assertion that the land could not be bought for any less than \$6 an acre was equally false; that, in point of fact, Keck never paid that price for the land, but only the original price, of \$12,000 to the owner, and \$3,000 to Brown & Co.; that out of the money he received from his associates (the plaintiffs), he kept for himself all of the difference between the amount received by him from his associates and the amount he actually paid out; that John Keck was not only guilty of falsehood and false representations, by means of which he obtained the moneys that were paid him, but he was also false to his agency for principals in making and completing the purchase, concealing from them the real amount which he paid, and was to pay, for the land, and false both in his relation of agent and in his relation of trust and confidence, in keeping from those who were his associates in the purchase, and his principals in the final negotiations and in the execution and acceptance of the deed, their money deposited with him for the specific purpose of paying for the land, in excess of the amount he actually did pay.

We have no doubt of the jurisdiction of equity in such a case. Here is a community of interest in a joint venture, in which the defendant has in his possession money belonging to the plaintiffs, which requires an accounting for its just determination. Here is fraud practiced upon the plaintiffs, by means of falsehood and false representations, to induce them to join him in an enterprise common to all. Here is the violation of a trust and confidence reposed in him by the plaintiffs, and a breach of his duty as the agent of the plaintiffs, as his principals, in the purchase of a large and valuable tract held by them and him as tenants in common. All of these are heads of equity jurisdiction. So far as the right to relief is concerned in such circumstances, our own case of *Short v. Stevenson*, 68 Pa. St. 95, furnishes an almost exact parallel. The syllabus of the case is: "*Stevenson, being in negotiation for oil land, proposed to form a company, represented that the land could be bought for \$12,000, and induced Short to take and pay for a share in it at \$1,000. Stevenson bought the land for \$6,000, without disclosing to his associates the price which he gave. Held that, on these facts, Short could recover his money back.*" Williams, J., delivering the opinion, said: "He [defendant] was not the owner of the land, and he did not buy it for himself, but for himself and his associates; and good faith required that he should deal fairly with them, and charge them no more than the amount actually paid therefor. As was said by the present chief justice in the recent case

of *Simons v. Mining Co.*, 61 Pa. St. 202: 'An agent cannot make profits out of his principal in the business of his agency; nor a partner out of his co-partner without his assent; nor an associate out of his co-associates, for whom he has undertaken to act. That this is the law authorities need not be required to prove. It is elementary.' The principle applies with all its force to the facts as proved in this case, and the evidence should have been submitted to the jury, with the instruction that if they found that the defendant purchased the land for himself and associates without disclosing the price paid therefor, and was guilty of concealment and misrepresentation as to the terms of the purchase, the plaintiff was entitled to recover back the advance price which he paid the defendant for his share." In the case of *Katz v. Johnston*, 178 Pa. St. 346, 35 Atl. 981, a bill in equity was sustained upon the following facts: Plaintiff and defendant entered into an agreement in writing to buy land, and divide it into building lots for sale at a profit. Plaintiff was to furnish all of the hand money to make the deferred payments, and was to be repaid out of the first sales; and, after such repayment, she was to receive two-thirds of the profits. Defendant negotiated for the purchase of the property, and, by a secret arrangement with the vendors, received \$500 out of the purchase money. Only a very small amount was realized from the sale of the lots, and plaintiff was obliged to pay the whole amount of the purchase money. In the meantime judgments had been entered against the defendant, which he claimed were paid. On a bill in equity filed by the plaintiff against the defendant, the court decreed that the defendant should repay to the plaintiff the \$500 which he had fraudulently obtained from the vendors, and that he should pay to her one-half of the purchase money, or, in lieu of such payments, should execute to her a quitclaim deed of his interest in the land, and have the judgments against him satisfied of record. Held, that the decree was proper, and should be affirmed. In the case of *Zahn v. McMillin*, 179 Pa. St. 143, 36 Atl. 188, we held that if a party knows that another is relying upon his judgment and knowledge in contracting with him, although no confidential relation exists, and he does not state material facts within his knowledge, the contract will be avoided; for knowingly to permit another to act as though the action was confidential, and yet not state material facts, is fraudulent. The case was a bill in equity to account, alleging fraud by the defendants in withholding certain facts from the plaintiffs with whom they were jointly interested in a certain transaction in which all were interested. Our Brother Dean, delivering the opinion reversing the court below for dismissing the bill, said: "It is not denied, nor could it be, in the face of the evidence, that, by that contract, J. M. shares in the fruits of the fraud to which E. A. was an active party, and for

which he is answerable in an account. But did J. M., by his declarations and conduct, aid his brother in procuring the fraudulent contract, so as to render him accountable in equity to these plaintiffs? The learned court below thinks not, because he was not one of the contributors to the first enterprise, and therefore must be treated as a stranger, dealing at arm's length with the co-partners or co-tenants of his brother. This is a mistake, for that one fact warrants no such conclusion. If he had been a member of the first association, and had untruthfully represented a material fact to his associates, to induce them to part with their interests, that would have been conclusive against him, because of the legal presumption of a confidential relation; but, if there was not presumptively a confidential relation, still, was there one in fact, or such relation as warranted them in relying in the truthfulness of his statements? The principle controlling such case, and deducible from all the authorities, is well stated by Perry on Trusts (volume 1 p. 179): "There are cases where a party must not be silent upon a material fact within his knowledge, although he stands in no relation of trust and confidence. * * * If a party knows that another is relying upon his judgment and knowledge in contracting with him, although no confidential relation exists, and he does not state material facts within his knowledge, the contract will be avoided; for knowingly to permit another to act as though the action was confidential, and yet not state material facts, is fraudulent."

Upon all the evidence in the present case, and upon all the principles, both of law and equity, to which persons in the relations of these parties are subject, we are of opinion that the defendant's intestate is liable to account to the plaintiffs, his associates, and in this proceeding. The assignments of error are dismissed. The decree of the court below is affirmed, and the appeal dismissed, at the costs of the appellants.

(68 N. H. 229)

LAMARSH v. L'UNION ST. JEAN BAPTISTE DE NASHUA.

(Supreme Court of New Hampshire. Hillsborough. March 15, 1895.)

BENEFICIAL ASSOCIATIONS—FORFEITURE OF BENEFITS—INSURANCE—PAYMENT OF DUES.

1. The by-laws of a beneficial association provided for the payment of a monthly contribution by each member, and, on failure to pay the same within the time required, a member was to lose his benefits until he paid what he owed, and, in case a member was indebted for more than six months' contribution, he could be ruled from the society. At the death of a member the society was to pay \$50 for funeral expenses. Plaintiff's intestate had been a member, and when taken sick owed six months' contribution, but no action had been taken by the society. Shortly before he died he paid his contribution to the proper officer. Held, that deceased was a member at the time of his death, and his administrator was entitled to recover the death benefit.

2. Where the by-laws of a beneficial association provided that each member should pay one dollar to the assistant secretary as his share of the insurance payable on the death of a member, and, in case of neglect to pay the amount, he should be deprived of his benefits in the society, as well as of the insurance, until he acquitted himself of his arrears, payment to the secretary by a member in arrears was payment to his assistant.

Exceptions from Hillsborough county.

Assumpsit by Edmund Lamarsh, administrator of the estate of Misael W. Blain, deceased, against L'Union St. Jean Baptiste de Nashua, to recover \$50 for funeral expenses of intestate, and \$376 insurance upon his life. Facts found by the court. Plaintiff alleges exceptions. Overruled.

The defendants are a voluntary association for affording relief to sick members, for defraying their funeral expenses, and for the payment, at the decease of a member, of a sum equal to one dollar for every surviving member. The by-laws are in the French language, and provide that there shall be two regular meetings every month, of which the first is called the general meeting; that the secretary of archives shall keep a register of the trials of the society, shall register the name, age, and general occupation of applicants, shall exact from an applicant, before registration, the deposit of \$1, shall call the roll, when ordered by the president, and shall notify members against whom complaints have been made; that the assistant secretary shall aid the secretary in the fulfillment of his duties, shall receive and register in a book kept for the purpose the admission fees, the insurance money, and the fines, shall turn over to the treasurer the money he receives at each meeting, shall every three months make a report of the receipts and expenses of the society, shall give a copy of the rules to all new members, shall state the amount of the receipts and the expenses at each meeting; that the two financial secretaries shall receive the contributions at each meeting, remit them to the treasurer, and make a report to the assistant secretary, and shall notify members in arrears two weeks before the expiration of their six months; that the admission fee shall be \$2, besides \$1.10 for the mutual insurance fund; that \$1 shall be payable at the death of each member; that the monthly contribution shall be 50 cents, payable every month; that (article 20, § 2) "at the death of a member the society pays the sum of fifty dollars for the expenses of interment"; that (article 21, § 4) "the members have a delay of two weeks after each general assembly to pay the monthly contribution. Any member who neglects to pay during this delay loses his benefits until he shall have paid what he owes to the society"; that (article 21, § 5) "any member indebted to the society for more than six months' contribution can, on a vote of a majority of the members present, be ruled from the list of the society, if he

has been notified by the financial secretaries"; that any member indebted for fines is deprived of all benefits until he has paid them, except in case of a member dying suddenly; that all fines are payable at the next regular meeting; that all members must attend a high mass at the feast of St. John the Baptist every year, under penalty of a fine of 50 cents, excepting members who are ill, or absent from Nashua; that at the decease of a member in good standing with the insurance he shall receive \$1 per member belonging to the insurance; that a member notified of the decease of a member must pay the amount of his contribution at the second regular meeting, and any member who shall have neglected to pay during this time shall be deprived of his benefits from the society, as well as from the insurance, for the time during which he shall not have acquitted himself of his arrears; that any member who shall have paid, besides his admission fee, \$1.10 for the mutual insurance, shall from that time have a right to the benefits of the insurance. Blain became a member in 1886. He was taken sick of typhoid fever October 1, 1892, and died October 12, 1892. When taken sick, he had neglected to pay his monthly dues for nine months. He requested Joseph Bellephonse to pay the amount due, \$2.50. Bellephonse, who was not a member, handed \$5 to Joseph Berryl, who paid it to Charles Broder, the financial secretary, at and in the regular meeting of October 4, 1892, receiving back 50 cents, and the sum of \$4.50 was credited in Blain's pass book by Broder. The money was received without objection, and has been retained by the society. A fine of 50 cents was imposed upon Blain for his non-attendance at mass on St. John's day, June 24, 1892. Blain went to Laconia June 18th, returning to Nashua in the evening of June 24th, after the exercises at mass were over. When Berryl paid the arrearages, nothing was said to him by Broder about the fine. When Berryl paid Broder \$4.50, the latter told him there was something due for insurance, but did not state how much. Berryl learned from Gendron, the secretary of archives, that four members died in July and August, and that \$4 was due the insurance fund from Blain. Berryl informed Bellephonse of this, and Bellephonse informed Blain, October 5th. At Blain's request, Bellephonse handed \$4, received from Blain, to Dr. Guilet, Blain's attending physician. Guilet paid the money to Le Favor, the president of the society, October 11th, about 9:30 a. m., in the presence of Bellephonse, stating that Blain was dying, and that the money was paid on account of his dues to the insurance fund. Le Favor received the money, saying it would be all right, and that he would call a meeting of the society. Within a few minutes he paid it to Gendron, and told him it was for Blain's dues to the insurance fund. Gendron hesitated to take

it, stating that he doubted his right to receive it. Le Favor advised him to receive it, and take it to a meeting of the society. Gendron took it, but declined to receipt for it. Le Favor went to him because he supposed he was the proper person to receive it, and Gendron did not say he was not the proper person, nor say who the proper person was. Later in the day Gendron learned that Blain was very low, and was informed that he had no right to receive money except at a meeting of the society, and he thereupon left the money at Le Favor's house, of which action Le Favor was informed about 10 p. m. Blain died the next day about noon. Le Favor then offered the money to Bellephonse, who refused it, and it has since remained in Le Favor's hands. So far as appeared, the general practice has been for members to pay their dues at a regular meeting. Sometimes members have handed Gendron the money for their dues, with their pass books, before the meeting, for him to take to the meeting. Blain's name was never stricken from the roll of members, and no action was ever taken for terminating his membership. Before suit brought, the plaintiff made a demand, and the defendants refused payment. The defendants excepted to a ruling that the plaintiff can recover the funeral benefits and the insurance.

G. B. French, for plaintiff. O. H. Burns, for defendants.

BLODGETT, J. In the absence of argument for the defendants, no reason is perceived why there should not be a recovery for the death benefit. "At the death of a member the society pays the sum of fifty dollars for the expenses of interment." Article 20, § 2. The deceased is properly found to have been a member at the time of his death. His name was on the roll of members, and no action had been taken for terminating his membership by reason of his indebtedness for more than six months' contribution, as might have been done under article 21, § 5. But, in addition to this, it is found that he had "acquitted himself of his arrears" as to his monthly contribution before his decease by the payment of the sum due to the financial secretary at a regular meeting of the society, and that "the money was received without objection, and has been retained by the society." Under these circumstances, there can be no forfeiture of the death benefit upon general principles, nor under any by-law which has come to our attention. On the other hand, the reasonable interpretation of the by-laws in point is that, unless a delinquent member is ruled from the list of the society, on a vote of a majority of the members present, for more than six months' neglect of payment (article 21, § 5), he simply "loses his benefits until he shall have paid what he owes to the society"

(Id. § 4). As to the insurance, it is sufficient to say that, if payment of the \$4 had been made to the assistant secretary, it would have been a valid payment (*Manson v. Grand Lodge*, 30 Minn. 509, 16 N. W. 395), and we think it should be held to be no less valid because made to the secretary. Payment to the superior officer may reasonably be regarded as payment to his assistant. Exceptions overruled.

SMITH, J., did not sit. The others concurred.

(68 N. H. 196)

COLLINS v. LACONIA CAR CO.

(Supreme Court of New Hampshire. Belknap. March 15, 1895.)

INJURY TO EMPLOYE — MANIFEST DANGERS — ASSUMPTION OF RISK.

1. Where an employé of ordinary intelligence was injured by a machine which he had worked at for a year, with full knowledge of the dangerous parts thereof and the liability to injury therefrom, the danger was perfectly apparent, and there was no emergency requiring him to expose himself to the danger, the liability to injury from the unprotected parts was one of the "seen dangers" of which the employé assumes the risk.

2. Master and servant stand on common ground as to all defects and dangers which are open to the observation of, and are within the knowledge and comprehension of, master and servant alike; and no recovery can be had for a resulting injury to the servant where he is of sufficient intelligence to comprehend such risks incident to his employment.

3. Sufficient knowledge and intelligence to comprehend the risks incident to employment, where defects and dangers are open to observation, are presumed in the case of an adult person, in the absence of evidence to the contrary.

4. There was no duty resting on an employer to warn or instruct the employé as to the danger incident to the employment where he was injured by a dangerous machine, which he had helped to operate for a year, with full knowledge of the liability to injury from the dangerous parts by which he was injured.

5. An employer is not bound to warn or instruct employées as to defects or dangers incident to the employment which are open to ordinary observation, except in cases of youth, inexperience, ignorance, or want of capacity.

Exceptions from Belknap county.

Case by Patrick Collins against the Laconia Car Company. From a judgment for plaintiff, defendants except. Reversed.

Case, for injuries to the plaintiff from a defective machine, while in the employment of the defendants. Trial by jury. The machine was about 3 feet wide, 2½ feet deep, and 6 feet high. It was known as a "press machine." It was placed upon and fastened to a wooden foundation, the base of the machine being 3 or 4 inches above the basement floor of the shop. Attached were the uncovered cog wheels, the in-running side being their underedge, or rim. The machine was operated by a belt connecting it with shafting overhead. The distance from the floor to the center of the gearing was 5 feet and 1 inch. The distance

from the back side of the machine to the wall of the shop was about 8 inches, and from the gearings to the wall of the shop was 29 inches. Attached to the wall behind the machine, and about 3 feet from the floor, was a shelf and a small cupboard, where the men who operated the machine placed some of their small tools, aprons, and other clothing. The machine was operated by one Laprise and the plaintiff. Laprise's place was on the left. It was his duty to pass rods of iron through a groove on the front side, where they were cut off the required length for bolts, the pieces dropping into a bucket and sometimes upon the floor. It was the duty of the plaintiff, whose place was on the right, to gather up the pieces, and carry them to other parts of the shop, as he might be directed. The cog wheels were upon the right side, about as high above the floor as the plaintiff's shoulders, and were in plain view. On the morning of the accident, as soon as the machine was started up, the plaintiff reached for his apron upon the shelf. In withdrawing his arm, his hand in some way was caught in the gearing of the cog wheels, and was injured. At the time of the accident, the plaintiff had worked on the machine nearly a year. He was about 52 years of age, and of average intelligence. No warning as to the danger from the gearing, or instruction as to the precautions which should be taken to avoid it, was given to him by the defendants; and there was also evidence tending to show that the gearing should have been covered to make it reasonably safe. The plaintiff testified that he knew he would get hurt if he got his hand in the gearing, but that he never thought of the danger, and that, when he took his apron from the bench, he was not thinking of it, and that, if he had, he supposed he should not have got hurt. The defendants seasonably moved for a nonsuit, which was denied, subject to exception. Verdict for the plaintiff.

E. H. Shannon, W. S. Peaslee, Cogswell & Blackstone, and E. A. & C. B. Hibbard, for plaintiff. Jewell, Stone, Owen & Martin, for defendants.

BLODGETT, J. The motion for a nonsuit should have been granted. Familiar principles of universal acceptance, as well as recent decisions of this court (*Bancroft v. Railroad*, 30 Atl. 409, 410; *Henderson v. Williams*, 66 N. H. 405, 23 Atl. 365; *Nash v. Steel Co.*, 62 N. H. 406, 408), forbid any other conclusion. The plaintiff's grounds of complaint are solely (1) that the gearing was not reasonably and safely protected, and (2) that the defendants gave him no warning or instruction as to the resulting danger. No recovery can be had upon either of these grounds.

The fact that the gearing was not covered is not of controlling importance. The

danger from it was as apparent to the plaintiff as to the defendants; and there was no emergency requiring him to expose himself to the danger. It was obviously one of the "seen dangers" of which the servant assumes the risk by entering upon the employment, even though reasonable precautions have been neglected by the employer. As to all defects and dangers which are open to the observation and within the knowledge and comprehension of master and servant alike, both stand upon common ground; and no recovery can be had for a resulting injury to the latter when he is of sufficient intelligence and knowledge to comprehend the risks incident to the service, which is presumed in the case of an adult person, in the absence of evidence showing the contrary. In such a case an injury to the servant is within the scope of the danger which both the contracting parties contemplated as incidental to the service, and the master cannot be held liable for the injury. Much less can he be held liable when, as in the present case, it affirmatively appears, not only that the danger of which the servant complains was open to common observation and within common comprehension, and that he was of sufficient intelligence and knowledge to comprehend it, but that he actually did know and comprehend it. In brief, the plaintiff stands no better than he would have stood if, by special agreement with the defendants, he had assumed the risk of the gearing.

Of still less importance is the fact that no warning or instruction as to the danger from the gearing was given to the plaintiff by the defendants. None was necessary. It would have been a useless formality merely. The most that could have been said to him was that he must keep away from the gearing when the machine was in operation, or he would get hurt. But this would have given him no knowledge he did not already possess. The danger of getting caught in the gearing was perfectly obvious to him, and he therefore knowingly and voluntarily assumed it as one of the ordinary risks of his employment. The duty resting on the master to instruct or warn the servant of all latent and hidden defects or hazards incident to the employment, of which the master knows or ought to know, does not extend to dangers open to ordinary observation, except in cases of youth, inexperience, ignorance, or want of capacity of the servant, and cannot be invoked as to patent defects or dangers by a servant of mature capacity and knowledge. As to such defects or dangers as are obvious to the senses, he is bound to take notice; and when, as in the case of this plaintiff, he admits he knew of the danger and comprehended it, it would be as absurd as it manifestly would be unjust to permit a recovery on the ground that his employers did not warn him of that danger. In view of these conclusions, the

other exceptions taken at the trial need not be considered. Judgment for the defendants.

SMITH, J., did not sit. DOE, C. J., did not concur. The others concurred.

(68 N. H. 264)

PERKINS v. PERKINS et al.

(Supreme Court of New Hampshire. Rockingham. July 26, 1895.)

SUIT BY ADMINISTRATORS — EVIDENCE — LIMITATIONS — COMPETENCY OF WITNESS.

1. Under Pub. St. c. 224, §§ 16-18, excluding the testimony of the adverse party as to facts which occurred in the lifetime of the deceased, where an administrator or executor is a party of record or a party of interest, unless the administrator elects so to testify, or unless its exclusion will be injustice, a defendant, executrix of her husband's will, cannot testify to conversations between her deceased husband and the intestate of the plaintiff concerning a bank book belonging to plaintiff's intestate, in the possession of defendant.

2. A suit against one who is an executrix, in her private capacity, for property which she claims as legatee of her testator, is not affected by Pub. St. c. 191, § 4, providing that suits against an executor must be begun within three years after the appointment.

3. Pub. St. c. 191, § 4, provides that suits against an executrix must be begun within three years after the appointment. *Held* that, nevertheless, such action may be brought after that time by the administrator of a person who at the time of her death had the right of such action, if brought "within two years after the original grant of administration," as provided by Pub. St. c. 191, § 6.

Exceptions from Rockingham county.

Action by Langdon M. Perkins, administrator, against Elizabeth A. Perkins and others. Decree for plaintiff, and defendants except. Exceptions overruled.

Mary A. Perkins died February 13, 1888, and the plaintiff was appointed administrator of her estate January 14, 1892. She was the widow of Elias Perkins, and at the time of her death was the owner of a deposit in the Portsmouth Savings Bank, standing in the name of Mrs. Elias Perkins, and of a sum of money. George A. Perkins, a son and heir of Mary A. Perkins, before her death obtained possession, without right, of the bank book representing this deposit, and held it till his death. The defendant Perkins is executrix of his will, having been appointed in January, 1889, and she has never settled her account as executrix, but there are no outstanding claims against the estate, and she is the sole legatee and devisee under the will. She now holds the deposit book, and claims the deposit, as executrix and legatee, as a part of the estate of George A. Perkins. She also, before the death of Mary A. Perkins, obtained possession, without right, of the sum of money belonging to the latter, and now claims it by reason of some transaction between her and Mary A. Perkins. The deposit and the money are the only property of the estate of Mary A. Perkins, and in part are needed to pay

debts, funeral charges, and expenses of administration. At the trial the plaintiff did not testify. The defendant Perkins offered to testify in regard to conversations and transactions between George A. Perkins and Mary A. Perkins with respect to the bank book, and also with regard to certain matters between herself and Mary A. Perkins with respect to the money. She being the party in interest, claiming the deposit as executrix and sole legatee of the estate of George A. Perkins, and claiming personally the money, her testimony was excluded, and she excepted. She then asked to be allowed to testify to those matters on the ground that injustice would be done without her testimony; but the court found that no injustice would be done without her testimony, and rejected it, to which she excepted. She also contended that the suit could not be maintained on account of the statute of limitations, not having been begun till more than three years after her appointment as executrix of the will of George A. Perkins. Decree for the plaintiff against the defendant Perkins for the bank book and against the defendant bank for the amount of the deposit, and also that judgment should issue against the defendant Perkins for the amount of the money and interest thereon, upon the plaintiff's filing a declaration in assumpsit for money had and received.

Calvin Page, for plaintiff. S. W. Emery, for defendant Elizabeth A. Perkins. J. S. H. Frink, for defendant Portsmouth Sav. Bank.

BLODGETT, J. The offer of the defendant to testify to conversations and transactions between her deceased husband and the plaintiff's intestate was alike properly rejected as a matter of law and of discretion, under the statutory provisions excluding the testimony of the adverse party in respect to facts which occurred in the lifetime of the deceased, where an administrator or executor is a party of record, or a party in interest, unless the administrator or executor elects so to testify, or it clearly appears to the court that injustice may be done without the testimony of the other party. Pub. St. c. 224, §§ 16-18; *Chandler v. Davis*, 47 N. H. 462, 465; *Harvey v. Hilliard*, Id. 551, 553; *True v. Shepard*, 51 N. H. 502; *Holt v. Russell*, 56 N. H. 563; *Drew v. McDaniel*, 60 N. H. 482; *Tuck v. Nelson*, 62 N. H. 471, 472; *English v. Porter*, 63 N. H. 206, 215. In brief, there is nothing in the reported facts to take the case out of the general rule that ordinarily "the safe guide and the decisive test is found in the inquiry whether the deceased, if alive, could testify to the same matters." The suit being against the defendant in her private capacity, she cannot interpose the statutory limitation of three years (Pub. St. c. 191, § 4) in bar of its maintenance; nor could she if it were against her in her official capacity as executrix of her deceased husband's will, the suit having been

brought "within two years after the original grant of administration" upon the estate of the plaintiff's intestate, in whose favor the right of action against the husband existed at the time of her death (Id. § 6; *Brewster v. Brewster*, 52 N. H. 52, 59; *Morse v. Whitchee*, 64 N. H. 591, 592, 15 Atl. 207). Exceptions overruled.

WALLACE, J., did not sit. The others concurred.

(68 N. H. 290)

ABBOTT et al. v. WOLFEBOROUGH SAV. BANK.

(Supreme Court of New Hampshire. Carroll, July 26, 1895.)

SAVINGS BANKS—SPECIAL DEPOSITS.

1. Special deposits in a savings bank, not made as savings-bank deposits, nor drawing interest or dividends, and which went into the general funds of the bank, are in the nature of loans, the true relation between the depositors and the bank being that of debtor and creditor, and are not subject to losses, as general deposits, so long as the assets are sufficient to pay the bank's debts.

2. Where a savings bank takes a depositor's money as a special deposit, and converts it to its use, and enjoys gratuitous benefits therefrom, it is estopped from denying its liability to repay the money, whether the receiving of the money as such deposit was ultra vires or not.

Petition by Sewall W. Abbott and others against the Wolfborough Savings Bank, praying that the bank be ordered to pay certain special deposits in full. Petition granted.

The petition alleged that petitioners had certain sums on deposit with said bank, as special deposits, at the time an injunction against the bank was granted by the supreme court on application of the bank commissioners; that said deposits were not made by them in the ordinary course of business, or for the purpose of receiving any interest or dividends thereon, and were not made or received as a part of the general funds of the bank; and that the plaintiffs never received or claimed any interest thereon. The prayer is that the bank may be ordered to pay the plaintiffs the amount of the special deposits in full. The bank commissioners, to protect the general depositors, appear to oppose the petition. The injunction was issued in October, 1893. The plaintiffs were special depositors, having pass books marked "Special." The deposits were not made as savings-bank deposits, and received no interest or dividends. The treasurer gave the money, or a check on a Boston bank, whenever it was called for. There was no vote of the directors on the matter. The money received went into the general funds of the bank. There is nothing on the cash book to indicate who are special depositors. One of the bank commissioners testified to a conversation with the treasurer of the bank before January 1, 1893, in which he told the treasurer that the bank could not take special deposits, citing the opinion of the attorney general in the bank report of 1890; also, to another con-

versation in which he told the treasurer that the bank had no right to take special deposits as a bank of discount. The bank commissioners contend that Pub. St. c. 165, § 10, forbids private banking in a savings bank, and that the receipt of special deposits was in violation of the by-laws of the bank.

S. W. Abbott, for plaintiffs. The Bank Commissioners, for defendant.

BLODGETT, J. In the view most unfavorable to the plaintiffs, no ground appears which authorizes the bank to keep, without repayment, any part of the money received from them. Doubtless the power of savings banks, in common with other corporations, is limited by the purposes for which they are created, and by those which are named in the charter or act authorizing their existence; but even admitting that the receiving of the plaintiffs' deposits in the manner detailed in the case was foreign to the purposes of the bank's creation, unauthorized by its legalized powers, and within the prohibition of the statute (Pub. St. c. 165, § 10), yet, as the deposits went into the general fund, and to the use and benefit of the bank (that is to say, to the use and benefit of the general depositors, who are in fact the bank), well-established principles require that a recovery should be allowed for the full amount of such deposits. The transactions were in the nature of loans. The true relation between the parties is that of debtor and creditor. The plaintiffs' money, when deposited, became the money of the bank; and they became its creditors, in every sense, and for all purposes. Having no share or interest in the profits or earnings of the bank, the plaintiffs are not liable to be subjected to any part of its losses, so long as the assets are sufficient to pay its debts. The general depositors cannot shift upon them any share of the burden which properly rests upon themselves alone. As owners of the bank, and of which they are not creditors in a general sense, or for all purposes, the general depositors, who alone are entitled to share in the bank's profits, must bear its losses, and can rightfully claim such assets only as may remain after payment of the corporate debts. In brief, the general depositors in a savings bank stand in the same relation to its assets as stockholders to banks of discount. *Cogswell v. Bank*, 59 N. H. 43, 45. And the standing of special depositors, like the plaintiffs, in the former, corresponds to that of ordinary business depositors in the latter, whose deposits are subject to payment on call.

The doctrine of ultra vires is no defense in this case; nor, if it can be held applicable to the facts, is the prohibition of private banking. By taking the plaintiffs' money, converting it to the bank's use, and enjoying its gratuitous benefit, the bank is now equitably and legally estopped to deny its liability to repay the money, whether the taking was with or without authority. *Rich v. Errol*, 51 N. H. 360,

361; *West v. Town of Errol*, 58 N. H. 233, 234; *Cogswell v. Bank*, supra; *Bank v. Fiske*, 60 N. H. 363, 369, 370; *Norton v. Bank*, 61 N. H. 589, 590, 593; *Manchester & L. R. R. v. Concord R. R.*, 66 N. H. 100, 126, 127, 131, 132, 20 Atl. 383. Petition granted.

CLARK, J., did not sit. The others concurred.

(68 N. H. 304)

FELKER et al. v. HAZELTON et al.

(Supreme Court of New Hampshire. Merrimack. July 26, 1895.)

ATTACHMENT—DISCHARGE OF MORTGAGE—PLEADING—TENDER.

1. A bill by an attaching creditor, praying for a discharge of a mortgage on the attached premises, which charges no collusion, and does not allege the purchase to be fraudulent or a cloud on the title, states no case against a defendant who had purchased the mortgagor's interest in the property subsequent to the mortgage and to the levy of the attachment.

2. A bill by an attaching creditor, praying for the discharge of a mortgage on the attached premises, which rests exclusively on the attachment and subsequent tender of the amount of the mortgage to the mortgagee, states no case against the mortgagee.

3. A bill by an attaching creditor, praying for the discharge of a mortgage on the attached premises, will not be entertained before the attachment has ripened into a judgment.

4. When a tender is relied on, it must be brought into court.

Bill by William H. Felker and another against John B. Hazelton and another praying for the discharge of a mortgage. Demurrers to bill sustained.

The bill alleges that one Richardson executed a mortgage of real estate, June 23, 1882, to the defendant Hazelton, trustee, to secure the payment of a note for \$1,200; that the plaintiffs caused said real estate to be attached on a writ against said Richardson, returnable in February, 1892, and now pending; that the defendant Baker purchased, June 14, 1893, all the right, title, and interest of said Richardson in said real estate; that the plaintiffs tendered to the defendant Hazelton \$1,351, being the full amount due on said mortgage, July 3, 1893, and requested him to execute a release of his interest in said real estate under his mortgage, but he refused and still refuses so to do. The defendants demur for want of equity.

Leach & Stevens and Felker & Pearl, for plaintiffs. Sargent & Hollis, for defendants.

BLODGETT, J. The bill states no case against Baker. No collusion between him and the mortgagee or the mortgagor is charged, nor is his purchase of the mortgagor's interest in the real estate attached by the plaintiffs alleged to be fraudulent or a cloud upon the title. The simple fact that Baker bought the mortgagor's equity subsequent to the attachment, without any other ground

for equitable aid, is wholly insufficient to maintain the plaintiffs' bill. See *Towle v. Janvrin*, 61 N. H. 605. No better is the case made against Hazelton. No grievance or injury impairing or imperiling the plaintiffs' security is set forth, no fraud is charged, and absolutely nothing is alleged which shows or tends to show any present existing ground for equitable interference with the mortgage which the plaintiffs pray to have discharged. The bill rests exclusively upon the attachment and subsequent tender. But, if the tender was a valid one, Hazelton's rights as mortgagee ceased at once, as against the attachment and the rights acquired under it, by virtue of Pub. St. c. 220, § 8; and, if the tender was not valid, no ground for equitable aid is claimed or suggested. At most, there can therefore be no occasion to invoke the aid of a court of equity in respect of the mortgage until the plaintiffs' attachment ripens into a judgment, and is followed by a levy upon the mortgage premises, both of which are contingencies that may never happen. If the court has jurisdiction of questions that may never arise, it is not advisable to decide them in advance. Then, again, the record shows that the tender has not been brought into court, which is an indispensable requisite when a tender is relied upon. *Bailey v. Metcalf*, 6 N. H. 156; *Frost v. Flanders*, 87 N. H. 552; *Allen v. Cheever*, 61 N. H. 32. Other objections need not be considered. Demurrers sustained.

CLARK, J., did not sit. The others concurred.

(68 N. H. 303)

ABBOTT v. KIMBALL.

(Supreme Court of New Hampshire. Merrimack. July 26, 1895.)

CORPORATIONS—ATTACHMENT OF SHARES—SERVICE.

Pub. St. c. 220, § 13, provided for service of writs of attachment against stockholders in corporations by leaving copy thereof with certain officers, not mentioning directors among them. Laws 1895, c. 93, § 1, passed to remove doubts in the construction of the former section, provided that such attachment might be made by service of the writ and return upon a director. Defendant's share in a corporation was attached, in 1894, by service upon a director. *Held*, that the service was sufficient.

Assumpsit by Edward A. Abbott against Moses Kimball. Defendant appeared specially, and moved to dismiss. Denied.

The defendant asked that the action be dismissed, because he was not an inhabitant of the state, and no personal service had been made upon him within the state, and there had been no actual attachment of his property. The sheriff's return is as follows: "Merrimack—sa: July 14, 1894. I attached all the shares in the capital stock of the Boston & Maine Railroad owned by the within-named Moses Kimball, by giving in hand to A. W. Sulloway, one of the directors of

said corporation, an attested copy of this writ, with an attested copy of this, my return thereon, at 10:10 of the clock in the forenoon of said day. Benjamin Tucker, Deputy Sheriff. And, the principal defendant being out of the state, I made no further service of this writ. Benjamin Tucker, Deputy Sheriff." The plaintiff moved to amend the return by adding after the word "corporation" the words "agent of said corporation, or person having the care of the property of said corporation." December 30, 1889, the Northern Railroad Company owned certain shares of the capital stock of the Concord & Claremont Railroad, and of the Peterborough & Hillsborough Railroad, which, by the terms of the lease of the Northern Railroad Company to the Boston & Lowell Railroad Corporation, were made over to the latter, to be held and used during the term of the lease for the purpose of maintaining the roads of these companies as its branches, and to allow it to vote on this stock, and collect the dividends which should become due on them during the term of the lease. February 28, 1890, the lease was assigned, and the lessee's interest in the stock was transferred to the Boston & Maine Railroad; and March 28, 1890, by vote of the directors of the Boston & Maine Railroad, its president was authorized to transfer the shares to A. W. Sulloway, "to be held by him as trustee under the lease of said Northern Railroad to the Boston & Lowell Railroad Corporation, of December 30, 1889, to be voted by him as the directors of this company may from time to time direct, and, upon their request, to be transferred to this company, or to such person or persons as the directors may designate"; and shortly afterwards the shares were thus transferred to him, and he has since held them as such trustee. Said Sulloway has been a director of the Boston & Maine Railroad for about four years last past. At the date of the sheriff's return, said Sulloway was not an agent of the Boston & Maine Railroad, or a person having the care of the property of the corporation, otherwise than as a director and as a trustee holding the shares as aforesaid.

W. L. Foster and S. C. Eastman, for plaintiff. G. B. French and C. H. Burns, for defendant.

BLODGETT, J. "An officer's return of an attachment of the share or interest of any person in a corporation may be as general as a return of an attachment of all the defendant's real estate in a town, and the attachment may be made by the officer by leaving an attested copy of the writ and of his return thereon with a director of the corporation. Any director so served shall forthwith notify the clerk, treasurer, or cashier of such corporation of such attachment." Laws 1895, c. 93, § 1. Giving to this declara-

tory statute (which is entitled "An act to remove doubts in the construction of section 13, chapter 200 (220), of the Public Statutes, relating to the service of process") the weight to which it is entitled, we are of opinion that the defendant's motion to dismiss must be denied.

WALLACE, J., did not sit. The others concurred.

(20 R. I. 335)

LISCOMB v. ELDRIDGE.

(Supreme Court of Rhode Island. Dec. 31, 1897.)

WILLS—CONTESTS—APPEAL—GROUNDS—BOND—APPROVAL.

1. The reason, stated as the ground of appeal from a decree refusing to admit an instrument to probate, that the instrument is the last will and testament of deceased, is sufficiently specific under the statute.

2. Where an affidavit on file shows service of the citation on Harriet R. Eldredge, in Boston, Mass., it will be presumed on appeal that the person thus served is identical with the Harriet Richmond Eldredge mentioned in the instrument presented for probate as the heir at law of the testator, and described in the reasons of appeal as of Dorchester, Mass.

3. Under Gen. Laws, c. 248, § 1, providing for appeals from probate courts, and requiring the appellant to give a bond to the court satisfactory to the court, or to the clerk if the court be not in session, the clerk has power to approve an appeal bond given him under the circumstances named.

4. When the clerk of the probate court approves an appeal bond, his minute thereon that the court is not then in session is sufficient evidence of that fact to bring the case within Gen. Laws, c. 248, § 1, authorizing the clerk to approve appeal bonds presented to him when the court is not in session.

Appeal from probate court.

Proceeding by Sarah A. P. Liscomb against Harriet R. Eldredge for the probate of a will. From a decree refusing to admit the instrument to probate, plaintiff appeals. On motion to dismiss the appeal. Denied.

Clarence A. Aldrich, for appellant. Louis O. Southard, for appellee.

MATTESON, C. J. This is an appeal from a decree of the court of probate of Little Compton refusing to admit to probate an instrument in writing dated May 14, 1880, purporting to be the last will and testament of James Pierce, deceased. The reasons of appeal state as ground of appeal that the instrument is the last will and testament of the deceased. Counsel of the appellee, as *amicus curiæ*, moves to dismiss the appeal because the reasons of appeal are not sufficiently specific. The term "specific" is relative. The purpose of the statute in requiring that the grounds of appeal shall be set forth specifically is to notify the adverse party of them, and to enable him to be prepared to meet them at the trial. We think that the reason stated in the present instance is sufficiently specific

to answer the requirement of the statute. It is equivalent to the statement that the testator was of sound, disposing mind and memory, and that the instrument was executed and attested in accordance with the statute. We do not see that the appellee would be any better apprised of the case to be met at the trial if these two matters had been separately stated in the reasons of appeal than by the statement that the instrument is the last will and testament of the deceased, in which they are necessarily involved.

The second ground of the motion urged is that the record does not show that the Harriet Richmond Eldredge, heir at law of said James Pierce, described and mentioned in the instrument presented for probate, has ever been served with a notice of appeal or summons. The reasons of appeal pray for a citation to Harriet R. Eldredge, described as of Dorchester, Mass., "sole heir at law of said James Pierce"; and there is a citation on file, with an affidavit of service thereon by a disinterested person on Harriet R. Eldredge, in Boston, Mass., on April 20, 1897, the service having been made, as the affidavit states, by leaving in her hands and possession a copy of the citation, together with a certified copy of the reasons of appeal, which accompanied the citation. We think that it is to be presumed, till the contrary appears, that the Harriet R. Eldredge thus served is identical with the Harriet Richmond Eldredge who is mentioned as the heir at law of said James Pierce.

The third ground urged in support of the motion is that the bond filed by the appellant is not sufficient. Gen. Laws R. I. c. 248, § 1, requires the appellant to give a bond satisfactory to the court, or to the clerk if the court is not in session. The bond is in the usual form, and was approved by the clerk, the court not being in session when the bond was presented for approval, as appears by the minute of the clerk on the bond. The objection to the bond is that it was approved by the clerk instead of the court. The appellee contends that the statute requires that the court should be given a chance to approve or disapprove bonds in appeal cases, and that this right is not to be usurped by the clerk; that he might allow a bond entirely inadequate both as to sureties and penalties, when the court would be just and reasonable. The appellee further contends that the clerk should show from a transcript of his record that the court was not in session at the time when the bond was approved by him, and that the court would not be in session in time to approve the bond. We do not think that such strictness is necessary. The statute gives authority to the clerk to approve the bond if the court shall not be in session. It is not to be assumed that he will not faithfully perform his duty by requiring an adequate bond both as to sureties and penalty. His minute on the bond that the court is not in session when the bond is presented for approval and approved by him is all the evidence that has ever been

required of the fact that the court was not in session, and, in our opinion, is sufficient. The motion to dismiss is overruled.

(30 R. I. 315)

McNALLY v. WILKINSON.

(Supreme Court of Rhode Island. Dec. 14, 1897.)

SUCCESSIVE GARNISHMENTS—VALIDITY.

The use of the process of the court, in garnishee proceedings, to tie up money in the hands of the garnishee by repeated service of writs, and then, without entering the writ or writs employed for this purpose, to commence a fresh suit, and attach the fund thus accumulated, is a perversion of civil process, and cannot be sanctioned.

Appeal from district court, Providence county.

Action by T. Henry McNally against William Wilkinson. Defendant appeals from order denying motion to discharge garnishee. Reversed.

Lellan J. Tuck, for appellant. Claude J. Farnsworth, for appellee.

FILLINGHAST, J. The record submitted in this case shows the following facts, viz.: On the 9th day of July, 1897, the plaintiff sued out of the district court of the Eleventh judicial district a writ of attachment against the defendant, returnable to said court on the 24th day of the same month. Service of said writ was made on the Moshassuck Valley Railroad Company, the garnishee therein named, on July 9, 1897, and again on the 15th day of the same month, for the purpose of attaching money in its hands, belonging to the defendant. The writ was also duly served on the defendant, but was not entered in court. On the 21st day of July, 1897, the garnishee duly made a return to said court of the amount in its hands on the said 15th day of July, although the writ had not been entered as aforesaid. The writ in the case now before us was issued from the same court on said 24th day of July. It is for the same cause of action as the one first above mentioned. It was served on the same garnishee, and the money attached in said former suit was again attached in this. These facts having been properly made to appear in the district court, the defendant moved that the garnishee be discharged, but the motion was denied, and the garnishee charged for the amount in its hands, whereupon the defendant duly excepted, and the case is before us on exception to said ruling and decision.

We think the ruling was erroneous. The evident purpose of the plaintiff in the proceedings recited, taken as a whole, and unexplained, was by successive attachments to secure a sufficient amount in the hands of the garnishee to pay his claim in full, regardless of the legal rights of the defendant. And while it was perfectly proper for the plaintiff to attach a sufficient amount to sat-

isfy his claim on the first writ, either by successive attachments thereon within the time allowed for the service and before the return day thereof, or by a writ of mesne process issued after the entry thereof in court (Gen. Laws R. I. c. 252, § 17), yet it was an abuse of legal process to go as far as he could on the first writ, and then, without entering that, to sue out another for the same cause of action, and attach the same, or an additional amount, to satisfy his claim. The law abhors a multiplicity of suits for the same cause of action. If the plaintiff could abandon his first suit in this way, and commence a second, he could also abandon a second, a fourth, and so on indefinitely, to the great annoyance and vexation of the defendant, and also of the garnishee. To use the process of the court to thus tie up money in the hands of a garnishee until the amount shall become large enough to satisfy the plaintiff's claim, and then, without entering the writ or writs employed for this purpose, to commence a fresh suit by attaching the fund thus accumulated, not only works a wrong upon the defendant, but is a perversion of civil process, and cannot, therefore, be sanctioned. The principle that even a valid and lawful act cannot be accomplished by unlawful means, and that wherever such means are resorted to the law will interpose to restore the party injured thereby to his rights, is a salutary and well-established doctrine of the law. Thus, in *Ilseley v. Nichols*, 12 Pick. 270, it was held that an attachment made by breaking open a dwelling house, and then attaching property therein, rendered said attachment unlawful and invalid. Shaw, C. J., in delivering the opinion of the court, said, among other things, that the law will "operate prospectively to prevent the acquisition of any lawful right by the excess and abuse of an authority given for useful and beneficial purposes." The court will always see to it that its process, over which it has inherent control, is not abused or perverted to purposes of oppression. See *McCusker v. Mitchell*, 20 R. I. pt. 1, p. 17, 36 Atl. 1123. The exception is sustained, and the case remitted to said district court, with direction to discharge the garnishee.

(20 R. I. 317)

STRONG v. LUTHER.

(Supreme Court of Rhode Island. Dec. 15, 1897.)

EXECUTORS AND ADMINISTRATORS — INSOLVENT ESTATE—APPOINTMENT OF COMMISSIONERS.

1. There is no provision for the appointment of commissioners of the insolvent estates of deceased persons except that contained in Gen. Laws, c. 215, § 3, and unless the proceedings marked out in that section be taken by the executor or administrator within 30 days after the expiration of the period limited for the presentation of claims as therein provided, there is no authority for the appointment of commissioners of an alleged insolvent estate.

2. Where the defendant, as administrator, did

not take proceedings for appointment of commissioners of the estate as insolvent, within the 30 days as prescribed by Gen. Laws, c. 215, § 3, their subsequent appointment by the court of probate constituted no bar to the plaintiff's suit, which had been already begun.

Action by Henry W. Strong against Eleanor R. Luther, administratrix, in assumpsit for services. Demurrer to replication overruled, and replication sustained.

Henry W. Hayes, for plaintiff. O. L. Bosworth, for defendant.

MATTESON, C. J. This is assumpsit for services. The defendant pleaded the general issue, and also, in bar of the action, that the estate of the testator at the time of the presentation of the claim to her, and at the time of the bringing of the suit and the filing of the declaration, was insolvent, and that since the bringing of the suit the probate court had adjudged the estate insolvent, and appointed commissioners in insolvency to adjust and settle the claims against it according to law. To the plea in bar the plaintiff replied that the defendant did not, within 30 days after the expiration of the period allowed for the presentation of claims, file a statement in the probate court having jurisdiction over the estate, allowing or denying the validity of the claims presented, and giving personal notice to the claimants whose claims were contested; that she did not file a statement of her belief that the estate was insolvent, declaring it to be so, asking for the appointment of commissioners, giving notice to all persons who had presented claims to prove them before the commissioners, as required by Gen. Laws R. I. c. 215, § 3; that there was no record by which the plaintiff could have knowledge of the alleged insolvent condition of the estate at the times mentioned in the plea, except as the same had been adjudged insolvent subsequently to the bringing of the suit; that the plaintiff, on June 26, 1897, after the 30 days referred to, received a notice from the defendant that his claim was disputed, and in consequence of that notice, and in accordance with Gen. Laws R. I. c. 215, § 4, brought this action against the defendant within the six months therein prescribed, which was pending when the defendant applied for the appointment of commissioners on the estate as an insolvent estate. To this replication the defendant has demurred.

There is no provision for the appointment of commissioners on the insolvent estates of deceased persons except that contained in Gen. Laws R. I. c. 215, § 3. That section marks out the proceedings to be taken by an executor or administrator, and requires that these shall be taken within the 30 days after the expiration of the period limited for the presentation of claims. We find no authority for the appointment of commissioners unless the necessary steps have

been taken within the 30 days so prescribed, and are, therefore, of the opinion that, as the defendant did not take the proceedings set forth in section 3 within the 30 days, the subsequent appointment of commissioners by the court of probate constitutes no bar to the plaintiff's suit, which had been begun already. Demurrer overruled, replication sustained.

(20 R. I. 319)

FIRST NAT. BANK OF SHREVEPORT v. RANDALL et al.

(Supreme Court of Rhode Island. Dec. 16, 1897.)

CREDITORS' BILL—SUFFICIENCY.

1. A creditors' bill by the holder of a foreign judgment, to set aside a conveyance of land by the judgment debtor, alleged that the judgment had not been satisfied; that the conveyance was without consideration, and to prevent complainant from collecting its claim; that such debtor was not a resident "of this state," and was not to be found therein; that he had no property "in this state" that it could attach, and thereby secure service of process; and that complainant had exhausted all its remedies at law. *Held* demurrable, on the grounds that it did not allege that complainant had judgment "in this state"; that execution had been issued and remedy at law exhausted; and that, at the time of said conveyance, said debtor had no other estate subject to execution.

2. A bill to set aside a conveyance as in fraud of creditors, on the ground that it was without consideration, need not allege that the grantee had knowledge of complainant's judgment, or had a fraudulent intent.

Bill by the First National Bank of Shreveport against Charles J. Randall and others. Heard on demurrer to the bill. Demurrer sustained.

Edwards & Angell, for complainant. Harrison A. McKenney, for respondents.

STINESS, J. The complainant, having obtained a judgment in Louisiana against Charles J. Randall, brings this bill, as a creditor, to set aside a conveyance of realty in this state, made by said Randall, which is alleged to be a fraudulent conveyance. The bill is demurred to upon the grounds (1) that there is no allegation that the complainant has judgment in this state; (2) that there is no allegation that execution has been issued and remedy at law exhausted; (3) that there is no allegation that, at the time of the conveyance, said Randall had no other estate subject to execution; (4) that it is not alleged that the other respondents had knowledge of the judgment, or had a fraudulent intent. The allegations of the bill, applicable to these objections, are that the judgment has not been satisfied; that the conveyance was without consideration, and for the purpose of preventing the complainant from pursuing said property for the purpose of collecting its claim; that Charles J. Randall is not a resident of this state, and is not to be found herein; and that he has no property in this state which it can attach, and

thereby secure service of process; and that the complainant has exhausted all the remedies at law within its power against said Randall.

Creditors' bills to set aside fraudulent conveyances and bills to reach equitable assets are frequently treated as though they were the same thing. In some respects they are alike, but the grounds of jurisdiction upon which they rest are quite distinct; the former invoking the aid of the court for relief from fraud, and the latter for the appropriation of assets which cannot be reached at law. Both are proceedings in equity, and so are subject to the same general rules. The office of equity is to supplement, and not to supplant, the law. Hence, when the remedy at law is adequate, equity does not need to interpose. The rule, therefore, that a bill to reach equitable assets cannot stand until legal remedies have been exhausted, and the complainant's right as a creditor has been established in the jurisdiction where the equitable remedy is sought, is applied to both proceedings, because it is based upon the principles that the aid of equity should not be invoked when there is an adequate remedy at law, and that the court of law is the proper forum to establish a right of recovery. Of course, there must be exceptions in cases where the requirements of the rule cannot be complied with, and one is to be found in *Bank v. Paine*, 18 R. I. 592. That was the case of a foreign and absconding debtor, who had real and personal estate here which had been given to trustees for the benefit of himself and others by the will of his father. The complainant claims that the decision supports this case. But the radical difference between the two cases is that in the former the assets were purely equitable, and hence no service of process could be made either upon the debtor himself or by attachment of his property in an action at law. In a case like the present one, where it is alleged that the transfer of property was fraudulent and void as to a creditor, it is held that as to such creditor the debtor retains his interest in the property, notwithstanding the conveyance, and it can therefore be attached in an action at law. *McKenna v. Crowley*, 16 R. I. 364, 17 Atl. 354.

The fact that the complainant has a judgment against the debtor in another state is not conclusive of the existence of a present debt, because there may be defenses such as payment, lack of proper service, set-off, and the like. Nor are the allegations conclusive that the conveyance was without consideration, and for the purpose of hindering and defrauding creditors, even on demurrer, because such a conveyance is not void if the debtor has other property sufficient to satisfy his debts, and from which the complaining creditor can get his pay; and we regard the rule as settled in this state that the best and conclusive evidence that the debtor has

no other property is the return of an execution unsatisfied. *Bank v. Paine*, supra; *Ginn v. Brown*, 14 R. I. 524; *Stone v. Westcott*, 18 R. I. 517, 28 Atl. 662. While, therefore, the legal remedy is open, and neither the debt nor the fraud in conveyance is conclusively established, the grounds for jurisdiction in equity do not appear. The strict application of the rule above stated has been so far relaxed in *McKenna v. Crowley* as to hold that after a creditor has secured a lien by attachment upon property fraudulently conveyed, and has recovered a judgment against the grantor, upon which execution is to issue, the court, in equity, has the independent and auxiliary jurisdiction to set aside the conveyance, in order to clear away a cloud upon the title, so that the interest of the debtor may be sold to better advantage for both his and his creditors' benefit. The jurisdiction is quite distinct from that of a creditors' bill to reach equitable assets, and hence the court remarked that "it is the levy of the execution giving a lien, and not its return unsatisfied, which is the prerequisite to it." The line of decisions in this state which is thus outlined is consistent, and is in harmony with decisions elsewhere, and with well-established principles, as shown by citations in previous opinions, so that it is not necessary to review authorities again in this case. From these decisions it appears that the complainant is not yet in a position to invoke the aid of a court of equity, and this disposes of the first three grounds of demurrer to the bill.

As to the fourth ground of demurrer, that it is not alleged that the other respondents had knowledge of the judgment, or had a fraudulent intent, it is disposed of by *McKenna v. Crowley*, where the court said: "It was not necessary that the grantee, the conveyance being voluntary, should actually participate with the grantor in his purpose, or be privy to it." Demurrer to the bill sustained.

(20 R. I. 322)

COLT v. SEARS COMMERCIAL CO. et al.
(Supreme Court of Rhode Island. Dec. 20, 1897.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES—RIGHTS AND DUTIES OF ASSIGNEE.

1. An assignee of an insolvent estate is a trustee for the creditors, and is bound to exercise the utmost diligence and good faith in the discharge of his duties.

2. Under the statute giving the assignee of an insolvent estate the authority to avoid a preference by the assignor, it is within his discretion whether he will attempt to avoid a preference or not.

3. Where it is the plain duty of an assignee of an insolvent estate to attack a preference by the assignor, he may be compelled to do so, on petition of the creditors, or be removed by the court.

4. The assignee of an insolvent estate is the only person who has power, under the statute, to bring an action to avoid a preference by the as-

signor which is in fraud of the rights of creditors, or prohibited by the statute.

Application for rehearing. Denied.

For former report, see 37 Atl. 311.

James, Wm. R. & Theodore F. Tillinghast and Samuel Norris, Jr.; for complainant
Edwards & Angell, for respondents.

TILLINGHAST, J. The complainant's counsel insist that under the decision of this court in *Hamilton v. Colt*, 14 R. I. 209, the transaction whereby the Sears Commercial Company obtained security for its claim against the National Rubber Company was absolutely void. He assumes, and claims that he has the right to assume, that this court in that case deliberately repudiated the doctrine of *Snow v. Lang*, 2 Allen, 18, and of like cases, as applicable to our statute, and knowingly and intentionally gave to the word "void," in our act, its full primary meaning and force. Such an assumption is quite unwarranted. In *Hamilton v. Colt* it was held that under proper pleadings it was competent for the defendant to show that the plaintiff's mortgage was void. And upon such showing the court said that "it instantly became void, ab initio, under the statute." The court nowhere said that such a mortgage was absolutely void, but only "generally" void; and, as the context shows, this word was used solely for the purpose of including the assignee in that case among the persons who might show as a defense that the mortgage was void. Moreover, the question as to the right of an assignee to elect to treat as valid a conveyance which might be open to attack as a preference was not raised, or even suggested, in that case. The main point involved was whether the defense set up—that of a preference under the statute—was open to the defendant assignee, or whether such defense was limited to creditors and bona fide purchasers for value, and the court said that such a defense was open to the assignee. But that Chief Justice Durfee, in using the language he did concerning the mortgage in that case, intended to lay down the rule that a preference is absolutely void under our statute, or that the court understood that it was so deciding, is quite contrary to our understanding of the scope and purport of the case. Had the learned writer of that opinion intended to array himself and the court in opposition to the whole current of judicial opinion, both English and American, as to the meaning of the word "void" in statutes like the one before us, he certainly would not have contented himself with simply making a bald statement as to the meaning thereof, without discussion or reference. Such dogmatism in judicial statement was not one of his characteristics. For a full discussion of the meaning of the word "void" in similar statutes, see *Pearson v. Chapin*, 44 Pa. St. 11-17; *Beecher v. Mill Co.*, 45 Mich. 103, 7 N. W. 695; *Bowen v. Johnson*, 17 R. I.

779, 24 Atl. 830; *Hudson v. White*, 17 R. I. 528, 23 Atl. 57; *Butler v. Moore*, 73 Me. 155; *Harvey v. Varney*, 98 Mass. 120.

But it is urged that, even if the preference was not absolutely void, yet the assignee could not abandon the right to avoid a preference; that is to say, that he had no power of election. In support of this contention, complainant's counsel argues that an assignee for the benefit of creditors is, as the name implies, a trustee for the creditors,—bound to preserve their rights and guard their interests,—and as such trustee he has no more power to surrender or abandon the rights of his cestui que trust than any other trustee. As to the correctness of the general proposition contained in this argument, of course, there can be no question. An assignee is, in a general sense, a trustee for the creditors, and is bound to exercise the utmost diligence and good faith in the discharge of the duties devolved upon him, and is at all times amenable to the court for any misconduct in connection therewith. But at the same time he has certain powers conferred upon him by our statute, which powers he alone can exercise, among which is the power to avoid a preference, which power rests wholly upon the statute. *Freeland v. Freeland*, 102 Mass. 475. The statute gives to the assignee powers superior to those either of the assignor himself or of his creditors; for, independently of the statute, preferences are good against either. That is to say, as argued by counsel for respondent: "Neither the property conveyed in preference, nor the right of action to avoid a preference, is vested by our statute in the creditors, but both are vested in the assignee. The assignee is given a new right of action which, but for the assignment, would exist in the creditor." If the assignee should refuse to discharge his plain duty in regard to setting aside a preference, he could either be compelled to do so, or else removed from his trust, and another person appointed in his place; so that creditors are fully protected in their rights. In other words, as well said by complainant's counsel, "The assignee cannot act as he pleases, but is subject to the control of the court at the petition or suit of the creditors."

The New York cases cited by complainant's counsel in support of his petition, viz. *Dewey v. Moyer*, 72 N. Y. 70, and *Spelman v. Freedman*, 130 N. Y. 421, 29 N. E. 765, are not controlling, for several reasons. In the first place, it is apparent, from an examination of the statutes of New York relating to assignments for the benefit of creditors (see *Laws 1858*, c. 314, and 1 *Birdseye's Rev. St., Codes & Gen. Laws N. Y.* [2d Ed.] p. 148), and the decisions thereon (see *Manning v. Beck*, 129 N. Y. 1, 29 N. E. 90; *Tompkins v. Hunter*, 149 N. Y. 117, 43 N. E. 532), that the statute against preferences in that state is widely different from ours; that it provides only for

voluntary assignments, and, as said by the court in the last-named case, "has none of the attributes of a general bankrupt law, under which a debtor may be compelled to assign his property for the benefit of his creditors," whereas the whole power of the assignee to avoid preferences under our statute arises from the fact that the proceedings which result in his appointment, even although the assignment is the act of the assignor himself, are proceedings against the assignor, and hence involuntary proceedings. *Bank v. Heintzman*, 15 R. I. 431, 8 Atl. 78. In the second place, while the case of *Dewey v. Moyer* seems to recognize the right of creditors to commence an action to recover property fraudulently transferred by an insolvent debtor, where the assignee neglects or refuses so to do, yet this was evidently only a dictum upon this point, as it is distinctly stated in the opinion that neither the appointment of an assignee, nor the existence of any rights in such assignee, nor any defense having reference to such rights, is set up in the answer. And the supreme court of the United States, in reviewing the same case on a writ of error, said that: "If it had been made to appear, by the record properly before the court of appeals, that an assignee had been appointed, and he had properly qualified and accepted such appointment, we do not see how the plaintiffs could have recovered judgment for the value of the property. * * * The court of appeals rests its decision on the ground that the pleading does not set out or rely on the assignment, or on the rights vested by it in the assignee; and it says very justly that, if any such issue had been made, the plaintiffs might have had a sufficient reply, which they were not called upon to produce as the pleadings stand." *Moyer v. Dewey*, 103 U. S. 301. The case of *Spelman v. Freedman*, supra, is a case where the assignee refused, after due notice, to bring an action to set aside fraudulent preferences obtained by confession of judgment made by the insolvent a few hours before the making of the assignment; and the court held that, as beneficiaries under the trust, the plaintiffs had the right to have it enforced through the assignee, by taking such action as he should have taken, not for their exclusive advantage, but for the benefit of all similarly situated, and that plaintiffs had the right to commence an action to reach property fraudulently transferred, making the assignee, the debtor, and his transferees, parties defendant. But what relevancy has this case, in any event? The complainant in the case at bar has not only not refused to bring an action to set aside the preference in question, but, on the contrary, is seeking by this bill to accomplish that object; and we are dealing with this bill, and not with one brought by creditors of the insolvent corporation. But the case above relied on, even admitting it to be pertinent, does not commend itself to our judgment in preference to the decisions of the United States supreme court, and those of Massachusetts and other

states, which are to the contrary. Thus, in *Glenny v. Langdon*, 98 U. S. 20, it was held that it is only through the instrumentality of his assignees that creditors can recover, and subject to the payment of their claims, the property which the bankrupt fraudulently transferred prior to the adjudication in bankruptcy, or which he conceals from, and falls to surrender to, his assignees. To the same effect are *Trimble v. Woodhead*, 102 U. S. 647, *Olney v. Tanner*, 21 Blatchf. 540, 18 Fed. 636, and *Burrill, Assignm.* § 56, and cases cited; and the provisions of the United States bankrupt law as to the right of an assignee to avoid preferences and fraudulent conveyances are similar to those of our statutes applicable to this case. Again, our statute, having clothed the assignee with all the necessary powers to enable him to recover all property of the insolvent debtor conveyed in fraud of the rights of creditors, or in violation of the provisions of this act, thus furnishing a purely statutory remedy, must, under well-settled rules of law, be held to be the only remedy available. See *Smith v. Tripp*, 14 R. I. 112. In the absence of the statute, as already said, preferences would be perfectly good. Under the statute they may be avoided, but only as therein provided. The statute has created a new right, and furnished a remedy for its enforcement, and that remedy only can be pursued.

As to the complainant's contention that an assignee, being a trustee for creditors, has no power to elect whether he will attempt to enforce a possible right, without regard to his own judgment as to its validity, it is sufficient to say that such a view, if adopted, would evidently be productive of much inconvenience and useless expense, and in many instances would unnecessarily delay the settlement of the estate; and the law has wisely devolved upon him the duty of determining whether the estate shall be involved in litigation of that sort, always assuming, of course, that he acts in the utmost good faith in making his election. In *Freeland v. Freeland*, supra, Gray, J., said: "The assignment in insolvency transfers to the assignee the right to avoid a conveyance made in fraud of creditors, and the right of electing whether to affirm or avoid such a conveyance may be exercised by the assignee, and by him only." And this doctrine is fully sustained by the supreme court of the United States in the cases hereinbefore cited, and also in *Dushane v. Beall*, 161 U. S. 513, 16 Sup. Ct. 637, and *Sparhawk v. Yerkes*, 142 U. S. 1, 12 Sup. Ct. 104. In the former case, Fuller, C. J., says: "If, with knowledge of the facts, or being so situated as to be chargeable with such knowledge, an assignee, by definite declaration or distinct action or forbearance to act, indicates, in view of the particular circumstances, his choice not to take certain property, or if, in the language of *Ware, J.*, in

Smith v. Gordon [Fed. Cas. No. 13,052], he 'stands by without asserting his claim for a length of time, and allows third persons, in the prosecution of their legal rights, to acquire an interest in the property,' then he may be held to have waived the assertion of his claim thereto." The same rule has prevailed under the English bankruptcy acts. In *Newnham v. Stevenson*, 10 C. B. 713, *Jarvis, C. J.*, says: "The effect of bankruptcy upon a fraudulent preference is not to put the goods in the same situation as if they were actually the goods of the bankrupt, so as to vest them at once, by the bankruptcy, in the assignees, independently of any election on their part, other than their acceptance of the office of assignees. By a transfer which is a fraudulent preference, the property vests in the transferee, subject to be divested by the assignees at their election; and the title of the transferee is perfect, except so far as it is avoided by the assignee." The case of *Preston v. Spaulding*, 120 Ill. 209, 10 N. E. 903, cited by counsel for complainant, is a very different case from the one before us, and is based on a very different statute from ours. That was a rank case of fraudulent preference, whereby substantially the whole of the assignor's estate was kept from the possession and control of the assignee, who refused to take any steps to recover the same. And the court held that, it being his imperative duty to sue for and recover "everything belonging or appertaining" to the estate of the assignors, upon his refusal to do so the creditors had the right to come into a court of equity and assert their rights and protect their interests; the "jurisdiction of courts of equity to decree rescissions of contracts for fraud, and to administer those remedies which are dependent upon such rescission, being well established." We do not think that a decision resting upon such a state of facts as are set forth in that case, and brought under a statute so different from ours (see *Farwell v. Nilsson*, 133 Ill. 45, 24 N. E. 74), should cause us to depart from the well-settled doctrine hereinbefore announced as to the powers of an assignee in insolvency. It is to be observed in the case at bar that no creditors are before us complaining of the conduct of the assignee, and no one is questioning either his entire good faith or his good judgment in the management and disposition of the assigned estate. He is before us, seeking by this bill to avoid a preference which, while not alleged to have been fraudulently made by the assignor, yet was within the inhibition of the statute, and in our previous opinion we have given the reasons why this cannot now be done. Upon a re-examination of the questions submitted, and a careful consideration of the elaborate briefs of counsel, we see no reason to modify our former decision, and the petition for reargument must therefore be denied.

STOECKLE et al. v. LEWIS et al.

(Court of Chancery of Delaware. Nov. 9, 1897.)

OFFICIAL BONDS — RELEASE OF SURETIES — OMISSIONS OF OTHER OFFICERS.

The failure of the levy court to obey 15 Laws, c. 342 (Laws 1877, p. 398), entitled "An act in relation to the liability of principal and surety," requiring them, on application of the sureties on a defaulting county tax collector's bond, to take from such collector the power to collect uncollected taxes, and to appoint another collector, will not release such sureties, as sureties in official bonds of public officers are not discharged because loss to them occurs through the omissions of other public officers.

Injunction by Joseph Stoeckle and others against Robert Lewis and others. Dismissed.

George Gray, Benjamin Nields, and Harry Emmons, for complainants. Edward G. Bradford and Lewis C. Vandegriff, for respondents.

NICHOLSON, Ch. This is a suit to enjoin the defendants from taking any action or proceedings upon a judgment entered on the 8th day of July, A. D. 1890, pursuant to a warrant of attorney, upon a bond given on the 5th day of May, 1890, to the state of Delaware, in the penalty of \$100,000, with the complainants and William McMenamin and John A. Boers as sureties, by John J. Dougherty, who on the 26th day of February, 1890, had been appointed collector of county taxes for the Northern collection district of Wilmington hundred, in Newcastle county,—the said taxes having been laid for the year 1890, and the term of office being for one year, running from the date of giving the said bond, the appointment not being deemed complete until a bond was given as required by the statute. On the 19th day of October, 1893, a writ of execution for the sum of \$16,353.43 was issued by order of the levy court upon the judgment entered upon the said bond, and under and by virtue of said writ the sheriff of Newcastle county, one of the defendants in this suit, levied upon and took in execution all of the goods and chattels of each of said complainants, respectively. A bill was filed by the complainants on the 4th day of November following, and a restraining order granted, and a rule issued to show cause why a preliminary injunction should not be ordered, returnable on the 9th day of the same month. On the 10th day of the same month this amended bill was filed, and, after hearing argument of counsel for the respective parties, the then chancellor, the Honorable James L. Wolcott, ordered that the rule be made absolute, and that a preliminary injunction issue, restraining the said defendants composing the levy court from taking any proceedings upon the said judgment, and the said defendant Pierce Gould, sheriff, from removing, disturbing, advertising, or selling the goods and chattels or property of said complainants, or any of them, until the further order of the chancellor. Subsequently proofs

were taken in the cause, and it was finally brought to a hearing before me, the last supplementary brief having been submitted by counsel in November, 1896. Thereafter, by the provisions of the amended constitution of the state of Delaware, which took effect on the 10th day of June in the year 1897, the courts of justice then existing were abolished, and the office of chancellor expired. Schedule Const. 1897, p. 46, § 9. It was further provided, however, in the same section, as follows: "All suits, proceedings and matters which on the said tenth day of June in the year 1897 shall be depending in the court of chancery or in the orphans' court, and all records, books and papers of said courts, respectively, shall be transferred to court of chancery or orphans' court respectively established by this amended constitution; and the suits, proceedings and matters shall be proceeded in to final decree, order or other determination." On the said 10th day of June I was duly commissioned and qualified chancellor of the state of Delaware, in accordance with the provisions of the amended constitution, and, a reargument of the case having been waived by counsel for the respective parties, I shall proceed to render a decision.

The question in this case is whether the liability of the sureties on the official bond of John J. Dougherty, tax collector as aforesaid, was destroyed by the action taken by the levy court of Newcastle county upon a certain petition presented to the said levy court by the sureties in accordance with the provisions of chapter 342, 15 Del. Laws, passed March 23, 1877. The case is one of great importance and interest, and has been argued by counsel on both sides with remarkable learning, ingenuity, and acumen, the arguments covering a very wide field and embracing a large number of distinct propositions, each of which was elaborately discussed. Before entering upon the consideration of the contested points, it will be well to state briefly, so far as seems to be necessary for a full comprehension of the case, what is undisputed in the facts and the law. According to the terms of the warrant issued to John J. Dougherty as collector, etc., under the then existing law, he was required to collect, and pay over to the officers authorized by law to receive the same, the amount of all the taxes committed to him for collection, excepting, only, so far as allowances should be made to him by the levy court, for commissions or otherwise, on or before the first Tuesday of February, 1891, being directed to pay one-third part thereof on the 1st day of July and the other third part thereof by the 1st day of October next preceding, but the levy court might, in their discretion, order payment of all or any of said taxes at an earlier day than those appointed; and upon the delivery to him of his duplicate and warrant, which was done in June, 1890, although bearing date the first Tuesday in April, 1890, he and his sureties became responsible for the whole amount of the taxes he was required

to collect, subject, only, to the allowances to be made by the levy court. His final settlement with the levy court was required to be made on the first Tuesday of March, 1891, and the levy court was required to make their allowance for delinquencies at such March session. His right, however, to exercise the powers granted by his warrant for the collection of taxes did not expire with his term of office as collector, but he might continue to exercise these powers until after the expiration of two years from the date of such warrant, and in the event of his death those powers devolved upon his executors or administrators. Rev. Code 1893, c. 8, §§ 18, 21; Id. c. 12, §§ 4, 5, 7, 8, 10; Smith v. Riding, 9 Houst. 259, 22 Atl. 97. The condition of Dougherty's bond was as follows: "That if the above-bound John J. Dougherty, being collector of county taxes for the Northern collection district of Wilmington hundred, in Newcastle county, shall faithfully and diligently collect all the rates and taxes which he shall, according to the duplicate and warrant to be issued to him as such collector, be required to collect, and all taxes whatever which shall be committed to him for collection, and shall pay the amount of all such rates and taxes, excepting, only, so far as allowances shall be made to him by the levy court for delinquencies, commissions, or otherwise, to the officers authorized by law to receive the same, in the manner and within the times prescribed by law or legally appointed by the levy court of said county for that purpose, and, furthermore, if the said John J. Dougherty shall perform the duties of his office of collector as aforesaid in all things with fidelity, then the above obligation shall be void." In March, 1891, he made his final settlement with the levy court, and it was found by the court from that settlement that the balance due and unpaid by him, after making the allowances required by law, amounted to the sum of \$14,431.51. After this settlement with Dougherty by the levy court in March, 1891, the breach of the condition of the bond was complete, and the amount to be collected from him and his sureties fixed. As stated by the court of errors and appeals in Smith v. Riding, 9 Houst. 263, 22 Atl. 99, in reference to a collector of county taxes: "If he had failed to pay, to the officers authorized by law to receive the same, the amount of all taxes committed to him for collection, after deducting commissions and delinquencies, by the first Tuesday of February next after his appointment, there was a complete breach of the condition of his official bond; and the levy court, after the final settlement in the following month of March, when the delinquent list was allowed, had full power and authority to order the official bond executed at once." This was not done, however, and it appears, as was stated above, that an execution did not issue until October, 1893. In the meantime, on the 20th day of May, 1891, which was after Dougherty's official term of one year had ex-

pired, the complainants presented to the levy court the following petition:

"To the Honorable the Levy Court of Newcastle County: The petition of Joseph Stoeckle, Bernand Bonner, Hugh Lynch, Thomas Toy, and John S. Russell, trust officer of the Security Trust & Safe-Deposit Company, administrator c. t. a. of John A. Boers, deceased, respectfully shows that John J. Dougherty was duly appointed by the levy court of Newcastle county collector of taxes for the city of Wilmington for the years 1889 and 1890, and your petitioners, with William McMenamin, John H. McClafferty, and John A. Boers, were accepted by the said levy court as sureties upon the official bond of said John J. Dougherty; that there is still due from the said collector about \$14,000, and an amount of taxes still uncollected, though not believed to be sufficient to meet and liquidate the above indebtedness. Your petitioners further show that they have good grounds to believe, and do believe, that they have sustained and will sustain loss by reason of their suretyship for said collector of taxes, and, as the term for which the said collector was appointed has expired, your petitioners pray that he may be restrained from further collection of taxes committed to him for collection, in accordance with the provisions of chapter 312, volume 15, Delaware Laws. [Signed] Joseph Stoeckle. Bernand Bonner. Hugh Lynch. Thomas Toy. John S. Russell, T. O.

"Sworn and subscribed before James Monaghan, notary public, May 20, 1891."

On the 22d of May, two days later, a statement was submitted to the levy court in support of the petition, by the attorney of the sureties, containing figures and calculations based upon an examination of Dougherty's accounts made April 22d and 23d by expert accountants selected by the sureties, and an allegation that since the examination of the books it had transpired that certain items then supposed to be unpaid had in fact been paid, and that the sureties were apprehensive that other similar errors might yet be discovered. It was further urged in this paper that a more thorough examination be made of the duplicate of the late collector, and a proper person be appointed to close up his accounts, and that their petition be granted without delay. On the same day the levy court refused the prayer of the sureties, and finally disposed of their petition by adopting a motion for its indefinite postponement. No further payments were ever made by Dougherty, and a subsequent examination of his accounts by the levy court revealed frauds or mistakes in the March settlement which increased their final estimate of his indebtedness to the sum of \$16,358.43, for which an execution was subsequently issued.

The statute referred to in the petition,

passed March 23, 1877, provided "that whenever the sureties in the official bond of any collector of taxes, appointed by the levy court in either of the counties of this state, shall have reason to apprehend loss by reason of their suretyship for such collector of taxes, it shall be lawful for any two or more of such sureties to present a petition to the levy court by which such collector was appointed, stating in substance that they are sureties in the official bond of such collector of taxes, and that they have good grounds to believe, and do believe, that they have sustained, or will sustain, loss by reason of their suretyship for such collector of taxes, and praying for his removal from office, or in case his official term shall have expired, and he shall not have collected and accounted to the levy court for all the taxes committed to him for collection, praying that he may be restrained from the further collection of any taxes committed to him for collection." It then prescribes the manner of verifying and presenting the petition, and provides that "upon the presentation of any such petition it shall be the duty of the levy court, as soon as conveniently can be thereafter to inquire into the matter, and if the said levy court shall be of opinion that there is danger of loss to such sureties by reason of their said suretyship, the said levy court shall have the power, at once, to remove from office such collector of taxes, and to appoint some citizen of the hundred collector in his place for the residue of his term, and may compel the delivery of the official seal and of the duplicate and warrant to his successor in office, after he shall have given bond, as other collectors." A subsequent clause applying especially to the case under consideration, provides that, "in case the prayer of any such petition presented to the levy court shall be to restrain a collector of taxes whose term shall have expired, and who shall not then have collected all the taxes committed to him for collection, from the further collection of any taxes committed to him for collection, and if the said levy court after inquiring into the matter, shall be of opinion that there is danger of loss to such sureties by reason of their said suretyship, the said levy court shall have power to issue an order restraining such late collector from the further collection of any taxes committed to him, and may appoint the collector resident in said hundred, or any other citizen of the hundred, to collect the residue of the taxes uncollected by such late collector and may compel the delivery of the duplicate and warrant to the person appointed to collect the residue of taxes uncollected by such late collector, after he shall have given bond, as other collectors." The other provisions of the statute relate in detail to the method of carrying into effect any order that might be made by the levy court in the premises without jeopardizing the interests of the

public, and contains, *inter alia*, the following: "Or in case of the appointment of a person to collect the residue of the taxes uncollected by a collector whose term of office shall have expired as herein provided, he and his sureties shall be chargeable with all taxes uncollected by his predecessor, subject to allowances by the levy court, as in the cases of other collectors. Such appointment shall not discharge the sureties of the first collector from any part of their responsibility, or otherwise affect it, but all sums collected by the last collector shall be credited to the first. He shall have the same powers and be subject to the same duties and liabilities as the collector first appointed. On his death they shall devolve upon his executor or administrator."

The complainants allege in their bill: "That upon the presentation to said levy court of said petition and statement, said levy court did not then nor at any time thereafter, inquire into the matter, as it was the duty of the said levy court under the said act in that behalf so to do, but wholly neglected and refused to make such inquiry." That the levy court had called upon their attorney and legal adviser for his opinion as to what action should be taken by the said court, and that he had advised them in substance that an act passed by the legislature on the 28th of April, 1891, known as the "Five Commissioners Bill," was inconsistent with and had repealed the act under the provisions of which the petition of the sureties had been presented, by abolishing the office of tax collector, and that he therefore advised the levy court not to take any action in the premises upon said petition and statement. That upon hearing this opinion and advice, which was given on the 22d day of May, 1891, the levy court immediately postponed indefinitely the petition of the sureties, being controlled by the opinion of their attorney that they had no right to make any inquiry at all, and that his opinion, upon which they acted, precluded the making of any inquiry in compliance with the law which he declared to be repealed. The decision of the court of errors and appeals in the case of *Smith v. Riding*, 9 Houst. 235, 22 Atl. 97, decided June 18, 1891, settled beyond a doubt that the so-called "Five Commissioners Bill" did not affect the power of the levy court to act in the premises under the provisions of the statute above cited. Complainants urge that this action of the levy court was an impairment of the obligation of the contract existing between the complainants, as sureties as aforesaid, and the state of Delaware, whereby the sureties were relieved from their liability in Dougherty's bond. The defendants deny that the opinion of their attorney had the effect upon the action of the levy court claimed by the complainants, and allege that the levy court did inquire into the matter presented by the petition and statement in accordance with its duty under the provision of the act of assembly in that behalf. The minutes

of the levy court are in evidence upon this point, and also the testimony of the individual members composing the levy court, who were examined at great length with a view to ascertain what kind of consideration was given to the petition, what kind of inquiry, if any, was made by them into the matter presented by the petition, and what motives influenced and controlled their action in indefinitely postponing said petition. The complainants further allege "that it was made to appear to said levy court, by said petition and statement, that there was danger of loss to the complainants as sureties as aforesaid, by reason of their said suretyship." And they contend, that although the language of the statute simply confers a power upon the levy court, and in its terms leaves its exercise to their judgment and discretion, yet the permissive words are in effect mandatory; that the power thus given, is in the nature of a trust for the benefit of the sureties, and it was the plain duty of the levy court to give them the relief prayed for. They therefore claim that, even granting the contention of the defendants that the levy court did inquire into the matter, they nevertheless violated the duty imposed upon them by the statute, and impaired the obligation of the contract of suretyship, in that they refused to grant the petition of the sureties upon information in relation to Dougherty's conduct in the office of collector and the character of his accounts, which, they claim, brought home to the levy court, at the time the petition was presented to them, the knowledge that Dougherty was fraudulently in default. The defendants, on the other hand, maintain that under the provisions of the statute it was discretionary with the levy court to grant or refuse the prayer of Dougherty's sureties, even if the court had been of the opinion that there was danger of loss to the sureties, which they deny; that many considerations affecting the public interests might enter into their deliberations and affect their decision, quite independently of the interests of the sureties.

The contention of counsel here is upon the application to the questions raised by the case under consideration of a rule of construction about which there seems to be practically no dispute. In the case of Turnpike Road v. Miller, 5 Johns. Ch. 101, which is cited with approval in substantially all the American cases upon the point, it is expressed by Chancellor Kent as follows: "In respect to statutes, the rule of construction seems to be that the word 'may' means 'must' or 'shall' only in cases where the public interest and rights are concerned, and where the public or third person have a claim de jure that the power should be exercised." Many cases were cited upon this point, and in particular Julius v. Lord Bishop of Oxford, 5 App. Cas. 214, in which there is not only a masterly analysis of all the English cases going to establish the rule, but an extremely felicitous and clear statement of it. But the contentions upon

this point, as well as the other questions which I have stated at length, can only be properly considered in relation to and in subordination to a principle of law which the counsel for the defendants claim to be applicable to and decisive of the question at issue. This principle is based upon the distinction which exists between the liability of sureties on the official bonds of public officers and their liability in similar bonds given in private undertakings.

It is claimed by the defendants that, assuming that the contention of the complainants is correct that the levy court did not inquire into the matter presented by the petition of the sureties as required by the act of March 23, 1877, and assuming, further, that this act was mandatory upon the levy court, and that the levy court improperly declined to grant the prayer of the sureties, yet, nevertheless, such breach of duty could not operate to discharge the sureties from their liability, because of the well-established principle of law that sureties in official bonds of public officers are not discharged because loss to them occurs through the acts or omissions, the fraud or wrongdoing, of other public officers, unless the wrongful act or omission inheres in and is made part of the condition of the obligation upon which the sureties are sought to be held. And this, they contend, is not the intention or effect of the act of March 23, 1877, upon the provisions of which the complainants base their claim for relief. The complainants, on the other hand, contend that the provisions of the act of March 23, 1877, did enter into and form a part of their contract of suretyship. The cases in which the supreme court of the United States has passed upon the liability of sureties in the official bonds of public officers, where loss has occurred in consequence of the acts or omission of other public officers, are comparatively few in number, although they cover a period of over 50 years. One follows the other in a very interesting and instructive manner, and they are all cited as authorities to be implicitly followed in the cases cited by counsel from the state courts. I will therefore consider them at length, and then endeavor to ascertain wherein, if at all, the case under consideration can be differentiated from cases whose authority and correctness is absolutely unquestioned.

The first case is that of U. S. v. Kirkpatrick, 9 Wheat. 720, decided in 1824, in which the opinion was delivered by Mr. Justice Story. The next case is that of U. S. v. Vanzandt, 11 Wheat. 184, decided in 1826, opinion by Mr. Justice Washington. In the third case, that of Dox v. Postmaster General, 1 Pet. 322, decided in 1828, the opinion of the court was delivered by Chief Justice Marshall, and so fully reviews the two preceding cases that a quotation from his opinion seems the best mode of presenting those cases. Dox was a deputy postmaster, and

the suit was instituted in the court below against him and his sureties, on a bond given for the faithful performance of his duty. Dox was removed from his office on the 1st day of July, 1816, but the postmaster general did not open an account against him, and make any claim and demand on him for the moneys received by him, as postmaster, until the 1st day of July, 1821. At the time of his removal from office, he was solvent and able to pay his debts, and continued so until the 1st day of July, 1819, after which he became insolvent, and continued to be so. And the postmaster general, well knowing that Dox had neglected and refused to pay over the moneys due from him as postmaster at the end of every quarter, etc., did not commence his suit until August, 1821. Chief Justice Marshall in his opinion says: "These facts, placed on the record without explanation, must be admitted to show a gross neglect of duty on the part of the postmaster general. Does this neglect discharge the sureties from their obligations? The condition of the bond is broken, and the obligation has become absolute. Is the claim of the United States upon them released by the laches of the officer to whom the assertion of that claim was intrusted? This question, also, has been settled in this court. The case of *U. S. v. Kirkpatrick*, 9 Wheat. 720, was a suit instituted on a bond given by a collector of direct taxes and internal duties, under the act of July 22, 1813 (3 Stat. 22, c. 16). The act required each collector to transmit his accounts to the treasury monthly, to pay over the moneys collected quarterly, and to complete his collection, pay over the moneys collected to the treasury, and render his final account within six months from the day on which he shall have received the collection list from the principal assessor. In case of failure, the act authorizes and requires the comptroller of the treasury, immediately, to issue his warrant of distress against such delinquent collector and his sureties. The comptroller did not issue his warrant of distress according to the mandate of the law, and this suit was instituted four years after such warrant ought to have been issued. The court left it to the jury to decide whether the government had not, by this omission, waived its resort to the sureties. A verdict was found for the defendants, the judgment on which was brought before this court by writ of error. The counsel for the defendant urged that laches might be imputed to the government through the negligence of its officers, but this court reversed the judgment, declaring the opinion that the charge of the court below, which supposes that laches will discharge the bond, cannot be maintained in law. 'The utmost vigilance,' it was said, 'would not save the public from the most serious losses if the doctrine of laches can be applied to its transactions. It

would, in effect, work a repeal of all securities.' It was further said that the provisions of the law which require that settlements should be made at short and stated periods are created by the government for its own security and protection, and to regulate the conduct of its own officers. They are merely directory to such officers, and constitute no part of the contract with the security. After a full discussion of the question, the court laid down the principle 'that the mere laches of the public officers constitute no grounds of discharge in the present case.' The same question came on to be again considered in the case of *U. S. v. Vanzandt*, 11 Wheat. 184. This was an action of debt, brought upon a paymaster's official bond, against one of the sureties. The act of organizing the general staff and making further provision for the army of the United States makes it the duty of the paymaster to render his vouchers to the paymaster general, for the settlement of his accounts; and if he fail to do so for more than six months after he shall have received funds, the act imperatively enjoins 'that he shall be recalled, and another appointed in his place.' Acts 1816, c. 69, § 4. The paymaster had failed to comply with the requisites of the law, after which the paymaster general, instead of obeying its mandate by removing him, placed further funds in his hands. The circuit court instructed the jury that the defendant, the surety, was not chargeable for any failure of the paymaster to account for such additional funds so placed in his hands after his said default and neglect in respect of the funds previously received were known, and a verdict was found for the defendant. The judgment on this verdict was also brought before the court by a writ of error, and was reversed. The counsel for the defendant contended that this case differed from *U. S. v. Kirkpatrick*, but the court said: 'The provisions in both laws are merely directory to the officers, and intended for the security and protection of government, by insuring punctuality and responsibility; but they form no part of the contract with the surety.' The placing further funds in the hands of the defaulting paymaster was considered as the necessary consequence of his continuance in office. This is certainly a very strong case. These two cases seem to fix the principle that the laches of the officers of the government, however gross, do not of themselves discharge the sureties in an official bond from the obligation it creates, as firmly as the decisions of this court can fix it. We think they decide the question now under consideration."

In the case of *U. S. v. Boyd*, 15 Pet. 208, decided in 1841 (Mr. Justice Catron delivering the opinion), the suit was instituted against Gordon D. Boyd, receiver of public moneys in the district of lands subject to sale at Columbus, Miss., and the sureties on

his official bond. Other questions were involved in the case, but Mr. Justice Catron, speaking of the failure of the receiver to account and pay as required by the rules of the treasury department, says: "Laches are not imputable to the government. The regulations requiring settlement to be made by its officers at short periods are designed for the protection of the government, and merely directory to the officers. Such is the settled doctrine of this court,"—and cites the cases above quoted.

Finally, in *Jones v. U. S.*, 18 Wall. 662, decided in 1873, suit was instituted in the court below against Jones et al. as sureties for one Quillian, conditioned that the said Quillian should faithfully discharge the duties of postmaster at Milledgeville, Ga., and, "faithfully, once in three months, or oftener, if thereto required, render account of his receipts and expenditures, and pay the balance of all moneys that shall come into his hands, and keep safely all the public moneys collected by him." The case was argued on demurrer, and the defendants' plea concisely and briefly presents the question at issue as follows: "That as to any default of the said Quillian, their principal in said bond in the declaration mentioned as postmaster aforesaid, within two years before the commencement of this action, they are not liable in law therefor, but have been and are fully discharged and released by the acts and conduct of the plaintiff, through their agent, the auditor of the treasury of the post-office department of the said plaintiff, who had full notice of the defalcation and embezzlement of funds of the plaintiff before them, and yet neglectfully permitted said Quillian to remain in office as such postmaster, whereby he was enabled to commit all the default and embezzlement aforesaid, within two years before the commencement of this action." Justice Clifford, who delivered the opinion of the court, simply said "that it was quite evident, that the facts pleaded did not constitute any defense to the action, and that, such being the settled law of the court, it was not necessary to enter into any discussion of the question."

I will cite at length one other case arising upon an official bond, which is particularly valuable as an illustration of the principle established by the preceding cases, although the bond is not the bond of a public officer. It is the case of *Hart v. U. S.*, 95 U. S. 318. This was a suit commenced in the court below against the sureties in a distiller's bond, the breach being the nonpayment of internal revenue tax by their principal, the distiller, on spirits distilled by him. It was argued on demurrer. Mr. Chief Justice Waite delivered the opinion of the court, and said: "Under the law as it stood when this suit was commenced, no distilled spirits could be removed from a distillery warehouse before payment of the tax (15 Stat. 130, § 15), without subjecting all of those engaged in such

removal to heavy penalties (Id. 140, § 36). An officer of the United States had no authority to dispense with this requirement of the law. If, in violation of his duty, he permitted such removal, he subjected himself to punishment, but did not bind the government by his acts. The government is not responsible for the laches or the wrongful acts of its officers. *Gibbons v. U. S.*, 8 Wall. 269; *U. S. v. Kirkpatrick*, 9 Wheat. 720; *U. S. v. Vanzandt*, 11 Wheat. 184; *U. S. v. Nicholl*, 12 Wheat. 505; *Jones v. U. S.*, 18 Wall. 662. Every surety upon an official bond to the government is presumed to enter into his contract with a full knowledge of this principle of law, and to consent to be dealt with accordingly. The government enters into no contract with him that its officers shall perform their duties. A government may be a loser by the negligence of its officers, but it never becomes bound to others for the consequences of such neglect, unless it be by express agreement to that effect. Here the surety was aware of the lien which the law gave as security for the payment of the tax. He also knew that, in order to retain this lien, the government must rely upon the diligence and honesty of its agents. If they performed their duty, and preserved the security, it inured to his benefit as well as that of the government; but if, by neglect or misconduct, they lost it, the government did not come under obligations to make good the loss to him, or (what is the same thing) release him pro tanto from the obligation of his bond. As between himself and the government, he took the risk of the effect of official negligence upon the security which the law provided for his protection against loss by reason of the liability he assumed."

This case is followed by *Minturn v. U. S.*, 106 U. S. 444, 1 Sup. Ct. 409, decided in 1882, in which a government officer permitted goods to be taken from a bonded warehouse without full payment of the duties thereon. Mr. Justice Blatchford delivered the opinion of the court, and, after citing the opinion of Chief Justice Waite in *Hart v. U. S.*, and the cases cited by him, concludes as follows: "It is well settled by the decisions of this court that the negligence of the officers of the government does not affect the liability of a surety in a bond any more than it does that of his principal." He then cites *Dox v. Postmaster General, U. S. v. Kirkpatrick*, and *U. S. v. Vanzandt*.

In all these cases, the statutory provisions which were violated by the officers of the government were laws existing at the time that the sureties in the official bonds entered into their contract of suretyship, and unquestionably modified and decreased the risk imposed upon such sureties by their undertaking. In several of them it is admitted that the whole loss incurred was in consequence of a violation of those statutes by the officers of the government.

At the same time, the supreme court, in

another series of decisions, which have been cited by counsel for complainants as supporting their contention upon this point, have laid down a principle which may best be expressed by quoting from the opinion of Mr. Justice Shiras in the case of *Barnitz v. Beverly*, 163 U. S. 127, 16 Sup. Ct. 1045, which has been quoted in the brief of one of complainants' counsel. Mr. Justice Shiras says: "But this court held, through Mr. Justice Miller, that all the laws of a state existing at the time a mortgage or any other contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give a remedy on such contracts; that the construction, validity, and effect of contracts are governed by the place where they are made and are to be performed, if that be the same; that it is therefore said that these laws enter into and become a part of the contract." Mr. Justice Shiras reviews the well-known cases of *Bronson v. Kinzie*, 1 How. 311, 316, and *Brine v. Insurance Co.*, 96 U. S. 627, 637, and many others defining and applying this general principle.

These cases state a well-settled principle of law, but it is made plain by the authorities I have cited that it must be applied in connection with the equally well settled principle that "the government is not responsible for the laches or the wrongful acts of its officers." And in the language of Chief Justice Waite, in *Hart v. U. S.*, cited above: "Every surety upon an official bond for the government is presumed to enter into his contract with a full knowledge of this principle of law, and to consent to be dealt with accordingly. The government enters into no contract with him that its officers shall perform their duty." As was said by Mr. Justice Story, in *U. S. v. Kirkpatrick*, "the surety may place confidence in the agents of the government, and rely on their fidelity in office; but he has of this the same means of judgment as the government itself, and the latter does not undertake to guaranty such fidelity."

The bond in the cause under consideration was given, as we have seen, by Dougherty and his sureties to the state of Delaware, conditioned for the faithful discharge of his duty as collector of county taxes; and it is not even suggested that the principles governing the liability of sureties on official bonds given for the federal government do not apply equally to bonds given to a state government. It is obvious, therefore, under the authorities I have considered at such length, that the sureties on Dougherty's bond could not be relieved from the obligation they had assumed to the state of Delaware by any action or nonaction of the levy court upon their petition, unless the statute under which that petition was presented differed in such essential particulars from the statutes construed in those authorities as to deprive the state, in this instance, of the pro-

tection of the principle that it "is not responsible for the laches or the wrongful acts of its officers," and to give to its provisions the effect of a contract on the part of the state of Delaware with the sureties that the levy court of Newcastle county should perform their duty under it, thereby making the performance of certain acts by the levy court part of the condition of the bond.

Can the act of March 23, 1877, be so read? I have cited it at length above, and it only remains to compare it with the statutory provisions in consequence of the disregard of which by government officials arose the cases in the supreme court which, taken together, establish and define, as we have seen, a rule that renders the position of sureties in official bonds so different from that of sureties in private undertakings. The contention of counsel for the complainants is that the statutes considered in those decisions were enacted for the security and protection of the government, and that those decisions were based upon such a construction of them; while, on the other hand, our state act of March 23, 1877, was enacted "solely for the benefit and relief of the sureties." In a case referred to above in another connection (*Julius v. Lord Bishop of Oxford*), Lord Penzance, in the course of his opinion, expressed a thought which must at times occur to every diligent student of the authorities. He remarked: "Passing, therefore, from definitions which are apt not to be uniform, and which are with difficulty so framed as to be applicable to all cases, I think it far more satisfactory that your lordships should look at what the courts in previous cases have done, rather than what the learned judges may have said." Now, I have already cited the authorities at such length as to set forth both what the learned judges have said and what the courts have done, and nothing could be more obvious than that, whatever may be the proper construction to be placed upon the language used by the judges in some of those cases, yet the provisions of all the statutes, ex necessitate rei, secured and protected the sureties and the government alike, if obeyed by the government officials; and in the case of *Hart v. U. S.* this is clearly stated and fully set out by Chief Justice Waite in his opinion. When we compare those statutes in detail with our state act of March 23, 1877, it is impossible to discover any difference between the thing required to be done by the United States statutes on the one hand, and the thing which the levy court was empowered to do on the other, which upon any conceivable theory could sustain the contention of complainants' counsel.

The statutory provision that a defaulting paymaster should be recalled, and another appointed in his stead, is assuredly no less a protection to his sureties than is the provision in our state statute that a defaulting tax collector should, under certain conditions, be deprived of the power of collecting more taxes, and

another collector appointed in his stead, a protection to the sureties on the collectors bond. And yet, when the officer of the government, instead of obeying the statutory mandate by removing the defaulting paymaster and appointing another person in his stead, placed further funds in his hands, which he embezzled, the court held that the sureties were not discharged, and they were obliged to pay to the government the money which their principal was thus enabled to embezzle. *U. S. v. Vanzandt*, supra. Again, the provision that the government officer shall not permit distilled spirits to be taken from his custody until the tax upon them be paid is certainly not less a protection to the sureties in the distiller's bond than is the provision in our state statute that the power to collect certain uncollected taxes be taken from a defaulting tax collector, and given to some duly-qualified citizen to be selected by the levy court, a protection to the sureties in the collector's bond. And yet, when the government officer, instead of obeying the statutory mandate, did permit the distiller to take away the spirits that were made by the statute a specific security for the internal revenue tax due thereon, and he then failed to pay the tax, the court held that his sureties were not discharged, and they were compelled to pay to the government the tax owed by their principal, for which the government had held ample security, which its agent, in violation of a statute existing when the sureties entered into their contract, gave away. *Hart v. U. S.*, supra. Or, reversing the point of view, if security and protection were afforded to the government by these provisions of the United States statutes, it cannot be denied that security and protection were in like manner afforded to the state by the provision in our state statute.

To continue this comparison throughout the other cases must surely be superfluous, the essential features being manifestly the same in all. Assuming, therefore, the claim of complainants' counsel to be correct, that the permissive language of the statute under consideration is in effect mandatory, the only difference that can be discerned between the mandate it contains, and the mandate of the statutes with which I have thus compared it, is that in the state statute it is conditioned upon the action of the sureties, and under it there could be no laches or wrongful acts in the premises on the part of the public officers until there had been action by the sureties, the levy court not being empowered or required to take any action looking to the removal of a collector unless certain preliminary action shall be taken by his sureties. To use the words of complainants' counsel: "What is required to be done by the levy court is solely on the motion and initiative of the surety." And they rely upon this feature of the statute, taken in connection with its title, "An act in relation to the liability of principal and surety" (*Laws 1877, p. 398*), to support their con-

tention that the act is solely for the benefit of the sureties, and that the authorities cited do not apply to it. It cannot be contended, however, that this condition of the statutory mandate alters the effect of the thing commanded, or, if it be not done, the effect of the laches or wrongful acts of the public officers, upon the interests either of the sureties or of the public.

This being the case, can it be maintained successfully, in the face of the authorities I have cited and analyzed at such length, that the act of March 23, 1877, has the effect of a contract on the part of the state of Delaware, with the sureties on the collector's bond, that the officers composing the levy court should obey the mandate of the statute, merely because that mandate was conditioned upon "the motion and initiative of the sureties"? Clearly not, and yet there seems to be no other ground upon which to rest the contention that the statute has such an effect. An examination of the whole course of decisions upon the question of the rights and liabilities of sureties in official bonds has left me with no doubt that the authorities I have cited are decisive of the point under consideration, and must control the decision of this court. The principles established by those authorities are based upon the broad consideration of public policy which is always prepotent in the determination of questions which affect the interests of the public,—the state,—and especially the public revenue, which is vital to the existence of government, and they have met with universal acquiescence. The sureties in the official bond of John J. Dougherty as tax collector, etc., must be presumed to have entered into their undertaking with the state of Delaware with a knowledge of those principles of law, and the foregoing consideration and comparison of the statutes fails to disclose any provision of the act of March 23, 1877, which, in the light of those authorities, either expressly or by necessary implication, makes the state responsible to those sureties for any failure on the part of the levy court of Newcastle county to comply with the provisions of that act.

In view of this conclusion, it seems entirely unnecessary for me to enter upon the discussion of the question whether or not the levy court, after the petition of the sureties had been presented to it, did or did not inquire into the matter within the meaning of the statute. Having been irresistibly lead, by the authorities and arguments already considered, to the conclusion that, even if the levy court of Newcastle county did disobey the mandate of the statute in this particular, and refused to inquire into the matter laid before them by the petition of the sureties, yet, nevertheless, the complainants would not be discharged from their liability thereby, and this court would not be warranted in interfering with the full legal remedy of the state upon their bond, I deem it unnecessary, if not improper, for me to pass upon the question whether or

not, upon the pleading and evidence in this cause, such was the fact.

Another question has been exhaustively argued by counsel, and that is whether or not the language of the statute, which has been quoted above, although in terms conferring a distinctly discretionary power upon the levy court, is in effect mandatory; the language being, "And if the levy court after inquiring into the matter, shall be of opinion that there is danger of loss to such sureties by reason of their said suretyship, the said levy court shall have power to issue an order restraining such late collector from the further collection of any taxes committed to him," etc. The complainants contend, as we have seen, that upon the state of facts at that time existing they had a claim *de jure* that the power should be exercised, and that, consequently, under the established rules of statutory construction, it became the duty of the levy court to exercise the power granted to them,—a duty which could have been enforced by proceedings in mandamus,—so that the officers composing the levy court disobeyed a statutory mandate when they refused to grant the relief prayed for in their petition. It is manifest that the effect of this contention is precisely the same as the preceding one, and that the conclusion reached as to the responsibility of the state—the public—to the sureties for the disobedience of a mandate of the statute by the officers composing the levy court renders this question in like manner immaterial, inasmuch as, if that conclusion be correct, it could not affect the liability of the sureties on the collector's bond if it should be held that the levy court did disobey the statutory mandate when they refused to grant their petition.

Many authorities have been cited by counsel, especially those from our own state, upon the rights and liabilities of sureties in private undertakings. Now, there is no branch of equity jurisprudence which has been more fully developed than that which deals with the rights and liabilities of sureties in private undertakings, and it is well settled under what circumstances courts of equity will interfere to restrain a creditor from recovering from a surety, upon the breach by his principal of the condition of his bond, when the creditor's own laches or wrongful acts have intervened to the detriment of the surety or the increase of his risk. But in the case of private undertakings the creditor is held to be responsible to the sureties for the acts of his agents,—their acts are his acts,—whereas, in the case of official bonds, entered into for the federal or state governments, the government is not held responsible for the acts of its agents when not authorized by law; and where loss or increase of risk comes to the sureties in an official bond by reason of the conduct of public officers, the chance of their mis-

takes or misconduct, their laches or wrongful acts, must, in the absence of express statutory provision, be taken to be part of the risk which the sureties in an official bond assume. To quote again the language of Mr. Justice Story: "The surety may place confidence in the agents of the government, and rely on their fidelity in office; but he has of this the same means of judgment as the government itself, and the latter does not undertake to guaranty such fidelity." The case of the complainants may be a very hard one, but it is one where there seems to be no warrant for the intervention of this court.

It is only necessary to advert to one other point in the case. The execution issued on the judgment entered against the sureties is for the sum of \$16,853.43, which is \$1,921.92 in excess of the amount which the levy court found to be due from Dougherty, after making the allowance required by law, when he made his final settlement in March, 1891. It is alleged by the defendants in their answer, and not denied by the complainants, that after the March settlement it was discovered by the levy court that fraud on the part of Dougherty had vitiated that settlement, which was afterwards opened and corrected, and that the amount found to be actually due upon a final examination of his accounts was the sum of \$16,353.43, for which the writ of execution was issued October 19, 1893. The injunction prayed in this case is therefore refused, and the bill of complaint is dismissed, with costs, on the usual terms.

PHILADELPHIA, W. & B. R. CO. v. WILMINGTON CITY RY. CO.

(Court of Chancery of Delaware. May 15, 1897.)

RAILROADS—CROSSING BY STREET RAILWAY AT GRADE—INJUNCTION.

1. Where the charter of a street-railway company provides that it may cross any track of any railroad, provided that it conform to the grade of the track to be crossed, injunction will not lie at the instance of a steam-railway company to prevent said street-railway company, operating by electricity under the trolley system, from stretching or extending its trolley wires over, or from operating its line of street railway at grade across, the tracks of the steam-railway company at a street crossing in a city.

2. Except under special statutes, the crossing by a street railway, at grade, of a railroad's right of way across an existing highway, will not be enjoined on the ground that the great volume of the railroad company's traffic and the number of its trains at such crossing rendered the crossing dangerous.

3. An electric street railway, as operated by the trolley system, is not an additional burden upon the soil in the common highway.

4. Where the act of an electric street railway in crossing complainant railroad company's tracks on a public highway does not take property of the complainant, and does not work some damage to it, differing in kind from the damage which the complainant would suffer in common

with the rest of the community, it has no standing to ask an injunction merely because the respondent proceeds ultra vires, or usurps a franchise.

Action by the Philadelphia, Wilmington & Baltimore Railroad Company against the Wilmington City Railway Company for an injunction. Motion for a preliminary injunction. Denied.

George Gray, H. H. Ward, and Andrew C. Gray, for complainant. Willard Saulsbury, for respondent.

NICHOLSON, Ch. Injunction bill. The complainant operates a line of railroad from the city of Philadelphia to the city of Baltimore and elsewhere which crosses the state of Delaware. It passes through the city of Wilmington, and crosses Third and Fourth streets at grade, both of said streets having been common highways, established and maintained at the expense of the city of Wilmington, long before the company complainant was incorporated, or in fact any other railroad company was incorporated in this country. At a short distance below the railroad crossing, there it a bridge over the Christiana river, known as the "Third Street Bridge," serving as a means of communication with an outlying portion of the city, known as South Wilmington, as well as with the adjacent country and the neighboring city of New Castle. The respondent operates a street railway in the city of Wilmington, and upon some country highways adjacent thereto, by electricity, under what is known as the "Trolley System," and has laid street-railway tracks along Third street to the complainant's railroad, both on the northerly and southerly side. Its purpose is to cross complainant's road with its street railway where complainant's road crosses Third street, thus connecting with its tracks already laid across the Third Street Bridge and in South Wilmington. Respondent's charter, granted in 1864, provides that it may "cross any track of any railroad company now incorporated, or hereafter to be incorporated, provided that it conform to the grade of the track to be crossed." The complainant filed a bill in equity to restrain the proposed crossing. Upon the presentation of complainant's bill, I granted a rule to show cause why the preliminary injunction prayed for in said bill should not be awarded, with a restraining order until the determination of the rule. The bill was subsequently amended, and the restraining order modified in accordance therewith. The amended bill prays as follows: "(1) That the said defendant may fully and truly answer this bill of complaint, and not under oath, the same being hereby expressly waived. (2) That the said defendant, and its successors, its officers, employés, workmen, agents, deputies, and attorneys, may be restrained by the injunction of the hon-

orable court from again stretching or extending its trolley wires across the tracks of the said complainant on said Third or Fourth street, in said city of Wilmington, and from operating, or attempting to operate, its said present or any projected line of street railway across the tracks of said complainant, at Third or Fourth Street, in the said city of Wilmington, with the use of electricity as a motive power. (3) And, also, that a preliminary injunction may be issued from this honorable court, to restrain the said defendant, and its successors, employés, workmen, agents, deputies, and attorneys, from again stretching or extending its trolley wires across the tracks of said complainant, on said Third or Fourth street, in said city of Wilmington, with the use of electricity as a motive power, or otherwise howsoever in like manner, until the further order of the chancellor. (4) That the complainant may have such further or other relief as the nature of the case may require. (5) That a subpoena may be issued for the said 'The Wilmington City Railway Company,' as defendant in this cause." The respondent has filed its answer, fully meeting and denying all the equities of the bill. Affidavits have been presented and read on both sides, and the questions involved argued upon the motion for a preliminary injunction.

The complainant does not claim any property rights as abutter or owner in fee which will be affected by the proposed crossing, and only shows in itself the right to cross Third and Fourth streets, previously existing highways, in such a manner as shall preserve to the public the use of the streets under the well-known common-law rule that where a steam railroad crosses a street or public highway, as in this case, it takes its right subject to the right of the public to use the street in a reasonable and lawful manner. As was said by Judge Houston in the case of McCoy v. Railroad Co., 5 Houist. 609, decided in 1879: "As Fourth street was then, and long had been before the company was started or the railroad was constructed by it, a common highway, established and maintained at the expense of the city of Wilmington, there can be no question in this case that the people of the city and the public in general had a paramount right to the use and enjoyment of it as such, as well where it was intersected and crossed by the railroad as in any other part of it." The status of the Third street crossing is identically the same. It appears from complainant's bill and affidavits—and it is not denied by the respondent, although it denies the necessity of so many tracks and so much shifting—that, in consequence of the great volume of complainant's business, it uses seven lines of railroad track at the crossing of Third street, and eight lines at its crossing of Fourth street; that the business and traffic

necessitates the passage of about 45 passenger trains north and 50 passenger trains south, and of about 33 freight trains north and south, every 24 hours over said crossings; that the necessary local shifting of cars and trains over said crossings causes the passage of about 350 trains or parts of trains every 24 hours, so that the total average passage of trains, or parts thereof, over said crossings, does not fall short of 475 during every 24 hours. And this crowding of its right of way at the Third and Fourth street crossings, and the consequent dangers and difficulties attending the use of Third and Fourth streets as public highways, are urged by complainant's counsel as in itself a reason for the exercise of the extraordinary powers of the court of chancery and the granting of an injunction in this case. The only cases cited, however, that could by any construction support such a contention, are under Pennsylvania statutes expressly investing the courts with special powers to prevent grade crossings. In the case of *Pennsylvania R. Co. v. Braddock Electric Ry. Co.*, 152 Pa. St. 125, 25 Atl. 783, the court recites the Pennsylvania statute, as follows: "When such legal proceedings relate to crossings of lines of railroad by other railroads, it should be the duty of the courts of equity of this commonwealth to ascertain and define, by their decree, the mode of such crossing which will inflict the least practical injury upon the rights of the company owning the road intended to be crossed; and if, in the judgment of such court, it is reasonably practicable to avoid a grade crossing, they shall by their process prevent a crossing at grade." But in this state there is no such legislation. The powers of the court of chancery and the rules governing its action in this behalf have not been extended or modified by any general legislation, and I am not aware of any principle in law or equity in accordance with which the difficulties and dangers attending the use of Third and Fourth streets as public highways at the points where they are crossed by the complainant, which are caused by the multiplication of the complainant's tracks and trains,—by its increased use of its right of way,—could be considered by the court of chancery as a reason for enjoining any use of the streets across the complainant's right of way, which is a legitimate use of those highways, and not an additional servitude or easement. There are cases, indeed, in which, under city ordinances, the writ of mandamus has been issued to compel a steam railroad company to elevate or depress its tracks when its increased use of its right of way had obstructed or materially impaired the public use of a highway; but I am not aware of any case, except as we have seen, under special statutes, in which the crossing by a street railway at grade of a railroad's right of way across an existing highway was ever enjoined by a court of

equity on the ground that the great volume of the railroad company's traffic, the number of its trains at such crossing, rendered the crossing dangerous. The remedy for such dangers must be sought elsewhere, and in a different mode.

It is conceded by complainant's counsel that the overwhelming weight of authority in this country has established the principle that what is ordinarily known as a street railway is not an additional burden to that of the general easement of the public in the street or highway, and they submit to the weight of authority on this point. It is not necessary, therefore, to cite the authorities or to consider the force of their reasoning. The whole subject is satisfactorily discussed by the chancellor of New Jersey in the case of *West Jersey R. Co. v. Camden, etc., Ry. Co.*, 52 N. J. Eq. 35, 29 Atl. 424, where he says in conclusion: "Basing their conclusions upon the contemplation of the customary use of the electric street railway, the courts have regarded that, as operated by the trolley system, it is not an additional burden upon the soil in the common highway," and he cites a number of important cases in confirmation and illustration. The chancellor then further says, speaking of a railroad crossing similar to the one now under consideration: "The exercise of the right to cross does not of necessity exclude the public from the enjoyment of the highway at the point of crossing, further than to permit the lawful operation of the railroad. The high rate of speed and the dangerous character of the trains run over the crossing necessitate that, in the operation of its railroad, the complainant shall have the right of way, to be exercised in accordance with the requirement of law, and imposes the duty upon the public, in the use of the highway, as the railroad crossing is approached, to stop, if necessary in the exercise of due care, look and listen, in order that the right of the railroad may be safely accorded to it. But there is nothing in the right which otherwise limits the use of the highway by the public, or restricts the increase of the volume of that use either in the manner originally exercised or through conveniences which invention may from time to time provide. It follows from the conclusion that the use of the street by the electric car, as it is now usually operated, is within the purposes for which the highway was created; that such car is not to be excluded from the point in that highway where the railroad may cross it. It, like other passers in the street, must conform with the requirements which the railroad imposes,—stopping, if necessary, looking, listening, and yielding the right of way. Nor do I perceive any tenable objection to the suspension of a trolley wire over the railroad crossing at a sufficient height. In the present instance it is not suggested that the elevation intended would be insufficient to permit the proper operation of the complainant's road." Admitting this to be law, it necessarily follows that the respondent, which is admitted

to have received from the municipal authorities all the necessary privileges in the streets in question which it was in the power of those authorities to grant, would have the same right to use those streets for the purposes of its railway across the complainant's right of way as it has to use those streets in any other part of them. The express legislative grant in respondent's charter, of the power to "cross any track of any railroad company now incorporated, or hereafter to be incorporated, provided that it conform to the grade of the track to be crossed," has already been referred to.

But the complainant has advanced another objection, upon which it largely bases its motion for a preliminary injunction. It is alleged in the fifth paragraph of the bill that "the defendant company hath no power or authority under its charter, as aforesaid, or under the law of the state of Delaware, to use electricity as a motive power for the propulsion of its cars in the said city of Wilmington." This objection at once raises the question: What standing has the complainant in this court to ask, on this ground, for the preliminary injunction prayed for? If that which the respondent proposes to do with its electric railway does not take property of the complainant for its use, and does not work some damage to it, differing in kind from the damage which the complainant would suffer with the rest of the community, it has no standing to ask for injunction merely because the respondent proceeds *ultra vires*, or usurps a franchise. This is hornbook law, but I will cite two cases which were decided by Chancellor McGill, and resemble very closely the case before me, viz. *Morris & E. R. Co. v. Newark Pas. Ry. Co.*, 51 N. J. Eq. 380, 29 Atl. 184, and *West Jersey R. Co. v. Camden, etc., Ry. Co.*, 52 N. J. Eq. 39, 29 Atl. 423. A careful examination of the pleadings and proof has satisfied me that the complainant in this case has failed to show such special damage. It is true that it has alleged in the third paragraph of its bill, as amended, that it "is advised and believes, and therefore avers, that the stretching of said trolley wires across the track of said company, and the laying of the necessary ground wires for the operation of said electric road over said crossings upon said Third street or said Fourth street, would be attended with great danger to the employes and servants of said complainant operating the trains of said complainant, and would most seriously interfere with the due operation of said road of said complainant at said crossing." But the answer denies this allegation, and alleges that the wires would be strung more than 22 feet above the ground, out of the way of any possible interference with complainant's trains or employes. There are no affidavits in support of this allegation of the bill, and the answer, being responsive, and being also supported by affidavits, must control in the present application.

The complainant also alleges that the use of electricity under what is known as the "Trolley System" will render the crossing by the street railway more dangerous than if it used horses as a motive power. But the answer denies this allegation, and a great number of affidavits upon this point have been presented and read on both sides; a number of expert electricians and officers of street-railway systems throughout the United States testifying in behalf of the respondent that, with the machinery and safety appliances in use by the respondent, the crossings would be safer than by horse power, and that the chances of accident from any of the causes alleged in complainant's bill and affidavit would be much less than those that might arise in the operation of a horse railway at the railroad crossing. After carefully considering and weighing these affidavits, I am satisfied that it does not clearly appear from them that the crossing under the trolley system at this point would be more dangerous and a greater menace to the complainant's traffic than would the crossing by horse power, against which no injunction is asked; so that, even should it be granted that these allegations are relevant and material to this application, yet, as the evidence before me leaves the relative danger to a railroad crossing of the two systems an unsettled question, they cannot avail the complainant, since, in the application for a preliminary injunction, the complainant's case must be clearly made out. As has been seen already, the complainant does not claim any property rights as abutter or owner in fee, which will be affected by the proposed crossing of its right of way by the respondent under the trolley system, and does not claim to be in danger of receiving any damages other than those already considered. It is therefore manifest that it has no standing in this court for its application for a preliminary injunction, and that, for the purpose of this motion, it is not open to the court to consider the question whether the respondent railway company has or has not power or authority under its charter, or under the laws of the state of Delaware, to use electricity as a motive power for the propulsion of its cars in the said city of Wilmington. There is more than one way of obtaining a judicial determination of that question, but the proceeding now pending before this court is not one of them.

The arguments of the learned counsel in this cause have been exceptionally able and elaborate, exhausting the whole field of inquiry. I have examined the vast number of cases cited by counsel with great care, and have given attentive consideration to the many points which have been so ingeniously raised and elaborated by them; but I do not deem it necessary in this opinion to discuss any other than those I have already presented, which I believe to be conclusive of the questions at issue. I will deny the motion for a preliminary injunction, and discharge the rule in this cause.

(86 Md. 653)

LONEY v. LONEY et al.

(Court of Appeals of Maryland. Jan. 4, 1898.)

PAROL GIFT—EVIDENCE—SUFFICIENCY—SPECIFIC PERFORMANCE.

1. Ten witnesses testified that plaintiff's father had stated that he had given the land in question to plaintiff, and that plaintiff fixed it up to suit himself. Plaintiff had no deed of the land. He paid more than \$1,100 to improve it. His mother and other members of his family testified that they never heard of such gift; that the father always spoke of the property as his own; and that he used a stable on the land for keeping cows and a horse, and kept hay in the loft. *Held* sufficient to establish a gift to the son.

2. A son is entitled to specific performance where his father made a verbal gift of land to him, and he took possession, and made valuable and permanent improvements.

Appeal from circuit court of Baltimore city.

Bill by Charles B. Loney against Annie M. Loney and others. From a decree for defendants, plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and BRYAN, PAGE, ROBERTS, and BOYD, JJ.

France & France, for appellant. Abraham Sharp and Henry W. Fox, for appellees.

BRYAN, J. Charles B. Loney alleged that his deceased father, Charles Loney, made him a verbal gift of a portion of a certain leasehold lot in the city of Baltimore, and that he entered into possession of the portion given to him, and erected buildings on it at considerable expense, and that his father died without having executed a deed conveying to him the legal title to the lot. He filed a bill in equity against the executors of his father, and against his widow and the other children and the husbands of the married daughters. The answers of the widow and of the daughters and the husbands of such of them as are married deny the gift of the lot by the father. The answer of Lewis Loney, the only brother of the complainant, admits the allegations of the bill of complaint. The answer of the executors does the same. We shall have something to say about the answer of the executors hereafter. The court below dismissed the bill, and the complainant appealed.

The question is principally one of fact. The deceased owned and occupied a leasehold lot in the city of Baltimore, at the northwest corner of Paca and Barre streets, fronting 50 feet on Paca street, and running back to Spring alley, bounding 120 feet on Barre street. The portion of the lot claimed by the complainant is the rear part of it, which is separated from the front part by a 12-foot way, with a gate on Barre street. The evidence is very voluminous, and much of it has no important bearing on the question in controversy. We have considered it carefully, but it would answer no good purpose to cite it in detail. We shall content ourselves by mentioning such parts of it as bear on the essential questions in the case. The witness Redsecker testified that the father told him that the property

"from here back" (pointing from the entrance on Barre street) belonged to his son. The old man (according to the witness) said: "I gave it to him, and he fixed it up to suit himself." At the time there was on this portion of the lot a three-story brick house, and in the rear of that a two-story brick building, used for a stable and carriage house. The witness said that he was pretty sure that the conversation took place in the summer of 1884. Mrs. Dougherty, Miss Dougherty, Richardson, Leydecker, Switzer, Lerian, Ensor, and Walter testify to the same general effect in respect to the gift. Cornthwaite testified that the improvements made on the rear portion of the lot were a very large brick stable, a two-story dwelling house, and a store. He also testified that he heard a conversation between old Mr. Loney and another person, in which the old man said: "Fix the property to suit Charley, as it belongs to him." The complainant paid the expense of the improvements on the property. It is shown that he paid more than \$1,100 for labor and materials used in the buildings; and it is evident from Ensor's testimony that the materials cost considerably more than the amounts shown by the bills which have been produced. The testimony in regard to these statements made by Loney, the father, has not been contradicted by direct testimony; but evidence is given by the mother and other members of the family tending indirectly to disprove the fact of the gift by the father. None of these witnesses ever heard of any such gift. They testify that they had no reason to believe that any had ever been made, and that they had every opportunity of knowing it, if such were the case; and some of them testify that the father always spoke of the property as his own, and that the father used the stable for keeping cows and a horse, and kept hay in the loft. There was a good deal of testimony which showed that much ill feeling existed towards the complainant, and charges were made against him in respect to matters which do not bear in any way on the alleged gift. As he could not be a witness, he has had no opportunity of being heard in his defense. Charles B. Loney and Lewis H. Loney were the executors of their father. When they passed their account in the orphans' court, they included in it this rear lot, and it has been distributed under the will of the deceased.

Without an elaborate discussion of the evidence, we may say that we are satisfied that Loney, the father, did give to his son the lot in question. The evidence of the many witnesses who testify distinctly and positively to the old man's declarations to this point requires that we should believe it. None of the witnesses for the defendants were present when the father's declarations on this subject are alleged to have been made; and the contradiction to them is altogether inferential, founded on their deductions made from circumstances, such as that they had never heard of the gift, although they had ample oppor-

tunity to know it if it had really been made, and on statements by the old man that it was his property, and on the use of a portion of the lot by him in a manner which indicated the ownership of it by him. After the time when, according to the evidence in behalf of the complainant, the gift was made to him, he entered upon the lot, and expended more than \$1,100 in erecting buildings on it, and making other improvements. This action on his part consummated his title in equity, and it could not be affected or defeated by any subsequent statements or conduct by the giver. Moreover, the keeping of cows or a horse or hay in the stable, or storing articles in a place on the premises which was not otherwise used, would, under ordinary circumstances, be permitted by a son to gratify a parent who had always shown great affection for him. As the son had never received a deed conveying the legal title to the lot to him, it was reasonable and proper that he should include the property in his account in the orphans' court, and, without embarrassing the proceedings before that tribunal, bring his case to a court of equity, where his rights could be fully adjudicated. The decisions have fully established that where a father makes a verbal gift of land to his son, and the son enters into possession, and expends money and labor in making valuable improvements of a permanent character, he is entitled to a specific performance. *Hardesty v. Richardson*, 44 Md. 617; *Haines v. Haines*, 6 Md. 435. The decree must therefore be reversed, and the cause remanded, in order that a decree may be passed establishing the gift to the complainant, and a trustee appointed to convey to him the legal title.

We have already stated that the complainant is on both sides of the record. He is made defendant, as one of the executors of his father. In this capacity he and his co-executor admit all the allegations of the bill of complaint, and consent to the passage of a decree as prayed. We have on two occasions expressed our disapproval of a practice of this kind. Without repeating what we have already said, we refer to *Owens v. Crow*, 62 Md. 491, and *Stein v. Stein*, 80 Md. 306, 30 Atl. 703. Reversed and remanded, with costs in both courts.

(87 Md. 48)

SMITH v. PHILADELPHIA, W. & B. R. CO.

(Court of Appeals of Maryland. Jan. 5, 1896.)

CARRIERS—WRONGFUL EJECTION—PUNITIVE DAMAGES.

Before the train stopped at his destination, a passenger had an altercation with the brakeman regarding certain conduct of the former. After the train stopped, he continued the altercation with the brakeman on the car platform, thus delaying the train; and the conductor thereupon forcibly jerked him down. There was no altercation between the passenger and the conductor to cause the latter to become angered, and the only reason for the conductor's conduct was the delaying of the train caused

by the passenger. *Held*, that the passenger was not entitled to punitive damages.

Appeal from the circuit court, Harford county.

Action by William J. Smith against the Philadelphia, Wilmington & Baltimore Railroad Company. From a judgment entered on a verdict for plaintiff, he appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BRYAN, PAGE, BOYD, FOWLER, and ROBERTS, JJ.

Albert Constable and James J. Archer, for appellant. Thos. I. Donaldson and L. Marshall Haines, for appellee.

McSHERRY, C. J. The only question discussed at the bar in this case was whether the trial court was right in giving to the jury an instruction that there was no legally sufficient evidence to warrant them in awarding punitive damages against the defendant. A verdict was rendered in favor of the plaintiff, and a judgment was entered thereon for \$500; but the plaintiff appealed because of the ruling just mentioned. The suit was brought to recover damages for a personal injury.

The plaintiff was a passenger on the cars of the defendant railroad company. He purchased a ticket entitling him to ride from Charlestown to Elkton. He entered the ladies' car, and according to his own testimony, after taking a seat, placed his feet, which were muddy, against the side of the car, just under the window. While in that reclining posture, he was approached by "some one," whom he afterwards described as the brakeman, who "grabbed" him, and said, "Put your feet down, or I will make you do it." "This," the plaintiff went on to testify, "was very rough treatment, and I resented it very promptly." He further swore that he used pretty plain language to the person who had accosted him; and it is unquestionable that he thought the person whom he addressed was the brakeman. Whether conductor or brakeman, the official wanted to know—so the plaintiff said—where he (the plaintiff) intended to get off; and to that inquiry, which was a perfectly proper one, the plaintiff stated that he replied, "None of your business. I can take care of myself." When the train reached Elkton, the plaintiff's destination, the brakeman said, "Get out here. This is Elkton;" and the plaintiff replied, "I will get out when the car stops," to which he said the brakeman enjoined, "I will make you." The plaintiff then proceeded to testify thus: "He did not say this in a very mild manner, and, as I approached the door, he looked at me, showing malice on his countenance; and I turned to him, and I says, 'Don't put your hands on me,'—apprehensive that I might fall. * * * The next instant was head foremost off the cars." It further

appeared beyond dispute that the brakeman did not touch the plaintiff, but that he was pulled from the car platform by the conductor, who was standing down on the station platform. There can be no doubt in the world that the car had stopped before the plaintiff walked out of the car door to the car platform, because there were two ladies in front of him, who had alighted, and there were passengers entering from the station platform, while the plaintiff stood inside the car, and later, on the car platform. Instead of descending the steps, he continued on the platform of the car, making no more delay, he says, than he "would have done had a man been standing by" him "in a threatening attitude"; and he remained in that position because he felt apprehensive that the brakeman might push him off. There was evidence adduced to show that the plaintiff had been drinking, and that he was under the influence of liquor; and there was also evidence before the jury tending to show, if not actually showing, that the plaintiff did in fact delay the train by not alighting in a reasonable time after the train had come to a stop at Elkton. Indeed, any other inference from the entire evidence would have been pure conjecture. The plaintiff himself admitted, as just shown by a quotation from his own testimony, that he caused no more delay than he would have occasioned had a man been standing by in a threatening attitude. If he caused no more delay than, in his judgment, he would have produced had a man been standing by in the attitude he describes, then he must have caused some delay; and he was not justified in causing any. Nearly all the witnesses examined in behalf of the plaintiff testified to the verbal altercation between the plaintiff and the brakeman on the car platform, and to the further fact that the conductor reached up from the station platform, and pulled the plaintiff down from the car. The injuries sustained from that fall are those for which the pending suit was brought. According to the plaintiff's witnesses, there had been no dispute or contention between the plaintiff and the conductor, and the only remark imputed to the latter is, "Yes, you will get down," as the conductor reached up, and, in the language of one of the witnesses, "jerked" the plaintiff down. There was much flat contradiction in the evidence, but it was the province of the jury to decide between the conflicting statements of the several witnesses; and we have nothing to do with that feature of the proof at all.

Conceding the truth of the plaintiff's case as made out by his witnesses, was there sufficient evidence before the jury to justify them in awarding punitive or exemplary damages? We are not concerned as to the right of the plaintiff to recover a verdict for something, nor as to his right to recover compensatory damages; and there is there-

fore no need to discuss the question of the degree of care with which the company was chargeable by the law. As the case stands, the jury, by their verdict, have settled the plaintiff's right to recover some damages; and there is, and there could have been in the conflicting condition of the proof, no exception in the record bringing up for discussion the question as to whether there was a total failure of evidence to sustain a recovery. Now, the force with which the act complained of was done is not the test by which the injury as to whether punitive damages are recoverable is to be determined. "On the contrary," say this court in *Railroad Co. v. Hoeflich*, 62 Md. 307, "to entitle one to such damages, there must be an element of fraud or malice or evil intent or oppression entering into and forming part of the wrongful act. * * * But where the act, although wrongful in itself, is committed in the honest assertion of a supposed right, or in the discharge of duty, or without any evil or bad intention, there is no ground on which such damages can be awarded." And in *Railroad Co. v. Larkin*, 47 Md. 162, quoting from *Quigley's Case*, 21 How. 213, it was said: "Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations." And the supreme court, in *Railroad Co. v. Arms*, 91 U. S. 493, said: "The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages." However this doctrine may be expressed, the adjudged cases now concur in holding that exemplary damages are awarded as a punishment for the evil motive or intention with which the unlawful act is done, and as a warning or example to others. "The mere fact," observed this court in *Hoeflich's Case*, *supra*, "that one is forcibly and deliberately ejected from a railroad car, does not necessarily imply that it was done wantonly or willfully, or with a bad motive, although the act may be in itself unlawful."

In the record before us there is a total failure of evidence to show that the act of the conductor in pulling or jerking the plaintiff from the car was, under all the circumstances proved by the plaintiff, done either wantonly or under the influence of a bad motive. On the contrary, the inference is strong and obvious that no such motive could possibly have actuated the conductor. It was not shown by any one that there had been any altercation or dispute of any sort between the conductor, who actual-

ly and incontestably did the act complained of, and the plaintiff. There is no pretense that the conductor had occasion, because of any remark made by the plaintiff, to become incensed or angered or resentful towards the latter. The whole drift of the evidence adduced by the appellant tended to show that the contention, and the only contention, about the position of the muddy boots and the departure of the plaintiff from the car at Elkton, was between the brakeman and the plaintiff; and there is not the faintest spark of testimony indicating, or tending to indicate, that the brakeman touched the plaintiff after the latter reached the car platform, or that he in any way, directly or indirectly, caused or contributed to the injury which ultimately befell him. That there was a delay on the part of the plaintiff in leaving the car is clear beyond question; and that there was a disposition on his part to resent what he assumed or supposed to be the menacing appearance of the brakeman is wholly free from doubt on the plaintiff's own showing. By his own admission, instead of descending the car steps, he turned and warned the brakeman not to put his hands on him. This delay of the train and his tardiness in alighting are the only reasons that the evidence furnished for the conduct of the conductor. If that be so, there is no malice or wantonness shown, and no motive suggested for its existence; and it would therefore have been improper had the trial court permitted the jury to speculate and conjecture that there was a sufficient ground for awarding exemplary damages, when there was in reality no ground at all. There being no error in the ruling complained of, the judgment appealed against will be affirmed. Judgment affirmed, with costs in this court.

(86 Md. 490)

ANDERSON et al. v. CECIL.

(Court of Appeals of Maryland. Dec. 2, 1897.)

RECEIVERS—PLEADING—SUFFICIENCY—JUDICIAL NOTICE.

1. A bill alleging that defendant had bid in land at a trustee's sale, and had failed to pay the price; that a resale had been ordered, but defendant had taken possession; that, unless the crops were applied to the payment of the price, a large sum due complainants would not be secured; and praying that a receiver be appointed,—is fatally defective, in that the nature of complainants' interests is not stated.

2. Proceedings in one case, that are referred to by the bill in another case, are not before the court in the latter case, where they are not offered in evidence, as the court cannot take judicial notice thereof.

3. Allegations that defendant had bid in property at a trustee's sale, and thereafter remained in possession without paying the price; that the trustees had been ordered to resell the property but had not done so; that defendant was insolvent, and that he was receiving the profits, which would be lost to complainants unless the court interfered, are not sufficient to authorize the appointment of a receiver without

first hearing defendant in response to the application therefor.

Appeal from circuit court, Queen Anne county.

Bill by Preston R. Anderson and others against William H. Cecil. From a decree for defendant, complainants appeal. Affirmed.

Argued before McSHERRY, C. J., and BRYAN, BRISCOE, RUSSUM, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

H. H. Barroll, for appellants. Edwin H. Brown, for appellee.

PAGE, J. The complainants, in their bill, allege that by proceedings "in chancery cause entitled 'Preston R. Anderson et al. vs. Wm. J. Anderson et al.,' being No. 732, chancery," referred to and prayed to be taken as a part of their bill, the trustees, John B. and E. H. Brown, sold unto the appellee certain real estate; that the sale was reported to and ratified by the court, but that a large part of the purchase money is still unpaid; that on the petition of the trustees the court ordered a resale at the risk of the purchaser, but they have never resold the property; that the appellee, who is insolvent, has been permitted to continue in possession up to the present time; that the real estate sold is an inadequate security for the purchaser's debt; and that of the sureties for the appellee "for his compliance with the terms of sale, William B. Shawn is dead, and the complainant believes and is informed he is insolvent." The appellants further charge "that on said farm, at the present, there are valuable crops" of wheat and corn, "which, if secured, and applied to the payment of" the complainants' claim, would "tend to secure" the complainants in a small measure at least; and that, if they be not so applied, the complainant will be unable to secure anything in excess of the market value of the land; and that the only way in which this can be done is by the appointment of a receiver, and the granting of an injunction to restrain the appellee and his agents and servants from interfering with the receiver. The prayer of the bill is for a receiver and injunction and general relief. Appended to the bill, there is an affidavit of one of the complainants, to the effect that the matters set forth in the bill are true "to the best of his knowledge and belief." It does not appear there were any exhibits filed with the bill. There is set out in the record what purports to be a copy of a part of the proceedings in the chancery case No. 732, but there is nothing to show it was filed with the bill as an exhibit, or was before the court when the decree appealed from was passed. The court refused to appoint a receiver, and dismissed the bill, and this action forms the subject of this appeal.

It must be noted that in the record before us the nature and character of the complain-

ants' interest is nowhere stated. In the last paragraph of the bill it is alleged that, unless the crops are applied to the payment of the purchase money due to the trustees, there will be no other way to secure anything towards payment of the large sum due to the complainants. But on what account, or from whom, the indebtedness is due, can only be conjectured. Even if the proceedings in No. 732, as set forth in the record, be considered, the court is left no wiser than it was before. It is true, some statements were made by the counsel for the appellants, tending to explain the interest of the complainants; but this court cannot look outside the record for the facts of the case. In this particular the bill is fatally defective, it being an elementary principle that to entitle a party "to sustain a bill he must show an interest in the subject of the suit, or a right to the thing demanded, and proper title to institute the suit concerning it. *Sellman v. Sellman*, 63 Md. 522. But, apart from this, we cannot regard any of the proceedings in No. 732, chancery, as having been before the learned judge who passed the decree below, or properly in the case before this court. As we have said, there is nothing in the record to show that these proceedings were presented to the court, and it is clearly stated in the affidavit of the clerk having charge of the chancery proceedings in the circuit court of Queen Anne county that the bill was "the only paper filed or ordered to be filed in the case, and that no exhibits accompanied the same," and that the "report of sale and other proceedings from No. 732 were incorporated in the record after appeal," by order of counsel, "and form no part of the case except by reference in the bill." If, as contended at the argument, the complainants' right to the relief prayed for in the bill rested upon anything contained in those proceedings, they should have exhibited with the bill such evidence of their claim as would satisfy the court of the correctness of their contention. If the facts "rest in record, or depend upon written evidence, such documentary evidence of their truth as office copies, or short copies and docket entries, are required. *Myers v. Amey*, 21 Md. 306. The fact that the proceedings referred to may be in the same court, will not relieve the complainants of this obligation. "A court will take notice of its own records, but cannot travel, for this purpose, out of the records relating to the particular case;" it cannot take notice of the proceedings in another case, "unless such proceedings are put in evidence." 2 Whart. Ev. § 326, and authorities there cited. It is not charged in the bill that the appellee is acting fraudulently, or is wasting the property. The averments substantially amount to no more than that the trustees have not resold the property, and that the appellee, who is insolvent, remains in possession of the property, receiving the profits

thereof, which will be lost to the appellants, unless the court interfere. Whether such facts would warrant the appointment of a receiver after notice to the defendant, we do not deem it necessary to determine. It is clear, the necessity shown is not sufficiently stringent to authorize such appointment without first having heard the defendant in response to the application. In *Association v. Stark*, 47 Md. 345, this court, referring to this subject, said: "If it be practicable, the defendant ought to have an opportunity to put in his answer, and, if this cannot be done, it is the duty of the complainant, not only to show that he has an interest in the property in dispute, but that the interference of the court is absolutely necessary to preserve it from loss and injury." Decree affirmed.

(184 Pa. St. 1)

COWAN et al. v. PENNSYLVANIA PLATE-GLASS CO.

Appeal of EXCHANGE BANK OF WHEELING.

(Supreme Court of Pennsylvania. Jan. 8, 1896.)

CORPORATIONS—INSOLVENCY—RECEIVERS—LIENS
—PREFERENCE TO OFFICER—NUNC
PRO TUNC JUDGMENT.

1. A judgment note given by a corporation, heavily in debt, to its treasurer, two months before a receiver was appointed for it, for money then advanced to him for it, on the promise thereof, to enable it to pay wages and freight bills, and thus keep its factory running, and, as it was hoped, survive its difficulties, is not an illegal preference.

2. Judgment recovered against a corporation after appointment of receiver, on adjudication of its insolvency, to take possession of all its assets, is not a lien on the funds, whether entered by leave of court or not; and it cannot be made so by entry nunc pro tunc as of a time before the appointment.

3. A creditor of a private business corporation, who has not obtained judgment against it till after appointment of a receiver, on adjudication of its insolvency, to take possession of all its assets, is not entitled to a preference, though his claim was for money advanced to pay wages and freight bills, to keep the business running; and it is immaterial that the advances were made on a promise to give judgment notes as collateral.

Appeal from court of common pleas, Westmoreland county.

Bill by George Cowan and others against the Pennsylvania Plate-Glass Company for a decree of insolvency and the appointment of a receiver. From a decree modifying and confirming the report of the auditor distributing the fund in the hands of the receiver, the Exchange Bank of Wheeling, a creditor, appeals. Modified.

Shiras & Dickey, for appellant. Williams, Sloan & Griffith, for appellee.

DEAN, J. The Pennsylvania Plate-Glass Company in August, 1890, was chartered, under the general corporation act of 1874, for the manufacture of glass near Irwin,

Westmoreland county. The capital stock was \$1,000,000. It owned in fee a tract of land, of about 28 acres, on which it erected an extensive manufactory, costing about \$850,000, wherein it commenced operations, and continued them until March 19, 1894, when these plaintiffs, for themselves and other stockholders and creditors, filed a bill for a decree of insolvency, and the appointment of a receiver. The principal averments of the bill were (1) that the corporation was insolvent; (2) that the interests of stockholders and creditors were in peril, from seizure and sale, at a sacrifice, of the property, on executions, which would result in expensive litigation. The prayer was that a receiver be appointed, to take into his possession all the property and assets of the corporation, and administer them under the direction of the court, in such manner as would best promote the interests of all the creditors and stockholders. The facts averred in the bill were admitted by the corporation. Thereupon the court appointed Joseph W. Stoner receiver. He duly qualified, gave bond, and took into his actual possession all the personal property, real estate, accounts, and choses in action of the corporation. Before his appointment, the company had executed and delivered to its treasurer, W. L. Kann, in consideration of money advanced and to be immediately advanced, a judgment bill, made in the sum of \$10,000, on which judgment was entered, execution issued, a levy made upon most of the personal property of the company, and the same sold by the sheriff. The whole sum realized on this execution was appropriated to preferred wages liens, paying about 37 per cent. thereof. Afterwards another sum, realized on other personalty, was appropriated to the same class of claims, paying an additional 13 per cent. of them. On the 2d of May, 1894, W. L. Kann, director and treasurer, to whom the \$10,000 judgment note was given, filed a bill in equity against the company, averring (1) that at different dates before the insolvency he had advanced money to the company to the amount of \$42,500, for which money, the company, antecedent to the advancements, had contracted to deliver to him judgment notes; (2) that the company, except as to the one note of \$10,000, refused to deliver to him the notes as it had agreed to do. He prayed that the company be directed to enter a cautionary judgment in his favor for \$32,500, to cover the balance of said advancements. Before action on this bill was taken, on the 5th of May, 1894, the receiver presented his petition to the court, praying for leave to sell the real estate, fixtures, and machinery of the glass plant at public sale on the 31st of May following, subject to a first mortgage of \$250,000, on the terms: \$10,000 when property was knocked down, balance of one-third on confirmation of sale, and remaining two-thirds in six and nine months. A de-

cree as prayed for was made the same day. Then, two days before the day fixed for sale, on 29th May, 1894, the court took up the bill by Kann for a cautionary judgment, and directed that judgment in his favor for \$32,500 be entered against the company nunc pro tunc, as of 16th of March, 1894,—three days before the appointment of the receiver. On the 20th of June, 1894, the receiver made report to the court that he had sold the real estate, fixtures, machinery, etc., to Kann for \$37,000, subject to a \$250,000 mortgage. On the 2d of July following, the sale was confirmed; and, on 25th of August following, H. W. Walkinshaw, Esq., was appointed auditor to distribute this fund realized from the sale of the real estate. As all the personalty had not sufficed, by former distribution, to pay the preferred labor claims, there was nothing from that source to distribute. At the audit, after deducting all preferred claims, and costs of receivership, there remained for creditors a balance of \$21,508.28. This sum was awarded as follows: To Kann, balance, \$7,707.30, remaining of his first judgment, entered 16th March, 1894, before the appointment of a receiver; on a second judgment, entered 7th April, 1894, after the appointment of a receiver, \$7,694.21; to Clark & Terhune judgment entered 21st of April, 1894, by leave of court, after appointment of receiver, \$367.98; and the balance, \$6,489.74, was set apart for Kann's cautionary judgment. There was laid before the auditor a mechanic's lien, of S. K. Smythe & Co., of \$2,147, for the erection of a gas producer,—a separate structure from the main building. This was disallowed because no notice of intention to file the lien had been given the owner, as required by the act of assembly, and because the lien should have been filed against the separate building, and not against the plant as a whole. This appellant, the Exchange Bank of Wheeling, laid before the auditor a judgment entered in the United States circuit court on 9th May, 1894, on a verdict. This, the auditor decided, was no lien on the real estate sold, because entered after the date of the receivership, and therefore must be postponed to those claims which were liens at that date, and to those which by leave of court became liens afterwards. The reasons given by the auditor for distribution to the Clark & Terhune, and the second judgment of Kann (both entered of record after the appointment of the receiver) were that proceedings to obtain judgment had been commenced before appointment of receiver, and by express leave of court these proceedings were prosecuted to final judgment after the appointment, but before sale of the real estate. As to the appropriation to the cautionary judgment, the auditor was of the opinion that having, by order of court, been entered nunc pro tunc, as if before the date of the receivership, it was entitled to recognition as a lien, in its order, except as

to intervening rights, and, as to such rights, but two liens intervened,—the second judgment of Kann, and that of Clark & Terhune,—both of which were allowed. Quite a number of exceptions were filed to the record, but only a few were pressed in the court below, and still fewer on the assignments of error here.

Two principal questions were raised before the auditor; both by judgment and general creditors: (1) They protested against distribution to the first Kann judgment, actually entered before the appointment of the receiver, because it was given in favor of the treasurer and a director of the corporation, at a time when the obligor and obligee in the judgment note had full knowledge of the corporation's insolvency. Thus a preference was created in the officer's favor, to the prejudice of creditors who were without such knowledge. (2) It was maintained by the general or unsecured creditors that, if the judgments were not invalid by reason of the relation of the parties to them, then all judgments entered after the appointment of a receiver must come in pro rata on the fund, for the reason that as soon as the corporate property, personal and real, passed from the deminion of the corporation to that of the receiver, it was in custodia legis, and no longer subject to lien by attachment or judgment at the instance of a creditor. As before noticed, the auditor, in effect, ruled against both propositions, and exceptions to his conclusions were filed by the parties affected by his rulings. After hearing the exceptions, the learned judge of the court below held that, as long as a corporation held possession of its property (that is, before the appointment of a receiver), it might prefer creditors, the same as an individual, with this distinction: that, if the preferred creditor was an officer, the burden was on him to show that the preference was in all respects fair and conscionable, and that it was not collusive, for the mere purpose of preference, but, under the circumstances, was just. The knowledge of the corporate officer that his debt is in peril, and the power, to some extent, to prefer himself, raises the presumption that he has taken advantage of his special knowledge and special power, to the prejudice of other creditors whose debts are equally meritorious. In so deciding, we think, there was no error. As is said in *Ashhurst's Appeal*, 60 Pa. St. 290, it does not follow that a preference is void merely because given by an insolvent corporation to an officer. It is only voidable. But such proceedings "are carefully watched, and their fairness must be shown." As to the first judgment note given to Kann, and entered of record on 16th March, 1894, three days before the appointment of the receiver, the circumstances attending the giving of this note, whereby a preference was created, were these: The company was sorely in need of money about the beginning of the year 1894. Immediately prior to the 12th of January of that year, Kann advanced to it \$3,500; on the 12th of January, he advanced

\$2,500; three days afterwards, \$5,000; on 16th January, \$6,000. All these advances were made upon the promise that the company would deliver therefor to Kann its notes, with power of attorney to confess judgment. On the 15th of January, 1894, the executive committee authorized the execution and delivery to him of one judgment note in the sum of \$10,000. The board of directors afterwards approved and ratified the action of the committee. The note was executed and delivered to Kann, who retained it in his possession until the 16th of March following, when he entered it of record. It is not disputed that Kann actually advanced the money, nor that it was used for the benefit of the company. He charged no commission or brokerage. The money was applied to payment of wages then largely in arrears, and to freights, either of which, if not paid, would have resulted in the closing of the works. This was a financially embarrassed corporation, in straits for ready money. The directors believed that it might survive its difficulties if it obtained a comparatively small amount for its then pressing necessities. It is doubtful if it could have obtained the money from any lender, banker, or individual on better terms, or on less security. The object was not to benefit Kann, but the corporation, and all others interested in its success. The security was given two months before the appointment of a receiver. From the circumstances, it is altogether reasonable to suppose that while the parties knew that the company was heavily in debt, neither of them believed that it was insolvent. We discover no semblance of unfairness or collusion, or an intent to prejudice other creditors, in the transaction. We have so fully expressed our views on this question in *Mueller v. Clay Co.* (argued at this term on 13th of October; opinion handed down this day) 38 Atl. 1009, that we need not repeat what was there said. This disposes of so much of appellant's fourth assignment of error as complains of the appropriation to Kann's first judgment, entered before the appointment of the receiver.

As to the judgment entered after the receivership by leave of court, and the judgment of this appellant, entered in the circuit afterwards, we think the court below rightly held that they were not a lien on the corporate real estate, and were entitled to no preference in distribution. This was a private manufacturing corporation, owing no special duty to the public, and the latter had no direct interest in the continuance of its operations. Creditors and stockholders alone had a direct special interest in the property. The facts which would move a court of equity to place a railroad or other common carrier corporation in the hands of a receiver might not avail to prompt the same decree as against a manufacturing corporation. In the first case the court must consider the interests of the public, as well as those of creditors and stockholders. Any act on the part of the corporate officers which would

interrupt or suspend the regular, continued operations of the corporation, in its public capacity, whereby serious inconvenience and loss would result to the public, might be sufficient to move the court to appoint a receiver, and this even where no complaint is made by stockholders or creditors; for its franchises and privileges were conferred on it by the public on the condition, express or implied, that it would exercise its functions for the benefit of the public as well as for the benefit of stockholders. Necessarily the effect of the appointment of a receiver on the rights and remedies of creditors of private corporations must in many cases be different from that on the rights and remedies of creditors of a public corporation. In the case of a private corporation, the public has no interest which gives it the right to be heard. Any averment that will avail to create a receivership must be such as will show that a receivership is necessary to protect and promote the interest of the stockholders and creditors. A petition of creditors or stockholders might set forth facts which would warrant a temporary receivership, and a temporary possession by him of the corporate property, real and personal, without affecting the legal title to either, and leaving the corporation subject to suits, and its property to liens, as before. Such a temporary receivership may be created where the corporation is entirely solvent, yet the corporate officers, by mismanagement or fraud, are jeopardizing the property. This gives stockholders and creditors—especially where the claims of the latter have not matured—a right to complain, and ask for a receivership. *Mining Co. v. Edwards*, 103 Ill. 472; *Avery v. Manufacturing Co.*, 27 N. J. Eq. 412. And it is not enough to defeat jurisdiction in equity that there is a remedy at law. The remedy must be complete, prompt, and efficient. *Gluck & B. Rec. § 19*, for which many authorities are cited in the notes. While we hold it to be settled on reason and authority that there may be many cases in which the appointment of a receiver does not change the status of the corporate property, or suspend the ordinary remedy of the creditor, still there are many instances where, from the very nature of the case, the ordinary remedy of the creditor is absolutely suspended when the receivership is established. And this is one of them. The bill in this case averred that plaintiffs were both stockholders and creditors; that the company was insolvent; that one judgment for \$10,000 had been entered, execution issued thereon, and the personal property seized; that suits had been brought by creditors, and a large number of others would have been brought, and the property seized and sold piecemeal; that it would bring a much larger sum if sold as a whole (that is, as one manufacturing plant). They therefore prayed that a receiver be appointed, to take into his custody all of the assets of the com-

pany, and administer them for the benefit of all the creditors and stockholders, under the direction of the court. In an answer filed, the corporation admitted the facts averred, and the court adjudged the averments of the bill to be true. Thereupon the receiver was appointed, to receive into his custody all the property and assets of the company, of whatever description, to abide the further order of the court; to take immediate charge of the plant and property of the corporation, insure it, and employ watchmen. At the same time an order was made staying all executions and further proceedings against the company and its property, and preserving the rights of liens already attached. It will be noticed that the fact of insolvency was adjudicated, and the court, through its representative, took actual possession of all the assets of the company, both personal and real, to administer them for the benefit of all the creditors and stockholders. In effect, the adjudication determined that the court should take into possession the assets, turn them into cash, and distribute them among the creditors according to the legal status of the company and creditors on the 19th of March, 1894, the day the receiver was appointed. On that day the property went into the custody of the law, and subsequent events could neither modify nor enlarge the rights of creditors. *Gluck & B. Rec. § 40*, thus states the situation of the property when the receiver takes possession: "The property of a corporation placed in the possession of a receiver is regarded as being in custodia legis. When a sale is decreed by the court to be made, in a proper case, of such property, it is not a question whether the receiver has title, but whether the court has power to pass the title of the corporation whose estate is placed in the hands of a receiver. Sales so made, whether before final judgment of decretal orders, or thereafter, are judicial in their nature, and binding on the corporation, as fully as its own act. The title to the property sold passes, not because the ministerial officer has title, but because the law casts upon him, when acting under its authority, the power to make a sale which will bind the corporation. No assignment is therefore necessary to entitle the court appointing a receiver to pass title through a sale made by him under its order." And for this text ample authority is given. We cite it, not because the power of the court is questioned, but as indicating the entire change in the condition of the property, and the absolute possession thereof by the law. If, as argued by appellant, the property, until the sale, still remained subject to liens obtained by proceedings at law in the federal court, then such proceedings would defeat the very purpose of a receivership. The insolvency was a fact. To avoid sacrifice of the assets by executions and sales on many claims, with the attendant costs, the court took possession of the property, that it

might be turned into money for equitable distribution among all the creditors, as they stood on 19th March, 1894. If any creditor can, regardless of the change in the situation of the property made on that day, obtain a lien by adverse proceedings against the corporation, then the property is still within corporate dominion, and the decree of the court goes for nothing. The argument leads to a conclusion wholly inconsistent with the very purpose of the receivership. The decided weight of authority in regard to common-law receiverships is that, in substance, stated by Tayl. Corp. § 813, "Where a judgment has been recovered against a corporation after the appointment of a receiver, it does not give the creditor who has obtained it a preference over other creditors in the distribution of corporate assets." In Dean's Appeal, 98 Pa. St. 104, the appellants on January 28, 1878, had insured certain property against loss by fire, in the Newton Fire Insurance Company. On May 18th following, the court of common pleas of Dauphin, at the instance of the attorney general, declared the company insolvent, and appointed a receiver, who immediately notified all policy holders (among them, appellants) to forward to him their policies, for the purpose of computing the amount of return premiums due them. Appellants did not return their policy. On the 29th of November, 1878, following, before any distribution was made by the receiver, the property was destroyed by fire. On distribution, appellants claimed a pro rata dividend on the amount of their loss, arguing that distribution was to be made among all the creditors in proportion to their claims at the date of distribution. This court held: The claim could not be sustained, that the situation was analogous to that of creditors of an assignor in an assignment under the insolvent laws, as to whom it was decided in Miller's Appeal, 35 Pa. St. 481, that their rights must be determined as of the date of the assignment. In the case before the court, the right of appellants, as of all creditors, must be determined as of the date the insolvency was adjudged, which entitled them only to a ratable return of premiums paid. The only distinction between Dean's Appeal, supra, and the one before us, is in the consequences following the decree of insolvency. There the proceedings against the corporation were initiated and carried on by the commonwealth, and the fact of insolvency was followed, not only by an order for receiving and distributing the assets, but also by a decree for a dissolution of the corporation. Here there was no decree for a dissolution, for the court had no jurisdiction, at the instance of creditors, to make one. But the corporation, to all intents and purposes, practically, by the appointment of a receiver to take possession of all its assets, ceased to exist. Therefore we are of opinion that the court below was clearly right in its con-

clusion as follows: "We need not stop to discuss the auditor's reasons for making the distribution, as we are of opinion the judgments recovered after the appointment of the receiver, whether judgment was entered by leave of court or not, are not liens on the receivership funds."

This leaves to be considered only the question raised by setting aside the balance of the fund to await the final event of a suit in equity by Kann against the company to compel specific performance of a contract. It will be noticed, in our statement of facts heretofore made, that on the 29th of May, 1894, the court ordered to be entered what is termed a "cautionary judgment," in favor of Kann, for \$32,500, as of the date of 16th of March, 1894,—three days before the appointment of the receiver. Whether the judgment should stand, with all the advantage of a lien as of that date, was to be determined on final hearing in the equity suit, which at the date of the audit had not taken place. This ties up, for the time being, \$14,501.93 of the fund. We see no reason why the question raised by the bill in equity should not have been finally disposed of by the court below; for, taking every averment to be true, there is no conclusion, legal or equitable, which warrants a preference to this judgment as a lien on the fund. What does the bill which forms the foundation of the judgment aver? (1) That Kann (director and treasurer of the company), before the appointment of the receiver, had advanced to the company, in cash and indorsements, \$42,500, for the purpose of enabling the company to continue its business. (2) That these advancements were made on the condition and understanding with the company that it would deliver to him therefor the company's demand notes, with power of attorney to confess judgment. (3) That on January 15, 1894, the executive committee adopted a resolution that the company deliver to Kann, as collateral for money already advanced by him, a judgment note for \$10,000, and any other amounts required to meet maturing liabilities of the company, and that on 14th February, 1894, the board of directors, by formal resolution, ratified and confirmed the action of the executive committee. (4) That relying upon this resolution, and the verbal promise of the officers of the company, and to relieve the company from financial embarrassment, he made advances to the amount of \$42,500, for which he received but one judgment note, for \$10,000, which he entered of record before the appointment of the receiver, leaving still due him \$32,500, for which he had received blank judgment notes. (5) That afterwards Phillip Semmer, president of the company, refused to join in the execution of the aforesaid notes, excepting as to the one for \$10,000. (6) That the money so advanced was used in paying wages, and for other purposes, and was absolutely necessary to the continuance of the company's operations.

Joseph W. Stoner, the secretary of the company, made answer to the bill, admitting all the material averments to be true. No creditor was made a party defendant. Stoner, the receiver, was not, as such, made a party. Although named, it is as secretary of the company. On this bill and answer the court made the order for the cautionary judgment. If there were any issue of fact raised by this proceeding, it would probably be best to await a decree before passing on the right of plaintiff. But the party defendant to the bill admits the facts. Therefore there is no reason why the legal and equitable rights of the plaintiff in the cautionary judgment should not, as a mere legal conclusion, be passed upon now.

As before noticed, in a railroad receivership the court will make orders creating equitable liens as to debts antedating the receivership, which they will not make as to receiverships of private corporations. The public is interested in the uninterrupted operations of the company. Wages for a limited time earned before the change of possession will be paid, on the ground that, if this were not so, employes apprehensive of insolvency would cease work before the change, and stop the operation of the road. On the same grounds, fuel, supplies, and equipment absolutely necessary to the daily operations have been allowed, although delivery has been made immediately before the receivership; and in some other cases like claims in character have been decreed equitable liens, and entitled to preference in distribution. In nearly every case, however, the payment is made out of the income derived from the road while in the hands of the receiver. We are not now speaking of decrees authorizing receivers' certificates to make good the difference between income and operating expenses, to which the court may give preference over mortgage creditors, but only as to rights of creditors whose claims antedate the receivership. As is said by Waite, C. J., in *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. 675, "The business of a railroad company should be treated by a court of equity as a 'going concern,' not to be embarrassed by any unnecessary interference with the relations of those engaged in or affected by it." But there is no public interest to be subserved by giving a preference lien to creditors who have advanced money to keep on its feet an embarrassed manufacturing corporation. Assume the absolute necessity of such advances; wherein does Kann's equity rise higher than that of any other creditor? It is argued that part of the money was applied to wages in arrears; if they had not been paid, a strike would have resulted; if freights had not been paid, the railroads would have refused to carry, and the plant would have been closed. But the same result would have followed if the company had refused payment for its raw materials, sand, lime, and fuel. Equity was not bound, as

in the case of a railroad company, to treat it as a "going concern." As a private business corporation, it was a "stopping concern," whenever it failed to pay its debts to its employes, its freights to the railroads, or its notes in bank. Nor does the fact that the advances were made on a promise by the board, of which Kann was a member, to give judgment notes as collateral, raise an equity in his favor superior to that of other creditors. This appellant, the Exchange Bank, had a written promise of the company to pay to it \$2,900 on the 31st of August, 1893, for \$2,900 advanced by it on the 31st May, 1893, which money was used by the company in its operations. The company wholly failed to keep its written promise, although the bank parted with its money on the faith of the promise. And so, doubtless, was the case with every other creditor. Each one parted with his money on the faith of a like promise, express or implied, and the money was used to promote the interests of the company. Kann parted with his money on a promise that a collateral security would be delivered him. The company broke its promise. There was no dishonesty, other than is incident to every debtor's violated promise. Taking his case in the view most favorable to him, on his own averments, he has no equity superior to that of any other creditor; and the court below erred in not so deciding. The entry of the lien long after the receivership, as of a date before it, was the exercise of a more than doubtful power. It was without notice to the other parties affected by it. It was valueless as a lien, and wholly inconsistent with the reasoning given by the court to sustain its action with reference to Kann's second judgment and that of Terhune & Clark, which it declared were not liens. Both of these were entered after the court had assumed possession of the real estate by the appointment of a receiver. Both were entered by express leave of court. Both were declared no liens because at the date of entry the property was in custodia legis. There was a reservation in the decree that rights intervening should not be affected by the *nunc pro tunc* entry. If the property went into the custody of the law on the 19th of March, when the receiver was appointed, and the status of all creditors was established by their relation to the property at that date, as the court decided, then the right of every one of them to a pro rata distribution of the fund remained unaffected by the decree. All our legislation and decisions on the subject of judgment liens enact and declare that such liens shall date from the day of actual entry on the lien docket. In *Welch v. Murray*, 4 Yeates, 197, it is said: "The uniform, uninterrupted practice in Pennsylvania for more than a century has been to consider the binding effect of judgments upon lands to take place only from the actual entry of the judgments. Judgments thus entered have never been sup-

posed liable to be affected by fictions and relations." This judgment being actually entered on the 29th of May, 1894, long after the receivership, whatever effect it could have as a judgment in determining the amount of plaintiff's claim, it could have none as a lien on the fund by the order of the court. If plaintiff had, by reason of the character of his advancements, and the promise of defendant, an equitable lien on the fund superior to other creditors, that must be worked out by establishing his equity before the auditor, and not by acquiring a nominally legal lien by an ex parte order of the court. But, as we have shown, he had no equity to assert before the auditor.

What we have said disposes of all the assignments of error preferred by this appellant. It is therefore ordered that so much of the decree of the court below as awards to the judgment 545, May term, 1894, of William L. Kann, \$7,007.35, as a lien creditor, and refuses to recognize as liens the claims of Terhune & Clark, S. R. Smythe & Co., the Exchange Bank of Wheeling, judgment of William L. Kann, 553, May term, 1894, be affirmed, and, further, so much of said decree as sets apart \$14,501.93 of the fund to await the event of the decree in bill of equity of William L. Kann against the Pennsylvania Plate-Glass Company be reversed and set aside. It is further ordered that the court below proceed to distribute the said \$14,501.93 pro rata to the claims of unsecured creditors. Costs to be paid by appellee, William L. Kann.

(184 Pa. St. 16)

COWAN et al. v. PENNSYLVANIA PLATE-GLASS CO.

Appeal of SMYTHE et al.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

MECHANICS' LIENS — PROCEEDINGS TO PERFECT — DESCRIPTION OF PROPERTY — TIME OF FILING LIEN.

1. Contractors erected a gas producer 289 feet distant from the principal building or factory. It was a mere addition to the main building erected more than a year after the completion of the latter, and separate and independent from it. *Held*, that a mechanic's lien for its construction should have been filed against the separate structure, and could not be sustained against the entire plant.

2. A mechanic's lien cannot be enforced where there is nothing to show when the work was completed, so as to enable the court to find that the lien was filed within six months after completion.

Appeal from court of common pleas, Westmoreland county.

Bill by George Cowan and others against the Pennsylvania Plate-Glass Company for the appointment of a receiver. A receiver was appointed, property sold, and an auditor appointed to make distribution. From a decree amending, and confirming as amended, the re-

port of the auditor, S. R. Smythe & Co. appeal. Affirmed.

C. A. O'Brien and J. J. Johnston, for appellants. Williams, Sloan & Griffith, for appellee.

DEAN, J. The facts, as well as the principal questions raised before the auditor and court below on the distribution of the fund realized from the sale of defendant's real estate by the receiver, have been fully stated and considered in Appeal of Exchange Bank of Wheeling (No. 143, Oct. term, 1897; in opinion this day handed down) 38 Atl. 1075. The appellants here, however, raise a question distinct from that of the appellant in that case. From the findings of fact by the auditor with reference to this claim, it appears that the appellants, by a contract made the 15th August, 1893, erected for the Pennsylvania Plate-Glass Company a gas producer 289 feet distant from the principal building or factory. The contract price was \$7,016.50, payable in 30, 60, and 90 days. The price, up to 28th March, 1894, was all paid, except a balance of \$1,792.26. For this amount, appellants on that day filed a mechanic's lien against the entire plant, and claimed before the auditor the balance of \$1,792.26. The auditor found as a fact that the building erected by claimant was a mere addition to the main building, erected more than a year after the completion of the principal one, and was separate and independent from it; that the lien should, therefore, have been filed against the separate structure, and could not be sustained against the entire plant. He further found that there was nothing in the lien filed to show when the work had been completed, and therefore he could not find that the lien had been filed within six months from the completion. For these reasons the claim was disallowed as a lien. On exceptions filed, the court below confirmed the finding and conclusions of the auditor. On the facts, they were clearly right in their conclusions; and the decree, in so far as it refuses to allow this claim, is affirmed. The appeal is dismissed, at costs of appellants.

(183 Pa. St. 386)

WEST BRANCH LUMBERMAN'S EXCHANGE v. AMERICAN CENT. INS. CO.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

FIRE INSURANCE — INVENTORY AS EVIDENCE — OWNERSHIP — CONDITIONS — DOUBLE INSURANCE.

1. Inventories of lumber piled in mill yard destroyed by fire are admissible in evidence in connection with the testimony of the parties who made them, in action for insurance thereon.

2. Provision in the policy that it was issued "on lumber, * * * their own, or held by them in trust, or on commission, or sold, but not delivered, piled in the yard," being in writing, prevails against the printed stipulation that insured had not parted with its interest in or title to any portion of the property at the time of the fire.

3. An agreement between plaintiff and K. that K. shall erect a mill, and manufacture into lum-

ber for plaintiff certain logs, the lumber to be kept insured for plaintiff; that for the work so done by K. plaintiff shall, after realizing a certain amount for the lumber, transfer to K. any lumber remaining; and that, in case the work is not pushed to plaintiff's satisfaction, it may take possession of the logs and mill, without liability to K. except for use of the mill,—does not pass title to the logs to K., so as to affect plaintiff's insurable interest.

4. Policies on "lumber of every description, including lath, shingles, and pickets," in a certain lumber yard, are not on the same subjects as one on "lumber, lath, and pickets" therein, so as to be liable to contribute to a loss.

5. Insurance on property effected by owner is not affected by other insurance thereon effected by another, and not consented to or known of by the owner.

Appeal from court of common pleas, Dauphin county.

Action by the West Branch Lumberman's Exchange against the American Central Insurance Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The contract between plaintiff and Kreamer is as follows: "Memorandum of agreement made and concluded this sixteenth day of June, A. D. 1894, by and between the West Branch Lumberman's Exchange, a corporation of the state of Pennsylvania, having its principal office and place of business in the city of Williamsport, in said state, acting through and by its committee duly constituted and empowered, party of the first part, and Frederick Kreamer, of the city of Lock Haven, state aforesaid, of the second part, as follows: First. The said Kreamer hereby covenants and agrees to gather, and at some convenient place within the limits hereinafter mentioned to erect, at his own expense, a suitable sawmill, and manufacture into lumber, for the West Branch Lumberman's Exchange, all the saw logs carried out of the waters of the West Branch of the Susquehanna river by the recent floods, and lodged on the shores and islands of the main river between Port Trevorton and Green's Dam. Work to be commenced immediately, and pushed to completion as rapidly as possible. Said lumber will be cut into such sizes as will best suit the market, shall be well piled, and in all respects the work shall be done in a good and workmanlike manner. The lumber to be kept fully insured for the West Branch Lumberman's Exchange as owner, but the cost of insurance shall be paid by said Kreamer. In case said Kreamer neglects or refuses to insure said lumber, or insures for a less amount than the owner deems necessary, said Kreamer agrees to pay any such insurance as may be paid by said exchange. The said logs shall be scaled by such person or persons as may be selected by said exchange, and at its expense, as they are jacked on to the mill. The scale shall be straight and sound by Scribner's old rule. Second. For the work so done by said Kreamer, the said West Branch Lumberman's Exchange agrees, when it has realized from said lumber, net, after paying all expenses attending the sale, and handling same, a sum of money equal to ten dollars and

twenty-five cents per thousand feet for white pine, cherry, ash, and cucumber, five dollars and ten cents per thousand feet for the oak and yellow pine, and three dollars and five cents per thousand feet for hemlock and all other woods, by the scale of the logs as hereinbefore provided, then the said West Branch Lumberman's Exchange will transfer to said Kreamer such lumber as may remain, if any, and said Kreamer will then receipt for same in full satisfaction of all work and other services to be performed under this agreement. Third. Charles Kreamer having this day given said West Branch Lumberman's Exchange an order on it to receive his share of the proceeds of all logs carried away by the recent floods, it is agreed that all moneys realized on same, after deducting expenses, shall be allowed on the final settlement between the parties. Fourth. The work shall at all times be under the supervision and direction of the stray log committee of the West Branch Lumberman's Exchange, and, in case the work is not pushed forward to the satisfaction of the committee, or is improperly done, they shall have the right to take possession of said logs and the mill and piling ground of said Kreamer without let or hindrance, and without liability to said Kreamer except reasonable compensation for the use thereof in the manufacture of said logs."

A. A. Leiser and Robert Snodgrass, for appellant. H. C. McCormick, for appellee.

McCOLLUM, J. We discover no error in the rulings complained of in the first and second assignments. They are in exact accord with the decision of this court in *Insurance Co. v. O'Hanlon*, 1 Walker, 359. In that case an inventory of goods totally destroyed was admitted, in connection with the testimony of the parties who made it, as tending to show the amount and value thereof. This is precisely what was done in the case at bar. The inventories of September 2 and October 28, 1895, were made by persons of large experience in the lumber business and for the purpose of ascertaining the amount of lumber in the yard when each inventory was taken. They were based on estimates of the lumber in piles. The method of estimating it was that usually employed by lumbermen, and the only practicable method of ascertaining the amount of lumber piled in the yard. Every grade and size of lumber piled there was inventoried separately. The manner of making the inventories was fully explained by the persons who made them, and the inventories, in connection with their testimony, were clearly competent for the purpose for which they were offered and admitted.

The third and fourth assignments relate to the refusal of the court to affirm the defendant's first and second points. The points denied the liability of the defendant to the plaintiff in the suit, and called for an instruction that the latter could not recover anything in it. The first point appears to be based on an alleged violation of the condition in the policy

In regard to the ownership of the property insured, and the second point seems to be founded upon alleged defects in the proofs of loss. A sufficient answer to the first point is that the policy was issued to the insured "on lumber, lath, and pickets, their own, or held by them in trust, or on commission, or sold, but not delivered, piled in the yard leased by Fred. Kreamer, at Dauphin, Dauphin county, Penna.," and that the plaintiff had not parted with its interest in or title to any portion of the property covered by the policy at the time of the fire. The insurance was not limited to property of which the plaintiff was the sole and unconditional owner. It included property held in trust or on commission, or sold, but not delivered. Besides, the part of the policy quoted above is in writing, and must prevail against the printed stipulations or conditions in conflict with it. *Grandin v. Insurance Co.*, 107 Pa. St. 26.

In answer to the second point we may say that the supplemental proof furnishes in detail the circumstances in connection with the collection and conversion of the logs into lumber under the contract with Kreamer, and it asserts that said contract was shown to the adjusters representing the defendant and other companies, and that a copy of it was furnished to them. It also appears by the defendant's "renewed objections to proof" that a copy of the contract was in its hands. In view of these facts, there is no force in the defendant's contention that the plaintiff's assertion and proof of title was defective.

The questions raised by the fifth, sixth, seventh, eighth, ninth, and tenth assignments relate to the effect of the contract between the plaintiff and Kreamer upon the measure of the defendant's liability in this suit. The defendant's contention is that, under and by force of this contract, the title to the logs passed to Kreamer, and, consequently, the plaintiff's insurable interest is measured by the balance of the purchase money due under it. This is a construction of the contract to which we cannot assent. It was not intended to, and it did not, transfer the ownership of the logs to Kreamer. "He was employed by the plaintiff to saw its logs into lumber, and for this purpose was intrusted with possession of the property." The work he was employed to do was at all times under the supervision and direction of the plaintiff's representatives, who were authorized by the contract to take possession of the logs and mill in case the work was not being pushed forward satisfactorily, or was improperly done. It required a supplemental agreement to authorize Kreamer to ship or sell the lumber, and for this purpose shipping orders were given from time to time. The lumber was to be kept fully insured for plaintiff "as owner." The contract was nothing more than the employment of Kreamer to do the work specified with a promise to compensate him for it in the manner stated therein. Cer-

tainly, as between the plaintiff and Kreamer, there was no transfer of the former's interest in the logs to the latter. The defendant concedes that, as "between the parties, the contract, upon its face, would probably be held to be a bailment." If this were so, the defendant is not in a position to challenge the plaintiff's title. It is only to prevent a fraud on creditors that a contract on its face a bailment is held to be a sale. It has been expressly decided in *Burson v. Association*, 136 Pa. St. 267, 20 Atl. 401, that an insurance company, in writing a policy, does not thereby become a creditor; that it has no standing to assert that the transaction is a legal fraud; that, where it is good between the parties, it is good against all the world except creditors intended to be defrauded.

To the defendant's contention that the policies taken out in the name of Kreamer should contribute to the loss, it is sufficient to say that these policies and the one in suit are not upon the same subjects, and therefore not double insurance. "Double insurance takes place when the assured makes two or more insurances, either simultaneous or successive, on the same subject, the same risk, and the same interest." *Clarke v. Assurance Co.*, 146 Pa. St. 561, 23 Atl. 248. The subjects insured in the Kreamer policies were "lumber of every description, including lath, shingles, and pickets, their own, or held by them in trust, or sold, but not delivered, on ground leased from John Q. Fertig, situate at Dauphin, Dauphin Co." The policy in suit was "on lumber, lath, and pickets, their own, or held by them in trust or on commission, or sold, but not delivered, piled in the yard leased by Fred. Kreamer, at Dauphin, Dauphin Co., Penna." Had the term "lumber" alone been used, it would, no doubt, have included the other items, as it would have been understood then in its broadest acceptation. But, when lath and pickets are enumerated with the lumber, the latter word must be understood in its more restricted sense of sawed boards or logs. It is not consistent with the enumeration contained in the policy in suit that the term "lumber" should include shingles. If the parties had so understood, it would also have included lath and pickets, and these latter terms would not have been used. It follows that, as the amount insured in the Kreamer policies is not apportioned among the subjects named, the amount of insurance to be placed on the shingles is not known, and the amount on the remaining subjects duplicated in the other policies is not capable of adjustment as double insurance. To what has been said on this branch of the case we may add that the undisputed evidence shows that the plaintiff did not know of the Kreamer insurance until after the fire, nor consent to it at any time. The policy in suit was not, therefore, affected by it. See *Wood, Fire Ins.* § 352. The assignments are overruled. Judgment affirmed.

(184 Pa. St. 241)

MORRIS v. ROSS et al.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

MECHANICS' LIENS—PROHIBITION IN CONTRACT.

Provision in contract between owner and contractor that "no lien shall be filed * * * by either the contractor or subcontractors" is binding on subcontractors, notwithstanding a provision that, if required by the owner, the contractor shall, before being paid, give evidence that the premises are free from liens, and that, if there shall be a lien, the owner may retain enough to indemnify against it.

Appeal from court of common pleas, Allegheny county.

Proceeding by L. M. Morris against Isabella Ross and another to enforce a mechanic's lien. Judgment for defendants. Plaintiff appeals. Affirmed.

The provision of the contract between the owner and the contractor, which plaintiff contends allows the filing of liens, is as follows: "It being understood that the final payment shall be made within sixty days after this contract is completely finished: provided, that in each of the said cases the architect shall certify in writing that all the work upon the performance of which the payment is to become due, has been done to his satisfaction: and provided further, that before each payment, if required, the contractor shall give the architect good and sufficient evidence that the premises are free from all liens and claims chargeable to the said contractor, and that all claims for materials furnished to and work done upon said building have been paid: and further, that if at any time there shall be any lien or claim for which, if established, the owner or the said premises might be made liable, and which would be chargeable to the said contractor, the owner shall have the right to retain out of any payment then due, or thereafter to become due, an amount sufficient to completely indemnify against such lien or claim, until the same shall be effectually satisfied, discharged, or canceled. And, should there prove to be any such claim after all payments are made, the contractor shall refund to the owner all moneys that the latter may be compelled to pay in discharging any lien on said premises, made obligatory in consequence of the former's default."

S. Schoyer, Jr., S. B. Schoyer, and William Kaufman, for appellant. W. F. McCook and J. H. Beal, for appellees.

GREEN, J. The present proceeding is a scire facias upon a mechanic's lien, filed by the plaintiff, as subcontractor, against the owner and contractor. The contract between the owner and contractor contained the following provision: "No lien shall be filed against the building by either the contractor or subcontractors." This is an express, positive provision against any liens

by either the contractor or subcontractor, and is without any qualification or condition whatever. That it is binding on both the contractor and subcontractor ever since the case of *Schroeder v. Galland*, 134 Pa. St. 277, 19 Atl. 632, under all the decisions, is not, and cannot be, denied. It is not contended by the appellant that it would not be binding on the plaintiff if it stood alone in the contract. But it is argued with much force and earnestness that, because there is another clause in the contract, which, if it stood alone, would be consistent with a right to file liens, there is a repugnance between the two clauses which avoids the positive prohibition against any lien. If the basis of the argument were sound, it would not at all follow that the prohibitory clause would be avoided; but we do not consider that there is any repugnance between the two clauses. The contention of the appellant is founded upon those decisions which had been made by this court where the contract did not contain any positive prohibition against any lien, but only a provision of a character similar to the one contained in the present contract, providing for a release of all liens. Where such was the case, the inference is that the parties contemplated the filing of liens, and provided for their release. Such an inference would naturally arise where the provision was of the character indicated, and provided only for the discharge or release of liens. Of this class of cases are *Lloyd & Co. v. Krause*, 147 Pa. St. 402, 23 Atl. 602; *Nice v. Walker*, 158 Pa. St. 128, 25 Atl. 1065; *Evans v. Grogan*, 153 Pa. St. 121, 25 Atl. 804; *Murphy v. Ellis*, 153 Pa. St. 133, 25 Atl. 1068; *Smith v. Levick*, 153 Pa. St. 522, 26 Atl. 97. In all of these, instead of there being an absolute prohibition of any lien, there was substantially a provision for the extinguishment of liens. In none of these was there a positive prohibition. In the case of *Association v. Jackson*, 163 Pa. St. 208, 29 Atl. 883, where the contract was that the contractor should "keep the lot and building free from mechanics' liens," we commented upon the distinction between the cases thus: "The cases of *Evans v. Grogan*, 153 Pa. St. 121, 25 Atl. 804; *Murphy v. Ellis*, 153 Pa. St. 133, 25 Atl. 1068; *Iron Works v. O'Brien*, 156 Pa. St. 172, 27 Atl. 131; and *Lucas v. O'Brien*, 159 Pa. St. 535, 28 Atl. 364,—are all cases in which the provisions of the contract were consistent with a privilege on the part of a subcontractor to file a lien, and contained nothing exclusive of such a right. They are, therefore, inapplicable to the present case, where the express words of the contract are in entire hostility to any such right." It is urged by counsel for the appellant that *Iron Works v. O'Brien*, 156 Pa. St. 172, 27 Atl. 131, sustains their contention. But we do not think so. There was no absolutely prohibitory clause in the contract in that case, as there is in this. The clause relied upon for the owner simply stipulated

that the contractor should not suffer or permit a lien to be put or remain on the building, and added that any such lien or incumbrance, until it is removed, should preclude any claim for payment under the contract. A further provision was made that the last installment should not be payable until a full release of all claims and liens was furnished. The decision was put upon the ground that: "The contract must be interpreted according to the intention of the parties, and the fair construction of this is that the intention was to protect the owner, not by the absolute prohibition of liens, but by providing for their payment by the contractor, and, in default of his doing so, the stoppage of his own pay. There is no sufficient language in the covenant to indicate that the parties meant—even if they knew of their power—to prevent absolutely the filing of any lien." This citation sufficiently shows that the decision was induced by the absence of a positive stipulation prohibiting all liens. As the contract in the present case contains just such a stipulation, it is not controlled by the ruling in the case cited. Inasmuch as the absolute prohibition in this case prevents a recovery, there is no difficulty in appreciating the force of the additional provision. It simply affords to the owner a means of protecting himself against any possible liens which may be filed by withholding from the contractor any money due him under the contract. Such a provision certainly cannot operate to deprive the owner of the benefit of the prohibitory clause. Judgment affirmed.

(153 Pa. St. 638)

HAMILTON v. PITTSBURG & L. E. R. CO.
(Supreme Court of Pennsylvania. Jan. 3, 1898.)

CARRIERS—NEGLIGENCE—PROXIMATE CAUSE.

Negligence of a railroad company whose conductor puts a passenger, slightly intoxicated, off the train a short distance beyond his station, is not the proximate cause of the passenger's injury, he having gone back to the station in safety, and passed by it onto the bridge of another railroad, where he was killed six hours later, when, if he was still intoxicated, it must have been the result of further drinking.

Appeal from court of common pleas, Lawrence county.

Action by Ellen Hamilton against the Pittsburgh & Lake Erie Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

B. A. Winternitz and Jno. G. McConahy, for appellant. D. B. & L. T. Kurtz, for appellee.

FELL, J. In this case a verdict was directed for the defendant, on the ground that the evidence would not justify a finding of negligence which was the proximate cause of the death of the plaintiff's husband. The facts shown by the testimony are these:

The plaintiff's husband got on a car of the defendant company at Lowellville, to ride 10 miles, to New Castle Junction, where he was to change cars, and take a train on a branch road operated by the defendant, for New Castle, where he lived. He was under the influence of liquor, and was assisted on the train by a friend, who requested the conductor to see that he get off at New Castle Junction, and took the train for New Castle. He failed to get off the train at the junction, and was not notified by the conductor, who, noticing him in the car soon after the train left the station, assisted him to alight, and pointed out to him the station which had been passed. This was between 8 and 9 o'clock at night, in September. The body of the deceased was found between 4 and 5 o'clock the next morning on a railroad bridge owned by another company, some 1,100 feet on the other side of the station. He had apparently been dead about an hour, and the injuries to his body were of such a character that his death must have followed very soon after they were received. He was not, while on the train, in a helpless condition of intoxication. With slight assistance, he got on and off the car. He paid his fare to the conductor, and, when the brakeman pointed out to him the station to which he would have to walk back, he said, "Good night. Don't bother about me; I'm all right,"—and walked without difficulty towards the station. The friend who brought him to the cars at Lowellville had procured for him a flask of whisky, which was handed to him after he was seated in the car, and a broken whisky flask was found near his body the next morning. There was considerable conflict in the testimony as to the distance from the station to the place where he got off the car, some witnesses stating it as not more than 200 feet, and others as 2,000 feet. The place was a dangerous one for a man in the full possession of his faculties. It was at a point which was poorly lighted, and where there were a number of parallel tracks on which trains frequently passed. These are the important facts as they appeared at the trial.

The plaintiff could not make out a case against the company by proof alone of negligence on the part of the conductor in directing her husband to get off the car at a place of danger. No matter what the danger of the place, or how clear the negligence, he was not injured there; nor until after he had reached a place of safety, and passed beyond it; nor until after such a length of time that, if still intoxicated, it must have been the result of further drinking. He reached the station in safety, passed by it, and to the tracks of another company, and along them 1,100 feet; and, as far as the testimony throws any light upon the subject, he was not killed until at least six hours

after he left the train. What had occurred in the meantime no witness knew. If he became sober, and ventured on the bridge, or if he drank again, and became intoxicated, and wandered aimlessly about, the defendant company was in no way responsible for his death. If he had got off the car at the station in his then semi-intoxicated condition, the company would have been under no duty to guard him from danger. The negligence with which it was charged was in putting him off the train at a place of danger. But this danger he entirely escaped, and, when he reached the station, he was as safe as if he had got off there. No negligent action of the company was the proximate cause of his death. Judgment affirmed.

(183 Pa. St. 641)

In re SCHMIDT'S ESTATE.

Appeal of BECKER et al.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

WILL—CONSTRUCTION.

No property not on the farm is included in the provision of a will: "After my said wife's decease, I give, devise, and bequeath to my son F. my home farm, together with the appurtenances, fixtures, goods, and chattels, etc., remaining upon said farm and belonging to my estate,"—testator having by preceding provisions made money bequests to his daughters, payable immediately on his death, and given to his wife for life "all the rest and residue of my estate, both real, personal, and mixed, wheresoever the same may be," and to his son C. a money bequest, payable after decease of his wife.

Appeal from orphans' court, Washington county.

Accounting by Charles Schmidt, executor of Charles Schmidt, deceased. From a decree confirming report of the auditor dismissing exceptions of Caroline Becker and another to said account, exceptants appeal. Reversed.

T. F. Birch, for appellants. Parker & McIlvaine, for appellee.

GREEN, J. It would be a waste of time to discuss the assignments of error which relate to the jurisdiction of the orphans' court and the question of executor de son tort. They are of no consequence at the best, they are not pressed in argument, and, if they were, they could not be sustained. The important and serious question for consideration is the construction placed upon that clause of the will of the testator which contained the devise to his son Francis. It is in the following words: "Item. After my said wife's decease, I give, devise, and bequeath to my son France my home farm, together with the appurtenances, fixtures, goods, chattels, etc., remaining upon said farm and belonging to my estate, and to his heirs." This clause, the auditor held, gave to the son named the entire residue of the estate; and, there being a sum of \$3,082.36 remain-

ing in the hands of the executor, which was otherwise undisposed of, he awarded the whole amount to the son Francis, or "France," as he was called in the will, as the residuary legatee of the will. The court below, without filing any opinion, dismissed the exceptions and confirmed the report. The question is, was this ruling correct?

The learned auditor held it to be the proper construction, relying almost entirely upon the proposition that a testator is not to be presumed to have intended to die intestate, wherever the words of the will would carry the whole. And he thought a fair reading of the words of the will would carry the whole. We find ourselves quite unable to agree either to the conclusion reached or the reasoning in support of it. This rule is useful, and it is available, at times and in circumstances where it may properly be applied, to determine the meaning of a testator in a doubtful case. But it is never more than a rule to help to determine the testator's intent when his meaning is doubtful upon the reading of the words he has employed. Where the meaning of the words is clear there is no doubt, and in all such cases the rule is entirely inapplicable. Moreover, as a mere rule of interpretation, it is met by another rule of equal importance and weight, to wit, that the heir is never to be disinherited except by plain words or necessary implication. And there is another rule of interpretation equally applicable, and of equal, if not greater, force, and that is that in expounding a will the question is not, what did the testator mean? but, what is the meaning of his words? *Weidman's Appeal*, 42 Leg. Int. 338; *Hancock's Appeal*, 112 Pa. St. 532, 5 Atl. 56. But, as to all rules of construction, they are mere aids, to be used in doubtful cases only, and they must always give way to the expressed intent of the testator. Thus in *Reck's Appeal*, 78 Pa. St. 435, we said (*Sharswood, J.*): "All mere technical rules of construction must give way to the plainly-expressed intention of the testator, if that intention is lawful. It is a rule of common sense, as well as law, not to attempt to construe that which needs no construction." It is manifestly our duty, therefore, in the first instance, to read the words of the will in question, and determine, if we can, what they mean. The will is short. The first item contains a direct pecuniary bequest of \$1,500 to testator's daughter Caroline Becker, payable immediately after his decease. The next item is a similar bequest to his daughter Mary Becker, payable at the same time. The third item is in the following words: "I give, devise, and bequeath to my beloved wife, Mena, during her natural life, all the rest and residue of my estate, both real, personal, and mixed, wheresoever the same may be." The next item is a bequest to his son Charles of \$3,000, "payable to him upon the decease of my said wife." And the next item is the devise in question, to wit: "Item.

After my said wife's decease, I give, devise, and bequeath to my son France my home farm, together with the appurtenances, fixtures, implements, and all other articles, goods, chattels, etc., remaining on said farm and belonging to my said estate, and to his heirs." The last clause simply gives to the wife absolutely as her own her savings out of the residuary estate realized during her life.

Is there any difficulty in determining what it was that was given to Francis? Certainly not. The plain, manifest meaning of the words is that the testator gives him, after the death of the wife, the home farm and the appurtenances, and all the fixtures, implements, and all other articles, goods, and chattels which remained upon the farm and belonged to his estate. It is a plain and simple gift of the farm and the articles of personal property which remained on the land and belonged to the testator. How is it possible to misunderstand this language? We cannot see. It means just what it says, and it does not mean anything more. Any articles of personal property remaining on the farm define themselves. They need no further help to understand what they are. The only qualifying expression used is they must belong to the testator. This was quite unnecessary, as he could not give away the property of other persons. But it does not in the least impair the meaning of the immediately preceding words. And so it happens we are reading a bequest by a testator of all his personal property on his farm, and are inquiring what it means. It really seems too simple for argument. We are asked to say it means, in addition, the whole residue of the testator's estate. How can we possibly say that? The will says nothing of the kind. There are no words in the clause which can by any possibility bear such a meaning. But there are other words in the will which clearly show that the words in question could not have been intended to convey such a meaning. The testator knew very well what kind of words to use when he intended to give the residue of his estate, because he did do that very thing in another clause. He gave to his wife, during her natural life, "all of the rest and residue of my estate, both real, personal, and mixed, wheresoever the same may be." But in the clause in favor of "France" there is not a fragment of such language, nor any language which can possibly be implied to convey such a meaning. Hence it follows that we have no right to put any such words in the will, and therefore we cannot do it. And there is no difficulty in understanding how the omission of a final residuary clause occurred. Next after the gift of the residue to the wife for life, he gives \$3,000 to Charles, but payable after his wife's death. The testator doubtless supposed that this bequest would exhaust the remainder of his estate. It was a small estate. He had given \$6,000

in pecuniary legacies. He had some debts, and the funeral expenses and the cost of the settlement of his estate would require an additional sum, and there would naturally be but little, if anything, left, and he might easily have supposed that there would be nothing, or he might have failed to consider the desirability of a residuary clause in addition to the one already written, or he might have forgotten to have such a clause inserted, or he may have intended to do just what he did do, to wit, leave it out altogether. But, however that may be, it is enough to know that there is no general residuary clause, and, there being some residuary estate, it must be distributed under the intestate law, as we have many times held.

The writer has examined carefully all the authorities cited by the auditor and counsel for the appellee, and not one of them contains any precedent for the ruling in this case. In all of them there was some special language, used in the will, which authorized the implication of an intent to give the residue. In *Reimer's Estate*, 159 Pa. St. 212, 28 Atl. 186, relied upon by the auditor, the testator expressly declared that he gave the whole of his estate as follows, and then, after giving to his son Andrew all of his enumerated goods which he might desire to take, he directed that the balance of his personal effects should be given to the children of his sister. We held that this meant all of his personal property other than what was given to Andrew. Also, in *Sweitzer's Estate*, 142 Pa. St. 541, 21 Atl. 885, cited by the auditor and appellee, the testatrix bequeathed "one-tenth of all I possess to charitable objects," and in the next sentence said, "The rest, or nine-tenths, of my available stocks I bequeath to my sister Charlotte during her lifetime," etc. It was so certain, when she said "the rest, or nine-tenths," etc., that she meant the remaining nine-tenths of all she possessed, that we held that was her meaning. These cases are mere samples of all the others. It is not necessary to review them in detail. They are all founded upon the special meaning of some clause or clauses which require the interpretation given to them in order to conform to the plain intent of the testator. In no instance are they used to create such an intent. In *Lippincott's Estate*, 173 Pa. St. 368, 34 Atl. 58, we held that a bequest of "my jewelry, wearing apparel, and personal effects, except such as are herein otherwise disposed of," does not include furniture in the testator's dwelling, when the excepted articles, otherwise disposed of, were associated with the person of the testator. Here we did not give the enlarged meaning to the words "personal effects" which we gave to the word "effects" in *Reimer's Estate*, supra, because the collocation and connection of the words showed they were intended to have a limited meaning.

But in the present case we are asked to

give the entire residue of an estate to a mere legatee of a specific and well-defined class of personal chattels, without any words showing that anything else than those particular chattels were intended to be given. Under this construction a sum of money due to the testator has been given by the auditor and court below to this legatee without a solitary word in the will indicating that the testator intended to give him any money at all. The result would have been the same, upon the rule adopted by the auditor, if the residue had embraced government bonds, municipal bonds, bank stocks, railroad stocks, promissory notes, money in bank, and all other personal property situated at other places than on this farm,—a conclusion so manifestly erroneous that it could not possibly be sanctioned. The omission of a residuary clause in wills is not by any means an uncommon occurrence. But, because of such omission, it is neither necessary nor proper to give the residue to some specific legatee, upon a forced construction of words which do not indicate such a purpose in the mind of the testator. In all such cases the testator is simply intestate as to the residuary estate, and it must then be distributed according to the intestate law. We are perfectly clear that such a course must be pursued in this case. The fourth, fifth, and sixth assignments are sustained. The decree of the court below is reversed, at the costs of the appellee, and the record is remitted, with instructions to distribute the estate in accordance with this opinion.

(183 Pa. St. 618)

WESTERN NEW YORK & PENNSYLVANIA R. CO. v. VENANGO COUNTY et al.

(Supreme Court of Pennsylvania. Jan. 3, 1898.)

TAXATION—RAILROAD'S MACHINE SHOP.

A machine shop belonging to a railroad company, and used exclusively for repairs in its own business, is not subject to local taxation, such repairs being reasonably necessary to the successful prosecution of its business.

Appeal from superior court.

Suit by the Western New York & Pennsylvania Railroad Company against the county of Venango and others to enjoin collection of taxes. Judgment for plaintiff, affirmed by superior court, and defendants appeal. Affirmed.

William H. Forbes, for appellants. Isaac Ash, Frank Rumsey, and P. M. Speer, for appellee.

WILLIAMS, J. Is a machine shop belonging to a railroad company, and used exclusively for repairs in its own business, subject to taxation by the local authorities? This must depend upon the answer to the question whether such repairs are reasonably necessary to the successful prosecution of the business of

the railroad company. If the shop is for the original construction of locomotives or cars, it is, under all our cases, subject to local taxation. A manufactory is no necessary part of the equipment of a carrying company, whether the carriage is conducted upon land or by water. Nor can a corporation engage in any other line of business than that which its charter and the general law under which it was granted authorizes. It may do the work for which it was created with as efficient and useful methods as it can command, and its preparations to serve the public and compete with its rivals are within its corporate powers, and are, therefore, covered by the taxation to which the state subjects its corporations. The application of this rule has in the main been uniform and consistent. It was stated with clearness and force in *Lehigh Coal & Nav. Co. v. Northampton Co.*, 8 Watts & S. 334, in which we held that the "bed, firm bank, and towpath of an incorporated canal are not taxable as land, * * * nor are the toll houses and collectors' offices belonging to it and incident thereto." The reason given was that these were a necessary part of the canal itself, without which its business could not be properly carried on. Freight and passenger depots upon the line of a railroad were considered in *Northampton Co. v. Lehigh Coal & Nav. Co.*, 75 Pa. St. 461. It would be possible to discharge passengers and freight into the streets, and so dispense with such structures; yet we held that they were reasonably necessary to the business of the railroad company, and constituted a part of its corporate machinery properly employed by it as incident to its carrying trade. They were, therefore, not taxable by the local authorities. This rule was held in *Railroad Co. v. McLenahan*, 57 Pa. St. 29, to include all buildings required for and in use by the company in its ordinary operations, such as water stations, toll houses, watch houses, oil houses, and "whatever buildings, without which the railroad would not be a complete and perfect railroad." The same test is applied impartially to other corporations. In *Wayne Co. Com'rs v. Delaware & H. Canal Co.*, 15 Pa. St. 351, it was applied to a water company, and its reservoir held to be protected from local taxation as real estate. In *West Chester Gas Co. v. Chester Co.*, 30 Pa. St. 232, it was applied to a gas company. In *Lackawanna Iron & Coal Co. v. Luzerne Co.*, 42 Pa. St. 424, to a corporation engaged in making and manufacturing iron. In the latter case we said: "The public works of corporations, used as such, with their necessary appurtenances, are exempt from taxation; but all the property owned by them, whether real or personal, is liable to assessment and taxation." The application of this rule to the case now before us requires us to affirm the judgment of the superior court for the reason that repairs are reasonably necessary as an incident to the business of the plaintiff

company. New cars are merchandise, and can be bought in the market as they may be wanted. Locomotives may be obtained in the same manner, just as the need for them becomes apparent. But the almost infinite variety of breakage due to constant wear and to the power required for the movement of cars, makes it necessary for a railroad company to maintain shops at convenient places along its line, with an adequate force of men and tools to mend and make fit for continual service all its appliances of transportation with the least possible delay. Many repairs can be made, if only the mechanics, with their tools, are at hand, in so short a time as not seriously to delay the movement of the cars on which they are needed; while serious delays would be the necessary result of detaching them, and sending them to some general repair shop, where they would be compelled to wait their turn for the attention needed, if such a system was compulsory upon the company. Current repairs we hold to be one of the necessities of the business of transporting passengers and freight. A shop in which such repairs are made is reasonably necessary as part of the corporate equipment of the carrying company, and cannot be taxed as real estate by the local authorities. It is thought that the Case of East Pennsylvania R. Co., 1 Walk. (Pa.) 428, is authority for a contrary doctrine. In that case the local authorities had assessed with taxes a three-story brick building at the corner of Sixth and Walnut streets, in the city of Reading. This was several squares away from the railroad of the company, and had no connection with its track or railroad property. The president of the company resided with his family in the building, and had his office there. Some other of the general offices of the company were located in the same building. The company defended against the payment of the taxes by setting up the rule adopted in 8 Watts & S. 384, and alleging that the use of the building, wherever it might be located, made it a part of the "public works" of the company. We did not take that view of the question, but held that the building, having no connection with the defendant's road, was no more a necessary appurtenant to it than any other house in the city of Reading would be if the company chose to rent and occupy it by its officers or employes. The company might prefer to occupy one building rather than another, or find one more convenient than another, but neither preference nor convenience is the test. It is necessary reasonably regarded with reference to the purposes for which the corporation was organized. So far the East Pennsylvania R. Co. Case was rightly decided. But the county of Berks appealed from the same judgment, and the cross appeal was heard, decided, and reported with the appeal of the East Pennsylvania R. Co., *supra*. In the latter case it was held, upon the facts as then

before the court, that the repair shop and blacksmith's shop in use by the company in its own business, and neither engaged in construction nor in custom work, was subject to local taxation. This case derives no support from the cases preceding it, nor has it, upon this particular point, been followed by the later ones. On the contrary, the distinction between construction and repair has been generally recognized. In *Railroad Co. v. Vandyke*, 137 Pa. St. 249, 20 Atl. 653, the shops operated by the company were held liable to local taxation because they were maintained "for the construction and repair of its locomotives and cars." The fact that they were used for construction made them liable, notwithstanding repairs might also have been made at them. This distinction seems to us to rest on principle as well as on the authority of our own cases. The business a corporation may lawfully do must be defined by its charter. If it is to supply a municipality with water or gas, its implied or incidental powers must be such as are reasonably necessary to the proper performance of its functions as a water or a gas company. It cannot manufacture pipe, because it may need to use pipe in the distribution of water or of gas. It cannot engage in the manufacture of plumbers' supplies, because it might be profitable to be able to supply its customers with such goods. Its business is one,—the supply of water or gas, as it may be, to its customers,—and to this it must devote its attention and confine its operations. It is precisely the same with a railroad company. It is given great privileges and franchises to enable it to build and operate a line of railroad for the public convenience and its own private profit. It must devote itself to the business for which the state has created it and clothed it with its powers and privileges. It may not embark in the mining of coal without leave. It may not engage in the business of making and manufacturing iron and steel, or in the production of textile fabrics, or in the establishment of commercial houses, or any other business enterprise not incident to, and reasonably necessary for, the successful running of a railroad. It may improve its road to any extent that it is practicable to do. It may avail itself of the best-known equipments and adjuncts so long as they are equipments and adjuncts only, and make its road as nearly perfect as it may be able. It may provide the best-known machinery and the means for keeping it as nearly as possible in constant order and repair, but here is the exterior limit of its appropriate field of operations. It may buy the best rails and cars and engines the manufacturing establishments of the world can offer. It may operate them with the highest skill it can command. It may employ all necessary mechanical talent to keep its road and its rolling stock in the best possible state of repair, and to offer the public the greatest

efficiency and safety attainable in its business. This is the legitimate province of a railroad company, and within it is ample room for the employment of its capital, and for the exercise of the highest administrative powers within its reach. With this province it must be content. If it steps over its boundary, local taxation is among the penalties which it incurs, and which it ought to be ready to submit to without protest. The judgment of the superior court is affirmed for the reasons now given. The case reported in 1 Walk. (Pa.) is distinctly overruled so far as it is in conflict with the rule laid down in the foregoing opinion.

(184 Pa. St. 28)

CLEMENTS et ux. v. PHILADELPHIA CO.
(Supreme Court of Pennsylvania. Jan. 8, 1898.)

NATURAL GAS—REMOVAL OF PIPE LINE—DAMAGES.

1. A company engaged in the production and transportation of natural gas, having acquired the right to lay its pipe line over plaintiff's land under the provisions of the act of May 29, 1885, has the right to enter upon the land and remove the same.

2. On the removal of the pipe the owner of the land was entitled to compensation for any actual injury to growing grain or grass, or for any substantial injury to the turf, if meadow land, beyond the mere opening and filling of the trench in which the pipe lay.

Appeal from superior court.

Action by H. M. Clements and wife against the Philadelphia Company for damages caused by the removal of a gas pipe over plaintiffs' land. From a judgment for plaintiffs, affirmed by superior court, defendant appeals. Reversed.

Dalzell, Scott & Gordon, for appellant. J. P. Hunter, for appellees.

WILLIAMS, J. This case presents a somewhat novel question. The defendant company is engaged in the production and transportation of natural gas. In 1888 it acquired, by proceedings under the act of May 29, 1885, the right to lay its line of pipes by means of which its gas was transported to consumers in and upon the lands of the plaintiffs, and damages were duly assessed and paid to them for the injury sustained by reason of the appropriation of the easement to the uses of the company. In 1893 the wells supplying this pipe line ceased to produce natural gas in marketable quantity, and the line became useless. It was abandoned as a line of transportation, and the pipe composing it became useless where it was, and was taken up and removed. It had been buried, as "the law required," not less than two feet below the surface, and its removal required the opening of the trench in which it had been placed, the lifting of the pipes to the surface, and the hauling of them away upon wagons. This was done in March, 1893, and this action was thereupon brought to recover the damages sustained by the plaintiffs in con-

sequence of the abandonment and removal of the line from their lands. The question thus raised is over the measure of damages to which the plaintiffs are entitled. This must depend on the consideration of two preliminary questions: First. What was the character and extent of the easement acquired by the defendant under the proceedings had under the act of May 29, 1885? This is a question of law. The other is to what extent, if at all, the defendant has exceeded the limits of its right under the easement so acquired. This is a question of fact.

The act of 1885 confers the right of eminent domain "for the laying of pipe lines for the transportation and distribution of natural gas" to be exercised in the manner pointed out. If the line is laid "upon or over lands cleared and used for agricultural purposes, the line of pipe shall be buried at least twenty-four inches below the surface: and if any line of pipe shall be laid over or through any waste or wood land, which shall be changed to farming land, then it shall be the duty of the corporation to immediately bury the said pipe to the depth of at least twenty-four inches as aforesaid." The easement acquired by the company is for the laying of the gas pipe beneath the surface of cleared land, or, as expressed by the act itself, for "burying" the pipe at least 24 inches below the surface in all such lands. The company does not require, nor is it to the interest of the landowner, that it should appropriate a definite strip of surface of 12 feet in width, as suggested by the learned judge of the court below, or of any other width, to which it shall have an exclusive right of possession as against the landowner. What is needed is the space under the surface in which the pipe may rest, together with the right to deposit or "bury" it out of the landowner's way, and the right of access to it for purposes of maintenance and repairs. Subject to the easement so defined, the landowner continues in the possession and use of the entire surface as freely as before the "burial" of the pipe took place; and, if the burial of the pipe is properly done, and the joints are made secure, the presence of the pipe line under the soil will in no way interfere with its cultivation or use. But the unlooked for failure of the gas wells compels the abandonment of the line as a means of transporting and distributing gas. It had no value for any other purpose. The material belonged to the company, and it had a clear right to remove the pipe from its bed, and utilize it in whatever manner might seem best. The proceedings under the right of eminent domain had not affected the title to the pipe, or imposed any obligation upon the company to maintain the line any longer than its own interests might dictate. The sole object and effect of the appropriation was to secure the right to transport natural gas across the lands of the plaintiffs in the manner provided for by the act of 1885. The damages were assessed with reference to the fact that the company acquired thereby a right to enjoy the easement indefinitely. Yet

if it happened that the supply for which the pipe line afforded the means of transportation should cease, it was within the knowledge and contemplation of the parties that the line would become useless, and that its abandonment must follow. In such a contingency the company may surrender the easement for which it has paid, and remove its pipes from the land. This is in case of the owner. A right of entry exists for this purpose, and, if the removal is conducted with a due regard to the interests and rights of the landowner, there is no ground for complaint on his part that the easement has been surrendered by a removal of the material that had been "buried" in his soil. But if the work is not properly done; if the trench is left open, or but partially filled; if the growing crops or grass are broken down or destroyed, or the turf unnecessarily cut into or injured,—the owner has a right to complain. The right of entry was incident to the laying and care of the line while the easement was being enjoyed, and when its enjoyment was no longer possible it was an incident to the right to withdraw from the land, and surrender the privilege acquired under the right of eminent domain. But neither while the line was in use, nor after its use had ceased, did the right of entry authorize the doing of any substantial injury to the owners beyond the burying or removal of the pipe in the best way practicable. If it was to the interests of the company to remove its pipe in wet weather, and in doing so to drive over the plaintiffs' fields on the driest routes it could find, thereby injuring the crops or grass, there is no reason why it should not pay for the injury so done. The measure of the damages to which the plaintiffs are entitled is the extent of the injury done them by the removal of the pipes at an improper time, or in an improper manner. The nature and extent of the easement permitted the cultivation of the surface over the pipe line in subordination to the rights of the company to enter upon it whenever such entry became necessary. If, because of an exercise of the right of entry incident to the easement, growing crops were disturbed, this was *damnum absque injuria* as to the surface necessarily occupied for the purposes for which the entry was properly made. An entry for the purposes of removal stands, however, upon somewhat different grounds. It is not made because of the necessities of transportation, but because they no longer exist. It is therefore the duty of the company to make the removal at the time and in the manner best adapted to the purpose and least harmful to the landowner. It is the duty of the company, upon a surrender of its easement, to fill the trench it has opened so as substantially to restore the surface of the land, and its failure to do so is just ground of complaint. It should make compensation for any actual injury to growing grain or grass, and, if the field be in meadow, for any substantial injury to the turf beyond the mere opening and filling of the trench in

which the pipe lay. Subject, however, to the limitations now indicated, it has the right to enter and remove its pipe without being liable as a trespasser therefor. The judgment is reversed, that the proper measure of damages may be given to the jury, and a *venire facias de novo* is awarded.

(223 Pa. St. 352)

COMMONWEALTH v. PEOPLE'S PASS. RY. CO.

(Supreme Court of Pennsylvania. Jan. 8, 1898.)

TAXATION — INDEBTEDNESS OF CORPORATIONS — TREASURER'S REPORT — BURDEN OF PROOF.

A report by the treasurer of a corporation to the auditor general of its indebtedness averred that the amount of such indebtedness "owned by residents and nonresidents, * * * as nearly as the same can be ascertained after diligent inquiry having been made," had been correctly returned; and that the "amount thereof held or owned by persons whose residence cannot be ascertained after diligent and careful inquiry" was correctly stated. *Held*, that such averments were not sufficiently specific and *prima facie* true, so as to cast on the commonwealth the burden of proving that the treasurer's duties had not been fulfilled, under Act June 30, 1885, which requires such treasurer to assess the tax on corporate loans against resident owners, and to report to the auditor general how much of the corporate indebtedness is owned by residents of the state, as nearly as the same can be ascertained.

Appeal from court of common pleas, Dauphin county.

Appeal to the court of common pleas by the People's Passenger Railway Company from the account settled by the auditor general and state treasurer for tax on loans and bonded indebtedness of said company for the year ending December 31, 1895. From a judgment in favor of the commonwealth, the company appeals. Affirmed.

The findings of fact and opinion of the court of common pleas are as follows (McPherson, J.):

Findings of Fact.

"This case was tried without a jury, under the provisions of the act of 1874. We find the facts to be as follows: (1) The defendant is a domestic corporation. During the year 1895 its indebtedness was \$750,000, evidenced by three series of bonds, each series being secured by a separate mortgage. (2) Of this amount \$10,000 was held and owned by a corporation of Pennsylvania paying tax upon its capital stock; \$278,000 was held by domestic corporations, as trustees, agents, or attorneys in fact, or by individual residents of Pennsylvania, either as agents or trustees or in their own right; \$17,000 was held by nonresidents; and \$447,000 was held by persons concerning whose residence defendant's treasurer reported that it could not be ascertained after diligent and careful inquiry. Of the last-mentioned item, \$67,000 was held in 1895 by domestic corporations as trustees, or by do-

mestic corporations having no capital stock, and paying no tax upon capital stock. (3) The defendant's bonds are all coupon bonds, the coupons being payable to bearer. Interest coupons are ordinarily presented by the messengers of banks, brokers, and other collecting agencies, who rarely know or refuse to disclose the names of the owners of the bonds or coupons. (4) Concerning the diligence of the defendant's treasurer, the testimony is vague and unsatisfactory. It has failed to convince us that the proper search was made after the owners of the bonds. The treasurer does not state the facts from which he draws the following important inferences: That he 'made every possible effort to ascertain the residence of the holders'; that 'the most thorough investigation possible * * * has failed to disclose the ownership of the bonds * * * further than is above shown'; and that he has 'no means of knowledge' that any other bonds than those reported were held in Pennsylvania. It does not help the matter to add with like vagueness that 'the sources from which coupons were received would seem to indicate that the bonds the ownership of which could not be ascertained as above shown were wholly outside of the state.' In a word, the treasurer gives his figures in lump sums, without schedules of persons and items, does not state how he obtained the information upon which he acted, failed to specify what that information was, and draws his own conclusion (which we are asked to accept without the means of verifying its accuracy), that his investigation has been 'the most thorough investigation possible,' and that he has made 'every possible effort.' Obviously, such an inference is equivalent to a decision of the point in controversy, and this is not within his province. It is his duty to detail the various steps he has taken, and thereupon it becomes the duty of the court to decide whether he has made diligent inquiry. A treasurer's report may in itself furnish sufficient evidence of diligence; but from some source the court must learn what he has done before it is possible to draw the inference that he has discharged his full duty. From the evidence now offered, we cannot avoid the finding that the defendant's treasurer did not use due diligence and care in making inquiry during the year in question. Accordingly, the company is liable for his default."

Conclusion of Law.

"The commonwealth is entitled to recover as follows:

Principal, four mills on \$723,000....	\$2,892 00
Less treasurer's commission.....	144 60
Balance	\$2,747 40
Interest at 12 per cent., from October 30, 1896, to March 30, 1897.....	137 38
Attorney general's commission.....	137 38
Total	\$3,022 16

"For which amount the prothonotary is directed to enter judgment, if exceptions are not filed according to law."

Defendant's Exceptions.

"(1) The learned court erred in not finding as a fact that, in the blank form prescribed by the auditor general, defendant's treasurer did, for the year 1895, make to the auditor general the following report and accompanying schedules, viz.:

"Report of Loans, viz.: Scrip, Bonds, Mortgages, Promissory Notes, Bills, Judgments, Certificates, or Other Evidences of Indebtedness, Issued or Assumed by the People's Passenger Railway Company for the Year Ended December 31st, 1895. Address of Company: Philadelphia, Penna.

"Date, November 4, 1895.

"To the Auditor General of Pennsylvania: In accordance with the provisions of the fourth section of the act of June 30, 1885, and the first section of the act of June 8, 1891, and the requirements of your department, I make, as treasurer of the above-named corporation, the following report of the indebtedness of said company for the year 1895; and I do also hereby assess each and every of the scrip, bonds, and other evidences of its indebtedness at its nominal value, and report the amount of indebtedness of the corporation owned by residents of the commonwealth, and others, as nearly as the same can be ascertained, as follows:

Nominal par value of all scrip, bonds, mortgages, promissory notes (except notes discounted or negotiated by banks or savings institutions), penal or single bills, judgments, or other evidences of indebtedness held or possessed by any person, persons, co-partnership, unincorporated association, company, joint-stock association or company, limited partnership, bank, or corporation, in his, her, their, or its own right, or as active trustee, agent, attorney in fact, or in any other capacity, for the use, benefit, or advantage of any other person, association, partnership, company, or corporation. Total indebtedness	\$750,000 00
Nominal par value of said indebtedness owned by nonresidents Pennsylvania	
Nominal par value of said indebtedness held, owned, or possessed by individual residents of Pennsylvania, or by any co-partnership, unincorporated association, company, joint-stock association or company, limited partnership, bank, or corporation, in their own right	
Held, owned, or possessed by them as trustee, agent, attorney in fact, or in any other capacity...	

See page 3 hereof.

"[Signed] D. C. Golden, Treasurer.

"State of Pennsylvania, County of Philadelphia—ss.: On this seventeenth day of December, A. D. 1895, personally appeared before me, a notary public in and for the coun-

ty aforesaid, D. C. Golden, treasurer of the said company, who, being duly sworn according to law, did depose and say that the foregoing report and the attached schedule of indebtedness, with the amounts owned by residents and nonresidents of Pennsylvania, respectively, as nearly as the same can be ascertained, after diligent inquiry having been made, is correct and true.

"[Signed] D. C. Golden, Treasurer.

"Sworn and subscribed before me, the day and year last aforesaid.

"[Seal.] Wm. F. Boyd, Notary Public."

"(2) The learned court erred in not finding the facts set forth in the undisputed affidavit of defendant's treasurer, which was admitted in evidence without exception, as follows:

"Commonwealth of Pennsylvania vs. People's Passenger Railway Company.

"In Dauphin County Common Pleas. No. 612, Commonwealth Docket, 1896.

"State of Pennsylvania, City of Philadelphia—ss.: On this 10th day of December, A. D. 1896, before me, a notary public in and for said state, residing in said city, personally appeared D. C. Golden, who, being by me duly

Schedule of Loans or Indebtedness, viz.: Scrip, Bonds, Mortgages, Notes, Bills, Judgments, or Other Evidences of Indebtedness Issued or Assumed by the People's Passenger Railway Company during the Year 1896.

Description of Loan or Indebtedness.	Total amount of indebtedness.	Amount thereof held and owned by corporations of Pennsylvania, in their own right,* including loans held by national banks.	Amount thereof held by domestic corporations as trustees, agents, or attorneys in fact, or by individual residents of Pennsylvania, whether as agents or trustees, or in their own right.	Amount thereof held by state banks or savings institutions, not including those held by national banks.	Amount owned by non-residents.	Amount thereof held or owned by persons whose residence cannot be ascertained after diligent and careful inquiry.	Date of issue of loans.	Rate interest.	Interest, if any, paid during tax year. If none paid, so state.	Date of payment or satisfaction of loan.
1st mfg. 7 per ct. bonds.....	219,000	10,000	184,000+	None	16,000+	None		7 per c	Whole	
1st mfg. 5 per ct. bonds.....	236,000	None	182,000+	None	17,000+	237,000+		Year.	Whole	
Con. mfg. 5 per ct. bonds....	246,000	None	48,000+	None	None	232,000+		Year.	Whole	
Discounted or negotiated by banks.			82,000+	None	None	214,000+		5 per c	Year.	
Other notes bearing interest.			84,000+	None	None	210,000+		5 per c	Year.	
Other notes not bearing interest.										
Miscellaneous.										

* See detailed statement of loans held by corporations of Pennsylvania on third page.

† At date of interest payment 1 1896. ‡ At date of interest payment 2 1896. § At date of interest payment 3 1896. ¶ At date of interest payment 4 1896. ** At date of interest payment 5 1896. *** At date of interest payment 6 1896. **** At date of interest payment 7 1896. ***** At date of interest payment 8 1896. ***** At date of interest payment 9 1896. ***** At date of interest payment 10 1896. ***** At date of interest payment 11 1896. ***** At date of interest payment 12 1896.

Schedule of Loans and Indebtedness Held, Owned, and Possessed by Corporations of Pennsylvania, Issued or Assumed by the People's Passenger Railway Company during the Year 1896.

Description of loan or indebtedness.	Amount held by corporations.	Names of corporations holding same.	Location.	Remarks.
1st mfg. 7 per ct. bonds.....	10,000	Spring Garden Fire Ins. Co.	Phila.....	Own right.

NOTE.—Where loans are held by institutions of purely public charity, a statement that the institutions holding them are purely public charities should follow the entry of their names and the amount of loans held by them.

sworn according to law, did depose and say as follows, viz.: "I am the treasurer of the People's Passenger Railway Company, and was such treasurer in 1895. The bonded indebtedness of the said company during said year was \$750,000, as reported by me to the auditor general, November 4, 1895, consisting of three separate loans, as follows, viz.: First mortgage, five per cent. bonds, \$235,000; first mortgage, seven per cent. bonds, \$219,000; consolidated mortgage, five per cent. bonds, \$246,000. I made every possible effort to ascertain the residence of the holders of these bonds in the year 1895, with the following result: Interest upon the first mortgage, seven per cent. bonds is payable January 15th and July 15th in each year. At the payment of interest due January 15th, 1895, \$10,000 of these bonds were held by the Spring Garden Fire Insurance Company, a corporation of the state of Pennsylvania, paying tax upon its capital stock; \$194,000 were held by individual residents of Pennsylvania, or by corporations or others in trust; \$15,000 were held by nonresidents of Pennsylvania. At the payment of the July interest, \$10,000 were held by the Spring Garden Insurance Company, \$192,000 by residents of Pennsylvania, and \$17,000 by nonresidents. The interest upon the first mortgage, five per cent. bonds, \$285,000, is also payable January 15th and July 15th. At the date of the January payment of interest, \$48,000 were held by individual residents of Pennsylvania, or by corporations in trust, and \$237,000 by persons whose residence could not be ascertained. At the payment of the July interest, \$33,000 were held by individual residents of Pennsylvania, or by corporations in trust, and \$252,000 by persons whose residence could not be ascertained. Upon the consolidated mortgage, five per cent. bonds, \$246,000 interest is payable March and September. At the payment of interest March 1, 1895, \$32,000 of these bonds were held by individual residents of Pennsylvania, or by corporations in trust, and \$214,000 by persons whose residence could not be ascertained. At the payment of September interest, \$36,000 were held by residents of Pennsylvania, or by corporations in trust, and \$210,000 by persons whose residence could not be ascertained. The company's bonds are all coupon bonds, the coupons being negotiable and payable to bearer. Coupons representing the interest upon those bonds mentioned above as held or owned by persons whose residence could not be ascertained were presented by banks, brokers, and other collection agencies through their messengers, who either did not know or refused to disclose the names of the owners of the bonds from which the said coupons had been detached. The most thorough investigation possible for me to make has failed to disclose the ownership of the bonds of the company in 1895 further than is above shown. I have no knowl-

edge, or means of knowledge, that any other than the bonds above reported are, or were in 1895, held or owned by residents of Pennsylvania, or by corporations of Pennsylvania or others in trust. The sources from which the coupons were received would seem to indicate that the bonds, the ownership of which could not be ascertained as above shown, were wholly outside of the state. All of which is correct and true according to the best of my knowledge, information, and belief.

"[Signed] D. C. Golden."

"Sworn and subscribed before me, the day and year aforesaid.

"[Seal.] Wm. F. Boyd, Notary Public."

"(3) The learned court erred in its fourth finding, as follows, viz.: 'Concerning the diligence of the defendant's treasurer the testimony is vague and unsatisfactory. It has failed to convince us that the proper search was made after the owners of the bonds. The treasurer does not state the facts from which he draws the following important inferences: That he "made every possible effort to ascertain the residence of the holders"; that "the most thorough investigation possible * * * has failed to disclose the ownership of the bonds * * * further than is above shown"; and that he has "no means of knowledge" that any other bonds than those reported were held in Pennsylvania. It does not help the matter to add with like vagueness that "the sources from which coupons were received would seem to indicate that the bonds, the ownership of which could not be ascertained as above shown, were wholly outside of the state." In a word, the treasurer gives his figures in lump sums, without schedules of persons and items, does not state how he obtained the information upon which he acted, failed to specify what that information was, and draws his own conclusion (which we are asked to accept without the means of verifying its accuracy), that his investigation has been "the most thorough investigation possible," and that he has made "every possible effort." Obviously, such an inference is equivalent to a decision of the point in controversy, and this is not within his province. It is his duty to detail the various steps he has taken; and thereupon it becomes the duty of the court to decide whether he has made diligent inquiry. A treasurer's report may in itself furnish sufficient evidence of diligence; but from some source the court must learn what he has done, before it is possible to draw the inference that he has discharged his full duty. From the evidence now offered, we cannot avoid the finding that the defendant's treasurer did not use due diligence and care in making inquiry during the year in question. Accordingly, the company is liable for his default."

"(4) The learned court erred in not finding

as a conclusion of law that the report, and the schedules which form part thereof, having been made by defendant's treasurer (the officer designated by the fourth section of the act of June 30, 1885), under oath, must be presumed to be correct, in the absence of proof to the contrary.

"(5) The learned court erred in not sustaining the first objection specified in defendant's appeal, said objection being as follows, viz.: 'In the settlement of account hereby appealed from, tax to the amount of \$1,890,000 is charged upon \$472,500 of bonds, none of which are known, or can be ascertained to be held, or to have been held or owned, at any time during the year 1895 by residents of Pennsylvania. The state cannot lawfully impose a tax upon property, persons, or business not within her jurisdiction. The acts of June 30, 1885, June 1, 1889, and June 8, 1891, cannot, nor can either or any of them, be construed to require the company, or the treasurer thereof, to retain a tax from interest paid upon bonds, save such only as are held by residents of Pennsylvania; or, if they can, they are void, because in conflict with section 10 of article 1 of the constitution of the United States, as impairing the obligation of contracts. And the state of Pennsylvania, having forced, or attempted to force, upon the company appellant, an obligation to act as tax collector not provided for in its charter, cannot, in any event, hold the company responsible for failure to collect a tax upon bonds until it shall be shown that said bonds are taxable by reason of their ownership within the state.'

"(6) The learned court erred in not sustaining the eighth objection specified in defendant's appeal, said objection being as follows, viz.: 'All the indebtedness of the corporation appellant is evidenced by bonds which have attached to them coupons representing the interest from time to time accruing, which coupons are payable to bearer, and are detachable from all said bonds, and are separate and distinct contracts, possessing all the attributes of commercial paper, the title to which passes by delivery; and the same may be owned, and often are owned, when presented for payment, by persons other than those who own the bonds to which they were originally attached; and if the act of June 30, 1885, the act of June 1, 1889, or the act of June 8, 1891, requires the company to withhold from persons owning and presenting the coupons a tax due upon bonds owned by other persons, then the said act impairs the obligation of the contract between the company and the owner of the coupon, and is in conflict with section 10 of article 1 of the constitution of the United States, and is therefore void.'

"(7) The learned court erred in its conclusion of law as follows, viz.:

"The commonwealth is entitled to recover as follows:

Principal, four mills on \$728,000....	\$2,892 00
Less treasurer's commission.....	144 60

Balance	\$2,747 40
Interest at 12 per cent. from October 30, 1896, to March 30, 1897.....	137 88
Attorney general's commission.....	137 88

Total	\$3,022 16
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"For which amount the prothonotary is directed to enter judgment, if exceptions are not filed according to law.'

"(8) The learned court erred in not finding that the defendant company, having upon a similar report and similar testimony been held by this court to be not liable for a tax on bonds held by persons of unknown residence for the year 1890, in Commonwealth against People's Pass. Ry. Co., No. 396, Sept. T., 1891, in Dauphin common pleas, it cannot reasonably be expected to make a different report for 1895, or to detail at greater length the steps taken by defendant or its treasurer to ascertain the residence of the bondholders in 1895.

"(9) The learned court erred in not finding as a conclusion of law that defendant's treasurer having reported to the auditor general under oath, for the year 1895, that the amount of defendant's indebtedness 'owned by residents and nonresidents of Pennsylvania, respectively, as nearly as the same can be ascertained after diligent inquiry having been made,' and also the 'amount thereof held or owned by persons whose residence cannot be ascertained after diligent and careful inquiry,' defendant is, in the absence of proof to the contrary, entitled to the presumption of law that said report is correct, and that diligent and careful inquiry was made.

"(10) The learned court erred in not directing judgment to be entered in favor of defendant."

Opinion of the Court on Defendant's Exceptions.

"In answer to the first exception, we find the facts to be as therein stated, namely, the defendant's treasurer did make the report as specified. The remaining exceptions must be overruled, but a few words may be said as to the eighth, fourth, and ninth. The eighth exception rests upon an averment of fact that was not supported by any evidence at the trial, and for this sufficient reason cannot now be considered.

"The fourth and ninth exceptions raise a question of importance. The report made by the defendant's treasurer contains an averment that the amount of the company's indebtedness 'owned by residents and nonresidents of Pennsylvania, respectively, as nearly as the same can be ascertained after diligent inquiry having been made,' has been correctly returned; and a further averment that the 'amount thereof held or owned by persons whose residence cannot be ascertained after diligent and careful inquiry' is also correctly stated. These are the formal aver-

ments of every report on this subject made to the auditor general, and therefore the question now raised is in the interest of every domestic corporation collecting the tax upon corporate loans. The defendant argues that these averments are prima facie true, and cast upon the commonwealth the burden of proving that the duties imposed upon the treasurer have not been fulfilled. We do not agree with this position. For the purposes of this tax, the treasurer of a corporation is not an independent official, but the agent of the commonwealth, required by statute to undertake a special service. His duties are clearly defined. He must assess the tax upon corporate loans against resident owners, and collect it from persons liable to pay; and he must also report annually to the auditor general how much of the corporate indebtedness is owned by residents of Pennsylvania, as nearly as the same can be ascertained. In making this report, which requires him to make a proper effort to ascertain who the bondholders are, and where they reside, he is in the position of any other agent making report to his principal. It is not within the power of such an agent to sit in judgment upon his own conduct, and decide either, finally or provisionally that he has fulfilled his duty. He may report in these terms if he chooses or is required so to do; but, if the principal is not satisfied, his right to call for a detailed account of the agent's conduct cannot be doubted. It is true that a public officer—assuming the treasurer to be a public officer—is presumed to do his duty; but this presumption is usually applied when his conduct is questioned by some other person than his superior. Generally, it does not apply when the superior is scrutinizing his subordinate's report. To allow it to prevail in such a situation would reverse the relation of the parties, and make the subordinate the temporary superior. For the time at least, he would thus be relieved of any liability to account, and would be bound to offer explanation only after his superior had made some attempt to prove the negative averment, that he had not fulfilled his duty. Moreover, according to a well-known rule of evidence, where the subject-matter of a negative averment lies peculiarly within the knowledge of one party, the burden lies upon him to disprove it, although under ordinary circumstances the burden of proof might be upon his antagonist. 1 Greenl. Ev. (13th Ed.) § 70. The reason of the rule applies to the case in hand. Here, and in all similar controversies, unless the commonwealth calls the treasurer as a witness, it is a very difficult task to discover whether proper diligence has been exercised. The kind and degree of effort made by the treasurer to discover the residence of the bondholders, the examination he may have made of the corporate records and correspondence, the use made of other sources

of information which may be open to him,—in short, all the details of his conduct,—lie peculiarly within his own knowledge, and therefore should be disclosed with his own lips. He should describe with sufficient minuteness what he has done; but he may not draw an inference in his own favor from undisclosed facts, and treat it as evidence that requires the commonwealth to rebut it.

"This particular question has not yet been decided in Pennsylvania, but for years we have been acting in the opposite sense. It has always been the practice in this court to require from the treasurer, not only the formal report made upon the blank furnished by the department, but also affirmative testimony concerning the manner in which he has discharged the duty imposed by law. Believing this practice to be correct, because warranted by the statute and by legal principles, we decline to adopt the position urged upon us by the two exceptions now under consideration. The exceptions are overruled, and judgment is directed to be entered in accordance with the opinion previously filed. [Exception to the defendant.]"

M. E. Olmsted, for appellant. J. P. Elkin, for the Commonwealth.

PER CURIAM. This case was in the court below on appeal by the defendant company from the account stated against it by the auditor general and state treasurer for tax on loans and bonded indebtedness for the year ending December 31, 1895. It was there tried without a jury, under the provisions of the act of 1874, and final judgment entered in favor of the commonwealth. The learned court's findings of fact, conclusions of law, and opinion on defendant's exceptions (on which its judgment is predicated) are all fully set forth in the record. A careful perusal and consideration of these, with special reference to the specifications of error, has led us all to the conclusion that neither of said specifications should be sustained. We find no substantial error in any of the learned trial judge's findings of fact or legal conclusions. All the questions involved in this appeal have been so fully considered and so satisfactorily disposed of by him in the opinions referred to that little, if anything, can be profitably added to what has been so well said therein. The judgment is therefore affirmed on said opinion. Judgment affirmed.

(183 Pa. St. 611)

CANAVAN et al. v. CITY OF OIL CITY.

(Supreme Court of Pennsylvania. Jan. 8, 1896.)

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—
OPEN GUTTERS—ABSENCE OF LIGHTS
—NEGLECTANCE.

1. A city is not guilty of negligence because it maintains open gutters of suitable size at street

crossings, where that is a common, approved method of construction.

2. A municipality is under no legal obligation to light its streets, where their construction is reasonably safe for travel, in the absence of statutory command or charter duty, and is not guilty of negligence if it fails to light them.

Appeal from court of common pleas, Venango county.

Action by Sarah J. Canavan and William Canavan, her husband, against the city of Oil City, for personal injuries caused by defendant's negligence. From a judgment in favor of plaintiffs, defendant appeals. Reversed and rendered.

P. M. Speer, City Sol., and Isaac Ash, for appellant. Wm. J. Breene, for appellees.

DEAN, J. In the defendant city, among others, are three traveled, paved streets, with paved sidewalks. Two of these are First and Second, parallel, running east and west, a square apart. Connecting them is Short street, running north and south, at right angles to them. Both streets and sidewalks are paved with brick, with crossings for pedestrians, where they intersect. The sidewalks were set with curb. The surface of the street, starting at about 8 inches lower than the curb, gradually ascended to the middle of the street, where the crown was about on a level with the pavement curb, thus causing a water shed to the gutters next the curb on each side. At the intersecting crossings, however, for the width of the crossing, there was what is called in the testimony, a "false curb," which was on a level with the pavement leading to the crossing. This maintained the crossing at the level of the pavement, and, instead of stepping down into the gutter, the traveler walked over the crossing on the same level as the pavement; but, to prevent obstruction of the gutter, it was necessary to place this false curb about 12 inches from the pavement curb, and at about the same height (8 inches) from the surface of the gutter. This left a space 12 inches wide and 8 deep, from the pavement to the crossing, over which the traveler must step in crossing Short street at its intersection with First street. About 11 o'clock in the evening of 11th of September, 1891, the real plaintiff, Sarah J. Canavan, who had lived in Oil City 27 years, was walking on the sidewalk of First street, and attempted to cross Short street at its intersection. A friend, Mrs. Clark, was with her. In stepping over the curb, instead of reaching the level of the crossing, she stepped into this gutter, cutting and bruising her leg and ankle. The injury, although apparently not very severe at the time, ended in serious and painful disability. She then brought this suit for damages, alleging the city was negligent in maintaining the open gutter at the intersection of the streets.

Although there was some dispute at the

trial in the court below as to the fact, the decided weight of the evidence tended to show the city maintained an electric arc light of 2,000-candle power at the corner of Second and Short streets, 254 feet distant from the place of the accident, and that this light in some degree illuminated this latter point. There was also another arc light at State and First streets, 343 feet distant. There was a decided conflict in the evidence as to what extent these lights made plain the gutter. The evidence showed that on the night in question there was full moon. The design and mode of construction of a large number of the streets and gutters were the same as at Short and First streets; and, although the brick pavement of surface of the streets had been adopted, and the work only fully completed, about a month before the accident, yet for years, at most of the crossings, there had been a depressed gutter, some places bridged with plank, but at others open. And it was undisputed that from Mrs. Canavan's home, from which she had walked that day to an entertainment that evening, she must necessarily have stepped over about 20 of these gutters, some like unto this one, others conforming to the old method of paving. The evidence established that the construction of the sidewalks and crossings, as at the place of accident, was common in towns and cities, and generally was considered an improvement over the older methods. The evidence also showed the city had contracted for the covering of these gutters by metal slabs or plates, which had not yet been put in place. In substance, the court submitted to the jury, on the evidence, two questions: (1) Was the city guilty of negligence in constructing and continuing in use the open-gutter plan at crossings? (2) Assuming there was no negligence in this particular, was it negligent in not providing sufficient light, whereby the gutters at the crossings could be seen and safely used? Under the instruction, there was a verdict for plaintiffs, and defendant appeals, assigning four errors, the substance of all of them, however, being disposed of by a consideration of the first,—that the court did not instruct the jury that, under the law and the facts, the verdict should be for defendant. This, as already indicated, the court refused to do.

The very careful consideration which the learned judge of the court below gave to all the points raised in the issue, and his lucid charge to the jury, render the work of review easy. While our conclusion is that he erred in assuming, on this evidence, that the controlling question was one of fact for the jury, it can scarcely be said the law is well settled throughout the United States otherwise; for the text writers and decisions on the questions are not always in harmony. The municipality is not an insurer of travelers on foot or in vehicles from accident or injury. All agree that this is the

law. It is only bound to construct and keep in repair its highways so that they shall be reasonably safe, by night and by day, for the public who use them. In constructing paved streets and sidewalks, it is absolutely necessary, to the durability and passability of both, that suitable gutters be provided at the sides for conveying from the surface the water from rains or melting snows. To this end different methods are adopted. In the case before us, the gutter at the crossing was of suitable size in view of the watershed, was in good repair, but was not covered or bridged. This, while not the only method, nevertheless is one adopted in many towns and cities all over the land, and the fact was not disputed. The writer steps across not less than 10 of them on his way from his hotel to the court room in the city of Pittsburgh. The defendant might have covered these gutter crossings, as it probably intended to do. Whether this would in any degree have lessened the inconvenience or the danger to the general public is problematical. Experience teaches that the bridge is at all times liable to displacement from contact with wagon wheels, from the warping by the weather, and from accumulation of drift and filth on the upper side in time of rains; the tendency then being to choke and dam the water. It is possible the open gutter is not the very best design; but there is no duty on the city to adopt the very best. If we so decide, then the rule is no longer that the highways shall be maintained in a reasonably safe condition, but a higher duty is imposed; that is, that they shall be constructed in the very best method for safety. This approaches very nearly the liability of an insurer. It would result in submitting to a jury, in case of every accident on a street or sidewalk, the question as to whether the municipality had adopted the very best kind of paving, both in material and design, and the very best of gutter crossings; and the fact would have to be ascertained from numerous expert witnesses, each favorable to some particular kind of pavement as the best, and asserting all other kinds were the worst, or at least inferior. There would be no difficulty in proving that the present impaved asphalt pavement was more slippery than cobblestones, Belgian block, or brick, and that an injured animal would not have fallen except for the new pavement. We are not inclined to increase municipal burdens, by adding to or enlarging the established rule,—established, at least, so far as concerns our own decisions. Judicial observation convinces us that, under the present rule, municipalities have as great a load as they can reasonably carry, when they are required to provide "reasonably safe" highways. There was no dispute as to the fact that the open gutter was a common, approved method of construction at crossings; nor could there be, under the evidence, any

dispute as to this crossing being reasonably safe. The only fact from which it was argued that it was not reasonably safe was that it was uncovered; but that, as already noticed, if not the best, was an ordinary, approved method of construction. This being so, the case comes directly within the principles announced in *Borough of Easton v. Neff*, 102 Pa. St. 474. There the plaintiff stepped into a gutter at a crossing in the nighttime and was injured. The court submitted the evidence to the jury, to find: (1) Was there any necessity at all for the gutter? (2) Was it as safe as a pavement would ordinarily be? On appeal, this court held, reversing the judgment for plaintiff, that the necessity for the gutter was exclusively for the judgment of the corporation, and not the subject of review by the court, and, as to the second question, all the jury could properly do, was to inquire whether the gutter was constructed in the usual and ordinary way, after the plan adopted by the borough, and in use elsewhere. This case only followed *King v. Thompson*, 87 Pa. St. 365, and was followed by *Robb v. Connellsville*, 187 Pa. St. 42, 20 Atl. 564; *Seddon v. Bickley*, 153 Pa. St. 271, 25 Atl. 1104; and *Stackhouse v. Vendig*, 166 Pa. St. 562, 51 Atl. 349. To practically leave the question to the jury whether the open gutter, undisputedly constructed in the ordinary way, is the very best, might lead to a finding by another jury directly opposite. Suppose the city bridges it. Then a traveler steps over the side of the bridge, and is injured. He sues for damages, and calls witnesses who testify that the open gutter is safer than the bridge; that a mishap is less likely over a 12-inch gutter, at a level crossing, right before his eyes, than are the two sides of a narrow bridge, neither being before him. The court should have instructed the jury that, on the undisputed facts, there was no proof of negligence by the city.

As to whether sufficient light was provided by the city on the night of the accident, we may briefly say there is no legal obligation on a municipality to light its streets when their construction is reasonably safe for travel. That is solely a question for the municipal legislature. It may do many things not enjoined by law to promote the general well-being and comfort of the citizen; but, in not doing that which no statute commands, negligence cannot be imputed to it. This, however, in no sense relieves it from the duty of that ordinary care which requires that temporary excavations for building purposes should be exposed by proper light, or that temporary obstruction of the streets by building material should be made conspicuous in the same way. Here the gutter was not temporary, but permanent. The same construction existed over the city, of which plaintiff for 27 years had been a resident. She knew, and was bound to know, as is said by our Brother Mitchell

in *Robb v. Connellsville*, *supra*, that some break in the continuity of the pavement probably existed at this point. And this, whether with or without artificial light. We have not found any authority which holds that a municipality, in the absence of statutory command or charter duty, is bound to illuminate its highways. *Bruch v. City of Philadelphia*, 37 Atl. 818 (not yet in our state Reports) has no application to these facts. That was the case of a pedestrian on the pavement falling into a hole left open in the pavement. The city defended solely on the ground of his contributory negligence, and alleged it had provided an electric light, not distant from the hole, whereby he could have seen and avoided it, if he had exercised ordinary care in passing over the pavement. The obligation of the city to provide light was not in question. We are of opinion that, on the undisputed facts, in law plaintiff had no case. The judgment is therefore reversed, and judgment entered for defendant.

MEMORANDUM DECISIONS.

EVANS v. MEREDITH SHOOK & LUMBER CO. (Supreme Court of New Hampshire. Belknap. March 12, 1897.) Case by Miles G. Evans against the Meredith Shook & Lumber Company to recover for injuries sustained by the plaintiff while serving the defendants as a fireman. Subject to the plaintiff's exception, the court ordered a nonsuit. The exceptions were overruled upon the ground that there was no evidence tending to show that the plaintiff was ignorant of any fact material to his safety. **PARSONS, J.**, did not sit. The others concurred. **Jewell, Stone, Owen & Martin**, for plaintiff. **Jewett & Plummer, E. A. & C. B. Hibbard, S. W. Rollins, and E. B. S. Sanborn**, for defendants.

PAGE v. BILBRUCK. (Supreme Court of New Hampshire. Rockingham. July 30, 1897.) Appeal from probate court, Rockingham county. A codicil to the last will of George Bilbruck, deceased, was offered for probate by Calvin Page, executor; and from a decree of the judge of probate, allowing the codicil, Joseph Bilbruck appeals. There was a verdict in favor of appellant (defendant), and the administrator (plaintiff) excepts to the denial of his motion that a verdict be directed in his favor. Judgment for plaintiff. **Calvin Page and Frank & Marvin**, for plaintiff. **S. W. Emery and E. G. Eastman**, for defendant. **CHANE, J.** There was no evidence on which the jury could properly find for the defendant, and the plaintiff's motion should have been granted. Verdict set aside. Judgment for the plaintiff. **PIKE, J.**, did not sit. The others concurred.

(@ N. J. L. 188)

STATE (BOTT et al. Prosecutors) v. BOARD OF STATE CANVASSERS. (Supreme Court of New Jersey. Dec. 21, 1897.) Application by the state, on the relation of Charles Bott and others, for a writ of certiorari to review the determination of the State Board of Canvassers declaring certain constitutional amendments

adopted. The writ was directed to issue by Justice DIXON, in a memorandum, and Justice COLLINS concurred. Justice VAN SYCKEL dissented, and filed an opinion. **Allan McDermott, William D. Edwards, and John P. Stockton**, for application. **Samuel H. Grey, Atty. Gen.**, opposed.

VAN SYCKEL, J. (dissenting). Our state constitution authorizes the legislature to formulate amendments to the constitution, and submit them to a vote of the people for ratification or rejection at a special election to be held for that purpose; and it provides (article 9) that "if the people shall approve and ratify such amendment or amendments or any of them, by a majority of the electors qualified to vote for members of the legislature voting thereon, such amendment or amendments so approved and ratified shall become part of the constitution." No provision is contained in the constitution for the manner of finally determining whether an amendment has received a majority vote. The legislature, by an act passed May 26, 1897, submitted to the popular vote, among other amendments, an amendment relating to "lotteries and gambling." This act provides for the conducting of the election, and, in its tenth section, directs that the respective boards of registry and election shall count and canvass the ballots given relative to each of the said proposed amendments, and thereupon shall set down in writing the whole number of votes given for each of said proposed amendments, and the whole number of votes given against each of the said proposed amendments, and certify and subscribe the same, and deliver their statement, so certified, to the county clerk. The eleventh section of the act makes it the duty of the county boards of election to examine these statements, and make and certify duplicate statements of the result of the election as shown thereby, one copy of which is to be delivered to the county clerk, and the other transmitted to the secretary of state, to be filed in his office as an official paper. Section 12 provides that it shall be the duty of the governor to summon four or more of the members of the state senate, who shall meet at the time and place in said act specified; and they, with the governor, shall constitute a board of state canvassers, to canvass and estimate the votes given for and against each of said amendments; and the said board shall determine and declare which of said proposed amendments have been adopted, and shall forthwith deliver a statement of the result as to each amendment to the secretary of state; and any proposed amendment which by said certificate and determination of the said board of state canvassers shall appear to have received in its favor a majority of all the votes cast in the state for and against said proposed amendment shall, from the time of filing such certificate, be and become an amendment to, and part of, the constitution of this state; and it shall be the duty of the governor forthwith to issue a proclamation declaring which of the proposed amendments have been adopted by the people. From this recital it will be perceived that the legislature constituted the governor of the state, and the senators summoned by him, a tribunal to determine and conclusively settle whether an amendment had been adopted. That tribunal, without dissent on the part of any of its members, declared that the amendment hereinbefore mentioned had been duly adopted, and the governor thereupon issued his proclamation as the act required. Application is now made to this court for a writ of certiorari to review the decision of the state board, by Charles Bott, whose only interest in the question is that of a taxpayer and a legal voter in this state. This involves the inquiry whether this court has the power to entertain such an application.

The question is not a novel one. So far as my investigation has extended in the limited time at my command to devote to this subject, the authorities uniformly hold that the courts have

no power to review the decision of the tribunal selected by the legislature for this purpose. In *Dorr's Case* the defendant offered to set up in his defense that a constitution had been adopted by a majority vote of the people, and that he did the acts charged against him under that constitution. Chief Justice Durfee said "that courts and juries do not count votes, to determine whether a constitution has been adopted, or a governor elected, or not. Courts take notice, without proof offered from the bar, what the constitution is or was, and who is or was the governor of the state. It belongs to the legislature to exercise this high duty. It is the legislature which, in the exercise of its delegated sovereignty, counts the votes, and declares whether a constitution be adopted, or a governor elected, or not, and we cannot revise or reverse their acts in this particular without usurping their power." 2 Whart. Cr. Law (5th Ed.) par. 2777. The same question was considered in the case of *Luther v. Borden*, in the United States supreme court, reported in 7 How. 1. Chief Justice Taney, in an exhaustive discussion of the subject, says: "Certainly the question which the plaintiff proposed to raise by the testimony offered has not heretofore been recognized as a judicial one in any of the state courts. In forming the constitutions of the different states, after the Declaration of Independence, and in the various changes and alterations which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified, or not, by the people of the state, and the judicial power has followed its decision. In Rhode Island the question has been directly decided. Prosecutions were there instituted against some of the persons who had been active in the forcible opposition to the old government. And in more than one of the cases evidence was offered on the part of the defense, similar to the testimony offered in the circuit court, and for the same purpose; that is, for the purpose of showing that the proposed constitution had been adopted by the people of Rhode Island, and had therefore become the established government, and, consequently, that the parties accused were doing nothing more than their duty, in endeavoring to support it. But the courts uniformly held that the inquiry proposed to be made belonged to the political power, and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not, and, when that decision was made, the judicial department would be bound to take notice of it as the paramount law of the state, without the aid of oral evidence, or the examination of witnesses; that, according to the laws and institutions of Rhode Island, no such change had been recognized by the political power. * * * Indeed, we do not see how the question could be tried and judicially decided by a state court. * * * And if a state court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and authority of the government under which it is exercising judicial power." The force, in its application to the case before us, of these observations of Chief Justice Taney with respect to the inability of courts to decide such questions, will be apparent, if we suppose that our legislature had submitted to the popular vote what were termed the "court amendments," and that such amendments had received the precise vote given to the "anti-gambling amendment." After the courts had been reconstructed in pursuance of the amendment, neither the courts at present existing, nor the courts as remodeled, could pass upon such a controversy as that now sought to be instituted. Mr. Justice Woodbury, in *Luther v. Bor-*

den, concurred in the views of Chief Justice Taney, hereinbefore recited, and I think it will be wise for courts and judges to bear in mind the language in which he expressed himself. He says, after stating that he regards this as a merely political, and not a judicial, question, that: "Another evil, alarming and little foreseen, involved in regarding these as questions for the final arbitrament of judges, would be that in such an event all political privileges and rights would, in a dispute among the people, depend on our decision, finally. We would possess the power to decide against, as well as for, them; and under a prejudiced or arbitrary judiciary the public liberties and popular privileges might thus be much perverted, if not entirely prostrated. But allowing the people to make constitutions and unmake them, allowing their representatives to make laws and unmake them, and without our interference as to their principles or policy in doing it, yet, when constitutions and laws are made and put in force by others, then the courts, as empowered by the state or the Union, commence their functions, and may decide on the rights which conflicting parties can legally set up under them, rather than about their formation itself. Our power begins after their ends. Constitutions and laws precede the judiciary, and we act only under and after them, and, as to disputed rights, beneath them, rather than disputed points in making them. We speak what is the law,—*jus dicere*; we speak or construe what is the constitution, after both are made, but we make or revise or control neither. But the other disputed points in making constitutions, depending often, as before shown, on policy, inclination, popular resolves, and popular will, and arising, not in respect to private rights, but in relation to politics, they belong to politics, and they are settled by political tribunals, and are too dear to a people bred in the school of Sidney and Russell for them ever to intrust their final decision, when disputed, to a class of men who are so far removed from them as the judiciary,—a class, also, who might decide them erroneously as well as right."

The question is asked, what remedy will the citizen have if the tribunal created by the legislature, either intentionally or by mistake, declares a result which is erroneous? The obvious answer is that the decision of the tribunal which the people, in the exercise of their sovereign right to amend the constitution, have made the final arbiter, can no more be questioned or reviewed than can the judgment of our highest court in a matter within its jurisdiction. Nor can we suppose that such a tribunal will be more likely, than are our courts, to commit an error. Courts have no more right to distrust the political branch of the government than that department has to distrust the courts. Legal principles cannot safely be discussed and settled upon such assumptions. This inquiry was answered by Mr. Justice Woodbury in the case above cited as follows: "If it be asked, what redress have the people, if wronged in these matters, unless by resorting to the judiciary? the answer is, they have the same as in all other political matters. In those they go to the ballot boxes, to the legislature, or executive, for the redress of such grievances as are within the jurisdiction of each, and, for such as are not, to conventions, and amendments of constitutions." In the case of *State v. Swift*, 69 Ind. 512, much relied upon by the prosecutors, Chief Justice Biddle delivered the opinion of the Indiana supreme court. He referred to an amendment to the state constitution known as section 7, in article 10 of the constitution, which had been submitted to the vote of the people some years before the submission of the amendment which was the subject of controversy in the case before him. The act of the legislature, under which that earlier amendment had been adopted, provided that the governor and secretary of state should examine the election returns, and declare the result of the election; and, if it should ap-

pear from said examination that a majority of all the votes cast at said election were in favor of the adoption of such amendment, then the amendment should be and become part of the constitution, and the governor should issue his proclamation so declaring. Chief Justice Biddle says "that the governor and secretary of state canvassed the returns, and the governor issued his proclamation declaring that the said amendment had become part of the constitution. The matter, therefore, having been decided and proclaimed according to law by the executive department, a co-ordinate branch of the government, has now become *res adjudicata*." He could not have pronounced it *res adjudicata* unless he regarded it as the decision of a tribunal which was not subject to review by the courts. His decision in the principal case was put expressly upon the ground that the legislature had provided, in the act submitting the amendment to popular vote, no way of adjudicating what the result of the vote was.

If we accept these views of eminent jurists, this court is without power to entertain the application now made. In my judgment, both upon authority and principle it must be held that there is an entire absence of jurisdiction in the courts. The right to alter and amend constitutions inheres in the sovereignty of the people; and it is unhampered, except in so far as it is regulated by existing provisions of the fundamental law. No provision being made in the constitution for determining how the result of the popular vote shall be settled, the people, in the exercise of their reserved sovereign power, have the right, through their representatives in the legislature, to declare how a decision shall be made final and conclusive. Unless this right in the people is conceded, no way can be logically found to call a constitutional convention, as no reference is made in our constitution, as now framed, to such a convention. But, if the jurisdiction of the court could be admitted, how stands this case? This court, in the very recent application of Bott for a mandamus to require a recount of the popular vote, made its deliverance in the following language: "The election at which the amendment was submitted did not affect any individual or private right. It concerned the government alone. Public policy, therefore, is to be primarily regarded, in an application to recount the vote. The legislature, by the act under which this amendment was submitted to the popular vote, having declared how that vote should be canvassed, made it the duty of the governor, after determining that the amendment had received a majority vote, to issue a proclamation forthwith, declaring that it had been adopted by the people. This was a declaration by the legislature that, so far as the government was concerned, public policy required that the question should be at rest when the chief executive had performed the duty imposed upon him by the statute. That verification of the correctness of the result satisfied the state, and it should be held to satisfy the relators. By the mandate of the legislature the amendment has become incorporated in the constitution of the state." There was the further reason given for refusing the recount, that it would be attended with great uncertainty, and give much opportunity for fraud, but that in no wise affects the pertinency of the language above quoted to this controversy. The conditions have not changed. The public policy is still the same. The prosecutor has acquired no new rights. He still has no private right to be protected by the writ he asks for. The government is still satisfied, and was represented by the attorney general of the state, who earnestly resisted this application before us. This amendment, which we declared had become imbedded and incorporated in our constitution, must be still there. Whence, therefore, does Bott derive any right to ask this court to mutilate our organic law? By what process this court will take out of the constitution an amendment it has so recently declared to be part

and parcel of it, is a mystery that I am unable to solve. The agitation of this subject should, in my judgment, end here. That this court, in the exercise of its discretionary power, may refuse to grant a writ of certiorari, cannot be disputed. *Wilkinson v. City of Trenton*, 36 N. J. Law, 499; *State v. Water Com'rs of Jersey City*, 30 N. J. Law, 249; *Hampson v. City of Paterson*, 36 N. J. Law, 159; *Ropes v. Board*, 37 N. J. Law, 335; *Jersey City v. Traphagen*, 53 N. J. Law, 434, 22 Atl. 190. These cases hold that, where a prosecutor has no private right to be affected, or where public policy forbids, he will not be allowed to institute the controversy. The test is not whether he could submit a debatable question if the writ is issued. He will not be afforded the opportunity to do so, when it contravenes public policy, as we have declared it will in this case. If any reason could exist to justify the court in disregarding its recent utterances, it does not appear in this case. There is nothing legally before us to show any merit in this case on the part of the prosecutor. The contention is that it appears that the amendment received 70,443 votes for and 69,642 votes against it, and that 961 ballots were rejected, and that, if the rejected votes are added to the votes for the amendment and the votes against the amendment, the vote given for the amendment is not a majority of the whole vote cast at the election.

1. The constitution provides who shall be qualified to vote, but does not prescribe what shall be a vote. It is, therefore, the province of the legislature to say what shall constitute a vote, the same rule being applied to all electors. The legislature has prescribed in the Werts law how votes shall be cast to be regarded in the law as votes in a legal sense. We must presume that the board of registry and election acted rightly in rejecting the 961 ballots, and that the persons who cast them did not exercise their right in such a way as to entitle them to be counted as qualified electors voting on the amendment. The constitution provides that, where more than one amendment is submitted, as was the case in this instance, they shall be submitted in such manner and form that the people may vote for or against each amendment separately and distinctly. The only votes, therefore, which, within the purview of the constitution, can be regarded in deciding the question of majority, are votes for and votes against the amendment. The legislative act in its twelfth section expressly declares that the amendment shall be part of the constitution if it receives a majority of all the votes cast for and against it. The governor and the senators who constituted the legislative tribunal properly decided that question.

2. It does appear on the statement made up by the board of state canvassers, certified under the hand of the governor, and attested by the secretary of state, that 961 ballots were rejected, but this statement, as it appears to me, had no basis except the certificate of the result of the election made by the respective boards of registry and election, and delivered to the several county clerks in pursuance of the tenth section of the act of May 25, 1897. That section authorizes the election officers to set down and transmit to the county clerk only the number of votes given for and the number given against the amendment, and is legal evidence for no other purpose. It has no evidential value whatever for the purpose of showing how many votes were rejected. It appears, therefore, that all we have legally before us is that 70,443 votes were given for this amendment, and 69,642 votes against it. The fact that 69,642 electors voted against the adoption of this amendment cannot give this court jurisdiction in this case, or be any better reason for granting a writ of certiorari than it is for granting a writ of mandamus for a recount of the votes. These, with all other electors in the state, agreed, through their representatives in the legislature in two succes-

sive years, that the result of the vote should be conclusively settled on their behalf by the tribunal provided in the legislative act. That tribunal was the instrument chosen by the people, speaking through their representatives, to determine the result. It was a consent on the part of all these 60,042 electors, as well as all others in the state, to submit this question to the final arbitrament of that tribunal, presided over by the governor, whose judgment is entitled to the highest confidence and respect. The deliverance of that body was an irrevocable declaration by the people, acting through the political department of the government, upon a political question, that the amendment had been adopted by them. The courts have no more right to challenge or controvert that decision than they have to call in question the regularity of the proceedings of the legislature in passing a statute. It is the conceded law of this state that such power does not reside in the judiciary. *Pangborn v. Young*, 32 N. J. Law, 29. In the language of Chief Justice Taney and Mr. Justice Woodbury, the people, through the political department of the government, decide whether a law has been passed or a constitutional amendment adopted, and the judiciary must accept that decision. The power of the judiciary begins where that of the political department ends, and relates exclusively to the interpretation of constitutions and laws. The harmonious working of our complex system of government cannot be preserved unless each department is scrupulously careful to act within the true limits of its domain. For these reasons I feel constrained to differ with my associates, and refuse to assent to the granting of the writ applied for. The prosecutor has admittedly no private right to be protected by the writ. All he could accomplish by the successful prosecution of it would be to give the legislature the power to declare that to be lawful which is now a crime.

CARROLL v. CITY OF PHILADELPHIA et al. (Supreme Court of Pennsylvania. Oct. 11, 1897.) Appeal from court of common pleas, Philadelphia county. Bill by Henry C. Carroll against the city of Philadelphia and others to enjoin said city and the mayor thereof from signing any contract with the Vulcanite Paving Company, or with the Pennsylvania Asphalt Paving Company, for paving certain streets under an award made by the director of public works, on the ground that the ordinance authorizing such paving was void, inasmuch as it sought to create a monopoly by prescribing a special kind of asphaltum to be used, thereby preventing competition in bidding for the contract. From a decree awarding a preliminary injunction, defendants appeal. Reversed. Edwin O. Michener, for appellant Pennsylvania Asphalt Pav. Co. M. Hampton Todd, for appellant Vulcanite Pav. Co. Dimmer Beeber, Hampton L. Carson, J. Levering Jones, M. W. Van Auken, E. Cooper Shapley, and John G. Johnson, for appellee.

PER CURIAM. October 11, 1897, it is ordered, adjudged, and decreed that the decree of the court below awarding the preliminary injunction from which this appeal is taken be, and the same is hereby, reversed and set aside. Record remitted for further proceedings.

(183 Pa. St. 38)

COMMONWEALTH v. URBAN.

(Supreme Court of Pennsylvania. Oct. 11, 1897.)

CLERKS OF COURT—FEES—STATUTES—CONSTRUCTION.

Appeal from court of common pleas, Dauphin county.

Proceedings by the commonwealth to settle the account of B. F. W. Urban, late clerk of oyer and terminer and clerk of quarter sessions of Lancaster county. From a judgment of the common pleas on defendant's appeal from the

settlement made by the auditor general and state treasurer, defendant appeals. Affirmed.

H. M. North, for appellant. J. P. Elkin, for the Commonwealth.

GREEN, J. For the reasons stated in the opinion just filed in the case of *Com. v. Fry* (May Term, 1897) 38 Atl. 417, the judgment in this case is affirmed. Judgment affirmed, and appeal dismissed, at the costs of the appellant.

(184 Pa. St. 120)

COWAN et al. v. PENNSYLVANIA PLATE-GLASS CO. (Supreme Court of Pennsylvania. Jan. 3, 1898.) Appeal from court of common pleas, Westmoreland county. Bill by George Cowan and others against the Pennsylvania Plate-Glass Company for the appointment of a receiver. A receiver was appointed, property sold, and an auditor appointed to make distribution. From a decree amending, and confirming as amended, the report of the auditor, George Cowan appeals. Reversed in part.

DEAN, J. We have disposed of all the assignments of error raised on this appeal in Appeal of Exchange Bank of Wheeling (No. 143, Oct. term, 1897; opinion handed down this day) 38 Atl. 1075. The decree, in part, is reversed, as therein stated; costs to be paid by William L. Kann, appellee.

(283 Pa. St. 102)

In re FAIR HOPE NORTH SAVAGE FIRE-BRICK CO.'S ESTATE. Appeal of LIVERGOOD. (Supreme Court of Pennsylvania. Oct. 25, 1897.) Appeal from court of common pleas, Somerset county. Exceptions by S. D. Livergood to the report of an auditor distributing a fund in the hands of Jacob D. Swank, assignee of the Fair Hope North Savage Fire-Brick Company, Limited. From a decree overruling the exceptions and confirming the report, said Livergood appeals. Affirmed. Kooser & Kooser and Coffroth & Ruppel, for appellant. W. H. Koontz, for appellee.

PER CURIAM. This case was argued with No. 4 of this term, same assigned estate, in which the decree of the court below has just been affirmed. 38 Atl. 519. We think the questions presented in this appeal have also been sufficiently considered and correctly decided by the learned president of the common pleas, and on his opinion the decree is affirmed, and appeal dismissed, at appellant's costs.

MCCOY v. BRUNOT. (Supreme Court of Pennsylvania. Oct. 25, 1897.) Appeal from court of common pleas, Westmoreland county. Assumpsit by William McCoy against H. J. Brunot. Judgment for defendant. Plaintiff appeals. Affirmed. Geo. S. Rumbaugh and Atkinson & Peoples, for appellant. James S. Beacom and David L. Newill, for appellee.

PER CURIAM. This appeal is from the refusal of the court below to take off the judgment of nonsuit. Our consideration of the evidence on which the plaintiff relied has satisfied us that no error was committed in denying his motion. Neither a review of the testimony nor a discussion of the questions involved would serve any useful purpose. The assignment of error is dismissed, and the judgment affirmed.

MCCULLOUGH v. PITTSBURGH, A. & M. TRACTION CO.

(Supreme Court of Pennsylvania. Nov. 8, 1897.)

STREET RAILWAYS—INJURY TO PERSON ON TRACK.

Appeal from court of common pleas, Allegheny county.

Action by Charles S. McCullough, Jr., by his next friend and father, Charles S. McCullough,

against the Pittsburgh, Allegheny & Manchester Traction Company, to recover for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

A. M. Neeper, for appellant. Walter Lyon, Charles H. McKee, and H. W. Mitchell, for appellee.

PER CURIAM. We find no substantial error in this record. The case was carefully and correctly tried, and submitted to the jury with full and adequate instructions, of which the defendant company has no just reason to complain. There is nothing in either of the specifications of error that requires discussion. Neither of them is sustained. Judgment affirmed.

(123 Pa. St. 537)

In re **MITCHELL'S ESTATE**. (Supreme Court of Pennsylvania. Oct. 11, 1897.) Appeal from court of common pleas, Huntingdon county. Exceptions by Elizabeth Mitchell to the report of an auditor appointed to distribute the proceeds of a sheriff's sale of the real estate of Thomas Mitchell. From a decree dismissing the exceptions and confirming the report, said Elizabeth Mitchell appeals. Affirmed. W. McK. Williamson, for appellant. Charles G. Brown, for appellee.

STERRETT, C. J. This case was argued with In re Mitchell's Estate (No. 505, Jan. term, 1896), in which an opinion has just been filed, affirming the decree of the orphans' court, 38 Atl. 489. The questions considered and decided in that case virtually dispose of the questions presented by the record in this case, and require that the decree of the court below be affirmed. There is nothing in either of the specifications of error that requires discussion. For reasons which sufficiently appear in the record of this case and in the opinion above referred to, the learned judge was clearly right in dismissing appellant's exception to the auditor's report, etc., and in discharging the rule to show cause. Decree affirmed, and appeal dismissed, at appellant's cost.

STERRETT SCHOOL SUBDIST. v. CITY OF PITTSBURG. (Supreme Court of Pennsylvania. Nov. 8, 1897.) Appeal from court of common pleas, Allegheny county. Action by the Sterrett school subdistrict against the city of Pittsburgh in the nature of an appeal from the report of viewers appointed to ascertain the damages and assess the benefits caused by the grading, paving, and curbing of a street, on which plaintiff had abutting property. Judgment for

plaintiff, and new trial denied. Defendant appeals. Affirmed. Clarence Burleigh and T. D. Carnahan, for appellant. Lazar & Orr, for appellee.

PER CURIAM. This case in the court below depended on questions of fact which were properly submitted to and determined by the jury in favor of the plaintiff. The appeal from the judgment entered on the verdict practically resolved itself into a renewal of the motion for a new trial on the ground of an excessive verdict, etc. Those questions were disposed of by the court below, and, so far as appears, there is no good reason why they should be reconsidered here. We find no error in the record, and the judgment is therefore affirmed.

(123 Pa. St. 97)

In re **WRIGHT'S ESTATE** et al. Appeal of **CONVERSE** et al. (Supreme Court of Pennsylvania. July 15, 1897.) Appeal from court of common pleas, Philadelphia county. In the matter of the assigned estate of Joseph S. Wright and Jacob A. Schmid, trading as Wright & Schmid. From a decree confirming the report of the auditor appointed to audit the account of William H. Schmid, the assignee, Converse, Stanton & Cullen, creditors, appeal. Reversed. John Sparhawk, Jr., W. A. Manderson, and George P. Rich, for appellants. Alex. Simpson, Jr., for appellee.

WILLIAMS, J. This case is identical in character with that of Appeal of Viotor, 38 Atl. 151, in which an opinion has just been filed. The decree is reversed for the reasons there given.

(123 Pa. St. 529)

WRIGHT et al. v. **WARRIOR RUN COAL CO.** (Supreme Court of Pennsylvania. Oct. 11, 1897.) Appeal from court of common pleas, Luzerne county. Bill by Annia A. Wright and others against the Warrior Run Coal Company for an account and an injunction. From a decree in favor of plaintiffs for only a part of the amount claimed, they appeal. Affirmed. Geo. R. Bedford and H. W. Palmer, for appellants. Alexander Farnham, for appellee.

DEAN, J. This is an appeal by plaintiffs from the same decree as in No. 146, January term, 1897, appeal by defendant, in which last case an opinion has been handed down this day. 38 Atl. 491. All the questions raised by the assignments of error on this appeal have been in effect overruled in the opinion in that case. Therefore the decree as modified in that case is affirmed, and this appeal is dismissed, at costs of appellants.

END OF CASES IN VOL. 32.

